



Alaska Energy & Environmental Policy Update

July 30, 2009

In July, Senator Mark Begich worked on drafting federal legislation to create a Regional Citizens Advisory Council for Alaska's North Slope. Senator Lisa Murkowski introduced revenue-sharing legislation for offshore oil and gas development; Senator Murkowski's legislation would also require that oil produced from the Arctic outer continental shelf be transported by pipeline through Alaska, and not by tanker. Activity on proposed federal energy legislation calmed down, with the focus in Congress shifting to health care and appropriations. The Senate Committee on Homeland Security and Governmental Affairs' Subcommittee on Contracting Oversight held a hearing on the participation by Alaska Native Corporations in the Small Business Act section 8(a) contracting program. At the end of June, the Supreme Court reversed a decision of the Ninth Circuit that had invalidated a permit issued by the Army Corps of Engineers for the discharge of mine slurry from the Kensington gold mine near Juneau; the Environmental Protection Agency's Region 10 office has since suggested to the Corps of Engineers that the discharge permit might be rescinded to require that the Kensington operation place its tailings elsewhere.

CONGRESS

Senator Begich Considering Legislation to Create an RCAC for Alaska's North Slope

In an effort to address the tough issue of community involvement in offshore development in the Arctic, Senator Mark Begich and his staff are working to develop legislation to create a Regional Citizens Advisory Council (RCAC) for the North Slope. The proposal is inspired by the formation in 1990 of the Cook Inlet RCAC following the Exxon Valdez oil spill.

The news that Senator Begich was working on draft RCAC legislation has created a significant level of new dialogue among industry stakeholders, Alaska communities, and Alaska Native groups on the North Slope.

Although details of the proposed legislation are still being worked out, the legislation reportedly would establish an RCAC with 15 voting members, including North Slope villages, the North Slope Borough, and Arctic Slope Regional Corporation. Members would provide advice and recommendations on all aspects of energy development, marine transportation, cruise ship tourism, and marine fishery activities in



Arctic waters; monitor the environmental impacts of such activities; and monitor oil spill prevention and response plans for the region.

Energy companies operating in the region would be required to participate in the RCAC in good faith, and collectively would be required to provide at least \$5 million every year to finance the Council's operations.

The intent of the proposal is to provide a forum through which Alaska communities affected by oil and gas development on the North Slope can participate more directly in the planning and implementation of future development. Although there are already opportunities for the public to comment on proposed federal oil and gas development activities on the North Slope, the existing processes do not create the roundtable-like atmosphere that some community stakeholders hope to see created through a North Slope RCAC. Through his effort to address this issue, Senator Begich has initiated a very interesting and certainly very important dialogue about the role of North Slope communities in regional resource development planning.

Murkowski Introduces Revenue Sharing Legislation with a Provision that Would Require Transportation of Oil by Pipeline in the Beaufort and Chukchi Seas

On July 24, Senator Lisa Murkowski introduced legislation that would mandate sharing of revenues derived from offshore oil and gas leasing and production in federal waters off of Alaska. The "Domestic Energy Security Act of 2009," which is similar to legislation proposed in the last Congress by Senator Stevens and Senator Murkowski, would provide for 37.5 percent of all rents, royalties, and bonuses from such offshore oil and gas development activities to be shared with the State of Alaska, including its Native corporations and coastal communities. Under the bill, the State government would receive 47 percent of the funds, Alaska Native regional and village corporations would share 33 percent, and coastal borough and community governments would receive 20 percent.

The proposed legislation also would require that oil produced from the Arctic outer continental shelf (OCS) be transported by pipeline through Alaska. In an atmosphere where many North Slope residents have real concerns about proposed new oil and gas development in the Arctic offshore, the new legislation would ensure that oil is not transported by tanker in the Beaufort, Chukchi, and Hope Basin OCS planning areas. Some marine pilots and others have warned that broken ice conditions in the Arctic can threaten shipping routes with little warning. The proposed legislation implicitly recognizes that a marine tanker accident like the Exxon Valdez oil spill in the Beaufort or Chukchi Seas would have a devastating impact on the Arctic marine environment and the way of life of the residents of the North Slope.

