

# Law in the Last Frontier: Commemorating the District of Alaska's 50th Anniversary



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This article celebrates the 50th anniversary of the U.S. District Court for the District of Alaska. Alaska joined the union in January 1959 as the 49th state, and the federal court in Alaska—the District of Alaska—was commissioned in February 1960. In the intervening 50 years, Alaska has anchored itself within the national constellation, yet the state has retained many of its unique characteristics.

Commemorating the 50th anniversary of a district court is no small task and could be approached in a number of different ways. Based on the premise that a good way to understand a people is by examining their disputes, this brief article approaches the task by reviewing some of the more significant state and federal cases that have shaped law and policy in Alaska. Published cases offer an objective view on how disputes are analyzed and resolved and also give us a window into a jurisdiction's values, concerns, and priorities. After setting the stage for the discussion by introducing the reader to Alaska, the article reviews some of the more significant cases that have been decided in the past 50 years, arranged by major field or practice area. No attempt is made to analyze the cases in a law review format.

## A Snapshot of Alaska

All of Alaska is divided into three parts. The southeastern part, or the Panhandle, is the most remote section of the state, which—by design or coincidence—houses the state's government. Fishing, tourism, mining, and timber constitute the region's economic foundation. The Railbelt Corridor divides the state through its center and links the Kenai Peninsula and Anchorage in the south with Fairbanks in the north. This area is Alaska's commercial and financial

center. Most of Alaska's 670,000 citizens live on or near this corridor. Finally, the northern and western part of the state is the great beyond, the Bush—a land of limitless potential, abundant resources, and weather-hardened and resourceful people. Oil, mining, commercial fishing, and tourism drive the economy of this area. Each of these three regions shapes both the law and its practice in the Last Frontier, and each region enjoys its own opportunities and faces its own unique challenges.

Alaska is America in miniature—a place where individual rights and community responsibility co-exist. At its best, Alaska is the type of place where stranded motorists can expect help. It is a big small state. It is the largest state by area, occupying 656,425 square miles, but it is one of the smallest states by population, ranking 48th with 626,932 people counted in the 2000 census—a number that is estimate to have increased to only 670,000 today. In terms of population density, Alaska is dead last—the state has about one person per square mile. Alaskans typically refer to their elected officials by their first names—not necessarily out of deference or support, but simply because the people have met government officials or know someone who has.

Our fellow Americans do not know what to make of the "Great Land" or of Alaskans in general. We are often held in affectionate disregard as the nation's backward country cousins.<sup>1</sup> This was true even B.S. ("Before Sarah")—as reflected by a television series that was popular in the 1990s, "Northern Exposure"—and the widely held view is probably not too different from how the English viewed Americans in Colonial times or Australians more recently.<sup>2</sup> A good number seem to see Alaska as some sort of national wildlife preserve that has two U.S. senators and a

congressional representative. Each year we welcome visitors who descend on the natural beauty of our parks, some of whom display an uncanny ability to get hopelessly lost before their boot tread collects dust. No one can find us on a map. Alaska is often depicted somewhere south and west of Catalina Island.

Many base their knowledge of Alaska solely on the image of crabbers battling raging storms in the Bering Sea or dog mushers and their teams running through the night. These first impressions are bound to disappoint those who confront the reality of McDonald's or Wal-Mart on their first drive through an Alaskan town. Alaska's laws reflect many of the same competing and conflicting dynamics that residents of the lower 48 states experience.

## The Law in Alaska

### **Privacy Rights**

Privacy rights most clearly pit individual rights against state interests, and are a good way to explore how individuals relate to their government. Alaskans cherish privacy rights to an extent unimagined by most other Americans. It is possible to fly over hundreds of miles in Alaska and never see another soul or perhaps see nothing but a cabin's light or a musher's head lamp somewhere in the arboreal forest between Fairbanks and Galena.

An Alaskan's view of privacy rights can only be approached by reference to *Ravin v. State of Alaska*,<sup>3</sup> a 1975 case in which Alaska's Supreme Court held that the right to privacy found in Alaska's state constitution confers a protected right for adults to possess a limited amount of marijuana in their homes for personal use. Remarkably, the court's opinion contains no facts. No one can tell how exactly Ravin was charged. "The record does not disclose any facts as to the situs of Ravin's arrest and his alleged possession of marijuana." The court noted that, "[i]f there is any area of human activity to which a right to privacy pertains more than any other, it is the home" and observed that "[o]ur territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states." In the *Ravin* ruling, the court concluded that private, noncommercial activities that take place in one's home and do not pose a risk to public health or safety are constitutionally protected. What is known as the *Ravin* right has subsequently been quantified as four ounces and remains recognized law in Alaska. In recent years, the state's court of appeals affirmed a superior court ruling striking down a search warrant because the warrant had failed to establish that the marijuana inside a residence exceeded the personal use amount protected by *Ravin* and its progeny.

