03/08/2017 Overview: State Litigation on Federal Issues

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Alaska Department of Law

List of Federal Issues and Conflicts

Dated: January 23, 2017

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
NAVIGABLE WATERWAYS			
Navigable Waterways - *Sturgeon v. Masica (and Dept. of Interior)* (Alaska intervened in support of plaintiff; after State's case dismissed, filed amicus) (9th Cir., 13-36165; 13-36166) AAGs R. Botstein, J. Hafner	Not aligned.	State intervened to challenge the U.S. Department of Interior's (DOI) application of National Park Service (NPS) regulations to state navigable waterways. The Ninth Circuit originally ruled in favor of the DOI and dismissed the State's independent challenge for lack of standing. State filed an amicus brief supporting Sturgeon's challenge at the U.S. Supreme Court. The Supreme Court reversed the Ninth Circuit's decision and remanded for further proceedings.	On remand to the court of appeals, the State submitted supplemental briefing and sought to confirm its continued status as an intervenor. Oral argument was held before the Ninth Circuit on October 25, 2016. We are awaiting a decision.
Mosquito Fork - *State of Alaska v. U.S.* (9th Cir., 16-36088, 17-35025) AAGs J. Alloway, M. Schechter	Not aligned.	State sought to quiet title to submerged land underlying Mosquito Fork of the Fortymile River. Ultimately, the U.S. disclaimed its interest in the Mosquito Fork, but the court also found the U.S. had acted in bad faith. The case is now on appeal on the issue of attorneys fees.	The U.S. appealed the award of $582,629 in attorney fees and $10,372.71 in costs to the State. The State cross-appealed the district court's decision that expert fees and expenses are not recoverable. The amount at issue is $335,758.44. Briefing is scheduled to begin in April.
Stikine River - *State v. U.S.* (3:15-cv-00226) AAG J. Alloway	Not aligned.	State sought to quiet title to submerged land underlying the Stikine River. The U.S. issued a disclaimer of interest in lieu of filing an answer.	The U.S. appealed the district court's finding that the State was the prevailing party for purposes of costs. The appeal is related to legal issues in the Mosquito Fork appeal. Briefing is stayed pending the U.S. obtaining final approval from the Solicitor General.

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NAVIGABLE WATERWAYS CONT.			
Kuskokwim River/IBLA Appeal AAG J. Alloway	Not aligned.	The State requested a recordable disclaimer of interest on the Kuskokwim River to resolve a dispute over ownership of a portion of the riverbed. The Bureau of Land Management (BLM) denied the request, and the State appealed to Interior Board of Land Appeals.	Briefing is complete and we are awaiting a decision by the IBLA.
Knik River/Eklutna, Inc.'s Selection Application/IBLA Appeal AAG J. Alloway	Not aligned.	In approving Eklutna, Inc.'s selection application, Interior Board of Land Appeals and BLM did not preserve ANCSA 17(b) easements and purported to convey portions of the bed of the Knik River, which the State asserts is a state navigable waterway.	The State appealed the approval of the land selection, but the issue of navigability has to be challenged in district court. The IBLA appeal is currently stayed pending ongoing negotiations. On the issue of the Knik River, the State is continuing to negotiate with BLM in an attempt to avoid litigation.
Navigable Waterways/ Togiak Public Use Management Plan (PUMP) AAG A. Nelson	Not aligned.	The PUMP asserts jurisdiction over, and directs USFWS to adopt regulations to limit unguided use on, state navigable waterways in the Togiak National Wildlife Refuge.	The USFWS has not proposed the regulations yet and will likely not do so until the *Sturgeon* case is decided.

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
ACCESS AND LAND			
Roadless Rule - *State of Alaska v. U.S. Dept. of Agriculture* (1:11-cv-01122-RJL) AAG T. Lenhart	Not aligned.	State challenged the application of the roadless rule in Alaska. The roadless rule prohibits the building of roads in wilderness areas, which essentially shuts down resource development in many areas of the Tongass.	At the district court on the merits. We are awaiting a decision.

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Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
ACCESS AND LAND CONT.			
King Cove Road - *Agdaagux Tribe of King Cove v. Jewell* (State intervened in support of plaintiff) (9th Cir., 15-35875) AAG T. Lenhart	Not aligned.	State intervened to challenge Secretary Jewell's decision to not allow the building of an emergency road out of King Cove. The State is also working on other options to get the road built.	At the court of appeals, after the district found in favor of Secretary Jewell. The briefing is complete and oral argument has not been set.
R.S. 2477 Rights of Way - *State of Alaska v. U.S.* (4:13-cv-00008) AAG K. Sullivan	Not aligned.	State sued the U.S. and others to quiet title to a number of R.S. 2477 rights-of-way near Chicken, Alaska.	At the district court following an appellate court ruling that State must seek to condemn parts of rights-of-way over property of Native allottees. State is seeking to condemn the rights-of-way.
Big Thorne Timber Sale - *SEACC v. U.S. Forest Service* (Alaska intervened in support of defendant) (1:14-cv-00013) AAG T. Lenhart	Aligned.	Plaintiffs are seeking injunctions to prevent U.S. Forestry Service's Big Thorne Timber sale on Prince of Wales Island.	At the court of appeals after the district court upheld the timber sale. We are awaiting the decision.
Shelter Cove Road - *State v. U.S. Forest Service* (1:16-cv-00018); *Greater Southeast Alaska Conservation Community v. Stewart* (State intervened in support of defendant) (1:16-cv-0009) AAG S. Lynch	Aligned on end result but not on justification.	The State intervened to defend the building of Shelter Cove Road in Ketchikan. Contrary to the federal government's position, the State asserts that it has a Section 4407 easement for the road. This would mean no environmental review is needed. Despite recent legislation shepherded by Senator Sullivan, the federal government still refuses to recognize the 4407 easement. To ensure the 4407 issue is addressed, State brought a separate lawsuit on that issue. The lawsuits have been consolidated.	Briefing on the lawsuit challenging the State's project concluded on December 14. On the second complaint filed by the State and consolidated with the original lawsuit, we are awaiting the federal government's response.

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ACCESS AND LAND CONT.			
Lands into Trust - *Akiachak Native Community v. DOI* (D.C. Dist. Ct., 1:06-cv-969) AAGs A. Nelson; D. Wilkinson	Aligned at the district court.	State intervened to maintain the prohibition against taking land into trust for Alaska Natives. After the district court found in favor of plaintiffs, DOI changed its regulations to permit lands in Alaska to be taken into trust. Moving forward, the Bureau of Indian Affairs must give the State an opportunity to comment on an application.	Case closed. The court of appeals dismissed case on procedural grounds. The State has commented on one application from the Craig Tribal Association for a one-acre parcel in downtown Craig. The Bureau of Indian Affairs granted the application.
ANWR Boundary IBLA Appeal AAGs M. Schechter; A. Brown	Not aligned.	BLM denied the State's request for conveyance of 20,000 acres, based on dispute over western boundary of ANWR. The State also objected to a survey plat of the area directly south of the area requested for conveyance.	The State has moved to consolidate the two IBLA appeals. The initial conveyance appeal has been fully briefed.
ANWR Section 1002 AAG M. Schechter	Not aligned.	Section 1002 of the Alaska National Interest Lands Conservation Act (ANILCA) set aside the coastal plain of the Arctic National Wildlife Refuge for further investigation of its oil and gas potential. Any oil and gas production activities as well as exploratory drilling in the 1002 area cannot occur until authorized by an act of Congress. The investigations in the late 1980s recommended that the 1002 area be opened to production, but Congress has failed to pass a bill implementing the recommendations.	Senators Murkowski and Sullivan introduced Senate Bill 49, the Alaska Oil and Gas Production Act, on January 5, 2017, that would allow exploration and production in a portion of the 1002 Area.

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Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
ENDANGERED SPECIES ACT			
Bearded Seal - *State of Alaska v. National Marine Fisheries Service* (9th Cir., 14-35811) AAG B. Meyen	Not aligned.	The state filed a lawsuit challenging the listing of the bearded seal as threatened under the ESA based on climate model projections 100 years into the future.	The court of appeals reversed the district court's decision that found in favor of the state. The State, along with other appellees, filed a petition for rehearing en banc, and we are awaiting a decision on the petitition.
Ringed Seal - *State of Alaska v. National Marine Fisheries Service* (9th Cir., 16-35380) AAG B. Meyen	Not aligned.	The state filed a lawsuit challenging the listing of the ringed seal as threatened under the ESA based on climate model projections 100 years into the future.	At the court of appeals after the district court found in favor of the state. The State's responsive brief is due February 21, 2017.
Critcal Habitat - *Alabama v. NMFS* (AL Dist. Ct. 1:16-CV-00593) AAG B. Meyen	Not aligned.	The State joined 17 other states to challenge two new rules regarding the designation of critical habitat. The new rules greatly expand the types of areas that can be designated, without much, if any, connection to the presence of the protected species. The Attorney General also joined a letter with several other attorneys general asking the new federal administration to review and withdraw these rules.	At the district court level. The federal government has moved for dismissal, and the State is working on its response.

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
ENDANGERED SPECIES ACT CONT.			
Polar Bear Critical Habitat - *State of Alaska v. Jewell* (9th Cir., 13-35667) AAG B. Meyen	Not aligned.	State challenged the final designation of critical habitat for the polar bear.	The court of appeals reversed the district court's decision and upheld the designation of critical habitat. State and other plaintiffs filed a petition for certiorari with the U.S. Supreme Court and await a decision.

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
CLEAN AIR ACT			
Clean Power Plan (40 C.F.R. 60.5700-.5820)	Not aligned generally.	The Clean Power Plan establishes mandatory "goals" for reducing carbon emissions from certain coal and natural gas fired power plants. EPA excluded Alaska and Hawaii from the final rule, but EPA indicated that they would likely include Alaska in the future after accruing more evidence.	Other states sued challenging the rule, and the State continues to monitor.

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
WATER			
"Waters of the U.S." Rule - *North Dakota v. EPA* (ND Dist. Ct. 3:15-cv-00059) AAG A. Brown	Not aligned.	State joined a coalition of 12 states challenging the new "waters of the U.S." rule. Among other things, the new rule expands what falls under federal jurisdiction by automatically sweeping up "adjacent" or "neighboring" waters and wetlands within certain geographical limits to downstream waters already covered by federal law.	The district court action is currently stayed pending further decision by the Sixth Circuit Court of Appeals or the U.S. Supreme Court.