Senate Holds Subcommittee Hearing on Native 8(a) Contracting

On July 16, the Senate Committee on Homeland Security and Governmental Affairs' Subcommittee on Contracting Oversight, chaired by Senator Claire McCaskill (D-MO), held a hearing on the participation by Alaska Native Corporations (ANCs) in the Small Business Act section 8(a) contracting program.



Senators Murkowski and Begich were allowed to sit on the panel, and both Alaska senators participated actively throughout the hearing. As a House Member, Congressman Young was not allowed to testify, though he did submit written testimony to the Committee.

Alaska witnesses, including Jackie Johnson Pata, Executive Director of the National Congress of American Indians, and Julie Kitka, President of the Alaska Federation of Natives, observed that the 8(a) program has enabled ANCs to take advantage of the federal government's massive procurement needs to jump-start ANCs, benefiting Native shareholders and village economies. Unlike other 8(a) participants, whose sole-source awards are capped at \$5.5 million, ANCs, which often serve thousands of Alaska Native shareholders, can win sole-source contracts of any value. And unlike other 8(a) participants, ANCs are allowed to have multiple affiliate businesses in the program as long as they operate in different sectors. These rights provide federal agencies and federal contractors with strong incentives to contract with ANCs. The equitable argument should be clear, Alaska witnesses argued: ANCs were established under ANCSA as a requirement of Congress and as part of the Native lands settlement; and Alaska Native villages suffer from some of the worst poverty in the U.S., with unemployment levels double or triple that of the rest of the United States in some areas, if not greater. Because of the lack of resources, there is often little room for individual entrepreneurship within the village economy. ANCs have the responsibility to promote economic development within the Alaska Native community.

The Committee issued a majority staff report the day of the hearing that reported that the amount of contracting to Native companies has totaled nearly \$24 billion this decade. "Nobody begrudges giving small, disadvantaged businesses a chance to win federal contracts," Senator McCaskill commented. It's fair to allow small businesses to "get their foot in the door." "But the Alaska Native corporations have used their special preferences to bust the door down."

By the end of the afternoon, many who attended the hearing thought that McCaskill took a softer approach, noting that the Subcommittee's role was to look at all government contracting, and did not intend to be selective about picking on ANCs as the target of her endeavor to curb sole-source contracting preferences for some private corporations. But we do know that McCaskill is not giving up on the ANCs. On July 22, McCaskill sought to attach an amendment to the Defense Department Authorization bill that would introduce various regulatory changes for the corporations and tribally owned firms, generally eliminating sole-source contracting authority and requiring competition between ANCs and tribal corporations. The Alaska senators objected, both publicly and through backdoor channels. For the time being, McCaskill has agreed to set the amendment aside. But "reform", she warned, "is going to happen." "It's not a matter of if, but a matter of when."

Questions regarding the special rights of Indian tribes and ANCs under the 8(a) program can be directed to Alan Mintz, alm@vnf.com, Rick Agnew, raa@vnf.com, Dan Press, dsp@vnf.com, Jon Simon, jxs@vnf.com, or to any other member of Van Ness Feldman's Indian Law or Alaska Native Law practices.



Activity on Energy Legislation Calms Down, with Bills Passed out of the Senate and House Committees in Mid-June; Focus Now is on Health Care and Appropriations

On June 26, the House of Representatives voted 219 to 212 to pass H.R. 2454, the American Clean Energy and Security Act (ACES), marking the first time a body of Congress has passed legislation to regulate greenhouse gas (GHG) emissions. The bill would place a cap on GHG emissions from covered sources at 3 percent below 2005 emission levels starting in 2012, 17 percent below 2005 levels by 2020, and 83 percent below 2005 levels by 2050. Local electric and natural gas distribution companies and energy-intensive and trade-exposed industries would receive a significant number of free emission allowance allocations through 2025. More information regarding ACES can be found by visiting Van Ness Feldman's website, at <http://www.vnf.com/news-alerts-374.html>.

The Senate Committee on Environment and Public Works (EPW) held hearings in mid-July on U.S. competitiveness, transportation, and economic opportunities for agriculture and forestry in the context of climate change legislation as well as the potential to create green jobs and economic growth through the proposed legislation.

