

Representative Mike Hawker

Alaska State Legislature



House Concurrent Resolution 10 Sponsor Statement

Session:

State Capitol
Juneau, AK 99801
907 465-4949 direct
800 478-4950 toll free
907 465-4979 fax

Interim:

716 W 4th Avenue
Anchorage, AK 99501
907 269-0244 office
907 269-0248 fax

House District 32:

Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

“Urging the Governor to file an action to restrain the United States Department of the Interior, National Park Service, from intruding on the sovereign right of the state to exercise jurisdiction over navigable water and submerged land and urging the Governor to allocate sufficient resources to the Department of Law, the Department of Natural Resources, and the Department of Fish and Game to defend the state's right to manage the public use of its navigable water.”

The State of Alaska owns and has the right to manage submerged land and navigable water in the state, unless Congress has specifically limited the state's authority. However, due to federal action, Alaska is quickly losing one of its most valuable assets and Alaskans are losing the ability to access these resources.

Starting in 1996, the United States Department of the Interior, National Park Service, began regulating public use of Alaska's navigable waterways. In the past 12 years, despite the state's continued protest and efforts to administratively address this problem, Alaskans' right to access and use Alaskan land has been eroded.

House Concurrent Resolution 10 reaffirms our sovereignty and asks for the governor to file suit to protect our citizens from this inappropriate preemption of our state's rights. We must take action now to ensure that our right to manage our resources, as guaranteed by Alaska's Constitution, and both federal and state law, is protected.

AMENDMENT

OFFERED IN THE HOUSE

TO: HCR 10

- 1 Page 2, line 17, following “by the state,”
- 2 Delete “issuing citations to placer miners that have valid state permits,”
- 3
- 4 Page 2, line 25, following “the Governor to”
- 5 Delete “file suit against the United States Department of the Interior, National Park
- 6 Service,”
- 7 Insert “pursue all available legal options”

HOUSE CONCURRENT RESOLUTION NO. 10
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES HAWKER, Stoltze, Lynn, Coghill, Kelly

Introduced: 2/27/09

Referred: Resources

A RESOLUTION

1 **Urging the Governor to file an action to restrain the United States Department of the**
2 **Interior, National Park Service, from intruding on the sovereign right of the state to**
3 **exercise jurisdiction over navigable water and submerged land and urging the Governor**
4 **to allocate sufficient resources to the Department of Law, the Department of Natural**
5 **Resources, and the Department of Fish and Game to defend the state's right to manage**
6 **the public use of its navigable water.**

7 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

8 **WHEREAS**, under the equal footing doctrine, the Alaska Statehood Act, and 43
9 U.S.C. 1301 - 1315 (Submerged Lands Act of 1953), the state assumed ownership of all
10 submerged land of navigable waterways within the boundaries of the state and all land
11 permanently or periodically covered by tidal water between the line of mean high tide and
12 seaward to a line three geographical miles from the coastline of the state, except for
13 submerged land specifically reserved by the United States Congress; and

14 **WHEREAS** the state acquired full power and control over the navigable water of the

1 state for use of watercraft, placer mining, recreation, commerce, and many other public uses,
2 regardless of the upland ownership, except where the United States Congress specifically
3 limited the state's authority; and

4 **WHEREAS** the Constitution of the State of Alaska, state statutes, and state
5 regulations clearly address and reiterate state ownership of and the power of the state to
6 manage its submerged land and navigable water, and the people of the state have free and
7 unrestricted access unless restricted by state law; and

8 **WHEREAS** the Alaska National Interest Lands Conservation Act clearly states that
9 regulations adopted for the management of conservation system units such as national parks
10 apply only to federal land within those units; and

11 **WHEREAS** the United States Department of the Interior, National Park Service,
12 began regulating public use of navigable waterways in 1996 and thereby usurped the state's
13 sovereign management of the public use of those navigable waterways; and

14 **WHEREAS**, as a result of its incursion on state authority, the United States
15 Department of the Interior, National Park Service, has directly affected the people of the state
16 in a number of ways, including prohibiting the use of certain types of watercraft that are
17 authorized by the state, issuing citations to placer miners that have valid state permits,
18 requiring commercial riverboat operators and dog mushing tours to secure federal permits,
19 and restricting the methods and means used in the recreational and subsistence fisheries; and

20 **WHEREAS** the United States Department of the Interior, National Park Service,
21 continues to expand the restrictions on the public use of navigable water of the state, thereby
22 voiding the state's legitimate authority and jurisdiction; and

23 **WHEREAS** the state has tried unsuccessfully for 12 years to resolve administratively
24 the issue of state authority over submerged land and navigable water;

25 **BE IT RESOLVED** that the Alaska State Legislature urges the Governor to file suit
26 against the United States Department of the Interior, National Park Service, to restrain the
27 United States Department of the Interior, National Park Service, from intruding on the
28 sovereign right of the state to exercise jurisdiction over submerged land and navigable water;
29 and be it

30 **FURTHER RESOLVED** that the Alaska State Legislature urges the Governor to
31 allocate adequate resources to the Department of Law, the Department of Natural Resources,

- 1 and the Department of Fish and Game to defend and advocate for the state's right to manage
- 2 the public use of its navigable water.

FISCAL NOTE

STATE OF ALASKA
2009 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: **HCR 10**
 () Publish Date: _____

Identifier (file name): _____ Dept. Affected: _____
 Title OPPOSE FED. CONTROL OF STATE LAND & WATER RDU _____
 Sponsor REPRESENTATIVE HAWKER, Stoltze, Lynn, Coghill Component _____
 Requester _____ Component Number _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2010	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
OPERATING EXPENDITURES								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES								
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CHANGE IN REVENUES ()								
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2009) cost: _____

POSITIONS

Full-time								
Part-time								
Temporary								

ANALYSIS: (Attach a separate page if necessary)

Prepared by: House Resources Committee Phone 465-3715
 Division: _____ Date/Time: _____
 Approved by: Representative Craig Johnson, Co-Chair Date 3/30/2009
House Resources Committee

STATE OF ALASKA

CITIZENS' ADVISORY COMMISSION ON FEDERAL AREAS

*SARAH PALIN,
Governor*

*3700 AIRPORT WAY
FAIRBANKS, ALASKA
99709*

*PHONE: (907) 374-3737
FAX: (907) 451-2751*

February 13, 2009

Richard Svobodny
Acting Attorney General
State of Alaska
Department of Law
P.O. Box 110300
Juneau, Alaska 99811-0300

Dear Mr. Svobodny:

In 1996, over the strong objections of the State of Alaska and others, the National Park Service adopted regulations which improperly extended its management and enforcement authorities over state owned navigable waters within units of the National Park System. While the agency has been fairly restrained in its enforcement of the regulations, there have been a growing number of encounters between National Park Service rangers and the public. It is our understanding that one citation has been issued and commercial operators have been required to get permits to operate on the Yukon River within the Yukon Charley Rivers National Preserve, even though they do not use the upland areas of the preserve.

The regulations at 36 CFR §1.2(a)(3) state that National Park Service regulations apply to waters located within the boundaries of the National Park System, including navigable waters, "without regard to ownership of submerged lands, tidelands or lowlands." This is contrary to ANILCA Section 103(c) which clearly states that only public lands are included as a portion of a conservation system unit and that state or private lands are not subject to the regulations applicable solely to public lands within such units. As defined by ANILCA, public lands do not include State owned lands, including the submerged lands beneath navigable waters.

In publishing its rulemaking the Park Service classified Section 103(c) as a "minor technical provision." To the contrary, addition of this section was a key revision included in the concurrent resolution that led to the final passage of ANILCA. Section 103(c)

clearly indicates that Congress recognized that the authority of the State to regulate its lands and waters was not to be superseded by federal agency regulations.

Since adoption of the regulations the State of Alaska, through your office and the ANILCA Program, has worked to find an administrative solution to this issue. While the National Park Service generally does not dispute state ownership of submerged lands underlying navigable waters, it maintains that the NPS Organic Act and other general statutory authorities grant it the necessary authority to regulate activities on navigable waters.

In view of the National Park Service position, it appears that there can be no administrative solution to this issue. Therefore, under the authority granted by AS 41.37.240, the Citizens' Advisory Commission on Federal Areas respectfully requests the Department of Law bring suit against the National Park Service and ask the court to set aside these regulations.