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Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
WATER CONT.			
Stream Protection Rule - Targets Coal Mines AAG A. Brown	Not aligned.	DOI released its final Stream Protection Rule, which goes into effect January 19, 2017. The rule directly impacts coal mines. State submitted comments on the draft rule objecting to the "one size fits all" approach and the failure to consider Alaska's unique conditions.	State joined a multi-state lawsuit challenging the rule on January 17, 2017. We are awaiting the federal government's response. The Attorney General also joined several other attorneys general in a letter requesting Congress to overturn the rule under the
Bristol Bay Watershed Assessment AAG A. Brown	Uncertain.	In July 2014, EPA published a proposed Section 404(c) veto decision based on the Bristol Bay Watershed Assessment that would preemptively restrict resource development in the entire watershed. The State has submitted comments on numerous occasions. EPA has not yet published its final decision.	Pebble Limited Partnership is currently in litigation with the federal government over some procedural issues. The State is not involved.

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
FISH AND GAME			
Salmon Fishery Management Plan - *United Cook Inlet Drift Association v. National Marine Fisheries Service* (Alaska intervened in support of defendants) (3:13-cv-0104) AAG S. Beausang	Aligned.	UCIDA challenged Amendment 12 to the Salmon Fishery Management Plan in Alaska that ensured Alaska retained full authority over salmon management in three historical areas beyond the three-mile limit, as it has since statehood. The court of appeals found in favor of the plaintiffs, reversing the district court's decision upholding state management.	The State is considering filing a petition for certiorari with the U.S. Supreme Court. The case has been remanded to the district court for determination of the terms of the judgment to be entered in favor of UCIDA.

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
FISH AND GAME CONT.			
NPS and USFWS Rules on Management of Fish and Game - *State v. Jewell* (3:17-cv-00013) AAGs C. Brooking, J. Alloway	Not aligned.	The State is challenging regulations from both the National Park Service and the U.S. Fish and Wildlife Service that impact state fish and game management. NPS adopted regulations that would allow the park superintendent to decide each year which state laws and regulations are contrary to park policies and should not be enforced. USFWS adopted regulations preempting state management of wildlife when the federal agency determines the state action relates to predator control, prohibiting several means of take for predators, and changing public participation procedures for hunting and fishing closures.	The State filed the lawsuit on January 13, 2017 and is awaiting a response from the federal government.
NPS Subsistence Collection Rule AAG C. Brooking	Not aligned.	Over the objections of subsistence users, the State, and others, National Park Service published a final rule on January 12, 2017 that, among other things, would restrict the use of plants and nonedible fish and wildlife parts for handicrafts, barter, and customary trade.	The State is evaluating all options.
Federal Subsistence Board/ Ninilchik AAG S. Beausang	Not aligned.	The Federal Subsistence Board is allowing the community of Ninilchik to use a gillnet to harvest salmon in the federal waters of the Kenai River. The State believes this will endanger the populations of king salmon and rainbow trout.	The State has filed a request for reconsideration with the board and is awaiting a decision.

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
MINING			
2008 Mining Claim Rule - *Earthworks v. U.S. Dept. of Interior* (Alaska intervened in support of defendant) (D.C. Dist. Ct. 1:09-cv-01972) AAGs E. Romerdahl, A. Brown	Aligned.	Plaintiffs challenged the 2008 Mining Claim Rule. State intervened to support the federal rule, which eliminated some of the regulatory hurdles for miners.	At the district court level. Briefing schedule has been set with the State's brief due in May 2017.
Wishbone Hill Mine - *Castle Mountain Coalition v. OSMRE* (State intervened in support of defendant) AAGs A. Brown, J. Hutchins	Not generally aligned.	The State intervened to defend the validity of the state-issued mine permits, which plaintiffs asserted had automatically terminated. The district court found in favor of plaintiffs and remanded the decision back to the agency.	In the court case, Usibelli moved to certify a question for appeal and the State joined the motion. Responses are due January 19, 2017. On remand, the federal agency issued a decision finding the State's determination that the permits were valid arbitrary and capricious. The State is evaluating options for seeking review of the decision.

OIL AND GAS			
Ban on Offshore Development AAG C. Moore	Not aligned.	President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all drilling in certain off-shore areas, including large portions of the Chuckchi and Beaufort Seas.	State is evaluating all options, including whether there is any legal recourse.

Alaska Department of Law

Federal Laws and Litigation Report

In compliance with AS 44.23.020(h)

Dated: January 23, 2017

Foreword

Under AS 44.23.020(h), the Department of Law must submit a report to the legislature that identifies federal laws, regulations, or actions that impact the State of Alaska and that the department believes may have been improperly adopted or unconstitutional. This report provides a brief summary of each federal law, regulation, or action identified along with a description of any ongoing litigation. To provide a complete picture, this report also identifies cases in which the State intervened or filed or joined in an amicus brief relating to a federal action or law. For more information on any item discussed in this report, contact the Civil Division's legislative liaison, Cori Mills, at (907) 465-2132 or cori.mills@alaska.gov.

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I. Federal Laws or Actions that Conflict with, or Attempt to Preempt, State Management of its Lands and Resources

1. **National Park Service (NPS) regulations that apply to "waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach . . . and without regard to the ownership of submerged lands, tidelands, or lowlands."**

   Citation to Federal Statute or Regulation – 36 C.F.R. § 1.2(a)(3)

   Description of the Issues Identified – The State believed this regulation violated Alaska National Interest Lands Conservation Act (ANILCA) section 103(c) (43 U.S.C. § 3103(c)), which excludes state-owned lands (including submerged lands) and waters from national parks and preserves and prohibits application of NPS regulations to them. The State was involved in two separate cases relating to this regulation. The only remaining case is *Sturgeon*.

   In a related matter, the Public Use Management Plan for the Togiak National Wildlife Refuge currently asserts jurisdiction over state navigable waterways in the refuge. The plan directs the U.S. Fish and Wildlife Service to adopt regulations limiting unguided use on the waterways. Regulations have not yet been proposed and will likely not be proposed until the *Sturgeon* case is completed. For now, the State continues to monitor the matter.

   Litigation – *Sturgeon and State of Alaska v. Masica, et al.* (9th Cir., 13-36165, 13-36166)

   Status of Litigation – The original lawsuit brought by Mr. Sturgeon challenged NPS' ban on the use of hovercraft on all navigable waters, including state-owned navigable waters. The State intervened in the case to challenge the authority of NPS to require Alaska Department of Fish & Game to obtain a research specimen collection permit to conduct salmon genetic sampling from the state-owned bed (a gravel bar) of the Alagnak River. The federal district court ruled in favor of NPS and the State appealed to the Ninth Circuit. The Ninth Circuit separated the two issues and ruled that the State did not have standing because the State's harm in obtaining the permit would not be remedied by a favorable decision. On the issue presented by Mr. Sturgeon, the Ninth Circuit held that the regulation did not violate ANILCA. The U.S. Supreme Court heard the case and overturned the Ninth Circuit's ruling. The matter is now back before the Ninth Circuit. The State submitted supplemental

briefing and sought to confirm its continued status as an intervenor. Oral argument was held before the Ninth Circuit on October 25, 2016. We are awaiting a decision.

2. BLM's refusal to recognize State's ownership in the land underlying portions of certain rivers

Description of the Issues Identified – Under the U.S. Constitution and federal law, the State of Alaska gained ownership to the beds of navigable or tidally-influenced water on the date of statehood. The only exceptions are waters expressly withdrawn by the federal government prior to statehood or waters determined to be "non-navigable." There are a number of ongoing disputes with the Bureau of Land Management (BLM) where the agency has refused to recognize the State's interest in the land underlying rivers that the State believes are navigable.

a. Mosquito Fork of the Fortymile River

BLM previously rejected evidence presented by the State that the Mosquito Fork is navigable. It instead labeled the river "non-navigable" and denied the State's ownership of the land underlying that river. BLM has since disclaimed any interest in the lands underlying the Mosquito Fork after the State filed litigation.

Litigation – *State of Alaska v. U.S.* (9th Cir., 16-36088, 17-35025)

Status of Litigation – On July 27, 2015, one day prior to oral argument on the State's motion for summary judgment and three weeks prior to trial, BLM filed a disclaimer of interest pursuant to 28 U.S.C. § 2409a(e). BLM disclaimed all interest adverse to the State in the submerged lands underlying the disputed portion of the Mosquito Fork. The Court confirmed the disclaimer on July 28. In response to the State's motion for an award of fees and costs, the district court found that the federal government had acted in bad faith during the case and awarded the State $582,629 in fees. The U.S. appealed the award and the State cross-appealed the district court's decision that expert fees and expenses are not recoverable. The amount at issue is $335,758.44. Briefing before the Ninth Circuit Court of Appeals is scheduled to begin in April.

b. Stikine River

State sought to quiet title to submerged land underlying the Stikine River by filing a lawsuit in federal district court. The federal government issued a disclaimer of interest in lieu of filing an answer.

Litigation – *State v. U.S.* (3:15-cv-00226)

Status of Litigation – The district court found that the State was the prevailing party for purposes of costs, and the federal government appealed. The appeal is related to legal issues in the Mosquito Fork appeal. Briefing is stayed pending the federal government obtaining final approval from the Solicitor General to pursue the appeal.

c. Kuskokwim River

The State requested a recordable disclaimer of interest on the Kuskokwim River to resolve a dispute over ownership of a portion of the riverbed. The BLM denied the request, and the State filed an administrative appeal to the Interior Board of Land Appeals (IBLA). Briefing is complete, and we are awaiting a decision by the board.

d. Knik River

In approving Eklutna, Inc.'s selection application, BLM did not preserve Alaska Native Claims Settlement Act 17(b) easements and purported to convey portions of the bed of the Knik River, which the State asserts is a state navigable waterway. The State appealed the approval of the land selection to the IBLA, but the issue of navigability has to be challenged in district court. The IBLA appeal is currently stayed pending ongoing negotiations. On the issue of the Knik River, the State is continuing to negotiate with BLM in an attempt to avoid litigation.

3. Application of 2001 Roadless Rule in areas like the Tongass National Forest

Description of the Issues Identified – The 2001 Roadless Rule prohibits road construction, reconstruction, and timber harvesting on inventoried roadless areas in national forests, including the Tongass National Forest in Southeast Alaska. The State believes that the rule was improperly adopted and incorrectly applied to Alaska. Although an exemption for Alaska was issued by the federal government, the court struck down the exemption. The Roadless Rule has greatly impacted the timber industry in Southeast Alaska as well as increased costs for developing hydroelectric and other projects.

