NAVIGABLE WATERS HEARING

2-28-96

SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Suite 520, Anchorage, AK 99501 (907) 258-8189 Session: State Capitol, Juneau, AK 99801 (907) 465-2095

February 19, 1996

Attorney General Bruce Botelho
Department of Law
PO Box 110300
Juneau, AK 99801

Re: Tide and Submerged Lands and Navigable Water Oversight Hearing

Dear Attorney General Botelho:

Alaska was granted title to all tide and submerged lands at statehood and the right to manage its waters. Since statehood, however, we have seen numerous attacks on the state's ownership and management rights, including differing interpretations of state constitutional authorities. Because of the importance of these issues, the Senate Resources Committee will hold an oversight hearing to examine the State's policies and programs directed at protecting the State and public interests.

The hearing will be held on February 28, 1996 at 3:30 PM in the Butrovich Room. We request that your department be prepared to brief the legislature on:

1. Background information regarding the state's submerged land waters jurisdiction and ownership authorities and responsibilities that are founded in statute and the constitution.

2. Procedures involved in asserting state title and management of navigable waters and tide submerged lands.

3. Describe existing jurisdictional and ownership conflicts involving tide and submerged lands and navigable waters and your department's role in addressing these conflicts.

4. Navigable waters access concerns.

5. The status of existing related litigation.

6. Your department's policies, priorities and programs related to the management, jurisdiction and ownership of navigable waters and tide and submerged lands.

7. Problems your agency has experienced due to the shutdown of the navigability section.

8. How state actions relate to federal reserved water rights and potential implications.

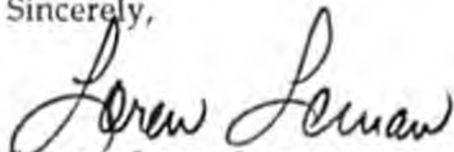
9. Agency recommendations.

We would appreciate your participation so we can address administration, agency and legislative policy issues. The oversight hearing will undoubtedly require some in-depth discussions so we would appreciate your having experienced and technical staff available. We have scheduled primarily listen only teleconferencing which will allow for technical staff to be on-line to answer specific questions if travel to the hearing is not possible or feasible. Please advise which stations you want on teleconference.

The agencies participating in this hearing will be the Department of Law, Department of Natural Resources, Department of Fish and Game and the Department of Transportation and Public Facilities. The hearing will include 10 minute briefings by each agency followed by questions from the committee members. Members of the Resources Committee would be grateful for any advanced material which could be made available prior to the hearing.

Thank you for your assistance.

Sincerely,



Senator Loren Leman
Senate Resources Committee Chairman

ak/ram
cc: Commissioner Shively, DNR
Commissioner Rue, DF & G
Commissioner Perkins, DOT & PF

MEMORANDUM

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING and WATER MANAGEMENT

TO: John Shively, Commissioner

DATE: January 12, 1996

TELEPHONE NO.: 269-8625

FROM: Jules V. Tileston, Director

SUBJECT: Black-Kandik-Nation rivers FY 97 budget to support quiet title litigation

All three rivers cross or are near the Canadian Border north of the Yukon River (see map). All three rivers are non-glacial, small to medium sized, and lack major lakes to augment low flows. All three have been determined in part to be navigable by the BLM as part of land transfers to Doyon Ltd. and to Chalkyitsik Native Corporation. Both the Kandik and Nation rivers are tributaries to the Yukon River and involve a part of the Yukon-Charlie National Rivers unit of the National Park System. The Black River is a tributary to the Porcupine River and involves a part of the Yukon Flats National Wildlife Refuge. Quiet title action was filed 1993 by the state (attached).

When we were preparing the FY 97 budget for the Division, we discussed with Joanne Grace (AG's Office) the likelihood of having to take supporting action of the state's request for quiet title on 42 miles of the Nation River, 80 miles of the Kandik River, and 250 miles of the Black River. At that time, we could not tell when the federal court would rule on a motion. We also explored the expected costs of DNR to provide support to the AG for these three rivers. We also considered potential funding arrangements wherein the department support would come from the AG in the form of an RSA. Preliminary estimated costs for the DNR are between $50K and $75K. This includes a combined AG DNR field trip to validate available hydrologic information and collect any supplemental information needed as well as technical review of government documents provided the state during the discovery process. Field work requires helicopter support. We did not have a good read on when, or what the federal court would rule on the federal government's motion to dismiss. Therefore, nothing was included in the FY 97 budget for this litigation.

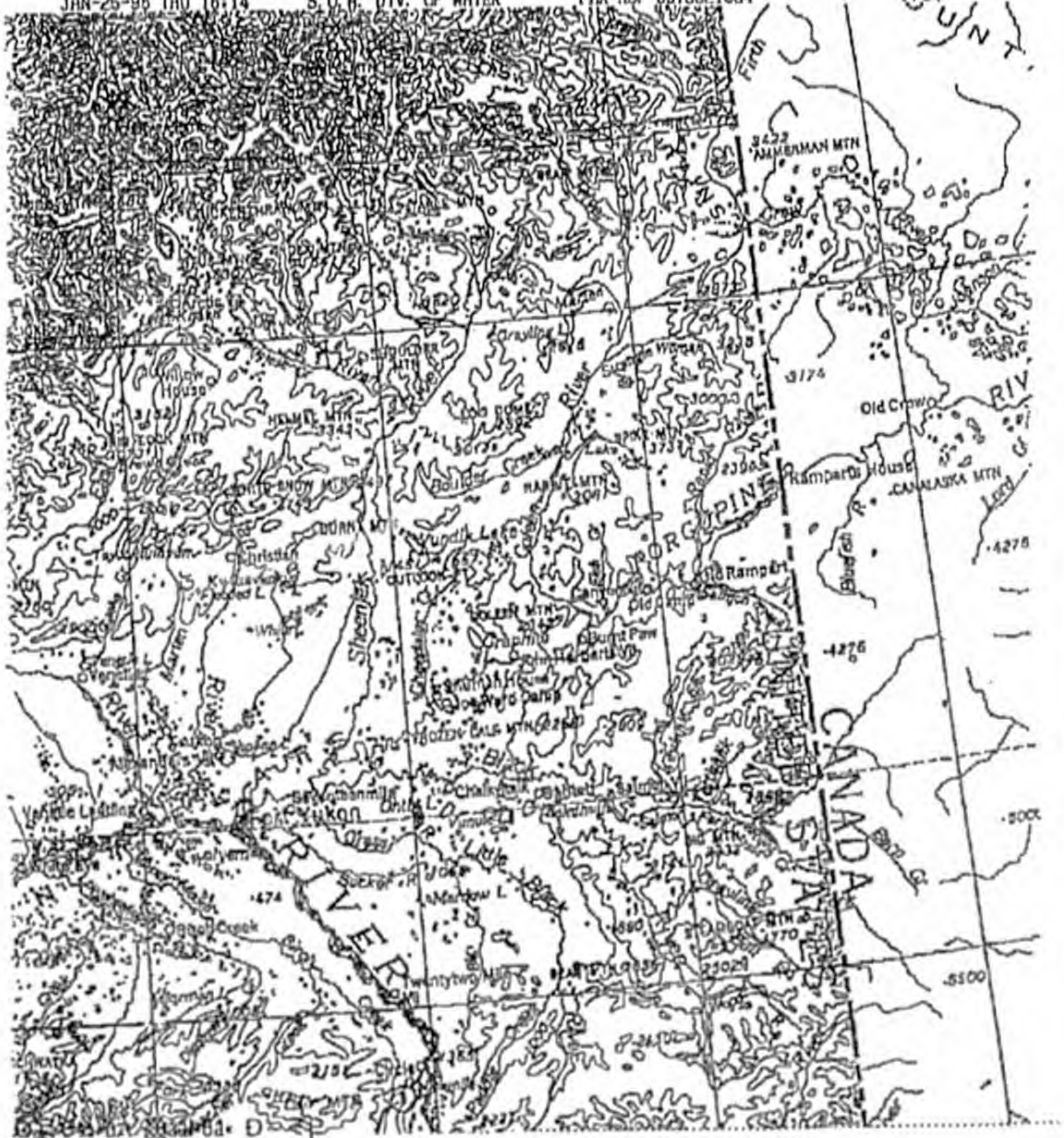
Joanne Grace alerted me early this week that the Ninth Circuit, in late December 1995, denied the federal government's second motion for an appeal. The federal government has 60 days (about March 1996) to file its answer on the state's 1993 quiet title request on these three rivers. Accordingly, we should know the extent of any disagreement the federal government has on the entire 370 miles of river ownership. We do not expect the federal government to agree with the state's position, but we do expect that portions of one or more of the three river segments will be considered to be in state ownership because navigability. Joanne also advised me that the AG did not want to cloud his FY-97 budget request with a RSA for DNR support on this litigation. Therefore, we need to come up with $75K that simply is not in the Division's FY-97 budget. I have discussed this with Marty Rutherford and she suggested that a supplemental appropriation may be the best way given where we are in the budget process. Any prelimary work done this FY can be absorbed without impacting other high priority work.