We should note that Senator Bunde and Senator Therriault have introduced Senate Concurrent Resolution (SCR) No. 3 which urges the Governor to file suit challenging these regulations. The Commission fully concurs with that resolution.

We believe that this action is in the best interest of the State and is necessary to protect the State's authorities over its lands and waters. The Commission is committed to providing any help and support it can in this matter. Please contact us if we can be of assistance.

Sincerely,



Rick Schikora
Chairman

Cc: Gov. Palin
Sen. Gary Stevens
Sen. Con Bunde
Sen. Gene Therriault
Rep. Mike Chenault
Comm. Tom Irwin
Comm. Denby Lloyd



Division of Mining, Land & Water

Alaska Department of Natural Resources

[State of Alaska](#) > [Natural Resources](#) > [Mining, Land & Water](#)

Navigability Program

- † [PAAD Notice regarding Director's Chuitna Report, Chuitna Field Trip Report](#)
 - [Director's Chuitna Report \(04/04/08\)](#)
 - [Chuitna Field Trip Report \(09/08/08\)](#)

The mission of the Division of Land's Navigability Project is to protect the public rights associated with navigable and public waters, and to ensure that the state's title to lands beneath navigable waters is protected. The Alaska State Constitution provides for free access and common use of public and navigable waters by any citizen of the United States or resident of the State of Alaska. State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution.

The Division's Navigability Project will enable the State of Alaska to assert ownership of lands beneath navigable waters. This is important for two reasons: first, the public will be ensured access to these state lands; and second, if these lands are already owned by the State of Alaska, they shouldn't be counted against Alaska's statehood land entitlement or conveyed by the Federal Government to non-state ownership.

Contact:

Scott Ogan
Natural Resource Manager II
Department of Natural Resources
Division of Mining, Land & Water
Phone: (907) 269-5515
E-mail: scott_ogan@dnr.state.ak.us
Fax: (907) 269-5043

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Division of Mining, Land & Water

Alaska Department of Natural Resources

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State Policy on Navigability

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Policies and Procedures on Ownership and Management of Navigable and Public Waters

June 18, 1996 State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution. *Utah v. United States*, 482 U.S. 193 (1987). Under the doctrine, all states enter the Union on an equal footing with respect to sovereign rights and powers, title to the beds of navigable waters in Alaska vested in the newly formed State of Alaska in 1959. In addition, under the Alaska Constitution and the public trust doctrine, all waters in the state are held and managed by the state in trust for the use of the people, regardless of navigability and ownership of the submerged lands under the Equal Footing Doctrine.

The purpose of this paper is to describe the State of Alaska's policies and procedures for identifying and protecting the state's title to the beds of navigable waters. In addition, this paper outlines the legal and policy considerations which guide the ownership and management of submerged lands and public waters.

I. IDENTIFYING AND PROTECTING STATE TITLE TO THE BEDS OF NAVIGABLE WATERS

Identification and management of the beds of navigable waters is an important policy of the State of Alaska. In 1980, the state established a comprehensive navigability program to respond to federal land conveyances and land management activities under the Alaska Statehood act, the Alaska Native Claims Settlement Act (ANCSA), and the Alaska National Interest Lands Conservation Act (ANILCA). Pursuant to the provisions of those acts, the federal government has issued navigability determinations for thousands of lakes, rivers, and streams throughout the state in an effort to determine whether the state or federal government owns the submerged lands. Navigability determinations are also made prior to many state land disposals to insure that adequate public use easements are reserved.

The basic purpose of the state's program is to protect the public rights associated with navigable waters, including, in particular, the state's title to the submerged lands. Because state and native land selections and federal conservation units blanket the state, navigability questions have arisen for rivers, lakes, and

streams throughout Alaska. The navigability of many of those waterbodies has already been established. There are hundreds of others, however, where navigability is not yet determined.

To help resolve these navigability disputes, a major goal of the state's navigability program is to identify the proper criteria for determining title navigability in Alaska and to gather sufficient information about the uses and physical characteristics of individual waterbodies so that accurate navigability determinations can be made as disputes arise. Other important aspects of the program include monitoring federal land conveyance and management programs to identify particular navigability disputes, seeking cooperative resolution of navigability problems through negotiations and legislation, and preparing for statewide navigability litigation.

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RIPARIAN RIGHTS AND STATUTE OF LIMITATIONS

Disputes over ownership of submerged lands in Alaska have arisen under a variety of circumstances. The principal source of the disputes in Alaska is the survey and acreage accounting system used by the federal government for conveying land to the state and native corporations.

The standard procedures for surveying and conveying federal land are found in the Manual of Instructions for the Survey of the Public Lands of the United States, generally known as the BLM Manual of Surveying Instructions. Under those procedures, consistently used in every public land state except Alaska, only uplands are surveyed and conveyed in fulfillment of acreage entitlements, not submerged lands. The survey rules require that all lakes 50 acres or larger, and rivers and streams three chains (198 feet) in width or wider, regardless of navigability, be meandered and segregated (excluded) from the surveyed public lands. Only the surveyed uplands are conveyed. The acreage of meandered rivers, lakes, and streams is not included in computing the amount of land involved in the conveyance.

In Alaska, however, the federal government had not consistently followed these survey rules. Until 1983, the federal government treated submerged lands the same as uplands. All bodies of water that were considered non-navigable by the federal government, regardless of size, were surveyed as though they were uplands and the acreage of submerged lands was charged against the total acreage entitlement.

Because of these conveyance procedures, the navigability of waterbodies in Alaska has been an issue of contention since the enactment of the Alaska Statehood Act and ANCSA. In addition to the problems caused by a lack of information about many waterbodies, the situation was exacerbated by the narrow definition of navigability used by the federal government. Hundreds of rivers, lakes, and streams considered navigable by the state were determined non-navigable by the federal government.

In 1983, following years of negotiations, lawsuits and legislative attempts to solve the navigability problems created by the unusual survey and conveyance procedures in Alaska, the State of Alaska, the United States Department of the Interior and the Alaska Federation of Natives (AFN) agreed that the standard rules of survey should be followed for land conveyances in Alaska. The effect of that decision was to treat Alaska surveys and land conveyances like federal land surveys and conveyances in other states. The recipients of conveyances from the federal government are charged only for the amount of public land that is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams.

The use of these survey procedures has eliminated many of the problems associated with the federal land conveyance programs in Alaska. Submerged lands are no longer being conveyed to fulfill acreage entitlements. With the exception of lakes smaller than 50 acres and streams narrower than 198 feet, navigability determinations are no longer being made prior to federal land conveyances. Determinations of ownership of submerged lands can be put off until a natural resource use or conflict requires resolution, such as issuance of an oil and gas lease, mining claim, or a gravel sale.

Through the joint efforts of the State of Alaska, AFN, and the Department of the Interior, the 1983 decision to use the standard survey procedures for land conveyances in Alaska was legislatively approved in August 1988 when the United States Congress passed legislation (94 Stat. 2430) amending Section 901 of the Alaska National Interest Lands Conservation Act, codified at 43 U.S.C. 1631. The 1988 amendment, sometimes referred to as the Alaska Submerged Lands Act, requires that the standard rules of survey in the BLM Manual of Surveying Instructions be used for all federal surveys under the Alaska Statehood Act and ANCSA. The 1988 amendment also repealed the Section 901 statute of limitations that would have required the state to file a lawsuit within a very short period of time in order to preserve its title to the beds of

navigable waters conveyed to native corporations by the federal government as a result of erroneous navigability determinations, poor maps, surveys or whatever. Even with this legislation, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are the hundreds of erroneous non-navigability decisions and the resulting submerged land conveyances made to ANCSA corporations in previous years. In addition, to comply with the meandering requirements of the BLM Survey Manual, the federal government is still required to make navigability determinations for lakes smaller than 50 acres and rivers or streams narrower than 198 feet in width to determine if these waters must be meandered.

