

**Alaska Department of Law
List of Federal Issues and Conflicts**

Dated: August 14, 2017

Issue and Case Name, if any	Alignment with Feds	Brief Description	Status
NAVIGABLE WATERWAYS			
<p>Navigable Waterways - <i>Sturgeon v. Masica (and Dept. of Interior)</i> (Alaska intervened in support of plaintiff; after State's case dismissed, filed amicus) (9th Cir., 13-36165; 13-36166) AAGs R. Botstein, J. Hafner</p>	<p>Not aligned.</p>	<p>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.</p>	<p>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.</p>
<p>Mosquito Fork - <i>State of Alaska v. U.S.</i> (9th Cir., 16-36088, 17-35025) AAGs J. Alloway, M. Schechter</p>	<p>Not aligned.</p>	<p>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.</p>	<p>The district court awarded the State \$582,629 in attorney fees and \$10,372.71 in costs. The U.S. decided to withdraw its appeal, so the attorney fees and costs award will stand.</p>
<p>Stikine River - <i>State v. U.S.</i> (3:15-cv-00226) AAG J. Alloway</p>	<p>Not aligned.</p>	<p>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.</p>	<p>The district court found that the State was the prevailing party for purposes of costs, and the U.S. decided to withdraw its appeal. State will receive costs.</p>

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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 AAGs J. Alloway; A. Naylor	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 settled the easement issue to preserve public access. On the navigability of the Knik River, the State filed a lawsuit in April 2017 challenging the navigability finding. BLM recently reversed its previous navigability determination. The litigation has been stayed until September 8, while the U.S. considers filing a formal disclaimer of interest.
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 <i>Sturgeon</i> case is decided.
ACCESS AND LAND			
Roadless Rule - <i>State of Alaska v. U.S. Dept. of Agriculture</i> (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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ACCESS AND LAND CONT.			
King Cove Road - <i>Agdaagux Tribe of King Cove v. Jewell</i> (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.	King Cove recently moved for dismissal of its appeal, and the State joined in the motion. The appeal has been dismissed, which closes the court case.
R.S. 2477 Rights of Way - <i>State of Alaska v. U.S.</i> (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 where the State is seeking to condemn the rights-of-way across Native allotment lands. Once that is complete, the court will address the merits of the R.S. 2477 claims.
Big Thorne Timber Sale - <i>SEACC v. U.S. Forest Service</i> (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.	The court of appeals upheld the timber sale. Plaintiffs have not filed a petition of certiorari with the U.S. Supreme Court.
Shelter Cove Road - <i>State v. U.S. Forest Service</i> (1:16-cv-00018); <i>Greater Southeast Alaska Conservation Community v. Stewart</i> (State intervened in support of defendant) (1:16-cv-00009) 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. In State's suit against USFS, consolidated with the original lawsuit, the federal government filed a motion to dismiss alleging failure to exhaust administrative remedies. Briefing is complete, and construction on the road continues while we await the court's decision.

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ACCESS AND LAND CONT.			
2016 Amendment to the Tongass Land Resources Management Plan (TLMP) AAGs T. Lenhart; S. Lynch	Not aligned.	The 2016 TLMP amendment fully incorporated both the Roadless Rule and the Secretary of Agriculture’s directive to rapidly transition timber harvest from old growth to young growth. The result will effectively place millions of additional acres off-limits to timber harvest and other resource development. The timber industry is likely to be forced out of business while utilities, mining and other industry will be substantially harmed.	The State is evaluating options, including the U.S. Congress rescinding the TLMP amendment under the Congressional Review Act, the Department of Agriculture directing the USFS to commence a new plan amendment process to undo the actions regarding the Roadless Rule and the transition to young timber, and the State and others filing a legal challenge to the TLMP amendment in federal court.
Eastern Interior Resource Management Plan (BLM) AAG A. Nelson	Not aligned.	The EIRMP, adopted January 6, 2017, recommends unjustified mineral closures and conservation designations that are inconsistent with ANILCA and FLPMA’s multiple use mandate. The EIRMP also fails to provide for lifting outdated ANCSA d-1 withdrawals unless new conservation withdrawals are implemented.	The State is evaluating options, including joining other affected parties in filing a legal challenge in federal court.

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ACCESS AND LAND CONT.			
Lands into Trust - <i>Akiachak Native Community v. DOI</i> (D.C. Dist. Ct., 1:06-cv-969) AAGs A. Nelson; A. Cleghorn	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 four applications to date--one from the Craig Tribal Association for a small parcel in downtown Craig and three from the Central Council Tlingit and Haida Indians Tribes of Alaska for parcels in downtown Juneau. BIA has granted the Craig application, but have not acted on the Juneau applications yet.
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.	IBLA denied BLM's motion to dismiss and has consolidated the State's two appeals. Briefing is underway.

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ACCESS AND LAND CONT.			
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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ENDANGERED SPECIES ACT			
Bearded Seal - <i>State of Alaska v. National Marine Fisheries Service</i> (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. Bearded seal listing was reinstated by NMFS in May 2017. The State along with other petitioners filed a cert petition with the U.S. Supreme Court. We are awaiting the response from the National Marine Fisheries Service.
Ringed Seal - <i>State of Alaska v. National Marine Fisheries Service</i> (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. State briefing is done. Federal government sought and received an extension to file reply brief on September 21, 2017.
Critical Habitat - <i>Alabama v. NMFS</i> (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. An amended complaint has been filed, and the case has been stayed to September 11, 2017 to allow the new federal administration time to review.