A final federal court determination on the upstream boundaries of these three river segments has a major and significant impact on the state ownership of a substantial portion of all small to medium sized rivers in Interior, Southcentral, Southwestern, and Northwestern Alaska. The BLM also determined that the interconnected sloughs on the Black River were navigable. A final court decision on the interconnected slough issue has significant statewide implications. As you may recall, I was one of the federal government expert witnesses on the BLM hearing on the Kandik River. Therefore, I intend to work closely on the field data collection and the interpretation of these data as it affects navigability. We have the potential to reduce the total field costs in two ways: use fire contract helicopter support (if available), and share costs with the federal government. I have asked Joanne to contact Bruce Landon in Justice to determine whether the state and the federal government can mutually collect data and set up a process that the state and federal government can then mutually agree on the factual data relating to stream profiles, hydrology, watershed characteristics, etc. I am making a similar contact with Debrah Williams.

Accordingly, I strongly recommend that we request $75K funding for the Division of Mining and Water Management for FY-97.

enclosures (2)

cc: M. Rutherford


AMMERMAN MTN
Old Crow
RIV
Rampart House
CANALASKA MTN
PORCUPINE
Old Rampart
Christian
Sheenjek
CANADA
Yukon
RIVER
Narrow L.

Tina 267-2456
Fax:

DESCRIPTIVE TITLE:
Navigation Litigation Support

CONTACT:
Gary Prokosch, 269-8645

DESCRIBE WHAT THIS AMENDMENT CHANGES FROM THE GOVERNOR'S ORIGINAL BUDG SUBMISSION, WHY IT IS NECESSARY, AND THE CONSEQUENCES IF IT IS NOT APPROVED:

See Attached

CODE	EXPEND BY OBJECT	GOV ORIG	AMEND	GOV AMEND
100	Personal Services	0.0	52.2	52.2
200	Travel	0.0	2.0	2.0
300	Contractual Services	0.0	32.0	32.0
400	Supplies	0.0	0.5	0.5
500	Equipment	0.0	1.0	1.0
600	Lands/Buildings	0.0	0.0	0.0
700	Grants/Claims	0.0	0.0	0.0
800	Miscellaneous	0.0	0.0	0.0
	TOTAL	0.0	87.7	87.7
1002	Federal Receipts	0.0	0.0	0.0
1003	General Fund Match	0.0	0.0	0.0
1004	General Fund	0.0	87.7	87.7
1005	GF/Program Receipts	0.0	0.0	0.0
1007	I-A Receipts	0.0	0.0	0.0
1061	CIP Receipts	0.0	0.0	0.0
1055	I/A Oil & Hazardous	0.0	0.0	0.0
1021	ARLF Receipts	0.0	0.0	0.0
POSITION INFORMATION	PFT			
	PPT	0.0	0.5	0.5
	Non Permanent	0.0		0.0

GBA Governor's Budget Amendment

AGENCY Natural Resources

BRU Resource Development

COMPONENT Water Development #816

Page 1 of 1

Revised Date

FY 97

Black-Kandik-Nation Rivers Supplemental Budget Form Text, 01/19/96

The Black, Kandik, and Nation Rivers are non-glacial, small to medium sized, and lack major lakes to augment low flows. All three have been determined in part to be navigable by the BLM as part of land transfers to Doyon Ltd. and to Chalkyitsik Native Corporation. The State filed quiet title action in 1993.

When the DMWM FY 97 budget was prepared, the likelihood of having to take supporting action of the state's request for quiet title on 42 miles of the Nation River, 80 miles of the Kandik River, and 250 miles of the Black River, was discussed with the AG. At that time, it was not known when the federal court would rule on a motion. The Director also explored the expected costs for DNR to provide support to the AG for these three rivers. Funding arrangements were considered wherein the department support would come from the AG in the form of an RSA. Preliminary estimated costs for the DNR are $88K. This includes a combined AG/DNR field trip to validate available hydrologic information and collect any supplemental information needed as well as technical review of government documents provided the state during the discovery process. Field work requires helicopter support.

It is expected that the federal government will not agree with the state's position, but it is expected that portions of one or more of the three river segments will be considered to be in state ownership because of navigability. The AG does not want to cloud FY 97 budget request with a RSA for DNR support on this litigation. Therefore, DMWM requests a supplemental appropriation of $88K, funding that is not in the Division's FY 97 budget.

A final federal court determination on the upstream boundaries of these three river segments has a major and significant impact on the state ownership of a substantial portion of all small to medium sized rivers in the Interior, Southcentral, Southwestern, and Northwestern Alaska. The BLM also determined that the interconnected sloughs on the Black River were navigable. A final court decision on the interconnected slough issue has significant statewide implications.

If not funded the AG would have to drop this case due to lack of relevant information and data needed to pursue the case to ensure a high probability of a favorable court decision. The State cannot take the chance of losing this critical case due to lack of supporting information and data.

MEMORANDUM

State of Alaska

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING AND WATER MANAGEMENT
ALASKA HYDROLOGIC SURVEY

3601 C Street, Suite 800
ANCHORAGE, AK. 99503-5935

TO: Jules Tileston
Director

DATE: January 19, 1996

FILE NO:

THRU: Mark Inghram
Hydrologist

TELEPHONE NO: (907) 269-8637 FAX 562-1384

FROM: Stan Carrick
Hydrologist

SUBJECT: Black, Kandik, Nation Rivers
Nav Project Cost Estimate

The following is a detailed breakdown of the estimated costs for the river reconnaissance to support the quiet title litigation on the Black, Kandik, and Nation Rivers. These costs include personnel time for one hydrologist (though in reality more than one hydrologist will work on parts of the project), navigability support, Director support, administration costs, helicopter support, per diem, and equipment costs.

PERSONNEL
- –hydrologist
  - field prep, field time, 1.5 man-months: $10,680
  - report prep, AG support, 3.0 man-months: $21,360
- –navigability support, report research, 1.0 man-months: $6,110
- –admin support, 0.5 man-months: $2,025
- –Director support
  - field prep, field time, 0.75 man-months: $6,025
  - litigation support, 0.75 man-months: $6,025

–Total Personnel Cost: $52,225

CONTRACTUAL
- –helicopter (Tundra or ERA Bell 206L), approx 10 days: $31,000
- –vehicle rental: $1,000

TRAVEL/PER DIEM
- –approx 12 days, ½ short term rate and ½ field rate for 2 DMWM staff: $2,000

EQUIPMENT
- –purchase, repair, etc.: $1,000

SUPPLIES $500

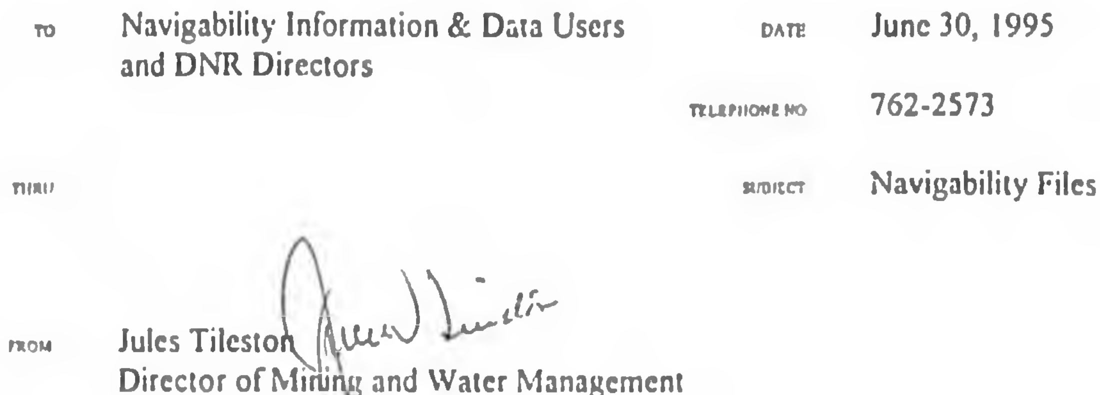
TOTAL ESTIMATED COST: $87,725

MEMORANDUM

State of Alaska

Department of Natural Resources

Div. of Mining & Water Mgmt.