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NAVIGABILITY CRITERIA

The greatest hurdle to overcome in the state's efforts to identify and manage navigable waters has been the long-standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability. Navigability is a question of fact, not a simple legal formula. Variations in waterbody use that result from different physical characteristics and transportation methods and needs must be taken into account. There are many legal precedents for determining navigability in other states based upon the particular facts presented in those cases. In Alaska, though, we are just beginning to get the final court decisions that are necessary to provide legal guidance for accurate navigability determinations.

The physical characteristics and uses of a waterbody used by the state for asserting navigability, commonly referred to as navigability "criteria", are based upon legal principles that have been established by the federal courts. These criteria are applied to rivers, lakes, and streams throughout the state and take into account Alaska's geography, economy, customary modes of water-based transportation, and the particular physical characteristics of the waterbody under consideration.

The federal test for determining navigability was established over a hundred years ago. In the landmark decision of *The Daniel Ball*, 77 U.S. (19 Wall.) 557, 563, (1870), the Supreme Court declared:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Although *The Daniel Ball* test is accepted as the correct standard for determining navigability, there has been a lot of disagreement over application of many of the terms and phrases used in *The Daniel Ball* test to the specific uses of Alaska's lakes, rivers and streams. The State of Alaska uses the following interpretation of that test as the basis for its navigability program.

The Waterbody Must Be Usable As a Highway For the Transportation of People or Goods. Interpreting the requirements that navigable waterbodies be used or usable as "highways of commerce", the courts have ruled that the central theme of title navigability is that the waterbody be capable of use as a highway which people can use for transporting goods or for travel. Neither the types of goods being transported nor the purpose of the travel are important in determining navigability. Transportation on water associated with recognized commercial activities in Alaska, such as mining, timber harvesting, and trapping is, evidence of navigability. The use of waterbodies for transportation in connection with natural resources exploration or development, government land management, management of fish and game resources, or scientific research is also evidence of navigability. Travel by local residents or visitors for the purpose of hunting, fishing, and trapping, or as a means of access to an area can be used to establish navigability. The same holds for recreational transportation, including personal travel and professionally guided trips.

Waters Which Are Capable of Being Used For Transporting Persons and Goods, Although Not Actually Used, Are Navigable. It is not necessary that a waterbody be actually used for transportation to be found navigable. It is enough that it is susceptible, or physically capable, of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth, and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable.

The susceptibility element of title navigability is very important for the identification of navigable waterbodies in Alaska. Because of Alaska's sparse population and lack of development, there are hundreds

of remote rivers, lakes, and streams where there is little or no evidence of actual use. Because of their physical characteristics, however, many of these remote waterbodies could be used for transporting people or goods if there was a need. Under these circumstances, they are considered legally navigable.

Transportation Must Be Conducted In the Customary Modes of Trade and Travel On Water. A finding of navigability does not require use or capability of use by any particular mode of transportation, only that the mode be customary. The courts have held that customary modes of transportation on water include all recognized types and methods of water carriage. Unusual or freak contrivances adapted for use only on a particular stream are excluded. Customary modes of trade and travel on water in Alaska include, but are not limited to, barges, scows, tunnel boats, flat-bottom boats, poling boats, river boats, boats propelled by jet units, inflatable boats, and canoes. In places suitable for harvesting timber, the flotation of logs is considered a customary mode of transportation.

The mode of travel must also be primarily waterborne. Boats which may be taken for short, overland portages qualify. The courts have ruled that the use of a lake for takeoffs and landings by floatplanes is insufficient, in and of itself, to establish navigability.

Without expressly rejecting the claim, at least two court decisions in Alaska have suggested that winter travel on the surface of a frozen river or lake is probably not evidence of navigability. The rivers involved in the two adjudicated cases were both found navigable based upon summer use by boats, however, and it appears likely that most waterbodies in Alaska that are used as highways in winter can also be travelled by at least small boats in the summer. Because of this, the state need not rely upon winter travel to support navigability.

Waters Must Be Navigable In Their Natural and Ordinary Condition. A waterbody which can be used for transportation only because of substantial man-made improvements to the condition of the watercourse is not navigable for title purposes. However, if transportation does or could occur on the waterbody even without the improvements and the improvements would only make transportation easier or faster or possible for larger boats (e.g., dredging), it is still considered navigable for title purposes.

The presence of physical obstructions to navigation (rapids, falls, log-jams, etc.) does not render a waterway non-navigable if the obstruction can be navigated despite the difficulties or if the obstruction can be avoided by other means, such as portaging, lining, or poling. A waterbody is also navigable even if seasonal fluctuations do not allow it to be navigated at all times of the year. However, a waterbody which is only navigable at infrequent and unpredictable periods of high water is not normally considered navigable. The fact that a waterbody may be frozen for several months of the year does not render it non-navigable if it is navigable in its unfrozen condition.

Title Navigability Is Determined As Of The Date Of Statehood. To be considered navigable for title purposes, the waterbody must have been navigable in 1959 (when Alaska became a state). This element of the navigability test focuses on the physical characteristics of the waterbody and whether those characteristics have changed significantly since statehood. Most waterbodies have not physically changed enough since statehood to alter their navigability. Assuming there have been no significant changes in the physical characteristics of the waterbody, a waterbody that is navigable today would be considered legally navigable in 1959 as well. Exceptions might include the creation, by natural or man-made causes after statehood, of a totally new lake, river, or canal now used for navigation. Such a waterbody would not be considered navigable for title purposes. Conversely, a waterbody which was navigable in 1959 but, because of natural or man-made physical changes, is no longer navigable in fact would still be considered navigable for title purposes.

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NAVIGABILITY CRITERIA DISPUTES

Because of differing legal interpretations of court navigability decisions, several aspects of the criteria used by the state to determine navigability have been disputed by the federal government. As a direct result of these criteria disputes, many waterbodies considered navigable by the state have been determined non-navigable by the federal government.

The major criteria dispute has been over the type or purpose of the transportation required to establish navigability. The federal government has asserted that a waterway must be used, or capable of use, for transporting commerce to be considered navigable. Other, "noncommercial" transportation uses are not

considered sufficient to establish navigability. In this context, the federal government has claimed that the only relevant "commercial" transportation is the distribution of goods for sale or barter, or the transportation for hire of people or things. The federal government has admitted that professionally guided transportation on Alaska's rivers, lakes and streams constitutes commerce, but nevertheless has argued that the waters are not being used as a navigable "highway" when recreation is involved, but rather more as an amusement park. The federal government has therefore claimed that waters used only for commercial recreation are legally nonnavigable even though they may be navigable in fact.

Through the work of the state's navigability program, this definition has been repeatedly rejected by the courts, most recently in the Gulkana River case. *Alaska v. United States*, 662 F.Supp.455 (D.Alaska 1987), affirmed sub nom. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). Applying the correct definition of navigability, many of the submerged lands that the federal government attempted to convey to ANCSA corporations should have been recognized as belonging to the state. The state appealed many conveyances to protect its title. As occurred in the Kandik-Nation Rivers appeal, *Appeal of Doyon*, 86 I.D. 692 (ANCAB 1979), Alaska Native Corporations also found it necessary to challenge erroneous federal determinations of non-navigability to insure they would not be deprived of any portion of their entitlement by being charged for submerged land owned by the state.

The federal government has also argued that aluminum boats, boats propelled by jet units, inflatable boats, and canoes are not customary modes of travel for the purpose of determining navigability in Alaska. As a result, many waterbodies navigated by these types of watercraft have been found legally non-navigable by the federal government. The claim is that these boats represent post-statehood technological advances, are too small to be considered "commercial", or that most "commercial" use of the watercraft developed after statehood.

Another navigability dispute involves remote, isolated lakes. The federal government has found many of these lakes legally non-navigable, even though they are physically capable of being navigated. The federal government's contention is that a navigable connection to another area is necessary to make travel on a remote lake worthwhile. Otherwise, the federal government views the lack of development in the area around the isolated lake as an indication that the lake will never be used for commercial transportation.

