Robin O. Brena, Esq.
Jake W. Staser, Esq.
Laura S. Gould, Esq.
Jon S. Wakeland, Esq.
Brena, Bell & Walker, P.C.
810 N Street, Suite 100
Anchorage, Alaska, 99501
Telephone: (907) 258-2000
E-Mail: rbrena@brenalaw.com
jstaser@brenalaw.com
lgould@brenalaw.com
jwakeland@brenalaw.com

Attorneys for City of Valdez, Mark Detter, Municipality of Skagway and Brad Ryan

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the	)	
	)	
2021 Redistricting Plan.	)	Case No. 3AN-21-08869 CI
	)	(Consolidated Cases)

Case No. 3VA-21-00080 CI
Case No. 1JU-21-00944 CI

REPLY TO ALASKA REDISTRICTING BOARD'S OPPOSITION TO RULE OF LAW MOTION

Plaintiffs, City of Valdez and Mark Detter and the Municipality of Skagway Borough and Brad Ryan (together "Valdez-Skagway Plaintiffs"), through their attorneys, Brena, Bell & Walker, P.C., hereby files their reply to Alaska Redistricting Board's ("ARB or Board") Opposition to East Anchorage Plaintiffs' Motion for Rule of Law.

1. Scope of Attorney Client Privilege.

The basis for opinion testimony is subject to discovery. The Record on Appeal ("ROA"), the Board members' depositions, and the Board members' affidavits is replete with opinion testimony concerning whether the 2021 Proclamation Plan ("Final Plan")

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

satisfies constitutional redistricting criteria and other legal criteria for redistricting. The Board members' extensive opinion testimony regarding these subjects was clearly based upon the opinions elicited from the technical and specialized knowledge of their consultants and counsel. The basis for the Board members' extensive opinion testimony on virtually all of the core legal constructs shaping this case should clearly be subject to discovery.

A witness may not offer opinion testimony on the record, in deposition, or in pre-filed direct testimony based, in part, upon discussions with attorneys and experts and then shield those discussions from the tribunal and opposing counsel. This is settled federal and state law in the context of administrative proceeding or at trial.

Administrative Law Judge Glazer, in *Missouri Interstate Gas, LLC,* ruled that the work product doctrine cannot shield materials considered by an expert witness offering opinion testimony. Noting that, under Rule 410(d)(i)[1], a presiding judge should look to decisions of the federal courts for guidance, Judge Glazer held:

> Federal case law holds that the underlying information provided by counsel to their expert witness may be discovered by an opposing party. As such, [the expert's] documents are discoverable to the extent that they "identify facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed" or "identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."[2]

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[1] Rule 410(d)(i) states: "[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with the decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities."

[2] *Mo. Interstate Gas, LLC,* Order Granting in Part Motion to Compel and Releasing "Enhanced Privilege Log," Docket No. CP06-407-007, at PP 6-8 (Apr. 19, 2011)

Support for Judge Glazer's approach is squarely found in *In re Pioneer Hi-Bred International, Inc.*,[3] in which the court stated that "we are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party."[4]

Likewise, in *Musselman v. Phillips*,[5] the court explained:

> Although it is not improper for an attorney to assist a retained expert in developing opinion testimony for trial . . . opposing counsel must be free during discovery to determine the nature and extent of this collaboration, in order to ascertain whether the opinion which is to be offered at trial is that of the expert, as opposed to the attorney. To hold otherwise would be an invitation for abuse, allowing the attorney to effectively construct the retained expert's opinion testimony to support the attorney's theory of the case, while blocking opposing counsel from learning of, or exposing, this influence. If permitted, this practice would seriously undermine the integrity of the truth finding process at trial.[6]

Moreover, the 2010 amendments to Federal Rule of Civil Procedure 26(b)(4)(C), adopted in Alaska Rule 26, make clear two exceptions to the work-product doctrine that provide for discovery of communications between a party's attorney and expert witness. Those

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interlocutory appeal denied, *Mo. Interstate Gas, LLC*, Order Denying Motion of Missouri Public Service Commission to Permit Interlocutory Appeal, Docket No. CP06-407-007, at P 26 (May 12, 2011) ("[T]he previous written or transcribed oral statements of a testifying witness about the facts underlying a case are fully discoverable.").