Litigation – *State of Alaska v. U.S. Dept. of Agriculture* (D.C. Dist. Ct., 1:11-cv-01122)

Status of Litigation – After the Alaska District Court struck down the exemption, the State filed a separate lawsuit in D.C. District Court challenging the Roadless Rule and its application to Alaska. After various procedural challenges that were rejected by the D.C. Court of Appeals, the case is being heard on the merits by the D.C. District Court. We have completed supplemental briefing at the court's request, and we are awaiting a decision.

4. Izembek National Wildlife Refuge/King Cove to Cold Bay Road

Description of the Issues Identified – For many years, residents of King Cove have been trying to get a road from the village to the airport at Cold Bay, primarily for health and safety purposes, where large planes can land in the area's often poor weather conditions. A portion of the area the road would traverse is within federal wilderness in the Izembek National Wildlife Refuge. The State intervened in a case filed by Agdaagux Tribe of King Cove, and others, challenging the decision of Interior Secretary Jewell denying a proposed land exchange which would have allowed construction of a road. The State asserted that the secretary's decision violates the National Environmental Policy Act and the Omnibus Public Land Management Act, among other claims. The State is also continuing to explore the potential for asserting an R.S. 2477 right-of-way across the refuge based on the historical use of roads and trails in the King Cove area. In April 2014, the State provided the Department of Interior a 180-day notice of intent to sue, which is required before an R.S. 2477 lawsuit could be filed. In addition to further evaluating the R.S. 2477 claim, the State is also actively pursuing other legal alternatives to achieving construction of the road.

Litigation – *Agdaagux Tribe of King Cove v. Jewell* (9th Cir., 15-35875).

Status of Litigation – The district court upheld Secretary Jewell's decision refusing to build the road, and the plaintiffs, including the State, appealed. The briefing is complete, but oral argument has not been set.

5. Federal action, inaction, and management activities related to R.S. 2477 rights-of-way owned by the State

Description of the Issues Identified – The federal government refuses to recognize the State's interest in many rights-of-way that were granted to the State under Revised Statute 2477. If left unchallenged, the impact would be substantial. The State could lose its ownership interest and/or management authority over more than 600 identified and codified rights-of-way, encompassing over 20,000 linear miles of travel corridors. The State could also lose its ownership interest or management authority over numerous other

R.S. 2477 rights-of-way within Alaska that are known or believed to exist. Additionally, the federal government has imposed public use restrictions in some rights-of-way which are impacting citizen livelihoods. The State has filed litigation, identified below, asserting its rights to a portion of the R.S. 2477 rights-of-way.

Primary Litigation – *State of Alaska v. U.S.* (AK Dist. Ct., 4:13-cv-00008); *State of Alaska v. U.S.* (9th Cir., 14-35051)

Status of Litigation – The case involves rights-of-way crossing lands owned by the U.S. and others, including Native allotment owners. The district court granted a motion to dismiss brought by the Native allotment owners in relation to their properties. The State appealed, and the Ninth Circuit Court of Appeals held that the State needed to condemn the rights-of-way across any Native allotments. The State's case against the other defendants has been stayed pending condemnation of the rights-of-way across the Native allotments.

Other Related Litigation – A number of other cases address similar issues:

Ahtna, Inc. v. State, Case No. 3AN-08-6337 CI (Klutina Lake Road and Copper Center to Valdez).

Dickson v. State, Case No. 3AS-12-7260 CI (superior court held that a portion of the historic Iditarod Trail (Knik to Susitna) was in fact an R.S. 2477 that belonged to the State for public use).

Aubrey v. State, Case No. 3PA-13-02322 CI (involving an appeal of DNR management actions taken concerning the Chickaloon-Knik-Nelchina right-of-way).

In Re. Memorandum of Decision Concerning Chitina Cemetery Road, 43 U.S.C. § 932, RST File Number 1974 (involving an administrative appeal of DNR's decision concerning the Chitina Cemetery Road).

6. U.S. Forest Service failure to recognize 4407 easement for Shelter Cove Road in Ketchikan

Description of the Issues Identified – A small portion of the Shelter Cove Road project in Ketchikan crosses U.S. Forest Service land. The State has a 4407 easement for the Shelter Cove Road corridor, which means no Forest Service environmental review is necessary for the project. The Forest Service went forward with an environmental review anyway, and granted a permit

authorizing construction and has promised a limited easement for operation of the road.

Litigation – *State v. U.S. Forest Service (1:16-cv-00018); Greater Southeast Alaska Conservation Community v. Stewart (1:16-cv-0009)*

Status of Litigation – Environmental groups challenged the Forest Service's environmental review and permit, and the State intervened to defend the building of the road. However, the environmental groups' litigation did not directly address the scope or validity of the 4407 easement (*Greater Southeast Alaska Conservation Community*). The State then filed its own action in district court seeking to compel the Forest Service to issue the 4407 easement, which would confirm that environmental review and a federal permit were not necessary (*State v. U.S. Forest Service*). The first case, *Greater Southeast*, has been briefed, and we are awaiting the Forest Service's response in the second case.

7. Dispute over ANWR boundary with BLM

Description of the Issues Identified – It has long been the State's position that the western boundary of the Arctic National Wildlife Refuge is the Canning River and that land between the Staines and Canning Rivers should be conveyed to the State; the State's position on the boundary also impacts the State's rights to lease offshore lands adjacent to this area. The State recently issued leases that included this disputed offshore area and, separately, requested conveyance of the uplands from the Bureau of Land Management (BLM) to resolve the issue. BLM denied the State's request for conveyance of the uplands. The federal government indicated its disagreement regarding the offshore leases but has not taken formal action. The State filed an administrative appeal to the Interior Board of Land Appeals on the uplands conveyance, which is pending. Subsequently, the State protested a survey plat that includes additional area west of the Canning River that is also in dispute; BLM denied the protest. The State has also filed an administrative appeal of the survey plat to the IBLA and is seeking to consolidate that matter with the original IBLA appeal.

8. **Federal action listing certain populations of the ringed and bearded seals as threatened or endangered under the Endangered Species Act by relying on speculative science**

   Citation to Federal Register – 77 Fed. Reg. 76706, 76740 (Dec. 28, 2012)

   Description of the Issues Identified – Listings under the Endangered Species Act are to be made "solely on the basis of the best scientific and commercial data available" to the applicable federal agency. The National Marine Fisheries Service (NMFS) listed the ringed and bearded seals as threatened or endangered based on projections 100 years into the future. These projections lacked sufficient information supporting the finding and conflicted with the State's data and the best available scientific and commercial data. NMFS also proposed to designate approximately 350,000 square miles of waters off Alaska's coast as critical habitat for the ringed seal. Alaska's ability to manage its wildlife resources and develop appropriate mitigation and conservation measures for the bearded and ringed seals and their habitat within Alaska's lands and waters are displaced or limited by the federal government's actions.

   Litigation – *Alaska Oil and Gas Association v. Pritzker* (AK Dist. Ct., 4:13-cv-00018; 9th Cir., 14-35811); *State of Alaska v. NMFS* (AK Dist. Ct., 5:15-cv-00005; 9th Cir., 14-35811)

   Status of Litigation – In 2013, the State, along with the Alaska Oil and Gas Association and the North Slope Borough, filed a lawsuit challenging the listing of the bearded seal as threatened. The federal district court agreed with the State and overturned the decision. The Ninth Circuit then reversed the district court and upheld the listing. The State and other plaintiffs filed a petition for rehearing en banc and are awaiting a decision.

   Based on the success with the case regarding the bearded seal at the district court level, the State filed a lawsuit challenging the listing of the ringed seal in March 2015. The district court again agreed with the State and overturned the listing. The case is now pending before the Ninth Circuit Court of Appeals. The State's responsive brief is due February 21, 2017.

9. **New Rules on critical habitat adopted by federal agencies**

   Citation to Federal Statute or Regulation – 50 CFR Part 424.

   Description of the Issues Identified – The National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) adopted new rules concerning designation of critical habitat under the Endangered Species Act in

February 2016. The new rules greatly expand the types of areas that can now be designated as critical habitat and give NMFS and USFWS the purported authority to declare land critical habitat regardless of whether it is occupied or unoccupied, regardless of the presence or absence of the physical or biological features necessary to sustain the species, and regardless of whether the land is actually essential to species conservation.

Litigation – *Alabama v. NMFS* (AL Dist. Ct., 1:16-CV-00593)

Status of Litigation – The case was filed in November of 2016, and the federal government moved for dismissal. The plaintiffs are working on a response.

10. Federal action designating a large area in Alaska as critical habitat for the polar bear under the Endangered Species Act

Citation to Federal Register – 75 Fed. Reg. 76086 (December 7, 2010)

Description of the Issues Identified – Designation of critical habitat under the Endangered Species Act is to be made on the "…basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." For the polar bear critical habitat designation, the federal government's action did not follow the required process and failed to include sufficient record evidence justifying the designation. For example, the federal government included large areas of land in the designation without providing evidence demonstrating features essential to polar bears were present. If the critical habitat designation is upheld, 187,147 square miles of Alaska and territorial waters of the U.S. would be subject to Section 7 federal Endangered Species Act permitting requirements.

Litigation – *State of Alaska v. Salazar, et al.* (9th Cir., 13-35619)

Status of Litigation – Following the district court's decision in favor of the State and other plaintiffs vacating and remanding the final rule, the cases were appealed to the Ninth Circuit. The Ninth Circuit found in favor of the federal government and upheld the critical habitat designation. The State, along with other plaintiffs, petitioned the U.S. Supreme Court for certiorari and awaits the Court's decision on whether to hear the case.

11. Clean Power Plan Rule by the Environmental Protection Agency (EPA) Under Section 111(d) of the Clean Air Act

Citation to Federal Statute or Regulation – 40 C.F.R. §§ 60.5700-60.5820.