TO: Navigability Information & Data Users and DNR Directors

DATE: June 30, 1995

TELEPHONE NO: 762-2573

THRU:

SUBJECT: Navigability Files

FROM: Jules Tileston
Director of Mining and Water Management

This memo is to inform users of navigability information and data users where file material can be obtained after we shut the Navigability Section down as of June 30, 1995. Files will be maintained by Division of Mining and Water Management, Suite 800, Frontier Building, 3601 C Street, Anchorage. The files contain the following

1. Historical information on the past court actions that DNR has filed in federal court. This includes Slopbucket Lake and Gulkana River files.
2. Historical information gathered by DNR and BLM historians
3. Copies of most BLM and State navigability determinations filed by quad sheets
4. Individual River files containing information on use, hydrology, and other river related research material.
5. Other litigation files such as Moose Creek in the Kantishna

These files will be kept in a secure location that can be accessed by DNR employees, other agencies and the public for in building uses

The navigability maps contain the Quads with navigability overlays These are important for planning and other purposes Historical reports and other supporting information for present and past litigation are kept in binders

We have also been asked to put together information so that each Division in DNR and other agencies can make their own navigability determinations I would suggest that they use the information in DO #125 and the fact sheet titled "Ownership and Management of Navigable and Public Water"

We suggest the following guidelines that may be used by agencies or individuals:

- A water body that is obviously navigable would be a lake or stream with a size, shape, depth and gradient that is capable of floating at least 1000 pounds. This would include rivers such as the Susitna, Kuskokwim, Copper, and Tanana, will also include rivers such as the Sixmile, Placer and Resurrection. For reference a 19 foot square stem canoe is rated by the manufacturer to carry 1000 pounds and a 13.5-foot Avon Adventure is rated by the manufacturer to carry 1700 pounds.

- Streams that are obviously not navigable would be streams that have excessive gradients (generally in excess of fifty feet per mile) or insufficient flows to carry water borne traffic.

- Streams that fall between these extremes will have to be evaluated using the guidelines in Department Order #125 and may require the collection of additional hydrological, historical, and physical characteristic data to support a navigability finding. Once a determination is made the agency may want to run the finding by the Attorney General's Office to ensure that they are not setting precedence that the State cannot defend or that may weaken the State's claim to submerged lands. These are policy issues that the Department will need to address.

These guidelines do not cover many issues associated with ownership of inland submerged lands, such as, prior and current litigation, pre-statehood withdrawals and management agreements.

There are three primary sources of digital data containing information about the navigability status of Alaska's' waterways. A WordPerfect directory, [navrpt] of navigability library sheets; a Foxpro database, [dailylog.dbf], which tracts navigability inquiries and the states response to them; and a Foxpro database compilation of different databases, [waterbod.dbf], which includes navigability work done on Mental Heath Trust Land and some of the independent statewide work prior of navigability adjudicators. These source of information are described in more detail below.

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2gakona.101
 |  |   └ HUC Cataloging Unit
 |  └─ Waterbody
 └─ HUC Subregion
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Figure 1. File Naming Convention

WordPerfect Reports

A directory of WordPerfect files containing library sheets that summarize work done by the state in recent years on specific waterbodies. These documents were intended to be dynamic as they were continually being updated with new information by the navigability staff. Brief notes as to the known physical characteristics, historical use, contemporary use, fisheries resources, and navigability determinations are included in these documents. The directory is not comprehensive of all navigability work done in Alaska, but it does provide a valuable overview of the waterbodies contained therein.

Access to these reports are on the GIS network at /net/water/water/navrpt/ directory. These reports are indexed by one of six Hydrologic Unit Code (HUC) subregions within the state. The first number in the file name corresponds to the number of the hydrologic unit subregion where the waterbody is located. A Hydrologic Unit Map can be obtained from the Division of Mining and Water Management to identify the HUC for the area of interest. The file naming convention is designed to eliminate confusion and potential

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH & GAME

TO: Frank Rue
Commissioner
Department of Fish and Game

DATE: September 14, 1995

FAX NO.: 267-2464

TELEPHONE NO.: 267-2342

SUBJECT: Briefing on Navigability and Related Issues

PREPARED BY: Lance Trasky
Habitat and Restoration Division

Kelly Hepler
Sport Fish Division

Doug Vincent-Lang
Sport Fish Division

Christopher Estes
Sport Fish Division/RTS

Tina Cunning
Commissioner's Office

Robin Willis
Habitat and Restoration Division

John Westlund
Wildlife Conservation Division

James Brady
Commercial Fisheries Management
and Development Division

You recently received a memo from Commissioner Shively announcing that the Alaska Department of Natural Resources (DNR) is suspending all work on navigability and that DNR is placing "responsibility" for determination of submerged ownership with the appropriate state official having jurisdiction over a pending action where state approval or a permit is dependant upon state ownership (Attachment 1). Responsibility for defending state ownership of tide and submerged lands and presumably the public's right to navigate state waters would be assigned through an amendment to Department Order 125 (Attachment 2). This amendment has not been distributed and may not be prepared. The memo states that DNR will make their expertise on navigability standards available where ownership of submerged lands involves very important public policy and the issues in dispute have regional or statewide

implications. DNR has not provided examples of threshold projects which would re-involve DNR in the navigability issue. Department staff have contacted DNR but have not been able to find out more about DNR's decision to re-assign navigability and how this would work.

Department staff who work on navigation, public access, instream flow, and state and federal issues, are concerned that DNR's action may jeopardize not only the public's right to use navigable waters, but many other things as well. These concerns include:

1. Delegation of responsibility by permits - Under DNR's proposal, the responsibility for asserting state ownership and navigability would be assigned to the agency who issues a permit for that activity. For example, the Alaska Department of Transportation and Public Facilities (DOT&PF) might exert state ownership when DOT&PF wants to build a state road across a navigable stream. The Alaska Department of Fish and Game (ADF&G) is interested in maintaining public access to and use of navigable waters by watercraft and aircraft for hunting, fishing, and access to hunting and fishing areas. These activities do not require any type of permit from a state agency. ADF&G permits only apply to fish habitat and special areas. DNR's memo does not indicate that any responsibility for determining navigability would be assigned to ADF&G. Under the permit concept, no state agency would have the responsibility for asserting navigability for access to or use of fish and wildlife. It is not clear how permitting relates to navigability or state ownership, or how the public's broad interest in navigability as it applies to access for hunting, fishing, subsistence, or other recreational activities will receive much consideration under this system. Failure to assert navigability for fish and wildlife access and harvest may result in the loss of access to and ownership of literally hundreds of miles of streams and lakes. Habitat protection and management of water allocation for fish and wildlife resources and recreational needs may also be jeopardized. Whatever process the state adopts for asserting navigability has to be comprehensive and protect all navigability interests.

2. Dispersal of responsibility - The delegation of DNR's responsibility to other agencies with no staff, no experience, little interest, and no established process makes it unlikely that navigability will be asserted consistently, if it is asserted at all. DOT&PF, DNR/Division of Mining, DNR/Division of Oil and Gas, etc., may assert ownership where there is mineral potential, oil and gas potential or where state highways cross

streams; however, these criteria apply to relatively few areas of the state. Because these agencies have no statutory responsibility to assert navigability for access to hunting and fishing, and no expertise, it seems unlikely that they will do this. There is even a possibility that there may be navigability disputes between agencies as there has been over the Russian River and over the ownership of avulsed lands in Prince William Sound.

