Board of Game litigation update, January 2019

--In 2011, *Manning v. State and Saxby*, 3KN-11-367CI. Kenneth Manning challenged the constitutionality of the regulations and the elimination of Tier II hunts, and sought to overturn the Unit 13 community caribou and moose subsistence hunt regulations. The trial court ruled in favor of the State and awarded the State attorneys' fees. Manning appealed to Alaska Supreme Court, S-15121. A final decision was issued in August 2015 upholding the superior court's decision in favor of the state, finding the Board's adjusted ANS for caribou and change from Tier II to Tier I were reasonable and valid decisions, the regulations were constitutional and did not violate the public trust. The court rejected Manning's assertion that considering "Ahtna racial customs and traditions" was unconstitutional. "Considering certain users' patterns to define the subsistence uses placing demand on the game population affects only that game population's classification; it does not affect any individual's ability to obtain a subsistence permit or to utilize that permit in a subsistence area." The definition applies equally to all Alaska citizens. The court then held that all other arguments made by Manning lack merit.

The Alaska Supreme Court remanded solely for the purpose of amending the award of attorneys' fees. 355 P.3d 530 (Alaska 2015). A decision on fees was stayed pending a petition for certiorari filed with the U.S. Supreme Court in November 2015. His petition was denied February 29, 2016. In September 2016 the superior court, on remand, awarded the State $3,816.00 in attorneys fees. Manning appealed to the Alaska Supreme Court again and oral argument was held February 13, 2018.

In a decision dated August 15, 2018, the Alaska Supreme Court upheld the award of fees to the State as the prevailing party, with directions to reduce the award by $100.06. The fees ultimately awarded to the state are $3715.94.

---Manning filed a second case in 2013, *Manning v. State, Dept. of Fish and Game*, 3KN-13-708 CI, again challenging the constitutionality of subsistence regulations and the elimination of the Tier II hunts for Nelchina caribou. This litigation was first stayed to await Alaska supreme court rulings on two other CSH challenges, including Manning's 2011 case. It was then stayed pending a decision regarding Manning's petition for certiari in his 2011 case. Following the U.S. Supreme Court's denial of his petition, Manning was given 30 days to file a motion seeking to amend his complaint in the superior court. Manning's request to amend his complaint was denied. Summary judgment was granted to the State and the court found that all issues raised in his original and proposed amended complaint were previously decided by the Alaska Supreme Court or would not withstand a motion to dismiss. No attorneys fees were awarded. Manning appealed, and the state cross-appealed on the issue of attorney fees. Oral argument for both appeals brought by Mr. Manning were held on the same day, Feb 13, 2018. The Alaska Supreme Court issued a decision dated June 22, 2018 holding that all of Manning's claims were either futile or forfeited, noting the similar claims made by Manning in earlier lawsuits.

---*Sturgeon*- The Ninth Circuit Court of Appeals issued its decision on October 2, 2017 in *Sturgeon v. Frost*, No. 13-36165. A 3-judge panel held that the federal government has broad authority, stemming from the federal government's reserved water rights, to regulate all navigable waters running through certain federal areas in Alaska. This marks a significant expansion of the federal water rights doctrine, giving the federal government broader regulatory powers and affecting the federal-state balance. The State worked closely with John Sturgeon in the second appeal to the U.S. Supreme Court. Oral arguments were held and we await a decision.

---*SOA v. Zinke* – In January 2017, the State filed a lawsuit in the Alaska federal district court challenging hunting restrictions adopted by the National Park Service and the US Fish and Wildlife Service. Separate cases were filed by Safari Club International, Alaska Professional Hunters Association, Sportsmen's Alliance Foundation, and Alaska hunting guide Joey Klutsch. Fifteen organizations intervened on behalf of the federal defendants. The cases were consolidated.

In March 2017, the rules restricting hunting methods and means on all refuges in Alaska were repealed under the Congressional Review Act. Plaintiffs then filed amended complaints, at the end of May, to drop claims against the revoked FWS regulations and to address regulations adopted outside of the timeframe that would have allowed revocation under the CRA – the NPS Rules and the FWS Kenai Refuge Rules. A litigation schedule was established but has been subject to delays pending direction given to NPS and FWS to review and revise the contested rules. Further delays are resulting from the federal shutdown. A status report will be filed February 6, 2019.

Meanwhile NPS began its rulemaking process, accepted public comments, but has not yet published a new final rule. The Kenai National Wildlife Refuge reports that a draft rule was prepared, but it has not been published or otherwise made available for review.