Alaska's protection of privacy rights is also seen in the way the state treats policies related to drug testing. For example, in *Anchorage Police Department Employees Association v. Municipality of Anchorage*,<sup>4</sup> the Alaska Supreme Court struck down random drug testing policies for Anchorage's police and fire departments on the grounds

that such testing subjected personnel to "continuous and unrelenting scrutiny that exposes the employee to unannounced testing at virtually any time," was more intrusive than necessary, and also lacked any significant grounds given the absence of any documented history of the person's substance abuse. This result followed even though the overwhelming majority of state and federal courts examining similar policies for public safety personnel have upheld random testing for drug use.

In the private employment context, in *Luedtke v. Nabors Alaska Drilling Inc.*,<sup>5</sup> the Alaska Supreme Court held that an employer's action in suspending employees who had failed a drug test violated the implied covenant of good faith and fair dealing for a number of reasons: (1) the employer had tested employees without giving them prior notice of a drug testing policy; (2) no other employee had been similarly tested; and (3) the employer had immediately suspended the employees upon learning the results of the test without affording them a chance to explain, rebut, or refute the test results or to request a second test. The court had previously rejected the employees' claim that drug testing violated privacy rights, holding that constitutional provisions did not apply to private employers and that no tort for invasion of privacy had been committed, because there was no evidence that the manner or method of testing was unreasonable.

Although these are not federal cases, they tell us a great deal about how Alaskans view their own personal space. Alaska is not Humboldt County. However, examining privacy rights in the context of drug-related cases is useful, because the exercise reflects that Alaska draws the line at a level of recognized protection that most other states would not acknowledge. Alaskans view privacy as something more than an abstract legal construct—a person's right to privacy is a social and cultural value that defines Alaska and Alaskans.

### **Residential and Employment Preferences**

If privacy rights draw the clearest distinction between individual rights and state interests, preferences offer insights into expectations—into what citizens expect or want from their government. Alaska is populated by "outsiders"—almost every Alaskan came from somewhere else. Identity as an Alaskan is hard to earn for those of us (like me) who were transplanted here from elsewhere. We could live here for a lifetime, yet some would never accept us because we were not born and raised in Alaska. Once a person is here, however, there is a tendency to close the doors. Alaska has adopted several preferences illustrating this tension.

The best example is seen in *Zobel v. Williams*,<sup>6</sup> a 1982 case that examined Alaska's permanent fund dividend system. With the discovery of vast oil resources within the state's borders, Alaska established a permanent fund with deposits from income produced by the state's mineral resources. This fund yields a dividend each year. The system does not quite work the way as depicted in "The Simpsons Movie" (in which Homer Simpson was handed \$1,000 upon crossing the state border), but it sometimes seems that way. As initially devised, the dividend was paid out to

residents based on the length of time that they had been living in state; thus, the system created perpetual classes of citizens based on the duration of their residency. For example, by 1979, a person who had lived in Alaska since it became a state in 1959 received 20 times more than a person who had moved to Alaska in 1978. The state justified this formula on three grounds:

- The system encouraged people to stay in Alaska.
- It encouraged prudent management of the permanent fund.
- It equitably distributed Alaska's energy wealth by allocating the dividend in recognition of past contributions to the state—the theory being that the longer one had lived in the state, the more one had contributed to the state's commonweal and thus the more one should receive as a dividend.

*Zobel v. Williams* involved a suit filed by Ron and Patricia (Penny) Zobel, which argued that the preference reflected in the system violated their rights to equal protection under the law. The Alaska Supreme Court upheld the system, basing its decision on the theory that the allocation recognized a resident's past contributions to the state. The Zobels sought and secured certiorari, and on review the U.S. Supreme Court reversed the ruling by a vote of 8-1. The litigants believed that the case would turn on the review standard—rational basis or intermediate scrutiny. The Court, however, perceived no rational basis that supported any of the stated purposes for Alaska's tiered durational residency standards. As Chief Justice Warren E. Burger noted, "If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence?" The Supreme Court further observed that "Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible."

The Supreme Court's analysis was based solely on the Equal Protection Clause. The justices did not rely on either the Privileges and Immunities Clause of Article IV of the U.S. Constitution or the Privileges or Immunities Clause of the Fourteenth Amendment. However, the Privileges and Immunities Clause of Article IV was implicated in an earlier case that challenged Alaska's Employment Preference Act—*Hicklin v. Orbeck*.<sup>7</sup> This case examined an "Alaska Hire" law (Alaska Employment Preference Act) that had been enacted during construction of the trans-Alaska oil pipeline and required contractors and unions to hire qualified Alaskan residents instead of any nonresidents to do public construction work. The act included a one-year durational residency requirement and effectively operated as a 100 percent residential preference, because few people

could survive for a year in Alaska without work in order to claim the residency that was required to secure a job.