3. Document flow - There is a long-established process between the Bureau of Land Management (BLM) and DNR and from DNR to other state agencies for distributing and receiving comments on land transfers which affect navigation, Alaska Native Claims Settlement Act (ANCSA) Section 17(b) easements, etc. It is not clear how this will work under the new DNR paradigm. If the responsible agency does not receive the document or does not respond within deadlines, not only public access will be lost, but some bad precedents may be set. There is good reason for concern. There may be as many as 2,500 land transfers from federal to private ownership this year, many involving Alaska's estimated 14,000,000 acres of navigable water bodies. Further, we understand that due to budget cuts, BLM is being asked to determine which of their duties could be contracted to private entities. Under the Indian Reorganization Act, several of the Native Corporations have submitted proposals to perform a number of BLM's current duties, including Native Allotment field verification surveys and surveys of lands to be transferred to ANCSA corporations. Although there is currently no move to have these same corporations identify ANCSA 17(b) easements and navigable waters, the potential does exist. The state and federal task force that has been working to establish mutually acceptable criteria for quiet title action on navigable waters has stalled, so no relief can be expected from that process. It seems more likely with both state and federal downsizing, and jettisoning of statutory responsibilities, that there is a much greater chance that very important land use decisions relating to navigability will fall through the cracks. To be successful in this environment, the state will have to assert navigability clearly, consistently, and unequivocally. BLM has already created numerous navigability problems which we thought DNR would rectify. BLM has designated some portions of streams non-navigable and sections above and below navigable. Failure to be businesslike and consistent in handling navigability assertions will invite more of the same.

4. Statutory responsibility - Although it is not clear what DNR intends to do, it seems that DNR has a statutory and perhaps a constitutional

mandate to assert the state's interest in navigable waters and the ownership of submerged lands. It is not clear that DNR can legally assign its responsibilities to other agencies, even if they agreed to accept them. This is akin to ADF&G assigning the subsistence issue to DNR to manage. There also is a question of what legal standing other state agencies such as DOT&PF would have in asserting navigability. Failure to do a credible job in protecting state interests in navigability might also invite litigation from users who feel that they may suffer substantial losses if the state fails to protect navigability. More detailed discussions of these issues are attached for your reference (Attachment 3).

5. Navigability is tied to other state interests - There is a great deal more at stake than the public's right to use navigable water bodies to harvest fish and wildlife or to access other public lands and waters. For example, navigability includes state ownership of submerged lands, and oil and gas and mineral rights. In regions such as the coastal plain, the ownership of mineral rights under rivers and lakes could mean billions of dollars in rents and royalties. State ownership of stream beds allows the ADF&G more freedom to construct weirs and conduct other fish and wildlife management activities without paying rent. The public also has a right to stand on the bed of navigable waters below ordinary high water and harvest fish even if the adjacent uplands are privately owned or in a restrictive federal ownership category. ANCSA 17(b) easements were created to allow public access to state lands and navigable waters. The state constitution provides for public access to navigable waters, even across private property. The department's legal and physical ability to protect fish and wildlife habitat in anadromous streams, prevent blockages in fish streams, and protect aquatic habitat in critical habitat areas and refuges is stronger in navigable streams than non-navigable streams. Failure to assert navigability consistently will consequently affect many other state interests.

ADF&G staff from the divisions of Habitat and Restoration, Sport Fish, Commercial Fisheries Management and Development, and Wildlife Conservation and the Commissioner's Office feel there is so much at stake that you need to discuss this issue with Commissioner Shively at the earliest possible date. Because DNR's actions affect other state agencies, and a wide variety of constituents including sportsmen, subsistence users, miners, oil and gas lease holders, this is an issue which should be discussed at the cabinet level if DNR can't satisfy this vital function. The most desirable outcome would be for DNR to continue to be the state's lead on navigability, and to rigorously defend all of

the state's interests in navigability and ownership of submerged lands. The department is ready and willing to provide substantial assistance to DNR and the Attorney General's Office where fish and wildlife interests are related to navigability, as we have in the past.

If DNR can not meet their statutory responsibilities, an alternate process needs to be established whereby the department can be confident that ADF&G can do a credible job protecting navigability-related fish and wildlife interests. This will require at a minimum: 1) establishing whether DNR will continue to receive and distribute BLM documents or if ADF&G will have to establish its own relationship with BLM and other state agencies such as the Department of Law; 2) if there is a dispute with BLM over navigability, will DNR become involved or will ADF&G and the Attorney General's office have to be prepared to perform all of DNR functions; and 3) if disputes over navigability arise between state agencies, who resolves them? DNR will also have to train staff from other agencies to handle navigability issues. There will also have to be a clear division of responsibilities for asserting navigability between state agencies, and central oversight, otherwise this will not work. Other questions will probably become evident as we get further into this function.

Please let us know how you wish to proceed.

Attachments

cc: Janet Kowalski
Kevin Delaney
Wayne Regelin
Doug McBride
Karl Schneider
Bob Schroeder
Paul Larson
John Hilsinger
Tom Kron
Rob Bosworth
Bob Clasby
Mike Mills

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

TONY KNOWLES, GOVERNOR

☐ 400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
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FAX: (907) 465-3886

☒ 3601 C STREET, SUITE 1210
ANCHORAGE, ALASKA 99503-5921
PHONE: (907) 762-2483
FAX: (907) 562-4871

July 26, 1995

Addressees Below

The enclosed memo summarizes the availability and location of information and provides suggested guidance for criteria used to determine ownership of submerged inland waters of Alaska. With the elimination of the department budget for navigability assertions, all work on a systematic stream or waterbody ownership program has been suspended.

It is recognized that there will be specific situations where disputed ownership of submerged land involve very important public policy and the issues in dispute have regional or statewide implications. When this situation appears to exist, we can make our technical expertise on navigability standards available. These instances, because of the zero budget, must be confined to challenges to state ownership by a federal or private interest where there is a real potential for the waterbody in question to be declared navigable.

We are preparing a supplement to Department Order No. 125 that places responsibility for determination of submerged ownership with the appropriate state official having jurisdiction over a pending action where a state approval or permit is dependant upon state ownership. For example, the division of oil and gas will make any necessary determinations associated with an upland lease and the division of lands would take similar action in response to removal of gravel from sources defined as submerged lands or for access to public lands involves stream crossings where a land use authorization is required. This division will make the necessary decision associated with mining claims. Other state entities, such as the Department of Transportation and Public Facilities for road and airport projects involving submerged lands under inland waters will be responsible for making and supporting ownership issues. This decentralization of the responsibility for asserting inland submerged land ownership makes it very important that the Attorney General's Office be consulted when there is a possibility that an assertion or acceptance of a federal agency determination of ownership may adversely damage the state's long-term capability to achieve successful quite title action in federal court.

Enclosed for you information is a current copy of Department Order No. 125 and a fact sheet titled "Ownership and Management of Navigable and Public Water." Please distribute this information to those within your organization that will have the basic responsibility for and/or are interested in navigability determinations.

Sincerely,

John Shively
Commissioner

Enclosures (3)

This is a draft.

DRAFT

Department Order 125, Revision No. 5

POLICIES AND PROCEDURES ON OWNERSHIP
AND
MANAGEMENT OF NAVIGABLE AND PUBLIC WATERS

The Fiscal Year 1996 department budget contains no funding to continue centralized determinations to resolve existing or prospective disputes about State ownerships of inland water bodies. Accordingly, the navigability staff has been disbanded and technical advice on the application of the criteria described in Department Order 125, Revision No. 4 is no longer routinely available. The purpose of this Revision (No. 5) is to establish clear guidance for the department for implementing new or revised determinations of the ownership of the beds of navigable inland waters in Alaska under the new decentralized responsibilities for making these determinations. Revision No. 5 is an addendum to Revision No. 4, it does not suspend, modify, or revoke Revision No. 4 dated November 22, 1994.

It is the policy of the department that each director shall have the responsibility and authority to make a title navigability determination for applications or requests to use state resources involving shorelands[1] that appear to be navigable for title purposes, but not yet found navigable by the State, or Bureau of Land Management, or federal court. In implementing this decentralized responsibility each director shall:

1. Use the navigability information contained in the Division of Mining and Water Management data base to determine whether the application involves a water body for which a navigability determination already exists. These data automated bases (Word Perfect - /navrpt, and Foxpro - /dailylog.dtf and - /waterbody.dtf) includes known BLM and Department of the Interior decisions and federal court decisions about specific water bodies as well and the list of those water bodies contained in a notice to the federal government of intent to file for quite title action in federal court. In addition to this electronic data base, the division has hard copy files with maps and other pertinent information on a water body by water body basis.