[3] *In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370, 1376 (Fed. Cir. 2001).

[4] *Id.* at 1375; *see Hardin Constr. Group v. Nat'l Union Fire Ins. Co.*, 2006 U.S. Dist. LEXIS 110015 (N.D. Ga. 2006) (citing *Pioneer Hi-Bred* and stating "documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party."); *Synthes Spine Co. L.P. v. Walden*, 232 F.R.D. 460, 460 (E.D. Pa. 2005)("[A] party must disclose all information provided to its testifying expert for consideration in the expert's report, including information otherwise protected by the attorney-client privilege or the work product privilege.").

[5] *Musselman v. Phillips*, 176 F.R.D. 194, 201 (D. Md. 1997); *see Am. Fid. Assur. Co. v. Boyer*, 225 F.R.D. 520, 522 (D.S.C. 2004) (citing *Musselman*).

[6] *Id.* at 201.

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

exceptions encompass communications that:

"(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed."[7]

The Tenth Circuit Court of Appeals has explained that "facts or data" should "be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients."[8] As another court explained, "these amendments do not alter the requirement that all facts or data considered by the expert witness in formulating his or her opinions, except for draft reports and mental impressions or theories of counsel, must be produced."[9]

It cannot be that the Board members' opinion testimony may be shaped behind closed doors by consultants' and counsels' advice that is then hidden from discovery under the guise of attorney-client privilege. Rule 26 is clear that the basis for opinion testimony is discoverable for testifying expert witnesses. The underlying concept of Rule 26 does not lose its value when applied to witnesses like the Board members who are providing extensive opinion testimony based largely upon the opinions offered to them by counsel. The applicability of Rule 26 to opinion testimony outside of the strict parameters of Rule 26 is discussed by the court in *Fletcher v. South Peninsula Hosp.*, 71 P.3d 833, 844-45 (Alaska

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[7] Fed. R. Civ. P. 26(b)(4)(C)(ii) & (iii).
[8] *In re Republic of Ecuador*, 735 F.3d 1179, 1187 (10th Cir. 2013).
[9] *Caroll Co. v. Sherwin-Williams Co.*, 2012 U.S. Dist. LEXIS 145871 at n.3 (D. Md. 2012).

2003) ("The purpose behind Rule 26, however, is still important; a defendant has a right to discover what expert testimony a treating physician will provide. Despite Rule 26's literal inapplicability, the trial court had the discretion to effectuate the Rule's basic purpose.").

Ordinarily, lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."[10] Testimony that is based upon "scientific, technical, or other specialized knowledge" may be offered "by a witness qualified as an expert" subject to the requirements of Civil Rule 26(a)(2) and Evidence Rules 702-705.

These provisions include the requirement that the expert is "required to disclose on cross-examination, the underlying facts or data" that form the basis of their opinion.[11] Moreover, under Civil Rule 26(a)(2)(B) an expert must prepare a report containing "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions." Because the members of the Board are relying on technical and specialized knowledge conveyed to them during the redistricting process, communications and materials relaying such knowledge should be produced in discovery and is not protected by the attorney client privilege

A. Overbroad Assertion of Privilege for Public Communications.

The parties anticipated issues with the scope of attorney-client privilege asserted by

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[10] Evidence Rule 701.
[11] Evidence Rule 705(a).

the Board during the initial pretrial conference for this matter. The Second Pretrial Order issued after that conference states that "the party asserting the privilege must assume the Court will be asked to review the assertion and prepare copies of the material subject to the assertion for a rapid *in camera* review."[12] The Board has identified 2,425 communications as confidential including numerous communications where no attorney sent or received the communication. Such an over-broad designation of the public process underlying redistricting as protected by the attorney-client privilege is an unfortunate abuse of the open public process in which redistricting is intended to occur. Generally, the Board appears to have designated all communications to which counsel was copied as attorney-client privileged regardless of the content of the communication. The Board's broad application of attorney-client privilege to communications is contrary to the Alaska Supreme Court's holding that "as with all exceptions to the public records act, the attorney-client and work product privileges should be construed narrowly to further the legislature's goal of broad public access."[13]

As the Ninth Circuit has noted, "The fact that a person is a lawyer does not make all communications with that person privileged."[14] In evaluating whether a communication should be protected, this Court should first bear in mind that the privilege should be narrowly construed in this constitutional redistricting process. The Ninth Circuit applied the typical eight-part test in determining whether information is covered by the attorney-