Hicklin and other nonresidents could not find jobs, and they filed suit. The Alaska Supreme Court struck down the one-year residency requirement but upheld the law in all other respects. On review, the U.S. Supreme Court reversed the ruling based on application of the Privileges and Immunities Clause. Writing for a unanimous Court, Justice Brennan noted that, among other features, the clause protected the rights of all citizens to travel and ply their respective trades. Alaska made no attempt to demonstrate that unemployment among its citizens was caused by nonresidents. Instead, the evidence suggested that unemployment was attributable to other factors, such as residents' lack of experience, education, and training. Moreover, according to the Court, Alaska's residential preference was overbroad in that it granted all Alaskans a blanket preference regardless of their individual unique characteristics. The Court observed that a "highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program." It necessarily followed that Alaska's residential preference could not survive.

A final example of a preference with a twist was addressed in *Malabed v. North Slope Borough*. The North Slope Borough (NSB) enacted an employment preference for purposes of increasing local hiring of Inupiat Eskimo. Six of seven NSB council members were Inupiat Eskimo as was the mayor. In 1996, the NSB vetted the preference through the office of the Equal Employment Opportunity Commission. The EEOC concluded that the NSB could rely on the employment preference for businesses located on or near an Indian reservation as provided for in Title VII. This opinion, in turn, was based on a 1988 EEOC opinion (by then Commissioner Clarence Thomas) that equated land held by the Alaska Native Claims Settlement Act as a "reservation" for purposes of the exemption spelled out in Title VII.

Robert Malabed, a Filipino-American, worked off and on as a temporary security guard for the North Slope Borough between 1994 and 1997. The NSB had hired Malabed as a full-time security guard in July 1997 but fired him almost immediately, because the hiring had been undertaken without regard for the NSB's employment preference. Malabed filed suit in federal court, alleging multiple claims. The NSB argued that its preference was based on a political classification and therefore subject to relaxed rational basis scrutiny. The NSB also argued that it could rely upon Title VII's exemption for businesses located on or near an Indian reservation.

The district court, with Judge Sedwick presiding, rejected the NSB's contentions and struck down the employment preference based on the Equal Protection Clause.<sup>8</sup> Intervening U.S. Supreme Court precedent had established that land that fell under the Alaska Native Claims Settlement Act was not Indian country. This proved fatal to the NSB's reliance on receiving an Title VII exemption. With respect to the equal protection arguments, Judge Sedwick

observed that there was no evidence that NSB had discriminated against Native Americans; in fact, the evidence supported the opposite conclusion. Moreover, the court ruled that states and political subdivisions do not enjoy remedial powers under the Fourteenth Amendment. The major problem the court found with the preference, however, was that the majority had designed it to benefit the majority, making it the type of preference that is “virtually always repugnant to the principles of a free and democratic society,” because NSB’s political base was dominated by Inupiat Eskimo. The inescapable conclusion required the court to invalidate employment preference in this case.

The North Slope Borough appealed the district court’s ruling to the Ninth Circuit. The equal protection claim raised a difficult issue concerning when and whether employment preferences for Native Americans should be analyzed as political or racial preferences. Perhaps as a consequence, the Ninth Circuit certified a state law question to the Alaska Supreme Court, essentially asking whether the preference violated Alaska law. The Alaska Supreme Court answered in the affirmative, holding that NSB’s hiring preference violated the state’s Equal Protection Clause.<sup>9</sup> Alaska’s Equal Protection Clause uses a tiered analysis that first explores the significance of the individual interest at issue, then examines the importance of the government’s interest, and finally evaluates the means the government uses to achieve its goals “to determine the closeness of the means-to-end fit.” Applying this methodology, the Alaska Supreme Court quickly concluded that the NSB’s preference violated state law. The court confirmed that the right to work was a significantly important individual right. The NSB’s interest, in contrast, was suspect, because the NSB was purporting to reduce unemployment among a special classification of borough residents at the expense of other Alaskans. Finally, the employment preference was not closely related to any avowed goal of reducing unemployment; the preference applied to all jobs across the NSB, regardless of an individual’s skills, education, or training, and was not limited in time, scope, or degree. After the Alaska Supreme Court answered the certified question, the Ninth Circuit issued its own opinion, validating the Alaska Supreme Court’s decision and further affirming Judge Sedwick’s disposition of the dispute.<sup>10</sup>

Notwithstanding the consistent rejection of employment or residential preferences, the dynamics of the political process make it likely that exclusionary preferences will persist in Alaska. Local hire is a “can’t miss” vote multiplier. No politician can resist trumpeting support “for Alaska,” and, if and when such preferences are struck down, one can always blame a rogue court system rife with activist judges intent on frustrating the people’s will. Consequently, we will probably see more cases involving preferences brought to courts in the next 50 years.