In the June edition of the Alaska Policy Update, we covered the markup by the Senate Committee on Energy and Natural Resources of a comprehensive energy bill that now goes to the floor of the Senate for consideration. The full Senate will take up consideration of the energy bill after the August recess. Congress reconvenes on September 8th.

The FY 2010 appropriations process has been a major focus in both houses of Congress. The House and Senate appropriations committees are close to moving all appropriations bills through committee, or clearing one or both chambers of Congress before Congress breaks for the August recess.

Efforts to advance health care reform are also expected to consume attention in both the House and the Senate when Congress reconvenes in September, with floor and conference committee actions on appropriations bills filling floor gaps.

Begich Organizing Trip for Senators to View Impact of Climate Change in Alaska

Senator Mark Begich is organizing a trip to Alaska on behalf of Senator Barbara Boxer (D-CA) for a number of senators at the end of August. The delegation is scheduled to view erosion in the Yukon-Kuskokwim region and climate change impacts on glaciers and forests in Southcentral Alaska, as well as to visit to the North Slope to view new energy technologies used in northern oil and gas production.

Murkowski to Serve As Vice Chairman of the Republican Conference

On June 25, Senator Murkowski was selected by Republicans to serve as the Vice Chairman for the Republican Conference, the formal organization of the 40 Republican Senators. The Conference serves



as a forum for discussion among GOP Senators, and works to inform the U.S. media of the opinions and activities of Senate Republicans.

ADMINISTRATION

Newly Nominated or Appointed

On June 17, Secretary of Agriculture Tom Vilsack announced that Tom Tidwell will serve as the Chief for the U.S. Forest Service. Tidwell takes over for outgoing Chief Gail Kimbell, who was known by Alaskans for her service in the Tongass National Forest, as the forest supervisor of the Stikine area in Petersburg, Alaska. Tidwell has a broad background with the Forest Service. He has served the Forest Service on a fire ground crew, as a Forest Supervisor, as a District Ranger, and in the Forest Service's Legislative Affairs office in Washington, D.C. Tidwell served as Deputy Regional Forester for Fire and Aviation Management, Recreation, Engineering, State and Private Forestry and Tribal Relations for the Southwest Region (Region 5) in 2006. In 2007, he was appointed Regional Forester for the Northern Region (Region 1).

On June 17, the U.S. Senate confirmed Hilary Tompkins as Solicitor of the Department of the Interior. As Solicitor, Tompkins is the chief lawyer for the Interior Department and represents the Department in administrative and judicial litigation and meetings, negotiations and other contracts with Congress, federal agencies, states, tribes and the public. Tompkins has served as adjunct professor at the University of New Mexico School of Law; chief counsel to New Mexico Governor Bill Richardson; an attorney with Sonoksy, Chambers Sachse, Endreson & Perry, a national law firm devoted to representing Native American interests; a special assistant U.S. attorney in New York; and, during the Clinton administration, as an honors program trial lawyer in the Environment and Natural Resources Division of the U.S. Department of Justice. In 1996, Tompkins received her law degree from Stanford University (1996), where she was associate editor of the Stanford Law Review. She is an enrolled member of the Navajo Nation.

Agriculture Secretary Tom Vilsack has appointed Ann Mills as the Department's Undersecretary for Natural Resources and Environment. Mills is a former senior vice president at the conservation group American Rivers, where she led an effort to implement programs to develop sustainable solutions for flood and drought mitigation and water quality improvement in major watersheds across the country. The Office of the Undersecretary for Natural Resources and Environment supervises policy development and day-to-day operations of the U.S. Forest Service and Natural Resources Conservation Service (NRCS), the federal agency with primary responsibility for working with private landowners in conserving, maintaining and improving natural resources on their lands.

On July 29, the Senate Committee on Energy and Natural Resources approved the nominations of Wilma A. Lewis to be assistant secretary of the interior for land and minerals management and Robert V. Abbey to be director of the Bureau of Land Management. Both were approved by unanimous voice vote. Wilma Lewis has served as the U.S. Attorney for the District of Columbia, Inspector General for the Department of the Interior, Assistant United States Attorney for the District of Columbia, and Associate



Solicitor for the Division of General Law at the Department of the Interior. Lewis was a partner at Crowell & Moring for six years and worked for Freddie Mac from 2007 to 2008. Bob Abbey has spent 32 years in public service, including eight years as the Nevada State Director for the BLM. Abbey is credited with being the principal BLM proponent for the Great Basin Restoration Initiative, which elevated the status and funding levels for restoration activities in the Great Basin.