---*CBD v. Interior* – In 2017 the Center for Biological Diversity filed a lawsuit in Alaska federal district court challenging the constitutionality of the Congressional Review Act and use of the CRA to revoke the FWS's regulations that would have restricted hunting methods and means on all refuges in Alaska. The State of Alaska, and a few others, intervened on behalf of the Secretary and the Department of the Interior to defend the CRA and revocation of the FWS Rules. Briefing was nearly complete on a motion to dismiss, when CBD was given the ability to amend its complaint. On October 6, 2017 the federal defendants renewed their motion to dismiss, and the State, as one of the intervenor-defendants, filed a motion in support of dismissal on October 27, 2017. On May 9, 2018, the federal district court dismissed the lawsuit for failure to state a claim, and also held that CBD lacks standing to challenge a potential future rule that has not yet been proposed, and may never be. CBD filed its opening brief on October 31, 2018. The federal defendants and intervenor-defendants were scheduled to file their briefs on January 18, 2019, but the federal government shutdown is preventing DOJ attorneys from working. The parties agreed to extend the briefing date beyond January 18th for the number of days of the shutdown, should the federal government open again.

---*WildEarth Guardians and CBD v. USFWS and Zinke* – Two cases were filed in Montana federal district court and later consolidated, challenging the FWS's Environmental Assessment

and Finding of No Significant Impact, under the National Environmental Policy Act, and the decision to continue the CITES furbearer export program.

CITES is the Convention on International Trade in Endangered Species of Fauna and Flora. CITES is an international agreement with 183 government parties to regulate international trade in ESA-listed plants and animals. The goal is to make sure the trade is legal and does not threaten survival of a species.

The FWS manages a wildlife export program allowing animal furs and parts to be exported from the United States. Bobcat, river otter, Canada lynx, gray wolf and grown bear have been listed in Appendix II since the 1970s. Export of these species requires a CITES export permit. FWS has delegated to the State, as a participant in the CITES export program, the ability to issue tags for pelts to be exported where the pelts were legally taken and a non-detriment finding has already been made. The State provides an annual report to the FWS. Under DOI policy and procedures, the permitting program is categorically excluded from NEPA, but FWS decided to prepare an EA anyway.

Appendix II includes species that, although not necessarily threatened with extinction now, may become so unless the trade is strictly controlled. In Alaska, none of the named species at issue are listed under the Endangered Species Act as either threatened or endangered. Gray wolf, brown bear, river otter, and Canada lynx are listed in Appendix II, and Alaska is subject to the program because the species may be listed elsewhere or could be considered "look-alikes." Director Dale provided written information as part of the FWS NEPA review process, explaining the importance of the CITES export program in Alaska, and that none of these species exhibit any evidence of decline in Alaska.

The State of Alaska, with several other states, sought permission to file an amicus brief but the court denied our request. Four of the five species at issue are exported from Alaska (brown bear, wolf, otter, and lynx).

On October 26, 2018, Judge Malloy issued his decision. To summarize, FWS was not required to conduct a NEPA analysis to continue an existing program. However, the court remanded to FWS on the sole point that "the incidental take statement for Canada lynx does not set adequate triggers and fails to minimize take" under the ESA.

Summary judgment was issued against CBD and the cases are no longer consolidated. The WEG case continues because WEG's complaint alleged ESA issues, whereas CBD's complaint alleged only NEPA issues.

OTHER CASES:

---In 2008, *Ahtna* filed a lawsuit against the State regarding public access along the Klutina Lake Road. Ahtna filed a motion seeking partial summary judgment, arguing that R.S. 2477 rights-of-way are limited to only ingress and egress. Judge Guidi ruled in favor of Ahtna on this issue and the Alaska Supreme Court denied the state's Petition for

Review on that decision, but directed Judge Guidi to allow evidence concerning the scope of use of the right-of-way. Extensive mediation and settlement efforts ended in early September 2017 when the Ahtna board voted to reject the proposed settlement. Since settlement discussions ended, the Court has granted the State's motion for summary judgment and ruled that the right-of-way, if it exists, is 100 ft wide and denied Ahtna's motion for summary judgment claiming that Ahtna's aboriginal title bars assertion of an R.S. 2477 ROW. On November 1, the State filed a motion for summary judgment on the existence of an RS 2477. Trial is set to begin on April 15, 2019.