### **Right to Free Speech**

Alaskans are quick to state their opinion—whether or not is an informed one. Alaska is a “citizen state” in which residents claim part ownership of state resources and are familiar with the state’s political leaders. These features,

along with the healthy disrespect many Alaskans have for government institutions, often lead to an ongoing clamor of dissent for dissent’s sake.

*Morse v. Frederick*<sup>11</sup>—the “BONG HiTS 4 Jesus” case—illustrates the point. The case involved Joseph Frederick, who was a senior at Juneau Douglas High School. In January 2002, the Olympic torch relay wound its way through Juneau’s streets. Deborah Morse, the high school’s principal, allowed students to go outside to watch the relay as a sort of school-sponsored community affairs event. Frederick stood across the street from school grounds with some friends. As the torch relay approached, Frederick and his posse unfurled a banner that stated “Bong HiTS 4 Jesus.” Frederick later explained that the banner meant nothing and that he had made it and raised it for no other purpose than to attract television cameras (as well as girls, one suspects).

Deborah Morse saw Frederick’s banner and construed it as an expression of a drug-related message. She demanded that Frederick and the others drop the banner, and all but Frederick complied. Morse then suspended Frederick from school for 10 days. After the local superintendent upheld the suspension, Frederick filed suit in federal court, alleging a civil rights violation for infringement of his First Amendment rights.

Morse and the school district moved for summary judgment on grounds of qualified immunity. The district court, with Judge Sedwick presiding, granted summary judgment, concluding that the defendants were entitled to qualified immunity and that they had not violated Frederick’s First Amendment rights. On appeal, the Ninth Circuit reversed the district court’s decision, relying on what the Ninth Circuit believed to be existing precedent, *Tinker v. Des Moines Independent Community School Dist.*<sup>12</sup> In *Morse v. Frederick*, the court held that, even though Morse could have reasonably concluded that the message conveyed a drug-related message, she was not entitled to qualified immunity, because it had never been shown that Frederick’s banner gave rise to a “risk of substantial disruption.” The *Tinker* ruling had held that students’ speech could be suppressed but only if school officials reasonably concluded that the speech “materially and substantially disrupt[ed] the work and discipline of the school.” The issue in *Tinker*, however, involved political speech. Subsequently, the U.S. Supreme Court held that school officials could suppress lewd and offensive speech without any showing of disruptive impact.

On review, the U.S. Supreme Court reversed the Ninth Circuit and ruled that Frederick’s speech was not entitled to protection under the First Amendment. The Court reasoned that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use” and that no violation occurred from the simple act of “confiscating the pro-drug banner and suspending the student responsible for it.”

Although one cannot disagree with the final result, Alaskans could be forgiven if many of them sympathized with young Mr. Frederick. Speech—even irreverent speech—promotes the germination of democratic institutions and thought. The last anyone heard, Joseph Frederick was

teaching English in China. If we're lucky, perhaps he will plant some small seed of Alaskan home-grown irreverence before returning home.

### ***Native Rights and Conflicts Between Urban and Rural Interests***

The issues related to the legal rights of Native Alaskans that have been arising in Alaska are far too numerous and complex to be treated in this article. Generally speaking, however, native rights and ongoing conflicts between urban and rural interests have led to significant legislative and judicial action during the first 50 years of Alaska's statehood. Alaskan natives draw upon cultural and social traditions that are thousands of years old and are tied to the rhythms of a harsh Arctic climate. Subsistence fishing and hunting rights are fundamental imperatives that sustain both life and traditions in Alaska. These interests almost immediately clashed with Alaska's emerging rights as a new state—rights that cannot be discounted and must be honored if Alaska is to enjoy equal footing as a sovereign state.

In *Organized Village of Kake v. Egan*,<sup>13</sup> the U.S. Supreme Court examined whether or not Alaska could regulate fish traps that are permitted by the federal government. Alaska prohibited the use of fish traps. Two Indian villages south of Juneau—Kake and Angoon—operated fish traps under permits from the U.S. Army Corps of Engineers. The state of Alaska threatened prosecution, then arrested the individuals who were using the traps. Kake and Angoon filed suit to enjoin the state's prosecution, but their complaint was dismissed. Seeking review by the U.S. Supreme Court, Kake and Angoon argued that they were immune from state prosecution by virtue of the Statehood Act, under which the federal government reserved absolute jurisdiction over Indian property (including fishing rights), as well as the White Act, which granted the secretary of the interior authority to regulate fishing. Kake and Angoon asserted that their permits precluded state prosecution.