Description of the Issues Identified – The Clean Power Plan establishes mandatory "goals" for reducing carbon emissions from certain coal and natural gas fired power plants. EPA contemplates that state plans required by the rule will include measures "beyond the fence" of the targeted power plants – e.g. statewide energy efficiency programs and new renewable generation. Because state plans would be federally enforceable, the rule effectively grants EPA new authority to regulate in areas traditionally within the state's jurisdiction. When the rule was first proposed, Alaska submitted comments explaining the severe impacts the rule would have on the delivery of electricity in Alaska and requesting an exemption. The EPA excluded Alaska and Hawaii from the final rule but indicated that this may only be temporary. Although Alaska was not included, the State continues to monitor the implementation of the rule and the lawsuits that have been brought by other states to challenge the rule.

12. Adoption by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) of the "waters of the United States" rule

Citation to Federal Statute or Regulation – The final rule would affect state and federal regulation across all facets of the Clean Water Act, including activities permitted under Section 402 (wastewater discharges) and Section 404 (dredge and fill); 33 CFR Part 328; 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.

Description of the Issues Identified – Under the Clean Water Act, the federal government has jurisdiction over "waters of the United States." The EPA and the Corps adopted a new rule that attempts to define what is encompassed by the term "waters of the United States" for purposes of federal jurisdiction under the Clean Water Act. Among other things, the new rule expands what falls under federal jurisdiction by automatically sweeping up "adjacent" or "neighboring" waters and wetlands within a certain geographic limit to downstream waters already covered by federal law. Additionally, if "adjacent" or "neighboring" water extends into the set geographic limit by even just a few feet, the entire water body or wetland is now subject to federal jurisdiction and permitting. By virtue of Alaska's unique and abundant water and wetland areas, many adjacent or neighboring waters will fall within the rule, regardless of their true "connectivity" to downstream waters.

Litigation – *North Dakota v. EPA* (ND Dist. Ct., 3:15-CV-00059)

Status of Litigation – Alaska joined a coalition of 12 states in filing a complaint in the federal district court in North Dakota challenging the rule. Among other claims, the states assert that EPA and the Corps failed to consult as required by the Clean Water Act in developing the rule; acted arbitrarily and capriciously in violation of the Administrative Procedures Act; and violated the National Environmental Policy Act by failing to prepare an environmental impact statement to assess the impacts of this significant rulemaking. The district court case is currently stayed pending further decision by the Sixth Circuit Court of Appeals or the U.S. Supreme Court to determine which court has jurisdiction. The Sixth Circuit has enjoined implementation of the rule until a decision is made.

13. Adoption by the Department of Interior, Office of Surface Mining Reclamation and Enforcement (OSM) of the Stream Protection Rule Targeting Coal Mines

Citation to Federal Statute or Regulation – 30 CFR Parts 700, 701, 773, 774, 777, 779, 780, 783, 784, 785, 800, 816, 817, 824, 827

Description of the Issues Identified – The new regulations adopted by OSM set new requirements for testing and monitoring streams that could be impacted by nearby mining. The new regulations also set standards for protection and restoration of those waterways. The State submitted comments on the draft rule in October 2015. The State's comments expressed concern that the rulemaking process was not transparent, the draft rule was too "one size fits all," and the rule did not take Alaska's unique conditions into consideration. Ultimately, unless the new regulations are reversed either by a court action or litigation, the State would have to change its statutes to conform with the new regulations in order to maintain primacy over surface mining across the State. Alaska's congressional delegation has made statements about taking legislative action to overturn the rule, and Alaska's Attorney General joined several other attorneys general in requesting that Congress and the President overturn the rule through the Congressional Review Act.

Litigation – *State of Ohio v. U.S. Dept. of Interior* (D.C. Dist. Ct., 1:17-cv-00108)

Status of Litigation – The State joined a multi-state lawsuit challenging the rule on January 17, 2017. We are awaiting the federal government's response.

14. Preemptive exercise by the Environmental Protection Agency (EPA) of its Clean Water Act Section 404(c) authority to veto dredge and fill activities on state lands in the absence of a Section 404 permit application

Description of the Issue Identified – EPA announced in the winter of 2011 that, in response to certain petitions, it would prepare a Bristol Bay Watershed Assessment (BBWA) that would comprehensively look at the potential impacts of large scale development throughout 15 million acres in the Bristol Bay area. Later, EPA refined its assessment to consider only potential impacts of hypothetical large scale mine development. But EPA records show that as early as 2009, before any petitions were filed, EPA was discussing whether it would use its Section 404(c) authority to regulate State lands at the Pebble deposit in order to prevent or curtail mining at the site. The final BBWA was released in January 2014, and in February 2014 EPA announced it was conducting a Section 404(c) veto review. In July 2014, EPA published a proposed veto decision in the Federal Register proposing to significantly restrict dredge and fill activities for mining at Pebble. Throughout these events, the State voiced concerns about EPA's actions with respect to both the BBWA and commencement of the veto review process. EPA has not yet issued a final decision, in part, because of lawsuits brought by the Pebble Limited Partnership. The State continues to monitor the cases, which are currently stayed while the parties seek to negotiate a resolution.

15. NPS and USFWS regulations purporting to preempt state wildlife management on federal lands

Citation to Federal Statute or Regulation – 80 Fed. Reg. 64325 (October 2015); 81 Fed. Reg. 151 (August 2016)

Description of the Issues Identified – The National Park Service (NPS) and the U.S. Fish and Wildlife Service (USFWS) both adopted regulations that conflict with state management of wildlife on federal land. NPS adopted regulations that would allow the park superintendent to decide each year which state laws and regulations are contrary to park policies and should not be enforced. There would be no public comment process associated with making and enforcing the list. USFWS adopted regulations prohibiting several means of take for predators and changing public participation procedures for emergency, temporary, and permanent closures.

Litigation – *State v. Jewell* (3:17-cv-00013)

Status of Litigation – The State filed a lawsuit challenging the regulations on January 13, 2017. The State is waiting for the federal government's response.

16. National Park Service (NPS) issues subsistence collection rule

Description of the Issues Identified – Over the objections of subsistence users, the State, and others, NPS published a final rule on January 12, 2017 that would restrict the use of plants and nonedible fish and wildlife parts for handicrafts, barter, and customary trade. The rule also limits the type of bait to be used at bear bait stations, and prohibits falconers from taking live raptors. These rules conflict with state fish and game management. The State is evaluating all options.

17. Federal Subsistence Board decision to allow gillnetting in federal waters outside of Kenai River

Description of the Issues Identified – The Federal Subsistence Board is allowing the community of Ninilchik to use a gillnet to harvest salmon in the federal waters of the Kenai River. The State believes this will endanger the populations of king salmon and rainbow trout. The State has filed a request for reconsideration with the board and is awaiting a decision.

18. President Obama's offshore development ban

Citation to Federal Statute or Regulation – Section 12(a) of the Outer Continental Shelf Lands Act of 1953 (43 U.S.C. 1341).

Description of the Issues Identified – President Obama issued an order pursuant to the 1953 Outer Continental Shelf Lands Act indefinitely banning all drilling in certain off-shore areas, including large portions of the Chuckchi and Beaufort Seas. The State is evaluating all options, including whether there is any legal recourse.

II. Federal Litigation in Which the State Intervened in Support of a Federal Action

1. Taking Land into Trust for Tribes – *Akiachak Native Community v. Dept. of Interior* (D.C. Cir., 13-5360)

The Department of Interior had a regulation excluding Alaska from regulations that otherwise govern the creation of Indian trust land. Akiachak Native Community, along with other plaintiffs, challenged the regulation, and the State intervened in support of the federal government. The State and the federal government defended the existing regulation exempting Alaska. The

federal district court disagreed and found in favor of the plaintiffs. The federal government and the State appealed, but subsequently the federal government changed its regulations to remove the Alaska exemption. The appellate court dismissed the appeal on mootness grounds. Since the case ended, the State has received notice from the Bureau of Indian Affairs (BIA) of one land into trust application submitted by the Craig Tribal Association. The State submitted its comments to the application in December, and the BIA recently granted the application. It is the State's understanding from various news articles and word of mouth that other applications have been submitted by Tribes to the BIA, but it has not received official notice of those applications yet.

2. **Mining Claim Rules – *Earthworks v. U.S. Dept. of Interior* (D.C. Dist. Ct., 1:09-cv-01972)**

   Earthworks filed a lawsuit against the federal government challenging certain rules relating to mining claims. These rules generally benefit miners by eliminating certain fees and restrictions. The State intervened in support of the federal government. The case is pending before the federal district court.

3. **Wishbone Hill Mine – *Castle Mountain Coalition v. OSMRE* (AK Dist. Ct., 3:15-cv-00043)**

   Several environmental and citizen groups challenged the validity of the Wishbone Hill coal mine permits on the grounds that the permits should have automatically terminated under federal law. The district court agreed and remanded the matter back to the Office of Surface Mining Reclamation and Enforcement. Usibelli, the mine owner, recently filed a request to certify an appeal, which the State has joined.

4. **Salmon Fishery Management Plan – *United Cook Inlet Drift Association v. National Marine Fisheries Service* (9th Cir., 14-35928)**

   United Cook Inlet Drift Association (UCIDA) sued the National Marine Fisheries Service (NMFS) challenging the validity of Amendment 12 to the Fishery Management Plan for Salmon Fisheries in the Exclusive Economic Zone off the Coast of Alaska. Amendment 12 effectively removes federal oversight under the Magnuson-Stevens Act, thereby allowing state management, for three fishing areas beyond the three-mile limit from shore. One of these areas was the lower Cook Inlet, which is the focus of the lawsuit. The State intervened in support of NMFS to protect the State's interest in maintaining management authority over the area. The federal district court found in favor of NMFS, upholding Amendment 12. After UCIDA appealed, the Ninth Circuit reversed the district court and held that federal oversight is

required. The State is considering filing a petition for certiorari with the U.S. Supreme Court. In the meantime, the case has been remanded to the district court for determination of the terms of the judgment to be entered in favor of UCIDA.

5. **Big Thorne Timber Sale - *SEACC v. U.S. Forest Service* (AK Dist. Ct., 1:14-cv-00013; 9th Cir., 15-352332)**

   In three separate suits, plaintiffs are seeking injunctions to prevent the U.S. Forest Service's Big Thorne Timber sale on Prince of Wales Island. The State has joined with several other parties as intervenor-defendants in support of the Forest Service. The district court upheld the timber sale and plaintiffs appealed. The Ninth Circuit denied plaintiffs motion for injunction pending appeal, and the parties await the appellate court's decision on the merits.