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[12] Second Pretrial Order at 7 (December 21, 2021).
[13] *Griswold v. Homer City Council*, 428 P.3d 180, 188 (Alaska 2018).
[14] *U.S. v. Ruehle*, 583 F.3d 600, 607 (2009).

client privilege: (1) where legal advice is sought; (2) from a professional adviser in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal adviser; and (8) unless the protection is waived.[15]

In the case of the 2,425 emails, many of these standards seem unlikely to have been met. To cite a few examples, as noted by the Alaska Supreme Court, the confidential communication must be "for the purpose of facilitating the rendition of professional legal services for the client."[16] This roughly equates to factor three considered by the Ninth Circuit above. There is little support that many of these emails were for the purpose of facilitating the rendition of legal services. Simply copying your attorney with a communication among third-parties or among clients certainly does not met this standard. Also, the broad distribution of several of these emails speaks against the intention to keep them secret from anyone but Plaintiffs. Finally, it must be evaluated if the privilege concerning these communications has been waived by distribution to someone other than a client or by revealing parts but not all of the communications to third-parties. Certainly, under the circumstances of this case, this Court should conduct an *in-camera* review of these emails and ensure that, given the narrow application of the attorney-client privilege under the circumstances of redistricting, each of these 2,425 emails meets each of the eight standards articulated by the Ninth Circuit above.

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[15] *Id.*

[16] *Blackmon v. State*, 653 P.2d 669, 671 (Alaska 1982).

B. Open Meetings Act Violations.

The Board has also applied an overly broad interpretation of the attorney-client privilege exception to the Open Meetings Act ("OMA") and otherwise failed to comply with OMA requirements. The OMA provides, in relevant part:

> The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.[17]

The attorney-client privilege exception to the OMA is not appropriate for "the mere request for general legal advice or opinion by a public body in its capacity as a public agency."[18] Counsel for the Board acknowledges this during the November 3, 2021, meeting when he stated: "If [Board at any point] wants to talk about specific, you know, Here's our idea for this district, Counsel, what do you think, I think it would be appropriate to have an executive session to talk about a specific -- to give you specific advice about a plan. But I thought general advice about what the law says is [appropriate for open session]."[19]

The attorney-client privilege exception to the OMA is limited to "consideration of pending litigation."[20] As the Supreme Court has stated:

> The privilege should not be applied blindly. It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[17] AS 44.62.310(b).

[18] *Cool Homes, Inc. v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1261-62 (Alaska 1993) (quoting *Minneapolis Star & Tribune Co. v. The Hous. & Redevelopment Auth. Minneapolis*, 246 N.W.2d 448, 454 (Minn. 1976)).

[19] Exhibit A at 40-41 (Board Meeting Transcript Excerpts).

[20] *Cool Homes*, 860 P.2d at 1261.

> the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies.[21]

There was no pending litigation when the Board was engaged in the public process of drawing house districts. It was not possible to discuss legal strategies concerning litigation, which did not exist. The mere potential for future litigation does not support the misuse of the public process. Even if there were pending litigation, the well-settled case law demands a narrow application of the attorney-client privilege exception to the OMA. Even counsel for the Board seems to acknowledge that general legal advice is not properly subject to executive session. Nonetheless, the Board repeatedly entered into executive session to receive general legal advice. On September 7, 2021, before the Board shared any maps with the public, the Board entered executive session "for the purposes of receiving legal advice under Alaska Statute 44.62.310(c)(4) for matters involving consideration of government records set by a law are not subject to public disclosure."[22]

The Board routinely violated the OMA by (1) failing to identify with specificity the topic of discussion in executive session; (2) entering executive session for the purpose of seeking general legal advice, which is not attorney-client privileged;[23] and (3) making substantive redistricting decisions in executive session when the deliberative process underlying such decisions are required to be made in an open meeting. The massive

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[21] *Id*. at 1262.
[22] Exhibit A at 7.
[23] *Cool Homes*, 860 P.2d at 1261-62 (quoting *Minneapolis Star & Tribune Co. v. The Hous. & Redevelopment Auth. Minneapolis*, 246 N.W.2d 448, 454 (Minn. 1976) ("The exception is not appropriate for "the mere request for general legal advice or opinion by a public body in its capacity as a public agency.").

designation of emails many of which are not even directed to the attorney fails these standards.