In an opinion authored by Justice Felix Frankfurter (one of the last he wrote—he retired five months later in August 1962), the Court rejected the villages' arguments. The Court concluded that the federal permits only acknowledged that the fish traps did not violate federal law, but they did not prevent Alaska from regulating or prohibiting fish traps. The White Act, the Court concluded, conferred authority only to regulate or limit fishing, not to grant any rights. With respect to the Statehood Act and the federal government's absolute jurisdiction, the Court clarified that Alaska's disclaimer of property was a disclaimer regarding only proprietary interests, not governmental rights. The Court held that the federal government's absolute jurisdiction was not the same as exclusive jurisdiction. It necessarily followed that Alaska retained the right to regulate the use of fish traps.

Less than 10 years later, Congress eliminated aboriginal rights by passing the Alaska Native Claims Settlement Act (ANCSA) in 1971. ANCSA transferred approximately a third of Alaska's land to regional Native corporations created by Alaskan tribes. Because the shareholders of the

corporations were Native Alaskans, the allocation of the land allowed, in concept, economic and social development for purposes of tribal self-determination. The ANCSA also sought to construct a new model for relations between the federal, state, and tribal governments and to depart from paternalistic policies that had characterized prior relations. In exchange for the transfer of land, all reservations in Alaska were eliminated (with one exception) and aboriginal rights were extinguished.

It was not precisely clear, however, the extent to which federally recognized tribes could assert tribal jurisdiction over lands transferred under the ANCSA. The issue came to head in Venetie, a Native village in Alaska's interior, that sought to impose a business tax on a private contractor working with the state of Alaska to construct a public school. Alaska challenged Venetie's right to impose the tax. The district court, presided over by Judge Holland, concluded that, even though Venetie was a federally recognized tribe, it was not located in Indian country and therefore lacked authority to tax the contractor. The Ninth Circuit reversed Judge Holland's ruling. On review, the U.S. Supreme Court reversed the Ninth Circuit,<sup>14</sup> unanimously holding that the land allocated by the ANCSA was not Indian country and therefore that the village of Venetie lacked authority to tax the private contractor.

When Congress enacted the ANCSA, the expectation was that both the state and federal governments would take steps to recognize rights to do subsistence fishing and hunting; however, neither the state nor federal agencies took any active steps to do so. Therefore, in 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA). Title VIII established a federal regimen to protect subsistence hunting and fishing in rural Alaska. Congress also conferred authority on Alaska to enact legislation for purposes of administering subsistence hunting and fishing with sport or recreational hunting and fishing. Alaska's state legislature attempted to do so by enacting a law that conferred a rural subsistence priority for hunting and fishing, but in 1989 the Alaska Supreme Court held that the law violated the state constitution's Equal Protection Clause.<sup>15</sup> Federal authorities stepped into the vacuum to enforce Title VIII.

Subsistence fishing rights immediately came to the fore. The ANILCA requires that subsistence fishing and hunting be given a priority over other uses on public lands. Defining public lands in the context of waterways, however, is difficult. Initially, the federal government adopted temporary regulations that defined public lands narrowly, excluding navigable waters. Both state and Native Alaskan interests filed suit challenging the federal regulations. Native interests argued that the definition was too narrow and that public lands should include all navigable waters. Alaska argued that the federal government lacked authority to regulate the state's waters. The federal government, meanwhile, revised its interpretation and concluded that public lands included those waters in which the federal government had an interest by virtue of the reserved water rights doctrine. The district court, with Judge Holland presiding, concluded that public lands should include all

navigable waters encompassed by the federal navigational servitude. On appeal, the Ninth Circuit reversed the district court's decision<sup>16</sup> and ruled that the federal government's revised interpretation was reasonable and that public lands should be defined as those navigable waters in which the United States has an interest under the reserved water rights doctrine. The court further concluded that the responsible federal agencies were the parties that would define those waterways. Fifteen years later, the issue remains mired in ongoing litigation and there is still no clear answer.<sup>17</sup>

An added twist to the litigation involving the ANILCA concerns how to define "rural" land for purposes of applying federal subsistence preferences. Initially, the district court adopted Alaska's proposed definition, which interpreted "rural" as applying to those areas where traditional use of fish and game was a principal characteristic of that area's economy. However, in *Kenaitze Indian Tribe v. State of Alaska*,<sup>18</sup> the Ninth Circuit rejected this definition and held, instead, that "rural" should be defined by reference to the commonly understood understanding of what "rural" means—that is, as the term is defined and applied in the lower 48 states. Unfortunately, this approach has proved difficult to adapt and apply in Alaska. Consequently, the rural-urban divide in Alaska remains unbridged.