III. Federal Litigation in Which the State Filed or Joined in an Amicus Brief

The following list summarizes the cases where the State either filed or joined in an amicus brief in 2016 involving the federal government or the potential preemption of state law.

1. ***U.S. Army Corps of Engineers v. Hawkes*** (Amicus Brief, Supreme Court). The state joined North Dakota's multi-state amicus brief, which argued that an Army Corps of Engineers decision that property contains a "water of the United States" for purposes of the Clean Water Act is a final agency action and should be subject to judicial review under the APA.

2. ***Kolbe v. O'Malley*** (Amicus Brief, Fourth Circuit En Banc). Alaska joined West Virginia's amicus brief which challenged Maryland's assault weapons ban on the grounds it violates the Second Amendment, and argued that the ban should be subject to strict scrutiny under Second Amendment.

3. ***American Building Industry Association v. Department of Commerce*** (Amicus Brief, Certiorari Stage, Supreme Court). We joined Alabama's multi-state amicus brief, which argued that the Secretary of Commerce's analysis of "economic impact" for critical habitat designation area should be subject to judicial review.

4. ***Markle v. U.S. Department of Commerce*** (Amicus Brief, Fifth Circuit En Banc). We joined Alabama's multi-state amicus brief, which argued that property which is unsuitable to a species cannot serve as "essential critical habitat" and that U.S.

Fish and Wildlife Service's decision to exclude areas from critical habitat from cost-benefit analysis is not discretionary and should be subject to judicial review.

5. ***New Mexico v. U.S. Department of Interior*** (Amicus Brief, Tenth Circuit). Alaska joined a multi-state amicus brief drafted by Colorado, Arizona, and Utah, which argued that the Fish & Wildlife Service must comply with state permitting requirements before releasing experimental populations pursuant to Endangered Species Act consultation regulations.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

AHTNA, INC.,

Plaintiff,

v.

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES; STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES; KEITH HJELMSTAD; SANDRA HJELMSTAD; AMY J. HUBBARD; LESTER A. HUBBARD; LUCY E. JORDAN; MICHAEL J. JORDAN; RICHARD A. KOVALSKY; AARON D. MAULDIN; DONNA RUTH MILLER; JOSEPH DONALD MILLER; DEBRA J. SISSOM; KENNETH H. SISSOM; JUDY V. VOORHIS; TONY R. VOORHIS; TERRY TOWNSEND; DEBBIE TOWNSEND; ERIC HELMS; LINDA HELMS; and all other persons or parties unknown claiming a right, title, estate, lien, or interest in the real estate described in the pleadings in this action,

Defendants.

Case No. 3AN-08-06337 CI

ORDER GRANTING AHTNA, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On December 17, 2015 Plaintiff Ahtna, Inc. ("Ahtna"). filed a motion for partial summary judgment. Ahtna's motion seeks a declaration from this Court that rights-of-way established under Revised Statute ("RS") 2744, 43 U.S.C. § 932, permit ingress and egress, but not campsites, day-use sites, and other uses

unrelated to transportation. The Court heard oral argument on Ahtna's motion on April 14, 2016. The Court now concludes that the rights conveyed to the public under RS 2477 are limited to egress and ingress. Accordingly, Ahtna's motion for partial summary judgment is GRANTED.

A. Background

This action concerns a road, locally known as the Brenwick-Craig Road, which runs approximately 25 miles from Copper Center to the outlet of Klutina Lake. The road occupies a federal highway easement, but the State claims additional rights to the roadway and surrounding property under RS 2477. In addition to the road itself, the State alleges that it obtained rights under RS 2477 to "various spurs and arterials." State of Alaska's Answer at 12, ¶ 84. The State further alleges that these "spurs and arterials" were historically used for "boat launching, camping, [and] day-use sites." *Id.* According to the State, RS 2477 conveyed not only the right-of-way itself, but also the right to incidental public uses such as camping and boat launching.

B. Summary Judgment Standard

Summary judgment is proper when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Civil Rule 56(c); *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 516 (Alaska 2014). Here, the State's interpretation of RS 2477 is, as a matter of law, overbroad. Therefore, Ahtna is entitled to partial summary judgment.

C. RS 2477

Congress passed RS 2477 in 1866. In its entirety, the statute provides: "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 43 U.S.C. § 932. This grant "was self-executing, meaning that an RS 2477 right-of-way automatically came into existence if a public highway was established across public land in accordance with the law of Alaska." *Price v. Eastham*, 75 P.3d 1051, 1055 (Alaska 2003).

In 1976, Congress enacted the Federal Land Policy and Management Act, which repealed RS 2477. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 741 (10th Cir. 2005). However, rights-of-way established before the repeal remain valid, and have been frozen "as they were in 1976." *Id.*

To prove that an RS 2477 right-of-way exists, a claimant must show either "some positive act" by the State "clearly manifesting an intention to accept a grant," or continuous public use "for such a period of time and under such conditions as to prove that the grant has been accepted." *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961). A right-of-way created by public use "connotes definite termini." *Dillingham Commercial Co. v. City of Dillingham*, 705 P.2d 410, 414 (Alaska 1985).

In *Dillingham Commercial*, the City of Dillingham claimed it had obtained fee simple ownership of a right-of-way by operation of RS 2477. 705 P.2d at 415. The Alaska Supreme Court rejected this position, reversing the lower court and holding that "a right of way creates only a right of use." *Id.* More specifically, the Court held that one who proves an RS 2477 right of way gains only the right to pass over the land, or the right of ingress and egress. The dominant estate holder cannot "use the land for any purpose, such as a park." *Id.*

The *Dillingham Commercial* Court's reasoning aligns with the definition of "highway" in the Alaska Statutes. AS 19.59.001(8) defines "highway" to include a "road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof." Thus, RS 2477, which granted rights-of-way for "highways over public lands," conveyed the right to pass over the land, and nothing more. It did not grant easements for recreational uses unrelated to "travel between two definite points." *Shultz v. Dep't of Army*, U.S., 10 F.3d 649, 658 (9th Cir. 1993).

D. Analysis

Paragraph 84 of the State's answer implies that RS 2477 conveyed not only the rights of ingress and egress, but ancillary uses such as "boat launching, camping, [and] day-use sites." While the State's position is partially correct, it is far too inclusive. To the extent that the State claims RS 2477 rights-of-way for "ingress and egress to the Klutina River," the State may prove such rights-of-way through admissible evidence under the standards set forth in Alaska law.[1] But boat launches, campsites, and other recreational uses exceed the maximum rights available to a claimant under RS 2477. Such uses are merely incidental to public travel, and would not have created additional rights-of-way while RS 2477 was in effect. Accordingly, any additional reservation of property rights for recreational uses would constitute new development which, by its nature, would not have existed when Congress repealed RS 2477 in 1976.

RS 2477 rights-of-way may accommodate regular maintenance and changes in technology. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988) (holding that RS 2477 permits changes that are "reasonable and necessary to assure safe travel"); *see also* Restatement (Third) of Property (Servitudes) § 4.10, cmt. f. ("The manner, frequency, and intensity of use of the servient estate may change to take advantage of developments in technology and to accommodate normal development of the dominant estate[.]"). They may not, however, expand in scope to accommodate new development unrelated to ingress and egress. To hold otherwise would permit RS 2477 rights-of-way to unreasonably encroach upon the servient estate. *Southern Utah Wilderness*

[1] *See Hamerly*, 359 P.2d at 123; *Dillingham Commercial*, 705 P.2d at 414-15; *Price*, 128 P.3d at 728-29. The State must carry a heavy burden to prove any such right-of-way. The State must show, first, that "the alleged highway was located 'over public lands.'" *Hamerly*, 359 P.2d at 123. Second, the State must prove that "the character of . . . use was such as to constitute acceptance by the public of the statutory grant." *Id.* Whether a right-of-way exists is a question of fact. *Id.* Moreover, a right-of-way "will not be presumed against the owner of the land." *Id.* The burden will rest on the State "to establish [the right-of-way] by proof that is clear and unequivocal." *Id.*

Alliance, 425 F.3d at 747 (holding that RS 2477 rights-of-way are bound by "[t]he principle that [an] easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate").

The State's position lacks any meaningful limit on the scope of an RS 2477 right-of-way. In its present form, the State's interpretation already goes beyond the statutory definition of "highway." *See* AS 19.59.001(8). And, because it seemingly extends to any uses incident to backcountry travel, the State's view could include within a right-of-way gas stations, lodges, hotels, automotive repair shops, and retail establishments. After all, any sort of long-distance travel brings with it the need to rest and replenish provisions. The Court declines to read so much into so short a statute. RS 2477 granted only the right to pass over public land. It did not—and cannot now, 40 years after its repeal—convey the right to develop that land for recreational and commercial purposes.

E. Conclusion & Order

Because RS 2477 granted only the right of ingress and egress, Ahtna's motion for partial summary judgment is GRANTED. The State may prove, through "clear and unequivocal" evidence, any alleged right of way for "ingress and egress to the Klutina River." *Hamerly*, 359 P.2d at 123; State of Alaska's Answer at 12, ¶ 84. But the State may not include within the scope of its alleged right-of-way "boat launch[es], camping, and day-use sites." *Id.*

ORDERED this 11 th day of May, 2016, at Anchorage, Alaska.

[signature]
ANDREW GUIDI
Superior Court Judge

I certify that on 5/11/2016
a copy of the above was mailed to or emailed
each of the following at their addresses of record:
mailed: Miller, Townsend, Helms, Mauldin
emailed: Haltner, Sullivan, Schechter, Trickey, Songer, Stark, Anjivel
[signature]
Jackie Kapper, Judicial Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

AHTNA, INC., Plaintiff,	)	RECEIVED LAW AGO ANC JAN 19 2012 PM 01:36
v.	)	
STATE OF ALASKA, Defendant.	)	Case No. 3PA-08-01600 CI

ORDER DENYING AHTNA'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING STATE OF ALASKA'S SECOND CROSS-MOTION FOR SUMMARY JUDGMENT

The plaintiff, Ahtna, Inc., filed a Motion for Partial Summary Judgment arguing that the State's current use of right-of-way (ROW) grant AA-2922 exceeds the scope of the right-of-way. Ahtna seeks summary judgment on its claims for declaratory judgment, trespass and injunctive relief. The State submitted its opposition to the motion and filed a cross-motion for summary judgment on the same issues. For the following reasons, it is HEREBY ORDERED that Ahtna's Motion for Partial Summary Judgment is DENIED and the State's Second Cross-Motion for Summary Judgment is GRANTED.