In the first executive session concerning drawing the house districts on September 7, 2021, the Board went into executive session "to receive legal advice from Matt Singer, legal counsel, to inform the process and direction moving forward."[24] One cannot imagine a discussion more suited to an open meeting. Upon exiting, Chair Binkley stated: "We had an opportunity in Executive Session to hear from legal counsel regarding a discussion on some of the previous opinions when it comes to the different criteria for the Board to consider in drawing the district boundaries."[25] Clearly, the general legal standards applied to the redistricting process should have been discussed in open session. Without an open session, the public may have no insight into even the basic legal framework relied upon by the Board to guide the deliberative process. Frankly, it would not even be clear that the public process was being properly guided based on appropriate legal authority.[26] The discussion that was held in executive session was clearly related to general legal advice not protected by the attorney-client privilege. Further, counsel for the Board provided a lengthy summary of what was discussed during the executive session in open session, which constitutes a waiver of any attorney-client privilege that could have

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[24] September 7, 2021, Minutes.
[25] Exhibit A at 9.
[26] Member Borromeo also observed on September 9, 2021, "Yesterday, we wasted -- maybe not wasted. We ate up a lot of time in executive session talking about procedural issues that maybe didn't need to be done in executive session and eating lunch." Sept. 9, 2021 Tr. 115.

been properly asserted.[27]

The Board's practice was to enter executive session by merely reciting the statutory language of the OMA,[28] which it did on September 7, November 2, November 3, November 4, and twice on November 5. Reciting the statutory language of AS 44.62.310(c) does not satisfy the statutory requirement that the Board "clearly and with specificity describe the subject of the proposed executive session."[29] On other occasions the Board entered executive session for the broad purpose of obtaining "legal advice" without providing any description of the subject matter to be discussed in executive session.[30]

The Board also scheduled executive sessions in regular intervals rather than wait for some specific need for executive session to arise and then entering executive session. This practice appears to have resulted in substantive redistricting discussions in executive session when they should have occurred in public. For example, on November 4, 2021, the Board scheduled an executive session at a set time despite counsel's statement that it was "premature" and that "[i]f I see a decision on which I would like to share legal advice with you, I'll suggest that we have an executive session."[31]

On November 4, 2021, shortly before entering executive session, the Board was engaged in substantive discussions regarding what district Valdez should be placed and

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

27 Exhibit A at 9-13.
28 Exhibit A at 7, 17-27, 43, 54, 66, 74.
29 AS 44.62.310(b).
30 Exhibit A at 80, 89.
31 *Id*. at 46.

had yet to reach consensus.[32] The Board entered executive session around 11:00 a.m. as scheduled. After reconvening in open session at approximately 1:00 p.m., the Board immediately began discussing areas of consensus. Specifically, the transcript for that meeting reflects the following colloquy:

> CHAIR BINKLEY: we're back on the record and out of executive session. It's just a little after 1:00. I think we've been working on Anchorage. Did we wrap up (indiscernible)? Did we wrap up? Kenai? I think we got consensus on that?
>
> MEMBER BORROMEO: We did, Mr. Chairman. Yes, we did.
>
> CHAIR BINKLEY: So really, the only area left is -- and we got the VRA districts. I think we're in consensus there.
>
> MEMBER BORROMEO: I think we just have to do formal action on that, but we're in consensus on that, too.
>
> MEMBER BAHNKE: Valdez?
>
> CHAIR BINKLEY: Well, yeah. I mean, all those pieces fit together, really. But maybe the area we really haven't gone into much detail on this morning is Anchorage. So shall we go into Anchorage?
>
> MEMBER BORROMEO: Sure.
>
> CHAIR BINKLEY: (Indiscernible) consensus
>
> MEMBER MARCUM: Yeah.

Under the OMA, the Board is not permitted to conduct substantive deliberations regarding how to draw district boundaries in executive session,[33] yet this is precisely what appears to have occurred.

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

[32] *Id*. at 50-51.

[33] *Cool Homes*, 860 P.2d at 1260.