### **Maritime Issues**

Alaska's coastline, which exceeds 6,600 miles, is longer than the coastline of the rest of the United States combined. Fishing, environmental concerns, and the maritime industry feature prominently in the state, and no better example could be seen than in Alaska's own *Bleak House*—the *Exxon Valdez* oil spill 20 years ago.<sup>19</sup>

The *Exxon Valdez* ran aground on Bligh Reef in Prince William Sound early on the morning of March 24, 1989. Its captain had left the bridge during a critical maneuver and was later discovered to have had a blood alcohol level of .061 11 hours after the accident. Millions of gallons of crude oil were spilled into Prince William Sound, befouling the ocean and the shoreline, and wreaking devastating environmental and economic damage. Several lawsuits followed, the primary one being a class action suit involving more than 30,000 plaintiffs and presided over by Judge H. Russel Holland. A jury eventually imposed punitive damages of \$5 billion in 1994. Appeals followed, and the Ninth Circuit remanded the case twice for re-analysis of punitive damages based on intervening Due Process precedent. Eventually, the award was fixed at \$2.5 billion, and Exxon sought and secured a review before the U.S. Supreme Court. Exxon raised three issues:

- Can Exxon be held vicariously liable for its captain when maritime precedent (based on early 19th-century case law) established otherwise?
- Does the Clean Water Act pre-empt imposition of punitive damages?
- Should punitive damages be permitted in the context of maritime law, and if so, what limitations or restrictions should govern such awards?

On the issue of vicarious liability, Exxon argued that a shipowner should not be held vicariously liable for a captain's mistakes, relying on an argument that traced back to a 1818 case, *The Amiable Nancy*. The plaintiffs countered that this reasoning was based on the practical realities of maritime shipping in the 1800s, when wooden ships left port under sail and were not heard from for months or even years. Ship owners had no effective means of communicating with or monitoring decisions that ship captains made in that era.

Concerning the punitive damages award, Exxon noted that it had acted quickly to initiate cleanup efforts for which it spent more than \$2 billion, pled guilty to federal criminal violations, and paid fines and restitution in the range of \$125 million. Exxon also settled other state and federal claims, agreeing to pay \$900 million to restore natural resources and entering into other voluntary settlements with private parties for a total amount exceeding \$300 million. Exxon believed that it had done enough and argued, as a matter of first impression, that maritime law—subject to federal common law—should recognize limits on punitive damages. The plaintiffs stressed that the punitive damages that had been imposed survived Due Process analysis and that, in context, the amount of punitive damages was nothing compared to the expansive nature of Exxon's profits or the devastating range of damage that had been inflicted on the Prince William Sound.

The case was finally decided in 2008—more than 19 years after the *Exxon Valdez* had spilled its oil. A fractured U.S. Supreme Court upheld imposition of liability under a vicarious liability theory by a vote of 4-4 and rejected Exxon's argument that the Clean Water Act pre-empted imposition of punitive damages. As far as the punitive damages issue was concerned, the majority concluded that rational predictability should govern any award that is imposed as a penalty. The Court struggled with establishing practical guidelines and ultimately voted 5-3 to seize upon a guiding principle that the amount of punitive damages in the maritime context should not exceed a 1:1 ratio for compensatory damages, thereby reducing the amount of punitive damages from \$2.5 billion to approximately \$500 million.<sup>20</sup> Exxon's declared profits for 2007 (the year preceding the ruling) were reported to have exceeded \$40.6 billion. From the perspective of establishing rational predictability in a system imposing damages, it is telling that one vote separated the difference between the initial punitive damages award of \$2.5 billion being upheld in its entirety (which is what would have happened had the 5-3 majority split 4-4) and that the same award was zeroed out (which is what would have been the result had the 4-4 result on the vicarious liability issue been 5-3).

The most recent case involving maritime law that is of interest concerns a relatively obscure provision in the U.S. Constitution, the Tonnage Clause, which prohibits ports from imposing fees (a duty) for the privilege of entering the port. In *Polar Tankers Inc. v. City of Valdez*,<sup>21</sup> the U.S. Supreme Court analyzed a property tax imposed on certain boats that were longer than 95 feet. The practical effect of the tax was to limit its application to oil tankers. Polar