I. FACTS

In 1968, the Bureau of Land Management (BLM) granted the State of Alaska ROW AA-2922 for the purpose of connecting the towns of Chitina and McCarthy. The BLM also granted the State ROW AA-2868 for the purpose of a material site which was used for construction of the McCarthy Road and Copper River Bridge. The BLM authorized the grants pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317.

On October 23, 1981, pursuant to the Alaska Native Claims Settlement Act (ANCSA), the BLM conveyed lands to Ahtna via Interim Conveyance 442. This conveyance purported to transfer title to the lands encompassing the ROWs, however the

State disputes that title passed to Ahtna.[1] BLM conveyed the lands subject to existing ROWs, including ROWs AA-2922 and AA-2868. In 2007, the BLM waived its administrative authority over ROW AA-2922 in favor of Ahtna as successor-in-interest to the United States. On October 12, 2007, Ahtna's Land Department issued an Administrative Order to the State, cancelling right-of-way grant AA-2868 and directing the State to cease and desist occupancy and use of the material site.[2]

A portion of ROW AA-2922 includes an area which the Alaska Department of Transportation (DOT) improved and maintains as a rest area. The DOT seasonally maintains a dumpster and toilets and allows overnight camping in the rest area. The State posted a sign in the rest area indicating that the rest area may be used for camping.

Within ROW AA-2922, the State improved an access road which is adjacent to the downriver side of the Copper River Bridge. The State used material from material site AA-2868 to improve and/or maintain the access road and rest area within AA-2922. The access road runs between the rest area and the Copper River. The State is aware that members of the public have been known to launch boats at that location and the State has not made any attempt to prevent such use.

II. DISCUSSION

A. Summary Judgment

Under Civil Rule 56, a moving party is entitled to summary judgment if there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. The moving party bears the initial burden of proving, through admissible evidence, the absence of genuine factual disputes and its entitlement to judgment as a matter of law.[3] Once the moving party has made a prima facie showing, the burden shifts to the non-moving party to produce "admissible evidence reasonably tending to dispute or contradict the movant's evidence."[4] A non-moving party may not rest upon mere allegations or

[1] The State argues that lands could not be conveyed because the ROWs are located in navigable waterways and the land beneath the navigable waterways passed to Alaska upon statehood. This issue is not the subject of the summary judgment motions or Motion for Rule of Law.

[2] Ahtna's Motion for Rule of Law relates to whether Ahtna had the authority to cancel ROW AA-2868.

[3] *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

[4] *Id.*

denials, but must set forth specific facts showing that there is a genuine issue for trial.[5] "To create a genuine issue of material fact there must be more than a scintilla of contrary evidence."[6]

The material facts relevant to the summary judgment motions are not in dispute. The parties do not dispute that the purpose of ROW AA-2922 was for "highway purposes" and continues to be for "highway purposes." The State maintains a rest area with overnight camping within ROW AA-2922. The access road within ROW AA-2922 is used by the public as a boat launch. Therefore, the issue on summary judgment is purely a question of law; whether the State's use of ROW AA-2922 exceeds the scope of permissible uses.

B. The State's Use of ROW AA-2922 for Highway Purposes

Ahtna argues that the State's use of site AA-2922 as a public campground and public boat launch exceeds the scope of permissible uses and is inconsistent with the purpose of the ROW at the time it was created. Ahtna claims ROW AA-2922 was granted to serve "highway purposes" and the term does not encompass public recreational activities such as camping or boat launches.

The State argues that Athna's interpretation of the phrase "highway purposes" is extremely narrow and restrictive. The State argues that the definition of "safety rest areas" is expansive and the State has broad discretion to manage its transportation infrastructure and to determine what is appropriate for the "rest, relaxation, comfort, and information needs" of the traveler. The State has historically interpreted and applied the term rest areas to include camping.

1. Rest Area as a Highway Purpose

As a threshold matter, the parties do not dispute that a rest area constitutes a highway purpose and the court finds that a rest area constitutes a highway purpose. The BLM granted ROW AA-2922 pursuant to the Federal Aid Highway Act.[7] The Act allows states to obtain interests in land which are "reasonably necessary for the right-of-

[5] Civil Rule 56(e).
[6] *Cikan*, 125 P.3d at 339.
[7] 23 USC 317.

way of any highway."[8] Moreover, federal regulations provide that "real property … within the right-of-way boundaries of a project shall be devoted exclusively to public highway purposes."[9] Thus, a ROW granted pursuant to the Federal Highway Act may be used only for highway purposes.

A safety rest area, also known as a "rest and recreation area," is "[a] roadside facility safely removed from the traveled way with parking and such facilities for the motorist deemed necessary for his rest, relaxation, comfort and information needs."[10] The federal regulations provide that rest areas will be located along highways and will be used for the benefit of motorists. Therefore, the State's use of ROW AA-2922 as a rest area is a permissible because the rest area is for "highway purposes."

2. Camping Within ROW AA-2922

As discussed above, rest areas are specifically considered to be for "highway purposes." The federal regulations define a safety rest area to include "facilities for the motorist deemed necessary for his rest, relating, comfort and information needs."[11] Federal law provides no indication as to whether camping is permissible within a rest area. The only explicit prohibitions on certain uses within rest areas pertain to automobile service stations and other commercial establishments.[12] This silence indicates that states are entitled to discretion in determining what is appropriate for the "rest, relaxation, comfort and information needs" of the public when utilizing the state highway system. Therefore, in the absence of federal authority on the issue, it is appropriate to refer to state law.

Additionally, the structure of federal/state partnership with respect to highways provides for deference to the State's policy choices. The federal government appropriates funds[13] and as in this case, provides the land necessary for federal-aid highways and related purposes.[14] The states are given the authority to plan for their

[8] 23 USC 317(a).
[9] 23 CFR 1.23(b).
[10] 23 CFR 752.3(a); *see also* 23 CFR 752.5(a).
[11] 23 CFR 752.3(a).
[12] 23 USC 111(a).
[13] *See generally* 23 USC 104.
[14] 23 USC 317(a).

transportation systems,[15] and design,[16] construct,[17] and maintain[18] federal-aid highways. Moreover, even if federal funds are appropriated, states still retain their sovereign right to determine which projects shall be federally financed.[19] Thus, this federal/state partnership provides states with the authority to determine how to carry out federal-aid highway projects.

Federal law is also deferential to the state's authority for roads not part of the National Highway System. Federal-aid projects not on the National Highway System are to be "designed, constructed and maintained in accordance with state laws [and] regulations...."[20] The McCarthy Road is not a National Highway System road. As such, federal law is deferential to design and maintenance of the highway ROWs on the McCarthy Road.

Turning to the State's authority, the DOT has broad authority over Alaska's highways. The DOT was established to create and maintain "a network of highways linking together cities and communities throughout the state (thereby contributing to the development of commerce and industry in the state, and aiding the extraction and utilization of its resources), and otherwise improve the economic and general welfare of the people of the state."[21] Through its police power, the State has broad discretion to achieve these goals.[22]

DOT is responsible for selecting sites for "roadside rests for travelers resting, camping, or parking."[23] The DOT is required to place these sites, insofar as possible, on or adjacent to highway rights-of-way.[24] At rest areas, the DOT "may construct and

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[15] 23 USC 135(a).
[16] 23 USC 106(a).
[17] 23 USC 114(a).
[18] 23 USC 116(a).
[19] 23 USC 145(a).
[20] 23 CFR 625.3(a)(2).
[21] AS 19.05.125.
[22] *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 523 (1959) (the power of the State to regulate the use of its highways is broad and pervasive); *B & G Meats, Inc. v. State*, 601 P.2d 252, 254 (Alaska 1979) ("It is well established that a state may regulate the highways within its boundaries pursuant to its inherent police power.").
[23] AS 41.21.800.
[24] *Id.*

maintain facilities … as are determined to be necessary and desirable."[25] These facilities specifically include "camp facilities, including picnic tables, fireplaces and toilets, camping areas or other facilities that are considered necessary and desirable for the convenience and benefit of travelers and small boat operators."[26] Alaska law specifically contemplates providing for camping areas within a rest area as the State has done here. Camping within a rest area is directly tied to the use of the highways. Therefore, the State's use of ROW AA-2922 for camping is within its authority and a reasonable and permissible use of the ROW.

Ahtna cites to two cases which have approvingly quoted the definition of "rest areas" as provided by the American Association of State Highway Officials in *A Guide on Safety Rest Areas for the National System of Interstate and Defense Highways* (1968) (AASHO Guide). The AASHO Guide reads:

> Rest areas are to be provided on Interstate highways as a safety measure. Safety rest areas are off-roadway spaces with provisions for emergency stopping and resting by motorists for short periods. They have free-way type entrance and exit connections, parking areas, benches, and tables and usually toilets and water supply, where proper maintenance and supervision are assured. They may be designed for short-time picnic use in addition to parking of vehicles for short periods. They are not to be planned for use as local parks. Areas for family leisure picnics, active recreation, waterfront activities, or overnight camping are not to be developed as part of an Interstate Highway.[27]

The court does not find the AASHO Guide persuasive. Camping within a rest area is "for the convenience and benefit of the travelers." Rest areas in Alaska are not similar to rest areas along interstate highways within the Lower 48, such as a rest area along I-90. Rest areas are not used merely as a brief stopping point between location A and location B. Rest areas are frequently used to partake in the surrounding recreation opportunities. Additionally, given the long distances to be traveled between areas,

[25] AS 41.21.805.
[26] *Id.*
[27] *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991); *see also Jacobsen v. Howard*, 904 F. Supp. 1065, 1069 (D. S.D. 1995).

overnight camping at rest areas may be a necessity to travelers. It is within the State's authority to determine whether camping facilities at rest areas are a necessity.

The AASHO Guide pertains to rest areas on interstate highways and the McCarthy Road not is part of the interstate highway system. Moreover, highways on the Interstate System in Alaska are exempt from the design standards of highways on the Interstate System.[28] Highways on the Interstate System in Alaska are to be designed "in accordance with such geometric and construction standards as are adequate for current and probable future traffic demands and *the needs of the locality of the highway*."[29] Even if the McCarthy Road were part of the Interstate System, the AASHO Guide would not be applicable as federal regulations specifically exempt the Alaska highways from the typical design standards.