---The state filed litigation against the U.S. and others in March 2013, seeking to quiet title to a series of roads and trails in the Fortymile Area around Chicken. The case involves six separate rights-of-way. The litigation covers portions of the roads and trails which traverse BLM land within wild and scenic river corridors, private property, state mining claims and Native allotments. Most of the non-federal defendants have already filed disclaimers of interest or been defaulted. The Court granted a motion to dismiss the state's claims by two Native allotment owners, holding that the Court lacks jurisdiction as to the allotments under the Federal Quiet Title Act and that the state cannot file a condemnation action against the allottees. The Ninth Circuit confirmed that the trial court lacked jurisdiction both as to the declaratory judgment and under the Federal Quiet Title Act. However, the Court overturned the trial court regarding jurisdiction under the condemnation count and remanded the case on that basis. The state amended its complaint in order to proceed with condemnation against the allottees as directed by the Ninth Circuit. The remaining portions of the case against the federal government were stayed pending the outcome of the state's claims against the allottees. In September 2018, the Court ruled in the State's favor on four pending motions related to the State's condemnation claims. The court denied the Purdy's motion for reconsideration in October 2018. The Purdys have appealed the condemnation decision to the Ninth Circuit.

In November 2018, the Court lifted the stay for the portion of the case against the United States.

---The State appealed to the IBLA a BLM decision approving Eklutna, Inc.'s selection application. The basis of the appeal was BLM's failure to reserve appropriate ANCSA 17(b) easements that guaranteed access to public lands adjacent to Eklutna, Inc.'s selection. In addition to the 17(b) issues, BLM also purported to convey portions of the bed of the Knik River based on its finding that the river was not navigable. Pursuant to statute, BLM's determination of the navigability is the agency's final action and could not be appealed to the IBLA. The IBLA appeal was settled, with Eklutna and the State agreeing to additional 17(b) easements that will preserve the State's access to public lands. In April 2017, the State filed a complaint to quiet title to the portion of the Knik River previously found non-navigable by BLM. After the State filed its complaint, BLM revised its previous navigability determination and concluded that the river was navigable. The United States filed a formal disclaimer on September 5, which the Court confirmed on September 7. In November 2017, the Court granted the State's motion to determine prevailing party status and awarded it $400 in costs. Final judgment was issued in December 2017, and that decision was appealed to the Ninth Circuit. At the request of the United States, the

parties are participating in the Ninth Circuit's mediation program. The parties are discussing ways that BLM can improve its RDI program to allow the State to clear its title to submerged lands in a more efficient and cost effective manner.

---*Alaska Peninsula Corporation v. DNR (Fog Lake)* The State has previously corresponded with Alaska Peninsula Corporation and Rainbow King Lodge to address their claims of exclusive fishing rights on Dream Creek and other trophy-fishing streams in the Iliamna Lake area and asked them to cease interfering with the public's right to access and use those waters and stream beds as provided by Alaska law. In 2013, DNR issued a land use permit to a competing lodge (Alaska Sportsman's Lodge) authorizing the installation and seasonal use of an anchor line and buoy on Fog Lake (a navigable-in-fact lake). The commissioner's office affirmed the Division's decision and APC appealed the commissioner's decision to superior court. In December 2018, the superior court affirmed the commissioner's decision.

---*Alaska v. United States (District Court, District of Alaska) (Middle Fork of the Fortymile and North Fork of the Fortymile)* In October 2018, DNR filed a complaint to quiet title to the submerged lands underlying portions of the Middle Fork of the Fortymile and the North Fork of the Fortymile. The United States has yet to answer that complaint. Its answer will be due 30 days after the end of the current government shutdown.

ESA-RELATED

--- *Alabama v. NMFS* (AL Dist. Ct. 1:16-CV-00593). The State of Alaska, as a party, joined 17 other states to challenge two new rules regarding the designation of critical habitat. The new rules greatly expanded the types of areas that can be designated, without much, if any, connection to the presence of the protected species. In March 2018, a settlement was made whereby plaintiff states dismissed the case without prejudice and the federal government agreed to submit revised proposed rules. Revised proposed rules were indeed proposed, and the comment period closed in December 2018 with the state filing comments. We are now awaiting a decision on the proposed rules.

--- *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, Supreme Court of the United States, November 27, 2018 --- S.Ct. ----2018 WL 6174253. This was also a case involving critical habitat but involved the regulations prior to the changes noted above. Private landowners in Louisiana challenge FWS's designation of their land as critical habitat for dusky gopher frog. The U.S. District Court upheld the designation. Landowners appealed. U.S. Court of Appeals affirmed and denied rehearing en banc.

On appeal to the U.S. Supreme Court, Chief Justice Roberts, held:

1. An area of land is eligible for designation as critical habitat only if it is habitat for species, and

2. The FWS decision not to exclude land from dusky gopher frog's critical habitat was subject to judicial review.

This is a good outcome for Alaska and other states as the earlier decision was vacated and remanded. Alaska was among 20 states signing as Amici Curiae in Support of the Petitioner, Weyerhaeuser Company.