C. Obfuscation of VRA Analysis.

Importantly, the attorney-client privilege has been asserted to shield information regarding Voting Rights Act ("VRA") analysis, including when such analysis was conducted or made available to the Board. Communications regarding VRA data and analysis have been withheld as privileged and the Board "had extensive discussion and presentation by our Voting Rights Act experts" in executive session.[34] The Board's assertion of attorney-client privilege regarding VRA analysis and information improperly obfuscates VRA information that should be made publicly available.

This information is critical to determine whether the Board complied with the *Hickel* process and is not within the scope of any OMA exception.[35] Moreover, any attorney-client privilege that may have been properly asserted is waived by virtue of counsel's subsequent public summary of what was purportedly an attorney-client privileged discussion.

I. CONCLUSION

For the foregoing reasons and the reasons set forth in the East Anchorage Plaintiffs'

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[34] Exhibit A at 18.

[35] *In re 2011 Redistricting Cases*, 274 P.3d 466, 467-68 (Alaska 2012) ("The *Hickel* process provides the Board with defined procedural steps that, when followed, ensure redistricting satisfies federal law without doing unnecessary violence to the Alaska Constitution. The Board must first design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socioeconomic integration; it may consider local government boundaries and should use drainage and other geographic features in describing boundaries wherever possible. Once such a plan is drawn, the Board must determine whether it complies with the Voting Rights Act and, to the extent it is noncompliant, make revisions that deviate from the Alaska Constitution when deviation is "the only means available to satisfy Voting Rights Act requirements.") (citing *Hickel v. Southeast Conference*, 846 P.2d 38, 51 n.22 (Alaska 1992)).

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

Motion for Rule of Law Regarding Scope of Attorney-Client Privileged Communications with Government Entities and the Matanuska-Susitna Borough Plaintiffs' joinder thereto, Valdez-Skagway Plaintiffs request that the Court issue an order requiring that all privileged materials identified by the Board be immediately provided to this Court for *in camera* review. In addition, Valdez-Skagway Plaintiffs request an order permitting examination of witnesses regarding subject matter discussed in executive session to the extent the subject matter is not properly subject to the narrow exceptions of the OMA.

DATED this 14th day of January, 2021.

BRENA, BELL & WALKER, P.C.
Attorneys for the City of Valdez, Mark Detter, Municipality of Skagway, and Brad Ryan

By //s// *Robin O. Brena*
Robin O. Brena, ABA No. 8511130
Jake W. Staser, ABA No. 1111089
Laura S. Gould, ABA No. 0310042
Jon S. Wakeland, ABA No. 0911066

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing document was e-mailed to the following attorneys/parties of record this 14th day of January, 2021:

Attorneys for Alaska Redistricting Board
Matt Singer, Esq.
Lee Baxter, Esq.
Schwabe, Williamson & Wyatt
E-Mail: msinger@schwabe.com
lbaxter@schwabe.com

Attorneys for Matanuska-Susitna Borough and Michael Brown
Stacey C. Stone, Esq.
Gregory Stein, Esq.
Holmes Weddle & Barcott, P.C.
Email: sstone@hwb-law.com
gstein@hwb-law.com

Attorneys for Felisa Wilson, George Martinez, and Yarrow Silvers
Holly C. Wells, Esq
Mara E. Michaletz, Esq.
William D. Falsey, Esq.
Birch Horton Bittner & Cherot
Email: hwells@bhb.com
mmichaletz@bhb.com
wfalsey@bhb.com

Attorneys for Calista Corporation, William Naneng, and Harley Sundown
Eva R. Gardner, Esq.
Michael S. Schechter, Esq.
Benjamin J. Farkash, Esq.
Ashburn & Mason, P.C.
Email: eva@anchorlaw.com
mike@anchorlaw.com
ben@anchorlaw.com

Attorneys for Intervenor Doyon Limited et al.
Nathaniel Amdur-Clark, Esq.
Whitney A. Leonard, Esq.
Sonosky, Chambers, Sachse, Miller & Monkman, LLP
Email: nathaniel@sonosky.net
whitney@sonosky.net

Attorney for the State of Alaska
Thomas. S. Flynn, Esq.
State of Alaska Department of Law
Email:
thomas.flynn@alaska.gov

//s// Mary G. Hodsdon
Mary G. Hodsdon

BRENA, BELL & WALKER, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Phone: (907) 258-2000
Facsimile: (907) 258-2001