For the above stated reasons, the court finds that the State's use of ROW AA-2922 as an overnight campground in conjunction with the rest area is permissible.

C. Access Road / Boat Launch

Ahtna also argues that the use of the access road within ROW AA-2922 for a boat launch does not constitute a highway purpose. Ahtna argues that recreational uses do not fall within the parameters of highway purposes. The State argues that the boat launch is necessary to provide access to the Copper River, as a connection to Alaska's water transportation system.

Funds made available to the State of Alaska under the Federal Aid Highway Act "may be expended for construction of access and development roads that will serve resource development, recreational, residential, commercial, industrial, or other like purposes."[30] On the other hand, federal regulations state that "access from the safety rest areas to adjacent publicly owned conservation and recreation areas may be permitted if access to these areas is only available through the rest area and if these areas or their usage does not adversely affect the facilities of the safety rest area."[31]

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[28] 23 USC 103(c)(1)(B)(ii).
[29] *Id.* (emphasis added).
[30] 23 USC 118(e).
[31] 23 CFR 752.5(d).

The primary purpose of the access road was for the maintenance of the right of way. However, as the State acknowledges, the access road is used by the public as a boat launch despite the availability of a nearby public boat launch. Pursuant to 23 USC 118(e), the use of the access road for a recreational purpose, such as a boat launch, is permitted. On the other hand, pursuant to 23 CFR 752.5(d), access from the rest area to the public waterways is only permitted if access to the waterway is only available through the rest area. The parties do not dispute that a public boat launch to the Copper River exists nearby off the McCarthy Road. Thus, use of the access road, which extends from the rest area, would not be permitted under the regulation. This presents a conflict between the federal statute and federal regulation.

Where an administrative regulation conflicts with a statute, the statute controls.[32] In this instance, the statute permitting the access road to be used for recreation purposes controls over the regulation limiting the use of rest areas for access to publically owned recreation areas. Therefore, the use of the access road within ROW AA-2922 as a boat launch is a permissible use.

Additionally, Alaska law contemplates the use of the access road as a boat launch. The DOT may construct facilities at roadside rests "determined to be necessary and desirable."[33] These facilities may include access roads "considered necessary and desirable for the convenience and benefit of travelers and *small boat operators*."[34] While the purpose of the access road is for maintenance of McCarthy Road, the use of the access road as a boat launch would be permissible if the DOT considered the road necessary and desirable for the convenience and benefit of small boat operators. Therefore, the State's use of ROW AA-2922 is considered a highway purpose under Alaska law.

[32] U.S. v. Doe, 701 F.2d 819 (9th Cir. 1983).
[33] AS 41.21.805.
[34] *Id.*

III. CONCLUSION

The court finds that the State's use of ROW AA-2922 is permissible and therefore the court declines reach Ahtna's remaining claims on partial summary judgment and the State's claim of adverse possession. Ahtna's Motion for Partial Summary Judgment is DENIED and the State's Second Cross-Motion for Summary Judgment is GRANTED.

Dated at Palmer, Alaska on this 17 day of January 2012.

Gregory L. Heath
Superior Court Judge

I certify that on 1/17/12 a copy of this order was mailed/faxed/ hand-delivered to counsel at their address of record. H. Trickey, M Hatch, J Baker

E. Griffeth, Judicial Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AHTNA, INC.,

Plaintiff,

vs.

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION & PUBLIC FACILITIES, et al.,

Defendants.

Case No. 3AN-08-06337 CI

STIPULATED MOTION FOR STAY PENDING SETTLEMENT

Ahtna, Inc. and the State of Alaska are pleased to report a tentative settlement of this long-running dispute. The parties hereby request the Court's assistance to facilitate a final resolution of this matter, as follows:

1. The Court should vacate the April 24, 2017 trial date.

2. The Court should suspend all briefing and pretrial deadlines.

3. The parties will work to finalize the settlement and obtain necessary client approvals within the next 90 days. If the settlement is not finalized within 90 days, the parties will file a status report with the Court.

4. The parties are optimistic that their tentative settlement will become a final settlement. If they are unable to reach this mutual objective and require further litigation, they shall notify the Court and seek a new trial date.

///

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CERTIFICATE OF SERVICE

This is to certify that on this 24th day of February, 2017, a true and correct copy of the foregoing was mailed, postage prepaid, to:

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

AHTNA, INC.,)
)
Plaintiff,)
)
vs.)
)
STATE OF ALASKA, DEPARTMENT)
OF TRANSPORTATION & PUBLIC)
FACILITIES, et al.,)
)
Defendants.) Case No. 3AN-08-06337 CI
)

ORDER GRANTING STAY PENDING SETTLEMENT

The Court grants the parties' stipulated motion as follows:

1. The April 24, 2017 trial date is VACATED.

2. All briefing and pretrial deadlines are cancelled.

3. The parties shall file final settlement papers or a status report within 90 days.

4. If the parties are not able to finalize their settlement, they may return to the Court to seek a new trial date.

DATED at Anchorage, Alaska this day of ____________, 2017.

____
Andrew Guidi
Superior Court Judge

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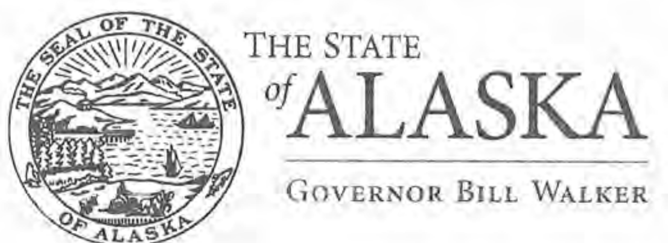

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December 9, 2016

Kathy Cline, Acting Regional Director
Bureau of Indian Affairs
Alaska Region
3601 C. Street, Ste. 1100
Anchorage, Alaska 99503-5947

Re: State of Alaska's Comments on the Craig Tribal Association's Trust Land Acquisition Application

Dear Acting Director Cline:

Thank you for the opportunity to offer comments on the application by the Craig Tribal Association (the Tribe) to place land into trust. Because this application is the first of its kind in Alaska, we ask that the Bureau of Indian Affairs (BIA) proceed thoughtfully with an eye to special circumstances that may exist here.[1] Also, we hope that BIA can use this as an opportunity to clarify its interpretation of the law governing a variety of issues.

Each application to place land into trust is unique and may raise different concerns for the State and other third parties. The parcel at issue here is a 1.08-acre lot in the downtown area of the City of Craig that includes a building and parking area currently housing the Tribe's administration offices, the Craig Tribal Association Hall, a local head

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[1] Alaska and Alaska Natives have a unique history. For example, in 1971 the Alaska Native Claims Settlement Act (ANCSA) settled all Alaska Native land claims in the State, conveying 44 million acres of land and $926.5 million to Alaska Native village and regional corporations. 43 U.S.C. §§ 1603, 1605-1607, 1611-1613, 1618. While only the Annette Island Reserve, set aside for the Metlakatla Indians, remained as a reservation under tribal jurisdiction, Alaska Natives are shareholders in their respective land-owning, for-profit corporations.

start preschool program, and commercial space.[2] The Craig Tribal Association does not currently contemplate any change in land use. Based on our understanding of the law, representations in the application, and an expectation of future opportunities to discuss issues as they arise, the State does not object to placing this particular parcel into trust.

A. Under Public Law 280, the State and City will continue to exercise criminal and some regulatory jurisdiction over the parcel.

We understand that, if taken in trust, the Craig Tribal Association could choose to assume some limited law enforcement or regulatory authority on the parcel. But this authority would not be exclusive. Rather, as a Public Law 280 state, the State of Alaska and the City will continue to hold criminal and civil prohibitory and adjudicatory authority.[3] To ensure all parties are on the same page—the Tribe, the City, the State, and the federal government—we note a few potential jurisdictional issues here and seek confirmation on these issues from the BIA. But we also expect that the Tribe and the State will be able to work together successfully to resolve any challenges as they arise.

Should the Tribe choose to exercise law enforcement authority, it is important to provide notice of tribal jurisdiction to the public and the State. First, tribal authority

[2] Craig is a first-class city under the laws of Alaska. The 2010 census reflected a population of 1,201. The property description is Lot Q-3, subdivision of the unsubdivided remainder of Tract Q, U.S. Survey 2327, according to the plat filed December 7, 1988, as plat No. 88-39, Ketchikan Recording District, State of Alaska, containing 1.08 acres.

[3] 18 U.S.C. § 1162; 28 U.S.C. § 1360. Currently, there is an Alaska State Trooper outpost on Prince of Wales Island and the City of Craig has a police department. Given the law enforcement services already available, it is unlikely that trust acquisition would impact public safety.

operates in a different constitutional framework.[4] The differences could be fairly concrete for individuals subject to tribal jurisdiction; for example, defendants in tribal misdemeanor prosecutions do not have a guaranteed right to counsel.[5] Second, tribal authorities can establish and enforce laws that are different than elsewhere in the state. For example, tribes could criminalize possession of alcohol or small amounts of marijuana—conduct that is otherwise permissible under state or local law. Finally, tribes might assert authority to briefly detain, investigate, and exclude non-tribal members from the parcel.[6] Should the Craig Tribal Association choose to exercise law enforcement authority, we believe it is in the best interest of the public and the Tribe to avoid unnecessary confusion and request that the property be clearly marked and the tribal laws explained to provide appropriate public notice. This is especially important for this parcel because it includes commercial space open to the public.

State authority on trust land clearly extends to alcohol regulation, including licensing alcohol businesses.[7] Although the Tribe may have concurrent authority to regulate alcohol, it is our understanding that the Tribe cannot disregard state law. Thus, should alcohol businesses open on the parcel, such activity would be conducted within

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[4] The Craig Tribal Association's prosecuting authority would generally be limited to offenses by Alaska Natives or Native Americans—though they do not need to be members of the Craig Tribal Association itself. 25 U.S.C. § 1301(2); *see also United States v. Lara*, 541 U.S. 193, 210 (2004) (upholding Congress's authorization of tribes to exercise inherent authority to prosecute people who are not members of any tribe). *But see* 25 U.S.C. § 1304 (allowing tribes to enforce special domestic violence crimes in Indian country against non-Indians). Prosecutions for tribal law crimes must comply with the Indian Civil Rights Act, but not the federal or state constitutions. *See United States v. Becerra-Garcia*, 397 F.3d 1167, 1171 (9th Cir. 2005) ("[T]he constitution does not directly apply to the conduct of tribal governments . . . ."). However, the Indian Civil Rights Act does incorporate important elements of the Bill of Rights, including the 1st, 4th, 5th, 6th, 8th, and 14th amendments. 25 U.S.C. § 1302.

