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Alaska's non-profit public interest environmental law

April 2011 Legal Brief

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Dear Friend,

Trustees for Alaska works strategically to address some of the most important environmental issues affecting Alaska. We represent a wide range of clients from native villages, community and citizen groups, local and national conservation groups, statewide coalitions, hunting and fishing groups, as well as individual Alaskans. Please read on to learn more about some of our current work.

Sincerely,

Trish Rolfe
Executive Director

Update: Ninth Circuit Decides Not to Rehear Challenge to EPA's Delegation of NPDES Program to Alaska

In the last Trustees for Alaska Legal Brief, we discussed the ongoing challenge to EPA's delegation of the NPDES program to Alaska. We filed a Petition for Rehearing by both the three-judge panel and an *en banc* panel. *En banc* review is a request to have 11 judges from the Ninth Circuit take another look at the case. While one of the three judges on the three-judge panel voted to rehear the case, unfortunately, the other two judges and the rest of the Ninth Circuit judges declined to rehear the case.

This is a disappointing decision and the concerns about Alaska's ability to carry out the NPDES program and a robust enforcement program remain. Trustees for Alaska and our clients will continue to address the issues with the State's take-over of the NPDES program.

The petitioners in the case are Akiak Native Community, Nunamta Aulukestai, Nondolton Tribal Council Curyung Tribal Council, Cook Inletkeeper, Alaska Center for the Environment, Alaska Community Action on Toxics, Center for Biological Diversity, the Center for Water Advocacy, Ekwok Tribal Council, New

Arctic Victory!

Judge rules that DNR has "an ongoing duty to consider best interests of the State at every phase of any project."



On February 22, 2011, Superior Court Judge Peter Ashman ruled that the State's process of evaluating whether oil and gas leasing, exploration and development in the Beaufort Sea

was in the public's best interest was unconstitutional. The ruling affirmed the Alaska Constitution's recognition of the importance of protecting the public interest and allowing for public participation in oil and gas development decisions. Trustees for Alaska challenged the adequacy of the Department of Natural Resource's (DNR) 10-year Beaufort Sea Areawide Lease Sale Best Interest Finding (BIF) on behalf of Resisting Environmental Destruction on Indigenous Lands, the Gwich'in Steering Committee, the Alaska Wilderness League, the Center for Biological Diversity, and the Northern Alaska Environmental Center.

The lawsuit challenged the constitutionality of DNR's phased review of oil and gas activities on the two million acres of state-owned submerged and tide lands in the Beaufort Sea. "Phasing" allows DNR to limit the scope of the BIF for multi-phased projects (*i.e.*, leasing, exploration, development, and transportation) to only the leasing phase when there are no details about any project. Because DNR limits its review to only the lease phase and the lease sale area, Trustees for Alaska argued that DNR's failure to look at the cumulative impacts of the later stages of oil and gas activities in any meaningful way, prior to making its decision that leasing was in the best interests of the state, violated the Alaska Constitution.

Judge Ashman agreed, holding that "application of statutory permission to issue only a single [best interest finding] at the initial phase of a development where it is impossible to assess the cumulative effects of the development as they relate to DNR's continuing obligation to consider the public's best interest violates Article VIII of the Alaska Constitution." The court found that DNR has "an ongoing duty to consider the best interests of the State at each phase of the subject project."

As a result of the court's ruling, the public will have the opportunity to participate in DNR's decisions about whether other uses, such as subsistence hunting and fishing, as well as the public's resources are jeopardized at each phase of oil and gas development in the Beaufort Sea.

-- Brook Brisson, Staff Attorney

-- Vicki Clark, Legal Director

Western Arctic Coal: Yet Another Global Warming Threat

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The single largest coal resource in the entire U.S., which comprises at least one-third of America's reserves and one-ninth of the world's reserves -- the "Saudi Arabia of coal" -- is found in the Western Arctic. An estimated 4 trillion tons, much of it high-grade, low-sulfur coal, extends across 30,000 square miles of the Western Arctic, including privately-held land owned by the Arctic Slope Regional Corporation (ASRC) and much of the National Petroleum Reserve-Alaska (NPRA).



Limited coal exploration has occurred in northwestern Alaska since 1984 on lands owned by ASRC approximately 40 miles from the Native Village of Point Lay. The area is known as the Deadfall Syncline. The exploration began as a surface coal mine (the Mormon mine) in 1984 and was converted to an underground coal exploration facility in 1993 known as the Kuchiak Reserve Mine. Since that time there have been coal exploration activities each year resulting in coal reserve estimates for the Deadfall Syncline of 5 billion tons. The most recent operator at the site was BHP Billiton, an Australian company which is one of the largest producers of coal worldwide.

The area is home to the Western Arctic Caribou herd which was Alaska's largest herd in 2004, numbering approximately 500,000. There has been a significant decline in the herd over the past 6 years to approximately 350,000.

In 2009, Trustees for Alaska was asked by the villages of Point Hope and Point Lay to submit comments on the exploration activities and to obtain a Citizen's Inspection of the site. The State declined a Citizens' Inspection, but ASRC provided access to the villages in August 2010 to inspect the reclamation operations. In the meantime, BHP Billiton announced in September 2009 that it was ceasing its exploration activities and would focus only on reclamation and rehabilitation.

In January 2011, the Department of Natural Resources (DNR) issued a "renewal" permit to BHP that allows for the reclamation activities to continue, but also permits exploration drilling if the operator provides a notice of intent to explore to DNR. Trustees for Alaska filed an administrative appeal on behalf of the Native villages and two conservation groups on the grounds that exploration in the region affects subsistence resources including the Western Arctic Caribou Herd and that DNR had failed to consider the impacts to those resources, in violation of Article VIII of the Alaska Constitution. The appeal is set for a hearing on May 17, 2011.

-- Nancy Wainwright, Senior Staff Attorney



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The "Bridge to Nowhere" is Trying to Go Somewhere

In December, the Federal Highway Administration issued its "Record of Decision" for the Knik Arm Bridge, approving and finalizing the Knik Arm Bridge and Toll Authority's (KABATA) proposed "Bridge to Nowhere." While the project still needs permits from various state and federal agencies, this final decision from the environmental review process provides the blueprint for the bridge construction.



The looming question now is how this currently estimated \$700 million boondoggle will be financed. We expect to see state guarantees and a public-private partnership, which have a

track record of ultimately putting the financial burden on taxpayers. Michael Foster, KABATA's chairman, stated, "We need it funded now in order to go to market for

our private partner. We have to show them we have funds available for the (payment) in the initial years. Because that's when things are tight." And while the project had already been turned down for a Federal low-cost loan, KABATA intends to file another application.

This "Bridge to Nowhere" isn't just a financial disaster, however. It will pose significant harm to the endangered Cook Inlet beluga whale; disrupt traffic patterns in Anchorage, including significant impacts to Government Hill, and open up areas across Knik Arm in the Mat-Su Borough to significant growth and traffic impacts. While KABATA is down in Juneau seeking \$150 million and revenue guarantees from the State to lure in private investors, Trustees for Alaska will continue to work with our clients, Alaska Transportation Priorities Project, Alaska Center for the Environment, Alaska Public Interest Research Group, as well as other groups to ensure this project truly goes nowhere.

-- Brian Litmans, Senior Staff Attorney

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