2. Use information provided by an applicant requesting use of shoreland or resources showing that the waterbody in question meets the criteria established by Department Order 125, Revision No. 4 when data in the Division of Mining and Water Management files are deemed inconclusive.

3. In the event that existing data, or data supplied by the applicant, are deemed inconclusive, determine whether the application involves a water body that meets the BLM cadastral survey standard for meandering the shoreline as an initial guide on whether the waterbody in question is likely to be considered navigable at some future date, or is a water body that clearly does not meet the criteria described in Revision No. 4 and therefore is shoreland not in State ownership.

4. In the absence of sufficient information to determine the State ownership of shoreland associated with a specific waterbody, all action regarding an application for use or disposition of the shorelands in question shall be suspended and the applicant notified that no further action will be taken because there is substantial uncertainty on whether the State actually owns the shoreland. The applicant

Has not been adopted yet.

should be provided a copy of Department Order 125 and informed of the navigability files in the Division of Mining and Water Management and that these files are available to the public. The applicant should also be told the type and extent of information that will be necessary for the department to resume processing their application and that this information can be developed by the applicant at their own expense or simply wait until such time as there funds and qualified staff may be available to answer the legal ownership issues associated with the specific application.

5. The division director making the decision is also responsible for updating the existing waterbody file in the Division of Mining and Water Management with the decision of the director on whether the shoreland is or is not deemed navigable together with any supplemental information developed by the appropriate division used to support the director's decision.

6. Questions concerning possible legal ramifications about a pending navigability decision by a division director should be directed to Ms. Joanne Grace, Anchorage Office of the Attorney General, phone 269-5235, FAX 279-2834.

7. In the event there is a dispute between the State and the federal government or private parties, the responsible division director shall consult with the Director Division of Mining and Water Management to develop a position paper for Commissioner action. The paper will focus on three matters that bear on a Commissioner decision about whether technical and budgetary resources should be committed to resolving the dispute:

a. Does the dispute involve substantive issues having statewide or regional application?

b. What level of information will be required to support State ownership, how long will it take to develop that information, and what are the estimated costs and staff time needed to assemble and analyze this information?

c. Is there a realistic chance that the State will prevail in federal court if supplemental information and technical staff commitment by the department are made?

This Revision also provides guidance on interim management of state-owned lands and waters associated with navigable waters. This interim guidance is patterned after the recent Alaska Supreme Court decision No. 4236 dated August 7, 1995 (Totemoff v. State of Alaska) which on pages 12-31 discusses the court's position about the extent of jurisdiction of the federal government over navigable waters and reserved water rights in Alaska. The court's opinion (attached) expressly addresses the issue of management of fish and game resources within the context of the Alaska National Interest Lands Conservation Act provisions dealing with subsistence uses. However, the overall the principal that the federal navigation servitude or reserved water right provides the federal government no management authority other than for navigation or against future water appropriations and is deemed appropriate for other overall resource uses of navigable waters for purposes other than subsistence, (e.g. mining, gravel sales, commercial guiding, and recreation use). This principal will be followed in department decisions for all resource uses associated with navigable waters in Alaska. Please consult with Joanne Grace on this matter when you have a concern about the legal implications of a pending decision by the department.

DRAFT

8. Distribution of navigability state and federal findings, assertions, and court action..........

(To reflect the December 19, 1995 meeting decision)

1. AS 38.05.965.(19) defines this term as follows: "'shoreland' means land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to ordinary high water mark as modified by accretion, erosion, or reliction."

DRAFT

Summary:

- Backlog = 1,300 applications involving adjudication of a water right.
- Keep all Temporary Water Permit applications current.

  Available staff in water adjudication are 7.5 positions funded to issue water authorizations.

  Temporarily shift one funded position from the Alaska Hydro Survey to water authorization.

  If needed, will assign all water use authorization work in backlog involving mining to mining. (Continue work by Hydro Survey associated with mining at Illinois Creek and AJ.)

- November 1996, identify and have policy, regulatory, and legislative amendments concepts that avoid future backlogs and streamline the water allocation process under a reduced public funding scenario. This could include:

  Establish a priority date, use and amount through filing with the State Recorders Office.

  Retaining state responsibility for instream flow, federal applications, large water resource projects, and large out-of-basin water use decisions.

  Entering into agreements to place certain water allocation responsibility with cities and boroughs for water uses as part of local zoning and land use decisions. This would include the right to collect fees to defray local administrative costs.

  Applicant notifies all senior water users potentially impacted and provides professional assessment of the effect of the proposed use on those senior users.

  Disputes between water users would be handled at the level having the primary responsibility for the disputed water allocation. (An alternative would be for disputes to be resolved by the courts.)

- January 1, 1997 now existing backlog of water right applications eliminated and all Temporary Water Permits current. Backlog eliminated by working from the oldest to the youngest application. By January 1, 1997 there will be a new backlog of 200 to 300 estimated new applications filed after January 1, 1996.

- July 1, 1997 all water use authorizations are current.

- During the priority effort to eliminate the backlog, other technical services and file maintenance will be set aside when not essential to TWP processing and backlog elimination. These include: permit and/or certificate amendments for the point of take, updates for name and address changes, changes in previously authorized water use or amounts, personally providing case file information, working on a case other than by date of filing, and pre-application technical assistance. Pending resolution of litigation in federal court (Katie John) work on pending and any new instream flow applications involving federal land and federal water rights will be postponed.

ENCL 5

Perceptions to be Confirmed or Revised:

- Water in Alaska is not in short supply except for a few urban areas and parts of the North Slope.
- There is no significant public, user group, or industry support for the water management program in its present form.
- The water management program should be revised to reflect local and individual responsibility for the establishment of water uses and allocations that are implicit in approved local land use plans, zoning, platting decisions, or transportation facilities and utility systems programs with opportunity for full public involvement.
- The annual administrative fee is onerous.
- Fees based on the amount of water used, or in the absence of metering, the amount of water approved for use are onerous.
- Budgets and technical staffing for the water management will continue to decline.

Options for a Comprehensive State Water Management Strategy in Alaska:

The following options have been developed on the basis of input from division staff. In addition, these were discussed informally with several individuals knowledgeable about the water allocation process in Alaska. In general, the existing water allocation process does not appear to be either beneficial or detrimental when there are no other conflicting water uses. There is general concern about assuring domestic water use priority. There is general concern about how to best assure the public trust aspect of water under the State Constitution.

Option 1. Do not modify the existing process with priority remaining with preventing future backlogs.

Impact: Not effective when considering long-term declining state budgets and employees, staff morale, and public/customer expectations. The water element of the DNR budget continues to be an annual "justification" of a constantly reducing fiscal and staff capabilities making effective backlog elimination difficult. This option is viable only with significant public support that the existing system is worth the results now and in the future.

Recommendation: Not prudent without significant support for the existing process.

Option 2. Eliminate backlog, identify areas where regulations or law can be revised to streamline the allocation process, where appropriate place costs of water allocations with the direct beneficiaries and water permit holders. Shift certain water allocation decisions to local government as part of local land use planning or zoning decisions under their jurisdiction, retain oversight and allocation decisions for new very large water allocations, large out-of-basin diversions, and instream flow reservations.

The basic elements of this option are:

- Identify types of use and amounts of water and localities where water applications are deemed to be automatically approved when filing and notification steps completed. A presumption of public interest and no adverse impacts to senior water users and those elements that must be considered under AS 46.15 when the proposed water use is in conjunction with an approved local, state, or federal land use plan unless there are objections deemed to have merit as a result of the notifications. This presumption would not apply to an instream flow reservation since this is a complex and frequently controversial issue of state or region wide importance. Processing federal water right and instream flow reservation applications involving federal land will be suspended pending the resolution of litigation associated with the

Katie John case. (A process question is whether a piece of paper is issued or that the filing with the Recorders Office and notation

to the official DNR land records is the only documentation necessary.)

- Other water allocations will become effective concurrently with state, local, and federal permits at the conclusion of public involvement process when a new use requires a new or revision land use plan, coastal zone consistency review, state best interest finding for another disposal action, National Environmental Policy Act compliance evaluations, etc.

- Require filing water right applications and temporary water use permits with the Recorders Office rather than the division. The filing fee must be sufficient for both the Recorders Office and for notation to the DNR land records. (This filing will establish the priority date, the use, and amount of water in the same manner as does an application now filed with the Division of Mining and Water Management. Actual water rights are not established until the identified amount of water is in full use.)