[5] 25 U.S.C. § 1302.

[6] *See United States v. Becerra-Garcia*, 397 F.3d 1167, 1175 (9th Cir. 2005) ("Intrinsic in tribal sovereignty is the power to exclude trespassers from the reservation, a power that necessarily entails investigating potential trespassers.").

[7] 18 U.S.C. § 1161; *Rice v. Rehner*, 463 U.S. 713, 726 (1983); *see* AS 04.11.010(a) (requiring licenses for sellers); AS 04.11.020 (setting out exceptions for sales made under foreclosure, bankruptcy, or board or court order and for sales at certain gatherings).

the strictures of state law, in addition to any requirements the Tribe may impose that do not conflict with state regulation.

We understand the rules governing marijuana are less clear. While the State arguably can regulate marijuana on the parcel similar to alcohol, marijuana remains criminalized under the federal Controlled Substances Act, including within Indian country.[8] The federal government has outlined enforcement priorities for marijuana and explained that threats to those priorities can be prevented by a "strong and effective state regulatory system," including measures to prevent diversion outside of the regulated system and to create a tightly regulated system for tracking sales.[9] Still, the law surrounding tribal marijuana businesses on trust parcels, and in Public Law 280 states in particular, remains undeveloped.[10] If BIA were to allow marijuana businesses to operate on a trust parcel, we assume the business must operate within the state's regulatory framework (and accept state enforcement jurisdiction) but the Tribe may impose additional requirements that do not conflict with state regulation.

While the State will maintain authority to implement criminal and prohibitory laws, the State's authority might not encompass entire programs as they currently operate. As an example of the State's broad regulatory programs, the State's environmental laws address hazardous waste reporting and cleanup, natural resource

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[8] *See* 21 U.S.C. § 812, Schedule I(c)(10), (17); 21 U.S.C. §§ 841-844.

[9] Federal enforcement priorities include preventing distribution to minors, revenue to criminal enterprises, diversion to states where marijuana is illegal, and marijuana possession or use on federal property. *See* U.S. Dep't of Justice, James M. Cole, *Guidance on Marijuana Enforcement* (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf; U.S. Dep't of Justice, Monty Wilkinson, *Policy Statement Regarding Marijuana Issues in Indian Country* (Oct. 28, 2014), https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf.

[10] Consistent with federal guidance, when the State legalized marijuana sales, it established a robust regulatory framework to prevent sales to minors, to prevent engagement by criminal enterprises, and to inform and protect consumers. AS 17.38.010. State regulatory requirements include licensing, testing, and taxing. *See* AS 17.38.010-.900; AS 43.61.010, .020, .030. Selling marijuana outside of the state regulatory system remains a crime under state law. AS 11.71.050(a); *see also* AS 17.38.020(3); AS 17.38.070(a).

damages to public resources such as groundwater, water pollution discharge, air pollution, solid waste, safe drinking water, and food safety. Existing activity on the property holds some potential for environmental or public health hazards (such as fuel leaks or stormwater runoff). Future uses of the property may present different, more significant challenges. Absence of appropriate environmental controls can pose risks for neighboring properties, particularly in the case of small parcels. We hope to work through these questions with BIA and the Tribe. The State will also work cooperatively with the Tribe on how best to protect the environment on and surrounding the parcel.

B. Trust status of the surface estate will not affect subsurface mineral rights.

This parcel is a split estate. In 1962, it was selected by and patented to the State.[11] When the State later conveyed the parcel, it reserved an interest in all subsurface resources on the parcel, including oils, gases, coal, ores, minerals, fissionable minerals, geothermal resources, and fossils, and a right to enter and explore the land for those resources.[12] We understand that the trust acquisition applies only to the surface estate, which is subject to the State's reservations, and that it will not impact the State's mineral estate.

The State's subsurface estate remains dominant. Thus, conveying the parcel in trust would not, for example, create a right for the Craig Tribal Association to receive an interest in the State's revenues from its mineral resources. Moreover, the Craig Tribal Association and the federal government cannot place additional restrictions on access, exploration, or development of that dominant mineral estate (including, but not limited to, taxes or regulatory requirements relating to the extraction of minerals).

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[11] U.S. Patent 1226370 (Apr. 16, 1962), Ketchikan Recording Dist. Book 28, Page 264, *available in* Craig Tribal Association Proposed Land Into Trust Application, at *59-60 (on file with State).

[12] State of Alaska Patent No. 5818 (July 6, 1981), Ketchikan Recording Dist. Book 93, Page 930-31, *available in* Craig Tribal Association Proposed Land Into Trust Application, at *61-62 (on file with State); *see also* AS 38.05.125(a) (providing that deeds of state land reserve mineral rights, including right to enter); AS 38.05.130 (requiring state to pay owner of land for damages caused by state entry, but also allowing surety bond and legal proceedings to determine damages to owner).

C. Future right-of-way expansions or additions will require tribal collaboration.

The parcel is currently subject to a utility easement and a water line easement.[13] Because the parcel is in downtown Craig and adjacent to a road, there will likely be a future need to expand existing or establish new easements.

Trust lands are not subject to state or municipal powers of eminent domain. So, while the parcel will continue to be subject to the existing easements, a future right-of-way expansion or acquisition cannot occur without collaboration with the Tribe.[14] Improvements requiring an expanded or new right-of-way would likely benefit the parcel, however. Based on initial conversations, the State is hopeful that the Craig Tribal Association will work through these issues in a formal memorandum of agreement with the State. Thus, while we note the change brought by trust status, we do not believe that it is a basis to object to the application in this instance.

D. Conclusion

Based on the Craig Tribal Association's application, many of the concerns raised in this letter may never become issues for this particular parcel. But if they do, we expect to work with the Tribe to find mutually acceptable pathways forward. We also expect that BIA will ensure appropriate opportunities for public process as any new issues develop. Finally, in hopes of avoiding confusion in the future, the State requests that BIA confirm or clarify our understanding of the law as summarized here. In particular, the State seeks confirmation on the issue of subsurface rights. Although this issue may not greatly impact the parcel in Craig, it is an important issue moving forward, and all parties would benefit from further clarification in this area.

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[13] Notice of (Non-Gaming) Trust Land Acquisition Application, Attached Subdivision Plat Map; *see also* State of Alaska Patent No. 5818 (July 6, 1981), Ketchikan Recording Dist. Book 93, Page 931 (ADL 34840 right-of-way for water line), *available in* Craig Tribal Association Proposed Land Into Trust Application, at *62 (on file with State).

[14] New rights-of-way on trust land must be acquired through a voluntary easement with consent of the Secretary of Interior. *See* 25 U.S.C. §§ 311, 323-28; 25 C.F.R. pt. 169.

We emphasize that every parcel is unique. A number of potential issues around trust acquisitions are not raised here because we do not believe they are sufficiently implicated by this particular application, including tax impacts, gaming concerns,[15] and education funding. Future applications may present different facts and the State may take a different position.

Sincerely,

Jahna Lindemuth
Attorney General

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[15] The State's comments do not address tribal gaming concerns as this application is expressly designated as a "non-gaming" application. Should there be any movement towards gaming in the future, as with other matters, the State expects that there will be additional opportunities to engage in a dialogue with the Tribe and BIA.

Overview of Trust Lands in Alaska

1. Tribal Governments and Trust Land

- Tribal governments are separate sovereign governments. The federal government annually publishes a list of federally recognized tribes. Dep't of Interior, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826 (May 4, 2016), *available at* http://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc1-033010.pdf.

- A tribe's government authority is tied to its tribal members and tribal land. "Indian country" status is generally needed for land-based tribal government authority.

- Lands held by tribes in fee title is not "Indian country." *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 532 (1998).

- A tribe or individual Native American can now acquire land and ask the federal government to hold it in trust for the benefit of that tribe or individual Native American. 25 U.S.C. § 5108; 25 C.F.R. § 151.3. A regulation had prohibited the federal government from taking land in trust in Alaska until December 2014, when the federal government revised the regulation. Dep't of Interior, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 (Dec. 23, 2014).

- Federal law provides that if land is placed in trust, it will become "Indian country" so that "an Alaska tribe possessing trust lands would be able to exercise jurisdiction over such land consistent with the manner in which Indian tribes exercise authority over trust lands located in the rest of the country." Dep't of Interior, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,893 (Dec. 23, 2014).

2. The Scope of Tribal and State Governmental Authority within Trust Lands

- The extent of tribal government authority and the extent of state government authority within trust lands is very complicated and depends on the subject matter. Generally, state authority is reduced and tribal authority is increased. Depending on the subject matter the tribal authority and the state authority may overlap so that there is concurrent jurisdiction. In other circumstances, either the tribe or the State might have exclusive jurisdiction.

- As a general matter, when lands are put into trust, tribes acquire civil regulatory and concurrent criminal jurisdiction. Tribal government conduct is governed by the Indian Civil Rights Act, which provides a limited bill of rights. Tribes can only enforce criminal laws against Alaska Natives and Native Americans. And in some circumstances tribal civil authority over nonmembers can also be limited.

- Under a federal law known as Public Law 280, the State will have continuing criminal jurisdiction within trust lands, as well as authority to enforce civil laws that are "prohibitory." State troopers will continue to have authority to arrest for state law crimes on the trust land.
- Public Law 280 does not give the State authority to enforce purely "regulatory" laws. The extent of the State's civil regulatory authority on trust land is very subject-matter specific, and the line between civil "prohibitory" and purely "regulatory" laws is not always clear.

3. Why Discussion with and Input from Agencies is Needed

- The State has an opportunity to comment to the federal Bureau of Indian Affairs on the jurisdictional and tax implications of specific trust acquisitions. The State may object to a particular trust application or raise concerns it wants addressed. The Attorney General's Office can help the various State agencies and departments evaluate and comment if you alert us to the state government activities that occur on a given trust parcel or how the property is currently regulated.

  For example, are there State-issued permits or licenses associated with the parcel or tribe? What state regulations are currently implicated by the parcel?

  Once the scope of current state government activities and regulations on the parcel are clear, those can be analyzed to determine if the State will lose that specific authority if that land is placed in federal trust.