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MEMORANDUM

April 28, 2022

SUBJECT: Ownership of certain submerged land
(HB 397; Work Order No. 32-GH2561\A)

TO: Representative Geran Tarr
Chair of the House Special Committee on Fisheries
Attn: Thatcher Brouwer

FROM: Alpheus Bullard 
Legislative Counsel

Mr. Brouwer asked whether HB 397 raises legal issues under federal law. For the reasons explained below, I do not believe it does.

This bill adds a new section to AS 38.04, AS 38.04.063, that provides a statement of the state's position as to whether it owns certain submerged land beneath navigable water within and adjacent to certain federal areas in the state.¹ The bill also places a list of certain related submerged lands beneath certain navigable waters into state law and requires the Department of Natural Resources (department) to provide a report to the legislature containing additional submerged lands that the department determines should be added to the statutory list.

It is not clear what effect a statutory claim that the state owns submerged land beneath navigable water within and adjacent to certain federal areas in the state might have. A claim in state law that a body of water is navigable will not bind the federal government.²

¹ The bill also conforms existing AS 38.04.062(a) to include the same legal claim. This claim is not inconsistent with the applicable law that a state generally holds title to the land underlying navigable rivers within its boundaries. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1403 (9th Cir. Alaska 1989) (citing *Utah v. United States*, 482 U.S. 193, 196 (1987)).

² The United States Supreme Court has stated:

Some States have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river, granted and vesting before statehood, depends for its validity on

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If there is a conflict with the federal government over the ownership of submerged land claimed by the state under the bill, ownership of the land will be determined on a case-by-case basis under federal law.³ If the state and federal government have competing claims of ownership in a parcel of submerged land, the state may bring an action to quiet title.⁴

That said, sec. 9 of the bill provides that the state's claim to the affected submerged land is retroactive to January 3, 1959. The legal consequences of this retroactivity are not clear. A retroactive statute is "one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute."⁵ The intended scope and purpose of providing retroactive application to the bill may be important to clarify.

If you have questions, do not hesitate to contact me.

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non-navigability of the stream in fact. In such a case, navigability [or not] is not a local question.

Brewer-Elliott Oil and Gas Co. v. United States, 260 U.S. 77, 89 (1922).

³ Again, it is a federal question whether a body of water is navigable. *Alaska v. Ahtna, Inc.*, 891 F.2d at 1401 (citing *United States v. Holt State Bank*, 270 U.S. 49, 55 - 56 (1926)).

⁴ A quiet title action is a means for determining the extent of competing claims in property. See, e.g., *Alaska v. United States*, 545 U.S. 75 (U.S. 2005) (Alaska filed a quiet title action against the United States relating to certain submerged lands in Southeast Alaska); 28 U.S.C. 2409a(a) (Real property quiet title actions).

⁵ *Norton v. ABC Board*, 695 P.2d 1090 (Alaska 1985) (citing Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960)).