- The applicant provides *either* a professional assessment of the expected impact of the proposed water use on senior water users of record in the affected part of the watershed or groundwater basin *or* references the local land use or zoning decision that provided for the development (agriculture, domestic, business, recreation, etc.) that is the basis for the water use.

- Require the applicant to publish in a newspaper of general circulation in the area of the proposed use and to notify local government, and ADFG, ADEC. Applicant is also responsible for certified notification of senior water users of record likely to be impacted by the proposed water use. Determination of senior water right holders and any pending applications having a date earlier than the applicant would be based on the official DNR land records. (The present process does not require a newspaper notice unless the proposed amount of water to be used is larger than 5,000 gallons per day. A process for resolving any disputes or protests needs to be developed. This could be court of competent jurisdiction, a state entity, local government, a water master or some combination of these according to specific issues and the public interest. Disputes are now handled within the Division of Mining and Water Management, with an appeal to the Commissioner, and finally a court of competent jurisdiction.)

- Require all water permit applicants and water permit holders to keep addresses current in the official DNR land record system. Fees for amending the official records will be required. (This is currently done in the Division of Mining and Water Management as part of its routine duties.)

- The department should enter into cooperative agreements with local governments that place the overall responsibility for the determination of public interest as part of local zoning and land use planning authorities. The cooperative agreement can provide that the local entity can charge reasonable fees to conduct the evaluations and issue the appropriate water use authorization.

- Revise the Water Use Act and regulations as necessary to accomplish streamlining the process.

- Outreach and consensus building can be done by:

    1. Reactivating the Alaska Water Resources Board with a narrowly defined mission of reducing the time and effort spent while maintaining the overarching public ownership theme of "public interest"

2. DNR, ADEC, ADFG conducting workshops to obtain public input and build consensus on

items that can be done to improve efficiency.

3. Prepare program and present to the Legislature as part of the FY 97 budget.

Impact: Assures that the regulations and/or revisions in law are consistent with public need to have some form of a water allocation program and if so, who pays. This option will also require a level of funding for water right adjudication at about the current level until the backlog is reduced to instream flow applications and federal water uses. Public outreach also requires a commitment of division time and funding for meetings, follow up summaries of the progress/decisions made and/or pending. The "water board" has the advantage of emphasizing the user and public interest aspect of the rather than the regulator.

Recommendation: Use agency workshop for outreach since there will be policy and budgetary considerations that will strongly influence the final recommendations contained in the November 1996 report.

Option 3. Treat water allocation, except for very large new water uses and Temporary Water Use permits as an unfunded mandate. Shift all available capabilities to processing the backlog with priority given to those having highest potential to create state and local employment and/or revenue. Notify all others that their application will be processed to the extent funding is available with priority given to the oldest date of filing. This would suggest a relatively stable budget for the water allocation program for the next year while the backlog is being eliminated. Based on the past two budget years and the recommendations of the State Long Range Financial Planning Commission report *Closing the Fiscal Gap*, an assumption that were will be stable budget does not seem realistic.

Impact: Continues long-term uncertainty on the proper role of protecting the public interest and public trust in the transfer of water to restricted use/ownership.

Recommendation: Not prudent.

Option 4. Repeal the Water Use Act and substitute a riparian ownership system (eastern water law concept vs. the present western beneficial use-first in time concept).

Impact: Sets up controversy without a solution that protects the public interest where adjacent land is in private or federal ownership. Provides federal agencies additional power to assert management authority over navigable waters and strengthens the arguments about this management becoming a veto of any land and resource use on state owned submerged land.

Recommendation. Not recommended at this time, but it is a potential outcome of the public involvement process and will be evaluated in the November 1996 report.

Option 5. Repeal the Water Use Act and substitute a system of water courts to resolve any conflict. This works when all available water has been appropriated (or over appropriated) in states such as Colorado. Dispute resolutions is handled by lawyers and the courts and is very expensive. At present the majority of the water allocation work in Colorado involves proposals to change the use of prior appropriations and the complex arrangements that must be met to maintain interstate water flow commitments. Colorado also has a major effort to assert state ownership and control of water as a direct result of federal reserved water issues and for endangered species.

Recommendation: Not recommended at this time, but it is a potential outcome of the public involvement process and will be evaluated in the November 1996 report.

Important Aspects of the Water Use Act (AS 46.15) and Regulations (11 AAC 05)

Water Use Act:

Water is reserved to the people. Wherever occurring in a natural state, the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water [1966, 1980].

Senior rights have priority over junior rights. When there are competing applications and insufficient water, priority is given first to public water supply and then to those uses that alone or in combinations with other foreseeable uses will constitute the most beneficial use [1966].

A right to appropriate water can be acquired only as provided in this chapter. A right to the use of water either appropriated or unappropriated may not be acquired by adverse use or possession. This right can be obtained by:

- First making application to the commissioner for a permit to appropriate water.
- Issue a certificate when a permit is granted and the means of appropriation constructed.

DNR *shall* determine and adjudicate rights in the water of the state, and its appropriation and distribution [1966]. The issuance of a permit or certificate does not guarantee that a certain volume, quality, artesian pressure, or cost.

The commissioner shall prepare a notice containing the location and extent of the proposed appropriation, the name and address of the applicant, and other information the commissioner considers pertinent. Written objections may be filed with the director within 15 days of publication or service of notice. Objections must include the name and address of the objector and any facts tending to show the rights of the objector or the public interest that would be adversely impacted by the appropriation. The applicant pays for publication in a newspaper. Notice must be served personally or by certified mail to all who DNR's records show may be affected and the ADFG and ADEC.

Notice may be served on any governmental agency, political subdivision, or person.

The commissioner *shall* exercise all those powers and do all those acts necessary to carry out the provisions and objectives of this chapter. The commissioner *may* enter into contractual agreements necessary to carry out the provisions of this chapter including:

- Agreements with federal, state, and local agencies.
- Apply, accept, administer, and expend grants, gifts and loans from the federal government and any other public or private source.
- Establish a division of water
- Designate types of appropriations that are exempt from notice and objections.
- Simplify procedures for ruling on applications.

The commissioner *shall* adopt procedural and substantive regulations to carry out the provisions of this chapter, including:

- Consider the responsibilities of the ADEC and ADFG under AS 16.
- Keep a public record of all applications for permits and certificates and other documents filed in the commissioner's office.
- Record all permits and certificates and amendments and orders affecting water and the name of the applicant or appropriator.
- Cooperate with, assist, advise, and coordinate plans with federal, state, and local agencies in matters relating to the appropriation, use, conservation, quality, disposal, or control of waters and activities related to water.

- Prescribe the form and contents of the application and the procedure for filing an application to appropriate water.
- Prescribe fees or service charges for any public service rendered.
- An application, permit, and/or certificate creates a right against a later appropriator, including a government agency.

Criteria for issuance of a water permit include a finding that:

- Senior rights will not be unduly affected.
- Means of diversion or construction are adequate.
- Use of water is beneficial.
- In the public interest. (Permits and Certificates may include terms, conditions, restrictions, and limitations necessary to protect the rights of others and the public interest.)

Criteria for determining the public interest include:

- Benefit to the applicant.
- Effect of the economic activity resulting from the appropriation of water.
- Effect on fish and game resources and public recreational opportunities.
- Effect on public health.
- Effect of loss of alternate uses of water with a reasonable time if not precluded or hindered by the appropriation.
- Harm to other persons.
- Intent and ability of the applicant to complete the appropriation.
- Access to navigable or public water.

Applications may be made by an agency or political subdivision, an agency of the federal government or a person for a reservation of sufficient water as a specified instream flow or level of water at a specified point on a stream or body of water, or in a specified part of a stream for the entire year or at specified times. An "instream" reservation may be for:

- Protection of fish and wildlife habitat, migration, and propagation.
- Recreation and park purposes.
- Navigation and transportation.
- Sanitary and water quality purposes.

An "instream" reservation application is approved when the commissioner finds:

- Senior appropriators are not affected.
- The applicant has demonstrated a need.
- There is unappropriated water sufficient for the reservation.
- The appropriation is in the public interest.

Regulations:

No water may be used in excess of 500 gallons per day for more than ten days a year without a permit. (A single family home uses an estimated 500 gallons of water a day.)