To resolve these navigability criteria disputes, the state has actively pursued a limited number of court cases challenging particular findings of non-navigability by the federal government. With the sole exception of floatplanes, the courts have agreed with the navigability criteria presented by the State of Alaska and have rejected the limitations suggested by the federal government. These cases include:

Gulkana River. In this case, both in the U.S. District Court and on appeal to the U.S. Court of Appeals, the federal courts rejected the federal government's restrictive interpretation of the phrase "highway of commerce" in the title navigability test. The federal district court stated that to demonstrate navigability, it is only necessary to show that the waterbody is physically capable of "the most basic form of commercial use: the transportation of people or goods." Because the Gulkana River can be used for the transportation of people or goods, the Gulkana River was found navigable. *Alaska v. United States*, 662 F.Supp.455 (D.Alaska 1987). On appeal, the court of appeals affirmed the district court's finding of navigability. *Alaska v. Ahtna, Inc.*, 892 F.2d 1401 (9th Cir. 1989). The court of appeals found that the modern use of the Gulkana River for guided hunting, fishing, and sightseeing trips is a commercial use and, since the physical characteristics of the river have not significantly changed since 1959, provides conclusive evidence that the river was susceptible of commercial use at statehood. The court also found that modern inflatable rafts can be used to establish navigability. In April 1990, the United States Supreme court denied a request by Ahtna, Inc. to reconsider and overturn the court of appeals decision. The Gulkana River precedent is now binding on all future navigability determinations in Alaska.

Kandik and Nation Rivers. In this administrative appeal, the State of Alaska and Doyon Limited, an ANCSA regional corporation, successfully established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by fur trappers, as well as extensive historic and contemporary canoe use, the court found the Kandik and Nation rivers, in Interior Alaska, navigable. *Appeal of Doyon*, 86 I.D.692 (ANCAB 1979).

Alagnak River. In this federal district court case, the Alagnak River, the Nonvianuk River, Kukaklek Lake and Nonvianuk Lake were all found navigable. These interconnected waterbodies are located in the Bristol Bay region of Alaska, south of Lake Iliamna. Their primary transportation use is for commercially guided hunting, fishing, and sightseeing and for government research and management. They also serve as a means of access for local residents to their homes and to the surrounding areas for subsistence hunting and

fishing. After several years of litigation, the federal government conceded that these rivers and lakes are navigable. *Alaska v. United States*, No. 82-201 (D.Alaska Feb. 2, 1985).

Matanuska River. The recommended decision in this administrative appeal agreed with the State of Alaska's position that post-statehood commercial river rafting operations are sufficient to establish navigability. Based upon that type of use, the administrative law judge who heard the case recommended that the Matanuska River, in Southcentral Alaska, be found navigable. The Secretary of Interior, over the state's objections, assumed jurisdiction over the case and stayed implementation of the recommended decision. No action has been taken in the case since that time. Appeal of Alaska, No. 82-1133 (IBLA Rec. Decision Aug. 18, 1983)

Slopbucket Lake. The state claimed that the extensive use of floatplanes on Slopbucket Lake, a twenty acre lake adjacent to Lake Iliamna, was sufficient to establish navigability. The federal courts rejected this view. The courts reasoned that floatplanes do not use the lake as a navigable highway; they just take off and land there. *Alaska v. United States*, 754 F.2d 851 (9th Cir.) cert denied, 106 S. Ct. 333 (1985).

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IDENTIFICATION OF NAVIGABLE WATERS

Even if the criteria for determining navigability in Alaska were totally agreed upon, it still would be difficult to prepare a complete list of all of the navigable lakes, rivers, and streams in the state. Much of Alaska has not yet been surveyed and many maps are inaccurate and out-of-date. It is an immense and complex task simply to identify and locate all of the thousands of named and unnamed lakes, rivers, and streams in the state which might be considered navigable. Furthermore, once a potentially navigable lake, river, or stream has been identified, detailed information about its size and uses is necessary for an accurate navigability determination. Because of Alaska's undeveloped and remote character, gathering navigability information is both time consuming and expensive. Finally, administrative navigability determinations made by the state or the federal government are always subject to legal challenge, since only the courts can authoritatively determine title to submerged lands.

Despite these difficulties, both the state and the federal government are frequently called upon to issue navigability determinations. Although the requirement that BLM adhere to the meandering requirements of the BLM Survey Manual has eliminated the need for navigability determinations on the larger rivers, lakes, and streams, which must now be meandered regardless of navigability, navigability determinations are still required for the smaller rivers, lakes, and streams to determine if they are to be meandered at the time of survey. Because of this, some navigability determinations are still made for nearly every federal land conveyance under ANCSA or the Alaska Statehood Act. The management plan for nearly every federal Conservation System Unit (CSU) also addresses the navigability issue.

Federal navigability determinations are reviewed by the state to insure that available information sources were used and interpreted correctly. Where the federal government determines non-navigable a waterbody which is considered navigable by the state, the state may provide the government with supplemental information about the uses and characteristics of the waterbody to obtain a redetermination of navigability. Under some circumstances the state needs to make its own navigability determinations, such as for a oil and gas lease sale, land disposal, material sale, mining claim, or another use of state land or resources requiring a determination of ownership of submerged lands within the affected area.

For large, undeveloped regions of Alaska there may be little or no accurate waterbody use or physical characteristics information available for making navigability determinations. When information is lacking, and it must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on maps and aerial photographs. In these cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 70 feet wide) and having an average gradient over the length of the stream of no more than 50 feet per mile. With rare exceptions, the state's experience has been that streams of this type are deep enough and wide enough to be navigable by boats carrying persons or goods and must, therefore, be considered legally navigable. Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 50 feet per mile and are at least 10 miles.

If there is no public use or physical characteristics information readily available for lakes, those lakes which are shown on maps and aerial photographs as having a navigable water connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size

of the lake. These lakes are part of a system of interconnected navigable waters. If a lake is totally isolated, it will be included on the state's navigability maps if it is at least 1 1/2 miles long. That length insures that the lake can be used as a "highway". Future judicial decisions interpreting the "highway" requirement for isolated lakes could shorten or lengthen this 1 1/2 mile "rule of thumb."

The state recognizes that, under some circumstances, lakes smaller than 1 1/2 miles long can be and are used as navigable highways. In those cases, when known, these smaller lakes are also depicted on the state's navigability map. Moreover, as a matter of administrative policy and convenience only, the state may sometimes make an exception to the 1 1/2 mile standard in the extremely wet regions of the state, including some areas in the Yukon- Kuskokwim Delta, Yukon Flats, and on the North Slope. In these areas, an isolated lake might need to be 2-3 miles long to be included on the state's navigability maps. Although smaller lakes in these areas are capable of being used for transportation and should be found navigable by the courts, the state has decided to concentrate its limited resources in protecting the larger waterbodies first.

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NAVIGABLE WATERS WITHIN PRE-STATEHOOD FEDERAL WITHDRAWALS

Although disputes over which waters in Alaska are navigable are the most frequent cause of submerged land ownership disputes, there is another major legal issue which poses a threat to Alaska's sovereign claim to the beds of navigable waters. Even where navigability is conceded, the federal government often contends that title to the submerged lands did not vest in the state if the area was withdrawn or reserved by the federal government on the date of statehood. Within native conveyance areas, the federal government has used this claim of "reserved submerged lands" to justify its attempts to convey the beds of navigable waters in fulfillment of the native entitlements. Within state selections, the federal government has used the same claim to charge the acreage of submerged lands against the state's entitlement.

The state strongly disagrees with this federal claim and has actively pursued a number of court challenges to resolve the issue. In addition to numerous appeals from federal decisions to convey or charge for the beds of navigable waters, the state was actively involved as a friend of the court in one case before the United States Supreme Court and continues to be involved in another Supreme Court case which presents this issue. The pending case is *United States v. Alaska*, U.S. Supreme Court 84 Original (filed June, 1979).

On June 8, 1987 the Court issued its decision in *Utah v. United States*, No. 85-1772 (filed Oct. 14, 1986). In this case the federal government, in 1976, issued oil and gas leases for land underlying Utah Lake, a navigable waterbody located in Utah. The suit sought a declaratory judgement that Utah, rather than the United States, holds the lands under navigable waters in the territories in trust for future states, and, absent a prior conveyance by the federal government to third parties, a state acquires title to such land upon entering the Union on an "equal footing" with the original 13 states.