U.S. SUPREME COURT

Coeur Alaska Decision and the Regulation of Mine Tailings

On June 22, 2009, the Supreme Court, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council et al.*, reversed a decision of the U.S. Court of Appeals for the Ninth Circuit that had invalidated a permit issued by the Army Corps of Engineers (Corps) for the discharge of mine slurry from the Kensington gold mine near Juneau into a lake located three miles from the mine site. An overview of the *Coeur Alaska* decision was published on our website and can be accessed at <http://www.vnf.com/news-alerts-372.html>.

Nine years ago, Coeur Alaska applied for a permit to discharge tailings from the Kensington mine. On July 9, the Ninth Circuit responded to the Supreme Court’s June 22 decision by lifting an injunction on issuance of the Kensington gold mine’s tailings permit.

On July 14, the Environmental Protection Agency’s (EPA) Region 10 office, based in Seattle, sent a letter to the Corps suggesting that the discharge permit might be rescinded to require that Kensington place its tailings elsewhere. The Corps’s Anchorage office opened a 15-day public comment period on minor changes to Coeur Alaska’s Lower Slate Lake construction permit, but has not yet responded to EPA’s letter. On July 29, Senators Begich and Murkowski delivered a five-page letter to EPA Administrator Lisa Jackson conveying their strong support for the existing Kensington Corps permit and its finding that the disposal option contained therein represents the best option for the environment of Southeast Alaska.

Following the Supreme Court’s *Coeur Alaska* decision, conservation groups have pressured the Obama Administration to revise Clean Water Act regulations to prevent issuance of permits like the one issued by the Corps for Kensington. Mining reform legislation before Congress would have a similar effect, if passed.

FOR ADDITIONAL INFORMATION

Please contact our Alaska practice coordinators or any member of the practice below.

Rick Agnew*	206.829.1815	raa@vnf.com
Andrea Campbell	202.298.1991	alh@vnf.com
Howard Feldman	202.298.1828	hjf@vnf.com
John Iani	206.829.1812	lji@vnf.com
Tyson Kade	206.829.1808	tck@vnf.com
Sam Kalen	202.298.1826	smk@vnf.com



Alaska Energy & Environmental Policy Update

Alan Mintz*	202.298.1837	alm@vnf.com
Curt Moffatt	202.298.1885	jcm@vnf.com
Dan Press	202.298.1882	dsp@vnf.com
Tom Roberts	202.298.1930	tcr@vnf.com
Jonathan Simon	202.298.1932	jxs@vnf.com
Bill Van Ness	206.829.1801	bvn@vnf.com
Andrew VanderJack	202.298.1941	amv@vnf.com
Julia Wood	202.298.1938	jsw@vnf.com

** Alaska practice coordinators*

The Alaska Energy & Environmental Policy Update is intended as a general summary of major energy and environmental policy developments that we judge to be of interest to a broad range of our clients and friends. We welcome your comments and suggestions. Coverage in, and selection of topics for, the Update is not intended to reflect the position or opinion of Van Ness Feldman or any of its clients on any issue. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.

ABOUT VAN NESS FELDMAN, P.C.

With 80 lawyers and policy professionals in Washington, DC and Seattle, WA, Van Ness Feldman has a unique and significant understanding of federal and state laws, regulations, and policies that impact companies and other organizations operating in Alaska. Members of the firm have been involved in the drafting and enactment of many of Alaska's landmark federal laws or have served in a federal agency with oversight responsibility over Alaska natural resources and environment issues. This knowledge and experience, together with excellent professional relationships with the Alaska Congressional Delegation and other key policy makers in the Congress, the executive branch agencies, and the Alaska State government, make Van Ness Feldman uniquely situated to develop and implement cost-effective strategies and solutions for clients on a broad range of Alaska-related matters, from energy and natural resources development to the unique concerns of Alaska municipalities and Alaska Native organizations.

© 2009 Van Ness Feldman, P.C. All Rights Reserved.