A $50 administrative service fee is required of all water users having a permit or certificate, including temporary water use authorizations. State agencies, domestic water users using less than 1,500 gallons of water per day, anyone using less than 500 gallons of water per day, and instr Public water supply has priority over other uses. Instream reservations for a public benefit are exempt.

Existing water rights by type:

Type	Number of Files	Percent of Files
Small domestic users (less than 500 gpd)	13,106	79.1
Mining	810	4.8
Schools, businesses, churches, misc.	660	4.0
Public water supply	486	2.9
Recreation	421	2.5
Farm and livestock	321	1.9
Seafood	187	1.1
Construction	133	0.8
Oil and gas	111	0.6
Hydroelectric power generation	103	0.6
Hatcheries	89	0.5
Instream reservations	78	0.5
Timber	45	0.3
Bottled Water	27	0.2
Total	16,577	99.8

Note: Available records indicate that only slightly more then 50% of the total water used in Alaska is reported. Over the past five years, the percentage of small domestic users has dropped to about 30% of the total number of new applications. In terms of the total amount of water actually allocated; hydroelectric power = 90%, public water supply = 5%, aquaculture (hatcheries) = 3.9%. Domestic water for single family/multi-unit dwellings are not reported, however, it is estimated that this accounts for 9 million gpd or less than 1 percent of the total authorized water allocated in Alaska. (Anchorage uses 25 million gpd and a hydroelectric project like Solomon Gulch uses over 50 million gpd.)

TONY KNOWLES, GOVERNOR

3601 C Street, Suite 800
Anchorage, ALASKA 99503
Phone: (907) 269-8600

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF MINING AND WATER MANAGEMENT

January 3, 1996

Sam McDowell
336 East 23rd
Anchorage, Alaska 99503

Dear Sam:

This is in response to your telephone request of December 21, 1995 requesting the current status of the navigability program and potential changes in the water rights program managed by the Division of Mining and Water Management. Department of Natural Resources.

TITLE NAVIGABILITY

As you probably recall from our discussions about the Russian River this past summer, the last Legislature deleted all funding for the Title Navigability program by Department of Natural Resources. Division of Mining and Water Management. Accordingly, the navigability program was suspended and the technical staff who had been coordinating this work for the State were reassigned to other funded work. Enclosure No. 1 is a copy of the information provided the budget committee on the navigability program and the expected effects if the program was terminated. I alerted Frank Rue, then Director for the Division of Habitat and Restoration, Alaska Department of Fish and Game and requested any assistance his organization and support groups could provide. My staff and I also alerted other individuals and organizations that recently had been using the end products of the navigability work. The Legislature ultimately determined that the Title Navigability program should not be funded.

A memo was prepared on June 30, 1995 (Enclosure No. 2) and sent to navigability information and data us[illegible] explaining how and where the centralized navigability data base could be accessed.

On July 26, 1995 (Enclosure No. 3) information about termination of the Title Navigability program was sent to the heads of state and federal departments and to the AFN. You will note that Commissioner Shively specifically offered the Department's technical expertise on navigability disputes involving very important public interest concerns of regional or statewide significance.

Subsequently, we received several calls from the Anchorage office of the ADFG Habitat and Restoration section that the BLM was about to declare the Russian River in federal ownership as a part of a pending

application by CIRI for certain federal lands adjoining the lower end of the river. Shortly after the ADFG call, you called me to emphasize the importance of the Russian River. At that time we also discussed how the Department would respond to navigability issues when the Legislature had specifically terminated the program. Commissioner Shively agreed that the Russian River was a significant public resource with very important regional and statewide implications should BLM determine the river to be non-navigable. The Division participated in a joint ADFG/DNR field inspection immediately thereafter. That field inspection resulted in a written report asserting that the Russian River was in state ownership because it was navigable. Later, we received a second invitation from ADFG to have our senior hydrologist join in a raft trip down the Russian River. That invitation was declined on the basis that no meaningful new hydrologic information would be collected and that the hydrologic records had already been considered in our just finished assertion that the river was navigable.

On November 15, 1995 (Enclosure No.4) Commissioner Rue wrote Commissioner Shively requesting a meeting. That meeting took place on December 20, 1955. In addition to the Director of the Division of Habitat and Restoration and me, the Director of Land and representatives of the Alaska Department of Transportation and Public Facilities and the Attorney General's Office participated. A representative of the Department of the Interior was invited to be an observer but did not attend due to the Federal Government shutdown. Enclosure No. 5 is a copy of our discussion about the specific issues raised by ADFG and navigability. As a result of the meeting, It has been agreed that the Division of Land will request BLM to provide copies of all land transfer documents to the Anchorage Office of Habitat and Restoration, ADFG. The Division of Land also will develop a computer access system so that new navigability findings can be easily entered into the computer data base. That system will be available to the public for access. The hard copy central files will continue to be kept in this Division. These points will be incorporated in the final revision to Department Order No. 125. Each participant was also requested to review the proposed revision to Department Order No. 125 and to provide any comments to me by mid January 1996.

In summary, the Attorney General will determine the State's position about litigation of navigability issues concerning ownership of lands beneath inland waters. The Department will provide any required technical assistance needed to support the State's position in litigation. It is likely that any budget request for litigation and technical support will be coordinated with the concerned state agencies. In the meantime, we are prepared to respond to specific issues having important navigability issues to the state. The technical evaluation and navigability report prepared by the Division of Mining and Water Management for the Russian River is an example of how this works.

WATER ALLOCATION PROCESS

As state operating budgets and staffing are downsized to meet the fundamental objective of balancing the budget along the lines presented in the report *Closing the Fiscal Gap* by the State Long Range Financial Planning Commission, many state expenditures and processes are being examined to see if they are still necessary and, if so, are there ways to reduce costs and increase efficiency through statutory or regulatory change. The water allocation processes and fees associated with that program are one of these state programs under review. It is our intention to enter into a public outreach process to examine how this public trust responsibility can be properly handled. At one end of the spectrum are water rights associated with in stream flows, large water projects and large out-of-basin water transfers tending to be issues which the state should probably retain a primacy role. At the other end of the spectrum are single-

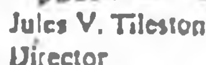
family and multi-family homes that are generally undertaken only after extensive public input on matters such as zoning, sewers and septic systems, platting, traffic, public services, schools and related public interest matters by local citizen and local, state and federal governmental entities. The fees associated with permit processing also will be evaluated to determine whether they reasonably reflect costs to the state, and the proper level of government that should be administering the water allocation program. For example, a borough or city and the Department can enter into an agreement that would transfer certain water allocation decisions to that local entity. That agreement could also include authority to collect reasonable fees to administer the program from those now, and in the future, having certain water rights. Another option would be to develop a program similar to mining claims in that a person wanting a water right must file with the State Recorders Office certain information about the water use intended. The cost of entering the site specific information, notification of the public at large and senior water right holders potentially effected by the water appropriation, professional evaluation of the availability of the water source, could be the sole responsibility of the applicant. Record changes, such as change of address, could also be accomplished through filing an appropriate document with the State Recorders Office and updating the official State land records. Costs for these changes also could be the sole responsibility of the water right holder.

It is planned that a discussion package of information be available prior to a series of workshops to explore feasible ways the public, local government and state agencies can develop partnerships that reduce the administrative costs while still protecting the Constitutionally guaranteed public trust doctrine for waters of Alaska. .

At this time, I envision that there will be an initial round of workshops in late January or early February 1996. These would likely be held in Anchorage, Fairbanks, and Juneau with teleconference tie-ins. The workshop input will be the basis for developing a formal strategy that would be resubmitted for public review and comment during the late summer. The overall analysis of the water a[illegible]cation process needs to be completed by November 1996 in order to the useful in Governor Knowles' submissions to the 1997 Legislature.

I have added you to our mailing list on the water allocation process evaluation. Enclosure No.5 is a preliminary draft on the concepts that we are developing for the workshops. We welcome any thoughts that you may have from a user's perspective.

Sincerely,



Jules V. Tileston
Director

cc: L. Vercelli (ADEC), J. Kowalski (ADFG)

Division of Mining and Water Management
FY 96 -- Navigability Project # 45 Impacts with Zero budget

March 15, 1995

The following are the impacts with deletion of the Navigability Project # 45 for FY 96.