Tankers, an oil company subsidiary, challenged the tax as a violation of several constitutional provisions. The state superior court rejected Polar Tankers' argument invoking the Tonnage Clause but held that the tax was unconstitutional on Due Process and Commerce Clause grounds, because the tax was allocated based on the amount of time spent in Valdez as compared to other ports—a calculation that could theoretically create a risk of multiple taxation. The Alaska Supreme Court reversed the ruling, holding that a tax that is based on the value of property was not a duty on tonnage and that the tax survived scrutiny under both the Due Process Clause and the Commerce Clause. Polar Tankers sought a review by the U.S. Supreme Court, which granted certiorari and reversed the ruling made by Alaska's Supreme Court. Writing for the majority, Justice Breyer noted that the Tonnage Clause is necessary in order to protect the scope of a companion clause that prohibits states from imposing duties on imports and exports. The majority of the Court determined that the tax imposed a fee for the privilege of entering the port of Valdez, that the tax related to a ship's capacity (its tonnage) because it only applied to larger ships, and that the tax was not related to services provided to a ship such as pilotage, wharfage, or other similar maritime services. It followed that the tax ran afoul of the Tonnage Clause.

### **Environmental Protection**

Alaska's abundant natural resources have led to numerous cases involving environmental law. All these cases tend to reflect the same competing interests—developers promoting jobs and economic growth on one side, and citizens concerned about the pace of unchecked development and the extent to which public safety and health can sometimes be placed at risk on the other side. In between are satellite (but important) interests, such as small-scale commercial fishers, Native Alaskans and rural dwellers who fish and hunt for subsistence, and individuals working in tourist industry—all of whom rely on undamaged natural resources for their livelihood.

Many readers may be familiar with the case of *Alyeska Pipeline Service Co. v. The Wilderness Society et al.*,<sup>22</sup> in which the U.S. Supreme Court set clarifying guidelines on when—and whether—courts can award attorneys' fees to prevailing parties in federal court. The Court held that these fees cannot be awarded to environmental groups under a "private attorney general" theory. Instead, the "American rule," by which parties are responsible for shouldering their own fees, is the rule that is presumed to govern legal practice in federal courts. According to the Court's ruling, only Congress can authorize an exception by expressly allowing for recovery of fees under statute. *Alyeska Pipeline* remains one of the leading cases dealing with the award of attorneys' fees.

A case more closely falling under the rubric of environmental law that is rather significant is *Alaska Department of Environmental Conservation v. EPA*,<sup>23</sup> in which the U.S. Supreme Court held that the Environmental Protection Agency (EPA) had the authority to overrule a state agency's decision that a company was using the "best avail-

able controlling technology" to prevent pollution under the Clean Air Act. The case involved a mining company that requested a permit to build an additional diesel generator at one of its mines. The Alaska Department of Environmental Conservation (ADEC) issued the permit, which required the mining company to adopt and use a particular form of technology on all of its generators (not just the new one) in order to reduce polluting emissions. The EPA stepped in, however, and determined that an even better form of technology was available. ADEC petitioned for review to the Ninth Circuit arguing that the EPA lacked any right to disturb its decision. The Ninth Circuit rejected ADEC's arguments, and the U.S. Supreme Court affirmed the decision, holding that the oversight authority that Congress had conferred on EPA included the right to make sure that state authorities made decisions concerning the best available controlling technology that were reasonable in light of the goals and purpose of the Clean Air Act.

The most recent environmental case of significant importance is *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*,<sup>24</sup> which was decided during the Court's 2009 term. In this case, Coeur Alaska, a mining company, sought and secured a permit to deposit tailings in a landfill. However, after the price of gold plummeted, the company began looking for a more cost-effective alternative and found the option of depositing the tailings into a lake that was close to the mine. The lake fell within the scope of navigable waters of the United States, implicating the Clean Water Act, which includes two separate permitting programs: a § 404 permit issued by the U.S. Army Corps of Engineers for fill material and a § 202 permit issued by the EPA for all other pollutants but subject to the effluent limitations under §§ 301 and 306 of the Clean Water Act. In 2002, the EPA and the Corps of Engineers had promulgated regulations defining fill material to include tailings. Therefore, the mining company sought a permit under § 404 to deposit its tailings into a lake as fill material, and the Army Corps of Engineers issued the permit. The district court, presided over by Judge James K. Singleton, upheld the permit on challenges filed by environmental groups. However, the Ninth Circuit reversed the district court, holding that a § 404 permit was still subject to the limitations or restrictions set forth by §§ 301 and 306 for effluents. On review, the U.S. Supreme Court reversed the Ninth Circuit, holding that the Corps of Engineers, not the EPA, had the authority to issue the governing permit, and that the Corps had complied with the law when it issued its permit.