The Supreme Court held that title did pass to the state upon Utah's admission to the Union. They held that there is a strong presumption against finding congressional intent to defeat a state's title, and, that in light of the longstanding policy of the federal government's holding land under navigable waters for the ultimate benefit of future state absent exceptional circumstances, an intent to defeat a state's equal footing entitlement could not be inferred from the mere act of the reservation itself. The United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation, but would additionally have to establish that Congress affirmatively intended to defeat the future state's title to such land.

This decision has significant ramifications within Alaska, since over 95 million acres - more than 25% of the total area of the state - was enclosed within various federal withdrawals and reservations at the time Alaska became a state.

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NAVIGABLE WATERS WITHIN ANILCA CONSERVATION SYSTEM UNITS

On December 2, 1980, the Alaska National Interest Lands Conservation Act became law. This act created or added 104.3 million acres to various federal conservation system units. Because these "withdrawals" occurred after the date of statehood, there is no disagreement between the state and federal governments that navigable waters within the various CSU's are owned by the state. However, there is some

disagreement on the amount of authority the federal land managers may have to regulate these state owned submerged lands.

The U.S. Constitution gives Congress certain limited powers to control uses on state owned submerged land. These are known as the Property Clause, Navigational Servitude and the Commerce Clause. The extent of these powers involves complex legal questions. However, even assuming that Congress has the power to regulate state-owned submerged lands in Alaska, the United States Supreme Court has ruled that Congress may choose not to exercise that power, thus leaving regulation totally up to the state. *Escanaba Co. v. Chicago*, 107 U.S. (17 Otto.) 678 (1883). Whether Congress has done that can only be determined by examining the federal laws passed by Congress dealing with Alaska lands. Another possibility is that the state and federal governments have concurrent jurisdiction, sharing the authority to regulate submerged lands.

In ANILCA, Congress did not take away the state's power to regulate state-owned submerged lands within federal CSU's in Alaska. Numerous provisions in ANILCA recognize and respect the state's authority over state-owned land. In some cases, however, Congress may have attempted to give the federal land managers some concurrent authority to regulate navigable waters within CSU's.

The state, where possible, cooperates with rather than confronts the federal land managers. This cooperation often takes the form of a memorandum of understanding that discusses management issues and how they will be resolved. Differences do occur, however, over issues such as column management and restrictions on mining.

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II. LEGAL AND POLICY GUIDELINES GOVERNING MANAGEMENT OF SUBMERGED LANDS AND PUBLIC WATERS

PUBLIC TRUST DOCTRINE

The state has special duties and management constraints with respect to state-owned land underlying navigable waters. These special duties and management constraints arise from the Alaska Constitution. The Alaska Constitution contains numerous provisions embracing the principles commonly known as the public trust doctrine. The public trust doctrine is remarkable both for its age and for its vigor. Rooted in the customs of the seafaring Greeks and Romans, it has evolved to become one of the most effective safeguards of public rights. Basically, the trust reflects an understanding of the ancient concept that navigable waters, their beds and their banks, should be enjoyed by all the people because they are too important to be reserved for private use.

In America, the concept of public rights to public waters was recognized since the early days of the Massachusetts Bay Colony where the great Pond Ordinance of 1641 guaranteed the right to fish and fowl in ponds greater than 10 acres, along with the freedom to pass through private property to do so.

By 1821, American courts were pronouncing the law of public trust as we know it today. This does not mean that no water-related development can take place. The public trust doctrine permits states to improve waterways by constructing ports, docks and wharves, thus furthering the purposes of the trust. Generally speaking, the people's trust rights may be alienated only in ways that further overall trust uses, and in relatively small parcels.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387,452 (1892), involved a grant by the State of Illinois of one thousand acres of the bed of Lake Michigan, constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The U.S. Supreme Court held that the grant was revocable, that the state held the land in trust for the public, and that it was powerless to relinquish its rights as trustee.

The court went on to say that land underlying navigable waters is much more than a simple property right.

[1]It is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties... The trust devolving upon the state for the public, and which can only be discharged by the

management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

In the 19th century the purposes of the trust were generally described as "commerce, navigation and fishery." This was logical because the major waterways were essential highways of commerce. But as other values became increasingly important, courts began to recognize recreation and environmental protection among the purposes for which the trust exists. As a California court said in 1971, "with our ever increasing leisure time...and the ever increasing need for recreational areas it is extremely important that the public need not be denied use of recreational water...the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes." *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1044 (1971).

The Alaska constitution provides protections similar to the public trust doctrine protections that cannot be disregarded by the legislature or overruled by the courts. Article VIII, Sec. 3 provides; "Wherever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use." After reviewing the public trust doctrine in *Owsichek v. State, Guide Licensing*, 763 P.2d 488 (Alaska 1988), the Alaska Supreme Court explained that "the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."

In *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988), the Alaska Supreme Court applied the public trust doctrine to tidelands, holding that, even after conveyance, the title remains subject to continuing public easements for purposes of navigation, commerce and fishery.

The 1985 Alaska legislature recognized the constitution application of public trust doctrine principles in Alaska. In an Act relating to the public or navigable waters of the state, the legislature found that "the people of the state have a constitutional right to free access to the navigable or public waters of the state" and that the state "holds and controls all navigable or public waters in trust for the use of the people of the state". 85 SLA Ch. 82. In the same act, the legislature ruled that submerged lands are "subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public trust."

Courts in other states over the years have defined in somewhat different ways the public uses that are permitted and protected by the public trust as it applies to submerged lands. In reviewing these other cases, it can clearly be seen that through time an ever expanding definition of the public uses protected by the public trust doctrine is being adopted. The California Supreme Court recently held that:

Although early cases had expressed the scope of the public's right in (lands subject to the public trust) as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the (public trust) lands in their natural state as ecological units for scientific study. *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 365 (Cal. 1980)

It is clear under the Alaska Constitution that the State of Alaska has the responsibilities of a trustee with respect to management of land underlying navigable waters. Moreover, the Alaska legislature has adopted a broad view of the public uses protected or permitted by the public trust. Accordingly, the Alaska Attorney General's Office has determined that, until the Alaska Supreme Court rules on the question, the state should assume that a broad definition of public rights protected by the Alaska Constitution and the public trust doctrine applies in Alaska, similar to the one adopted by the California Supreme Court. 1982 Atty. Gen. Op. No. 3 (June 10, 1982).

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PUBLIC WATERS

It is not only the beds of navigable waters in Alaska that are reserved in public ownership for public use. Under article VIII, Section 3 of the Alaska Constitution, all waters occurring in their natural state are reserved to the people for common use. Article VIII, Section 14 of the Alaska Constitution also provides for the broadest possible access to and use of state waters by the general public.

Section 14. Access to Navigable Waters. Free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by general law regulate and limit such access for other beneficial uses or

public purposes.

Pursuant to this grant of authority, the Alaska State Legislature, in AS 38.05.365(12), defined "navigable waters" as follows:

"navigable waters" means any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes.

This definition of navigable waters does not define state ownership of submerged land in Alaska. The definition of navigability for ownership purposes was discussed earlier in this paper. This definition, however, does define what types of waterbodies in Alaska are available for public use under the Alaska statutes.

The Alaska State Legislature has broadly construed the constitutional protections for public use of the waters of the state. In an Act (85 SLA chap. 82, codified as AS 38.05.128) relating to the navigable or public waters of the state, the state legislature found:

- (a) The people of the state have a constitutional right to free access to the navigable or public waters of the state.
- (b) Subject to the federal navigational servitude, the state has full power and control of all of the navigable or public waters of the state, both meandered and unmeandered, and it holds and controls all navigable or public waters in trust for the use of the people of the state.
- (c) Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purposes for which the water is used or capable of being used consistent with the public trust.
- (d) This Act may not be construed to affect or abridge valid existing rights or create any right or privilege of the public to cross or enter private land.

AS 38.05.128 provides:

OBSTRUCTIONS TO NAVIGABLE WATER

(a) A person may not obstruct or interfere with the free passage or use by a person of any navigable water unless the obstruction or interference is:

(1) authorized by a federal agency and a state agency; (2) authorized under a federal or state law or permit; (3) exempt under 33 U.S.C. 1344(f) (Clean Water Act); (4) caused by the normal operation of freight barging that is otherwise consistent with law; or (5) authorized by the commissioner after reasonable public notice.