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ENDANGERED SPECIES ACT CONT.			
Polar Bear Critical Habitat - <i>State of Alaska v. Jewell</i> (9th Cir., 13-35667) AAG B. Meyen	Not aligned.	State challenged the final designation of critical habitat for the polar bear.	Case closed. The court of appeals reversed the district court's decision and upheld the designation of critical habitat. The U.S. Supreme Court denied the State and other plaintiffs' cert petition.
CLEAN AIR ACT			
Clean Power Plan (40 C.F.R. 60.5700-.5820) AAG E. Pokon	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. President Trump signed an executive order calling on the EPA to review the Clean Power Plan and end the moratorium on coal mining on federal lands. Consistent with President Trump's EO, in April, EPA announced it was reviewing the rule. Administrator Pruitt also issued a guidance letter to Governors advising that states have no obligation to spend resources to comply with a rule that has been stayed by the Supreme Court and that the deadlines in the rule will be tolled.

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WATER			
<p>"Waters of the U.S." Rule - <i>North Dakota v. EPA</i> (ND Dist. Ct. 3:15-cv-00059) AAG C. Peloso</p>	Not aligned.	<p>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.</p>	<p>The district court action is currently stayed pending further decision by the U.S. Supreme Court on the proper venue for hearing the case. EPA proposed a rule to withdraw the current rule and reinstate the prior rule, while it works with states and stakeholders to develop a new proposal.</p>
<p>Stream Protection Rule - Targets Coal Mines AAG A. Brown</p>	Not aligned.	<p>DOI released the Stream Protection Rule, which was scheduled to go 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. The Attorney General also joined several other attorneys general in a letter requesting Congress to overturn the rule under the Congressional Review Act.</p>	<p>In mid-February, President Trump signed a resolution passed by Congress under the Congressional Review Act overturning the rule. However, the litigation filed in the U.S. Fish and Wildlife Service matter below could impact this case.</p>

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FISH AND GAME			
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 reached a settlement with the EPA, ending the current lawsuit. The State has not been involved since the district court. On July 11, the EPA announced a proposal to withdraw the Clean Water Act Proposed Determination. There is a 90 day public comment period on the proposal. Comments are due October 17.
Salmon Fishery Management Plan - <i>United Cook Inlet Drift Association v. National Marine Fisheries Service</i> (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 and remanded to the district court for imposition of a remedial order.	The State filed a petition for certiorari with the U.S. Supreme Court and awaits a decision by the Court as to whether it will take the case. The United States filed a response opposing the petition, but agreeing with the State that the Ninth Circuit's decision is erroneous. On May 30, 2017, the Supreme Court requested that UCIDA file a response to the petition. UCIDA's response was filed on June 29, 2017. The petition will likely be considered by the Court at its September 5, 2017 conference.

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FISH AND GAME CONT.			
<p>NPS and USFWS Rules on Management of Fish and Game - <i>State v. Zinke</i> (3:17-cv-00013); <i>Center for Biological Diversity v. Zinke</i> (3:17-cv-00091) AAGs C. Brooking, J. Alloway</p>	<p>Not aligned.</p>	<p>In January 2017, the State challenged regulations from both the National Park Service and the U.S. Fish and Wildlife Service that impact state 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. After President Trump signed the resolution overturning the USFWS regulations, the State amended its complaint to delete the USFWS challenge and add a challenge to a USFWS regulation prohibiting state-authorized hunting practices on the Kenai National Wildlife Refuge.</p>	<p>After President Trump signed a resolution passed by Congress under the Congressional Review Act overturning the USFWS regulations affecting 80 million acres, the State and other plaintiffs amended their complaints in <i>State v. Zinke</i>. The response to the amended complaint is due August 31. In <i>CBD v. Zinke</i>, the Center for Biological Diversity filed a lawsuit challenging the resolution, claiming the Congressional Review Act is unconstitutional. The State intervened in the lawsuit and joined in the Department of Interior's motion to dismiss.</p>

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FISH AND GAME CONT.			
NPS Subsistence Collection Rule AAG C. Brooking	Not aligned.	The National Park Service published a final rule on January 12, 2017 allowing the use of plants and nonedible fish and wildlife parts for handicrafts, barter, and customary trade. This rule was developed over the course of more than eight years, and the State was generally supportive. However, the final rule included two provisions unrelated to subsistence collections (restrictions on the type of bait and prohibiting the take of live raptors) that were absent from earlier discussions and were not included in the environmental analysis.	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.
MINING			
2008 Mining Claim Rule - <i>Earthworks v. U.S. Dept. of Interior</i> (Alaska intervened in support of defendant) (D.C. Dist. Ct. 1:09-cv- 01972) AAG 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 has been completed.

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MINING CONT.			
<p>Wishbone Hill Mine - <i>Castle Mountain Coalition v. OSMRE</i> (State intervened in support of defendant) AAGs A. Brown, J. Hutchins</p>	<p>Not generally aligned.</p>	<p>The State intervened to defend the validity of the state-issued mine permits, which plaintiffs asserted had automatically terminated.</p>	<p>The district court found in favor of plaintiffs and remanded the decision back to the agency. The permits are currently still valid while the administrative process plays out. On remand, the federal agency found that DNR did not take “appropriate action” regarding allegations that the Wishbone permits had not terminated by operation of law. The State has requested informal review of that determination, and the matter is still pending.</p>
OIL AND GAS			
<p>Ban on Offshore Development - <i>League of Conservation Voters v. Trump</i> AAG J. Douglas</p>	<p>Not aligned.</p>	<p>Before leaving office, 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. President Trump issued an executive order rescinding the ban, and environmental groups have challenged the plan. BOEM gathered comments through August 17 on the preparation of a new five-year National Offshore Oil and Gas Leasing Program, for years 2019-2024.</p>	<p>We are monitoring the situation.</p>