### **Criminal Issues**

Alaska has not generated too many significant cases involving criminal law and procedure. However, one recent case generated national interest, even though it was a civil rights action filed under 42 U.S.C. § 1983, not a criminal case. In *District Attorney's Office v. Osborne*,<sup>25</sup> the U.S. Supreme Court examined whether due process requires states to allow inmates a right to DNA testing after they have been convicted. The case involved Osborne, who had been convicted of sexual assault and related offenses in state court in 1994. Osborne filed a § 1983 action,

seeking access to biological evidence that was still in the state's possession so that this evidence could undergo improved DNA testing. After initial proceedings clarified that Osborne's claim did not challenge the validity of his confinement and therefore did not violate the rule set forth by *Heck v. Humphrey* and its progeny, the district court, with Judge Ralph R. Beistline presiding, granted summary judgment for Osborne. Judge Beistline ruled that, under the specific facts of the case, Osborne had a limited right under the Due Process Clause to gain access to the evidence for purposes of post-conviction DNA testing, because the testing method in question had not been available to Osborne at the time of his trial. Judge Beistline also reasoned that the state could have no reason for punishing the innocent and therefore no reason for denying Osborne access to evidence that might prove to be exculpatory. The Ninth Circuit affirmed Judge Beistline's decision, primarily holding that, under precedent, Osborne's *Brady* rights survived and were applicable in post-conviction proceedings, thereby requiring the state to produce potentially exculpatory evidence after trial as well as before and during trial. The Ninth Circuit based its holding on the unique facts and limited circumstances presented in the case, including the following:

- The evidence could be secured by the state and the conviction was based on that evidence.
- The testing sought by Osborne had not been available at the time of the conviction.
- The testing would conclusively establish whether the biological evidence could be traced to Osborne.
- The testing could be completed without cost or prejudice to the state.
- The evidence was material to post-conviction relief (The Ninth Circuit defined materiality as being evidence that would establish a reasonable probability that he was entitled to post-conviction relief.)

The state sought a review by the U.S. Supreme Court, which reversed the Ninth Circuit by a vote of 5-4, holding that Osborne had no constitutional right to compel post-conviction testing of the state's evidence. The majority determined that Osborne's *Brady* rights affording him pretrial disclosure of exculpatory evidence did not survive to post-conviction proceedings. Instead, according to the Court, a less searching inquiry governed post-conviction analysis, and there was nothing in Alaska's post-conviction relief procedures that was "fundamentally inadequate" to protect substantive rights. The Court expressed reluctance to constitutionalize an issue that states were already addressing through a variety of legislative measures. Alaska, however, is not yet one of those states and has not undertaken the "prompt and considered legislative response" contemplated by the Supreme Court majority's opinion.

## Conclusion

For every case reviewed in this brief article, one could probably find five or more cases that perhaps have had a greater impact on Alaska and Alaskans. And, even the cases

discussed here deserve far more comprehensive treatment than this article can provide. However, if nothing else, the issues and opinions discussed here provide a glimpse of Alaska's first 50 years as a state and the role played by the District Court of Alaska in the state's development. **TFL**

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## Endnotes

<sup>1</sup>See Todd Purdum, *It Came from Wasilla*, VANITY FAIR (August 2009).

<sup>2</sup>I neither intend nor imply any criticism of former Gov. Sarah Palin.

<sup>3</sup>537 P.2d 494 (Alaska 1975).

<sup>4</sup>24 P.3d 547 (Alaska 2001).

<sup>5</sup>834 P.2d 1220 (Alaska 1992).

<sup>6</sup>457 U.S. 55 (1982).

<sup>7</sup>437 U.S. 518 (1978).

<sup>8</sup>See *Malabed v. North Slope Borough*, 42 F. Supp.2d 927 (D. Alaska 1999).

<sup>9</sup>See *Malabed v. North Slope Borough*, 70 P.3d 416, 427-28 (Alaska 2003).

<sup>10</sup>See *Malabed v. North Slope Borough*, 335 F.3d 864 (9th Cir. 2003).

<sup>11</sup>127 S. Ct. 2618 (2007).

<sup>12</sup>393 U.S. 503, 506 (1969).

<sup>13</sup>369 U.S. 60 (1962).

<sup>14</sup>See *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 420 (1998).

<sup>15</sup>See *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989).

<sup>16</sup>See *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1995).

<sup>17</sup>My law firm represents the state of Alaska in some of the pending litigation involving water rights that remains unresolved.

<sup>18</sup>860 F.2d 312 (9th Cir. 1988).

<sup>19</sup>My law firm represented several plaintiffs' interests in the litigation involving the *Exxon Valdez* oil spill.

<sup>20</sup>See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

<sup>21</sup>129 S. Ct. 2277 (2009).

<sup>22</sup>421 U.S. 240 (1975).

<sup>23</sup>540 U.S. 461 (2004).

<sup>24</sup>129 S. Ct. 2458 (2009).

<sup>25</sup>129 S. Ct. 2308 (2009).