(b) An unauthorized obstruction or interference is a public nuisance and is subject to abatement. The cost of abatement shall be borne by the violator and is in addition to any penalty imposed by the court.

(c) This section may not be construed to affect or abridge valid existing rights.

(d) Free passage or use of any navigable water includes the right to use land below the ordinary high water mark to the extent reasonably necessary to use the navigable water consistent with the public trust.

(e) Free passage or use of any navigable water includes the right to enter adjacent land above the ordinary high water mark as necessary to portage around obstacles or obstructions to travel on the water, provided:

(1) entry is made without injury or damage to the land; (2) entry is made in the least obtrusive manner possible; (3) there is no reasonable alternative available to avoid the use of the adjacent land above the

ordinary high water mark; and (4) the navigable water is reentered immediately below the obstacle or obstruction at the nearest point where it is safe to do so.

(f) A violation of (a) of this section is a class B misdemeanor.

Thus, under the Alaska Constitution and this statute, any surface waters capable of use by the public defined in AS 38.05.365(12) are available to the public, irrespective of streambed ownership. Further, such public use is not considered a taking and is not subject to inverse condemnation action. Private ownership is subject to the public rights that are protected by the public trust.

In two Montana Supreme Court cases involving the nature of public rights where the submerged lands are privately owned, the court rules that public portaging, anchoring, and other uses incidental to the use of the water are allowed. The court also found that if travel on the water or streambed is obstructed, the public is allowed to use the adjacent private land to portage around the barrier in the least intrusive way possible, avoiding damage to the property holder's rights. However, the public does not have the right to enter into or trespass across private property in order to enjoy the recreational use of state-owned waters. The State of Alaska agrees with this ruling and believes a similar ruling would be made by our state courts.

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BOUNDARIES OF NAVIGABLE WATERS

The state is often asked where public ownership of water bodies ends and private ownership begins. There are two types of water body boundaries to address: 1) non-tidal water boundaries and 2) tidal water boundaries. Non-tidal boundaries are boundaries of lakes, rivers, and streams. Tidal boundaries are the boundaries along any body of water which is influenced by the rise and fall of the tides.

1. Non-tidal Water Boundaries The boundary between public and private ownership is the "Ordinary High Water Mark" which is defined in 11 AAC 53.900(23) as being - The mark along the bank or shore up to which the presence and action of the non-tidal water are so common and usual, and so long continued in all ordinary years, as to leave a natural line impressed on the bank or shore and indicated by erosion, shelving, vegetation, or other distinctive physical characteristics. Also see the Alaska State Supreme Court definition in *Department of Natural Resources v. Pankrantz* 538 P.2d 984, 988-89 (Alaska 1975). The ordinary high water line can usually be observed by the laymen simply by noting the vegetation line or well defined stream banks.

2. Tidal Water Boundaries The boundary between tidal water bodies and private/public owned uplands is the Mean High Water Line. Mean high water line as defined by 11 AAC 53.900(15) is: The tidal datum plane of the average of all the high tides, as would be established by the National Geodetic Survey, at any place subject to tidal influence.

This line is not readily observable because it is a line of known elevation which intersects the land surface. The mean high water line can be a considerable distance below the vegetation line because extreme high water will denude the beach above the line of mean high water. The only way that the location of mean high water line can be accurately determined is by differential leveling from known bench marks or by operating a tide gauge for a sufficient period of time to determine the mean high water elevation. The line of mean high water line can be approximated by time coordinated observations of the daily predictions for high and low waters, predicted by NOAA, as they relate to the published mean high water elevation. This method can be highly unreliable because small errors in the predictions or observations can transform into large errors in the horizontal location; this is especially true in areas where the beach gradient is very flat.

It is important to note that in some areas, such as Prince William Sound, the mean high water line boundary is considerably higher than the current mean high water line because the boundary became fixed at the 1964 pre-quake location. In this instance the boundary between state-owned tidelands and the uplands would be established at an elevation which equals the sum of the mean high water elevation plus the published amount of uplift or, in some cases, submergence.

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CONCLUSION

This paper describes the state's policies and procedures for managing and protecting state submerged lands

and public waters. As further legal and practical developments occur in this area, these policies and procedures will be reexamined by the state and, if necessary, appropriate changes will be made.

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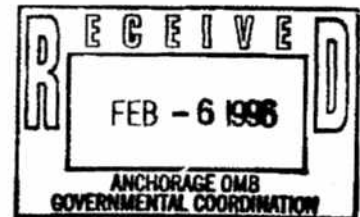
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DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

February 2, 1996



Ms. Maureen Finnerty
Associate Director, Operations
National Park Service
Department of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

Re: State of Alaska's Comments on the Proposed Rule at 60 Federal Register
62233 (December 5, 1995)

Dear Ms. Finnerty:

The State of Alaska has reviewed the proposed rule published December 5, 1995, at 60 Fed. Reg. 62233. These comments represent the consolidated views of various state agencies and replace the overview of comments previously provided to Solicitor Leshy.

The proposed rule would revise portions of the National Park Service's (NPS) general regulations, as well as certain provisions governing National Park System units in Alaska. Primarily at issue is whether NPS should extend regulatory jurisdiction over all navigable waters within park boundaries, regardless of ownership of the submerged lands. The proposed rule is not a simple "clarification" of prior law as the NPS has attempted to portray. The regulations would substantively and inappropriately extend NPS jurisdiction.

The State opposes the proposed rule and urges that it be withdrawn for the following reasons:

- The Federal Register notice fails to adequately address potential effects of this rulemaking in light of the draft NPS subsistence policy and management in Alaska and the State of Alaska v. Babbitt case.
- The federal government has no authority to regulate waters within the boundaries of conservation system units where Alaska owns the submerged lands.

State of Alaska comments
Re: 60 Fed. Reg. 62233

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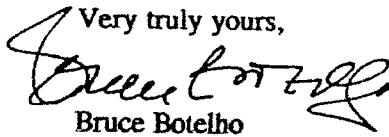
- The proposed rule is premature given that the Alaska National Interest Lands Conservation Act's definition of "public lands" is still in question.
- The NPS has failed to show other authority, e.g. the Commerce Clause, for its proposed action.
- Proposed definitional changes are inconsistent with existing law.

For these reasons, the NPS does not have the authority to extend its regulatory jurisdiction to all navigable waters within park boundaries, regardless of ownership of the submerged lands. These and other issues are documented in greater detail in the attachment, which should be considered part of the State's formal comments.

If NPS has concerns about particular activities occurring on navigable waters within park boundaries in Alaska, the State encourages NPS to discuss these concerns with the appropriate state representatives. We believe that many issues of particular concern to NPS can be resolved through ongoing cooperative efforts.

Thank you for your consideration of this letter and the attachment.

Very truly yours,



Bruce Botelho
Attorney General

Attachment

cc: Robert Barbee, Field Director, NPS
John Katz, Governor's Office, Washington, D.C.
Marilyn Heiman, Governor's Office, Juneau
Diane Mayer, Director, Division of Governmental Coordination
John Shively, Commissioner, Department of Natural Resources
Frank Rue, Commissioner, Department of Fish and Game
Joseph Perkins, Commissioner, Department of Transportation and Public Facilities
Michele Brown, Commissioner, Department of Environmental Conservation
William Hensley, Commissioner, Department of Commerce and Economic
Development

ATTACHMENT

State of Alaska's Comments on the Proposed Rule at 60 Fed. Reg. 62233, December 5, 1995:

- A. **The Federal Register notice fails to adequately address potential effects of this rulemaking in light of the draft NPS subsistence policy and management in Alaska and the State of Alaska v. Babbitt case.**

At the present time, an extensive statewide review of subsistence management and policy is underway within NPS. In fact, NPS has requested public review and comment until May 1, 1996 on its "Draft Review of Subsistence Law and National Park Service Regulations." In light of this ongoing internal review, the State believes the present rulemaking is premature and recommends that this rulemaking be postponed in order to consider the outcome of the subsistence program review. Remaining comments are provided without the benefit of this information.

- B. **The proposed rule is more than a "clarification" of prior law; it substantively extends NPS jurisdiction.**

In the Federal Register notice, NPS states that the proposed rulemaking is designed to "clarify" that existing NPS regulations apply on navigable waters within National Park System units regardless of ownership of the submerged lands, and that the proposed rule does not create new or additional regulatory controls.

NPS claims this "clarification" of previous regulatory intent was made necessary by a seal hunting case in Glacier Bay National Park. United States v. Greg Brown. NPS states the seal hunting case made it aware that 36 C.F.R. § 1.2(b) "inadvertently incorporated language that seems ambiguous and could preclude park regulation of 'non-federally owned . . . waters.'" However, the proposed rule does not "clarify" existing regulations; it substantively extends NPS jurisdiction to areas not previously regulated.

Despite NPS' representations, 36 C.F.R. § 1.2(b) is not ambiguous. It clearly states that NPS regulations do not apply on non-federally owned waters.¹ The only exception

1 Section 1.2(b) states:

Except for regulations containing provisions that are specifically applicable, regardless of land ownership, on lands and waters within a park area that are under the legislative jurisdiction of the United States, the regulations contained in parts 1 through 5 and part 7 of this chapter do not apply on non-federally owned

to this rule is for non-federally owned lands and waters under the legislative jurisdiction of the United States. For areas under the legislative jurisdiction of the United States, NPS regulations apply only when the regulations are made specifically applicable regardless of land ownership. 36 C.F.R. § 1.2(b). There is no dispute that state owned lands and waters within Glacier Bay National Park, and most every other park system unit in Alaska, are not within the legislative jurisdiction of the United States.

Other NPS regulations reaffirm the unambiguous language and intention of 36 C.F.R. § 1.2(b). For example, the regulations applying to park units in Alaska state: "The regulations contained in this part 13 are applicable only on federally owned lands within the boundaries of any park area. . . ." 36 C.F.R. § 13.2(e).² See also 36 C.F.R. § 13.1(p) (defining "public lands" to mean lands in Alaska "which are federally owned lands"); 36 C.F.R. § 13.65(a) (humpback whale protection regulations, expressly stating they are an exception to §§ 1.2(b) and 13.2(e) and therefore apply on all navigable waters within Glacier Bay National Park).

Indeed, in the Glacier Bay seal hunting case, the United States openly acknowledged the express limitation in 36 C.F.R. § 1.2(b) on its regulatory jurisdiction. See United States v. Brown, No. 94-30019, United States' brief to the Ninth Circuit Court of Appeals at 5-6, 9 (submitted May 12, 1994) (conceding that, for NPS general regulations to be enforceable against Mr. Brown, 36 C.F.R. § 1.2(b) requires that the United States prove either legislative jurisdiction over Glacier Bay National Park or ownership of the submerged lands in question). Thus, in dismissing the Brown prosecution, the United States recognized the unambiguous language of its regulations. The United States conceded it does not have legislative jurisdiction over Glacier Bay National Park, see id. at 5, and decided not to attempt to prove ownership of the submerged lands in that case.

Contrary to NPS' assertion in the Federal Register, both the language and intent of its 1983 and 1987 regulatory revisions were that NPS regulations did not apply to non-federally owned lands and waters, unless those lands and waters were under the legislative jurisdiction of the United States. See 48 Fed. Reg. 30252 at 30261, 30275 (June 30, 1983) (regulations do not apply to state owned inholdings within national park boundaries unless those areas are under the legislative jurisdiction of the United States).

The regulatory revision in 1987 simply "clarified" that state owned lands would

lands and waters . . . within the boundaries of a park area.

² For the reasons discussed in these comments, the State opposes the proposed deletion of this statement in 36 C.F.R. § 13.2(e).

be treated like privately owned lands, and NPS regulations would not apply as a matter of course to either private or state lands and waters within park boundaries. See 52 Fed. Reg. 12037 (April 14, 1987) (proposing to clarify that NPS regulations only would apply to state owned lands and waters within park boundaries if those areas were under the legislative jurisdiction of the United States); 52 Fed. Reg. 35238, 35239 (Sept. 18, 1987) (certain NPS regulations apply to non-federally owned lands and waters within park boundaries only if those areas are under the legislative jurisdiction of the United States).

For these reasons, it is at best misleading for NPS to characterize the proposed rule as a "clarification" and not a substantive extension of regulatory jurisdiction. The proposed action substantially extends NPS jurisdiction to areas not previously covered by its regulations. The exclusion of state owned lands and waters from prior and existing regulations was not "inadvertent" but by express design. By not acknowledging these facts in its December 5, 1995 Federal Register notice, NPS significantly understates the effect of its proposed rule.

- C. **The federal government has no authority to regulate waters within the boundaries of conservation system units where Alaska owns the submerged lands.**

On the substance of NPS' proposed action, the State disagrees that NPS has authority to extend its regulatory jurisdiction to all waters within park system boundaries, including navigable waters, and without regard to ownership of submerged lands.

The State has consistently objected to previous attempts by NPS to grant itself such extraterritorial authority in proposed rulemaking, e.g., Alaska's comments dated Nov. 1, 1991 (regarding proposed rule published Aug. 5, 1991). We reiterate our objections to NPS' efforts to extend regulatory jurisdiction to lands and waters lawfully owned and managed by the State.³

The proposed extension of NPS authority appears to be particularly dramatic in Alaska. Numerous navigable waterways run through the exterior boundaries of nearly all of the thirteen multi-million acre park units in the state. These waterways are often used for transportation and for many other activities. Under the proposed rule, NPS would apparently

³ Under the constitutional doctrine of equal footing and confirmed by the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act of July 7, 1958, and the Alaska Constitution, the State of Alaska owns and therefore is responsible for the management of all water columns, shorelands, tidelands, and submerged lands, including the resources located within or on such lands and waters.

intend to regulate these activities. For example, under the proposed rule, NPS might require an NPS Commercial Use Permit for the commercial barging and ferry service interests currently operating on the navigable Yukon River as it passes through the Yukon-Charley Rivers Preserve, despite the fact that the State presently manages water uses, access and activities on those waters. Such an assertion of general jurisdiction is not permitted by the Alaska National Interest Lands Conservation Act (ANILCA) or other applicable law.

One of Congress' primary purposes in enacting ANILCA was to preserve vast quantities of lands and waters in Alaska. 16 U.S.C. § 3101. Congress implemented this purpose in part by creating "conservation system units" (CSUs). By definition, CSUs include any unit in Alaska of the National Park System. 16 U.S.C. § 3102(4).

However, not all lands within Glacier Bay National Park or other national park units in Alaska are included as part of the CSU. ANILCA section 103(c) states in relevant part:

Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit.
16 U.S.C. § 3103(c).⁴

Similarly, in coastal areas, ANILCA section 103(a) excludes lands seaward of the mean high tide line from the boundaries of areas added by ANILCA to the National Park System. 16 U.S.C. § 3103(a).

ANILCA Section 103(c) further provides that those lands not included within the conservation system unit are not subject to federal regulation:

No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units.
16 U.S.C. § 3103(c).

⁴ The legislative history of ANILCA § 103(c) makes clear Congress' intent to exclude lands which are not owned by the U.S. from conservation system unit regulations. The history specifies that "only public lands (and not State or private lands) are to be subject to the conservation system unit regulations applying to public lands." 126 Cong. Rec. S15129-32 (daily ed. Dec. 1, 1980) (statement of Sen. Stevens).

Legislative history establishes that Congress took this action fully aware of Kleppe v. New Mexico, 426 U.S. 529 (1976) and its progeny, which might arguably support extension of federal regulatory control over non-federally owned lands.⁵ Congress directly and knowingly limited federal regulatory authority to "public lands" within conservation system units and specifically exempted inholdings from regulation. 16 U.S.C. § 3103(c). NPS recognized this fact in promulgating 36 C.F.R. § 13.2(e). See 46 Fed. Reg. 31836, 31843 (June 17, 1981) (ANILCA §§ 103(c) and 906(o) restrict the applicability of NPS regulations to federally owned lands within park boundaries; therefore, 36 C.F.R. § 13.2(e) applies only to federally owned lands).

In the case of parks in Alaska, any submerged lands underlying navigable waters within park boundaries are "inholdings" belonging to the State of Alaska. See Submerged Lands Act of 1953, 43 U.S.C. § 1311(a); Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). Federal regulation does not apply to these waters.⁶ The NPS therefore does not have authority to regulate navigable waters within park boundaries regardless of ownership.

If identical regulations addressing both state and federally owned lands or waters are particularly desirable in certain instances or for certain issues, the State encourages NPS to discuss these with the appropriate state regulatory entity. Through a cooperative effort, the goal of consistent regulation of especially significant issues can be lawfully achieved. Without State consent and cooperation, however, NPS may not extend its regulatory jurisdiction as proposed.

D. The proposed rule is premature given that the definition of "public lands," over which ANILCA permits some federal regulation, is still in question.

As noted earlier, the Federal Register notice does not address the proposed rule's potential effect on the implementation of ANILCA's Title VIII subsistence priority, and the State requests that NPS address the rule's implications for subsistence management and

⁵ The State does not concede this authority. While there is case law in the Eighth Circuit that appears to support this contention, the question of extra-territorial regulation is not yet resolved. In any event, NPS does not purport to rely on Congress' Property Clause power to justify this proposed action.

⁶ The fact that ANILCA (and existing NPS regulations) specifically exclude state lands and waters from NPS general jurisdiction is also reflected in the General Management Plans adopted for park units in Alaska.

policy.⁷

ANILCA specifically limits federal regulatory authority in conservation system units to "public lands." Accordingly, federal jurisdiction depends on whether the waters in question constitute "public lands" as defined in ANILCA.

Although the State asserts the definition of "public lands" does not include any navigable waters where the state owns the submerged lands, this question is currently unresolved. The Alaska Supreme Court's decision in *Totemoff v. State*, as well as Judge Hall's dissent from the Ninth Circuit opinion in *State of Alaska v. Babbitt* (also commonly known as the "Katie John" case), conclude that navigable waters are not "public lands" under ANILCA. See *Totemoff v. State*, 905 P.2d 954 (Alaska 1995); *State of Alaska v. Babbitt*, ___ F.3d ___, 1995 WL 749795 (9th Cir., Dec. 19, 1995). This issue is presently before the U.S. Supreme Court on a petition for certiorari. Accordingly, the NPS should withdraw these regulations until they can be reassessed in light of the *Babbitt* litigation once it has been finalized.

E. The NPS has failed to show other authority for its proposed action.

NPS asserts that Congress' Commerce Clause power provides authority for NPS' regulation of non-federally owned lands and waters within park boundaries. However, NPS fails to explain where it derives its Commerce Clause power, and how its power is co-extensive with Congress' Commerce Clause powers.

Moreover, even assuming NPS has some authority to regulate pursuant to the Commerce Clause, the United States Supreme Court has confirmed that the Commerce Clause power is not unlimited. See *United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624 (1995). To rely on this power, NPS must satisfy traditional Commerce Clause analysis, including a showing as to how the regulated activities "substantially affect" interstate commerce. *Id.* at 1629-30.

NPS' Federal Register notice makes no effort to undertake a Commerce Clause analysis, and the state does not agree that the Commerce Clause permits the proposed action. Cf. *State of Alaska v. Babbitt*, ___ F.3d ___, 1995 WL 749795 (9th Cir., Dec. 19, 1995) (majority opinion concludes that Congress did not intend to exercise its Commerce Clause authority to regulate subsistence fishing in Alaska's navigable waters; dissenting opinion

⁷ Along this line, we note that the proposed revision to 36 C.F.R. § 13.2(c) deletes Sitka National Historical Park from the list of park units where subsistence activities are prohibited. This change is not addressed by NPS in its notice.

concludes that subsistence fishing in navigable waters does not "substantially affect" interstate commerce).⁸

Nor does NPS otherwise justify its authority to extend general regulatory jurisdiction over non-federally owned waters within park boundaries. NPS cites to 16 U.S.C. § 1a-2(h); however, the authority set forth therein is limited. That section permits NPS to promulgate and enforce regulations concerning boating and related activities; it does not provide general jurisdiction over non-federally owned waters within park boundaries. Likewise, the fact that NPS may enforce Coast Guard regulations on navigable waters within park boundaries does not provide authority over navigable waters for other purposes.

As examples of its asserted authority, NPS cites park-specific regulations that have applied on navigable waters within certain parks. However, these limited instances do not justify this proposed rule. In the case of Glacier Bay National Park, the State cooperated with the National Marine Fisheries Service and NPS in the adoption of regulations deemed necessary to protect whales. These special whale regulations were identified as an exception to NPS' general regulatory authority. See 13 C.F.R. §13.65(a), (b)(2). This example does not imply that NPS has jurisdiction to enact other regulations applying to waters owned by the State.

F. Proposed definitional changes are inconsistent with existing law.

Though the State's objections to NPS' proposed definitional changes should be clear from the preceding comments, we address the following comments specifically to NPS' proposed definitional revisions.

NPS' proposed revision of "boundary" at 36 C.F.R. § 1.4 would broadly include "the limits of lands or waters administered by the National Park Service" as "published or posted by the National Park Service." This definition grants to NPS the ability to define "boundaries" essentially as it chooses, on a case-by-case basis.

This definition is not permissible under ANILCA. ANILCA Section 103 directs that the conservation system units created by ANILCA shall have specific and defined boundaries. 16 U.S.C. § 3103 (a), (b), (c). Pursuant to the mandate in ANILCA § 103(b),

⁸ In any case, even if the proposed action could be justified under a Commerce Clause analysis, the Submerged Lands Act expressly limits that authority as it applies to this situation. See 43 U.S.C. § 1311(a) (confirming state title and ownership of lands beneath the navigable waters within the states, as well as the natural resources within those lands and waters, and providing states rights to manage those lands and natural resources).

NPS published in 1992 a legal description of the external boundaries of national park units established or expanded by ANILCA. 57 Fed. Reg. 45166 (Sept. 30, 1992).

As a result of these authorities, the proposed definition of "boundary" would conflict with the determined boundaries of park units and with ANILCA's defined areas of NPS authority. NPS is not free to ignore these existing legal boundaries, nor may it grant itself authority to amend park boundaries simply by posting a notice of intent. Accordingly, NPS may not broadly revise "boundary" as proposed.⁹

The proposed revision to 36 C.F.R. § 13.2(e), including the revised definition of "federally owned lands," likewise is not permitted by ANILCA. Under ANILCA, "federally owned lands" include lands, title to which is in the United States. 16 U.S.C. § 3102. Thus, State and privately owned lands cannot be defined as "federally owned lands," as they apparently would be under the proposed rule. ANILCA prohibits this definitional change, as well as NPS' attempt to extend its jurisdiction to state owned lands and waters.

G. No notice of the proposed rule was provided to the State despite ongoing meetings with NPS regarding Glacier Bay National Park.

To promote cooperation between state and federal resource managers, Alaska agency representatives participate in quarterly meetings with the NPS field director to discuss issues involving park units in Alaska. In addition, state representatives and commercial fishing interests have embarked upon good faith discussions with NPS to resolve potential conflicts arising from activities on state waters adjacent to Glacier Bay. In fact, on December 5, 1995, the day this proposed rule was published in the Federal Register, the Superintendent of Glacier Bay National Park met with state representatives, fishermen, special interest groups and others to seek cooperative resolution of problems related to activities on waters adjacent to the park.

The State is troubled that, despite these ongoing meetings, NPS provided no notice of the proposed extension of NPS regulations over all navigable waters within park boundaries, regardless of ownership, especially since the seal hunting case in Glacier Bay inspired the proposed rulemaking.

To avoid compromising the effectiveness of these ongoing cooperative efforts,

⁹ Similarly, NPS may not use such a broadened definition of "boundary" to assert general jurisdiction over state-owned lands and waters administered by NPS pursuant to a cooperative agreement. NPS and the State have entered into several cooperative agreements which grant NPS some limited administrative authority over state lands or waters. We do not contemplate that these agreements can be construed to permit broader federal authority over these areas.

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the State urges the NPS field office to alert us of pending rulemakings in the future and to promote discussion of the issues involved.

Conclusion

The State disagrees that NPS has authority to extend its regulatory jurisdiction to all navigable waters within park boundaries regardless of ownership of the submerged lands. Consistent with the above discussion, the state requests that NPS withdraw the proposed rule.