1. No technical support will be available to determine, assert, or defend State ownership of submerged lands transferred to the State under the Alaska Statehood Act. This places at risk the ownership of millions

2. Technical support will be unavailable to the Attorney General about the three rivers (Kandik, Nation, and Black) presently in Federal court.

3. Technical support to file quite title action in Federal court on all navigable waters associated with the Trans Alaska Pipeline System will be unavailable.

4. Cooperative efforts between the Department of the Interior and the State to develop a strategy that will significantly reduce the State and Federal litigation costs associated with water by water body action in Federal court will be suspended.

5. Technical support to determine whether a water body associated with a transportation project such as a road realignment, bridge, or airport extension, is or is not in State ownership will be unavailable.

6. Technical support to determine the ownership of sand and gravel or other locatable minerals such as gold placers situated below ordinary high water will be unavailable.

7. Technical advise on the ownership of submerged lands to commercial guiding operations using rivers and lakes as a principal focus will be unavailable.

8. Follow up assertions of Sta[illegible]ership of submerged lands in the Chugach National Forest as provided for in the Katella decision will be suspended.

9. Determinations of State ownership of submerged lands associated with the new block leasing oil and gas program will not be made.

10. Technical support will be unavailable to consider the ramifications of the pending declaration of the Secretary of the Interior about Federal sovereignty over navigable waters for subsistence purposes.

ENCL 1

TONY KNOWLES, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

SUPPORT SERVICES DIVISION

400 WILLOUGHBY AVENUE
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2406
FAX: (907) 465-2492

February 14, 1996

The Honorable Rick Halford
Chairman of Senate Finance Committee
State Capitol, Room 508
Juneau, AK 99801

Dear Senator Halford,

At the Senate Finance Committee Overview of the DNR budget three issues came up for which we would like to provide you with additional information. They are:

1. **Navigability** - Current policy compared to what was proposed in the FY96 budget.

Attached is a memo from Jules Tileston addressing this issue.

2. **Parks funding history** - General funds vs. Program receipts.

We have attached a table with graph showing the FY86-FY97 funding history for the Division of Parks. The total funding request in FY97 is less than the general funds for the program in FY86, yet we have more park units and more visitors.

3. **Land Status GIS automation project** - status report.

This project is on schedule and should be 80% complete at the end of this fiscal year. There will be two more years of effort left to have this completed, when funded at the Governor's request level of $350.0. Attached is a write-up showing the status of this project.

I hope this additional information is helpful to you. If you have any further questions please feel free to contact me.

Sincerely,

Nico Bus
Acting Director

10-J9LH

Attachments:
Memo Jules Tileston February 7, 1996
State Park GF funding history FY86-FY97
Land Status GIS project status report

cc: Senator Steve Frank, Chairman DNR Senate Finance Subcommittee
Representative Gene Therriault, Chairman DNR House Finance Subcommittee
Members of DNR's House and Senate Finance Subcommittees
Commissioner John Shively
Deputy Commissioner Marty Rutherford
Director Jim Stratton
Director Jules Tileston
Chief LRIS Rich McMahon

MEMORANDUM

Dept. of Natural Resources

State of Alaska

Division of Mining & Water Mgmt.

TO: Nico Bus
Acting Director
Division of Support Services

Date: February 7, 1996

Telephone: 269-8625
Fax: 562-1384

NB for JT

From: Jules V. Tileston
Director

Subject: Navigability Program

At Commissioner Shively's recent appearance on the department budget, supplemental information was requested on the navigability program as it existed in this Division until it was eliminated from the FY 96 budget. The following describes the former program. Based on our experiences over the past year on handling important navigability issues having regional and statewide implications, I am also outlining the concepts of a navigability program that is both in balance with realistic long-term budget expectations and assuring a continuing and timely ability to resolve and pursue federal court actions to quiet title for all significant issues impacting ultimate ownership and management of resources associated with inland water bodies in Alaska.

Budget-FY96 submitted by the Knowles Administration for the navigatibility project:

Personnel Services:	$122.5
Travel:	$3.0
Contractual Services:	$5.0
Supplies	$2.0
Equipment:	$0.0
TOTAL:	**$132.5 General Funds**

These FY 1996 funds were intended to:

1. Continue systematic assertions on and provide technical support in defense of the state's title to submerged lands that are held in trust by the federal government for the future State of Alaska. It is estimated that there are over 14,000,000 acres of submerged lands associated with inland navigable waters and another 65,000,000 acres of coastal submerged lands.

2. Assemble and maintain a centralized factual and historical data base on the use, physical characteristics and court decisions influencing ownership of and access to Alaskan water bodies.

3. Work with federal agencies through pro-active partnerships and joint state-federal cooperative management agreements to identify navigable waters in Alaska. This includes collecting and exchanging information and data between state and federal land managing agencies. The primary objectives of this effort are threefold; (a) reach agreement on factual and historical data applicable to specific waterbodies, (b) reach agreement on which waterbodies clearly are or are not navigable, those waterbodies where the available data are inconclusive, and those waterbodies where the interpretation of the data are of a nature that only the federal court can resolve and, (c) reduce the necessity for water body by water body litigation. Sometimes, the interest of the federal and state governments differ and the state must be prepared to timely assert and follow through with appropriate action to protect the public's interest.

4. During FY 95, the Navigability Project resulted in navigability determinations for airport improvement projects at Chisana, Kongnignanohk, and Kwigillingok to resolve ownership questions associated with airport improvements by the Alaska Department of Transportation and

Public Facilities. Navigability determinations were made for potential gravel sources for roads, dikes, and power plant construction projects at the Kotsina, Scott, Sheridan, Makushin. Information was provided the Alaska Department of Transportation and Public Facilities and the U.S. Coast Guard both for ownership and for the type of boat traffic in support of highway bridge projects throughout the state.

5. Provide continued technical assistance to the orderly development of mineral deposits located in inland waters. This included a detailed evaluation of available hydrologic and use information and an aerial inspection of the watershed flowing out of the recent addition to the Denali National Park and Preserve. This was in direct response to an administrative appeal hearing held to collect currently available information about the prospective navigation condition of a stream at Kantishna where the ownership of the stream bed for the purposes issuing a state mining permit. The administrative record was reviewed in anticipation of litigation being filed if the state did not issue the permit. In addition, the records were reviewed to validate previous navigatible assertions on parts of the bed of the Fortymile wild and scenic river where federal agencies are attempting to extend federal jurisdiction to state ownerships expressly excluded from conservation systems created by ANILCA.

During FY 96, the Commissioner approved minor reprogramming of funding in the Division to complete several tasks to assure that the state's interest in asserting ownership of inland navigable water bodies. This included :

1. Development of a policy allowing each state entity to make navigability determinations when a permit, lease, or sale of public land or public projects, follow standard guidelines that currently applied to Alaska. The standards and criteria were distributed to state agencies and to federal land managing agencies with a request for comment. Comments were recently received from the Alaska Department of Fish and Game and a final revision to the existing Department Order is underway.

2. Developed a standardized, user-friendly electronic format for easy input to the centralized navigability data base files in the division.

3. At the request of the Alaska Department of Fish and Game, the division reviewed the hydrology and use information in the files associated with a pending transfer of the lower Russian River to private ownership. Based on this review and an onsite visit, a report asserting the Russian River was in state ownership because of its navigable condition was prepared and distributed. ADFG also identified a second river that the department should reexamine as a result of pending BLM land transfers in the Tyonek area.

4. Developed, in close coordination with the Attorney General's office, a strategy to collect information needed to defend the state's assertion in federal court that the Kandik, Nation, and Black rivers are in state ownership because they are navigable. This quiet title action was started several years ago and vigorously fought by the federal government as an issue that was not ripe for federal court action. The 9Th Circuit Court recently rejected that position and directed that quiet title action proceed. After discovery by the AG's office, the division will provide a technical analysis of the information being used by the federal government. A field inspection will be scheduled in late summer to validate hydrologic data that has broad application to a large number of non-glacial streams and small rivers in Interior, Southcentral, and Southwest Alaska. A preliminary inquiry has been made of the Department of the Interior to see if they would join in the field examination to share costs and to share data. The primary objective is to collect hydrologic data for each of the disputed stream reaches in a manner that can be stipulated in court as acceptable to both the state and the federal governments.

Current status:

Navigability determinations are routinely made as part of a land transfer from the federal government. These federal determinations are made in order to keep track of acreage entitlements since if the state

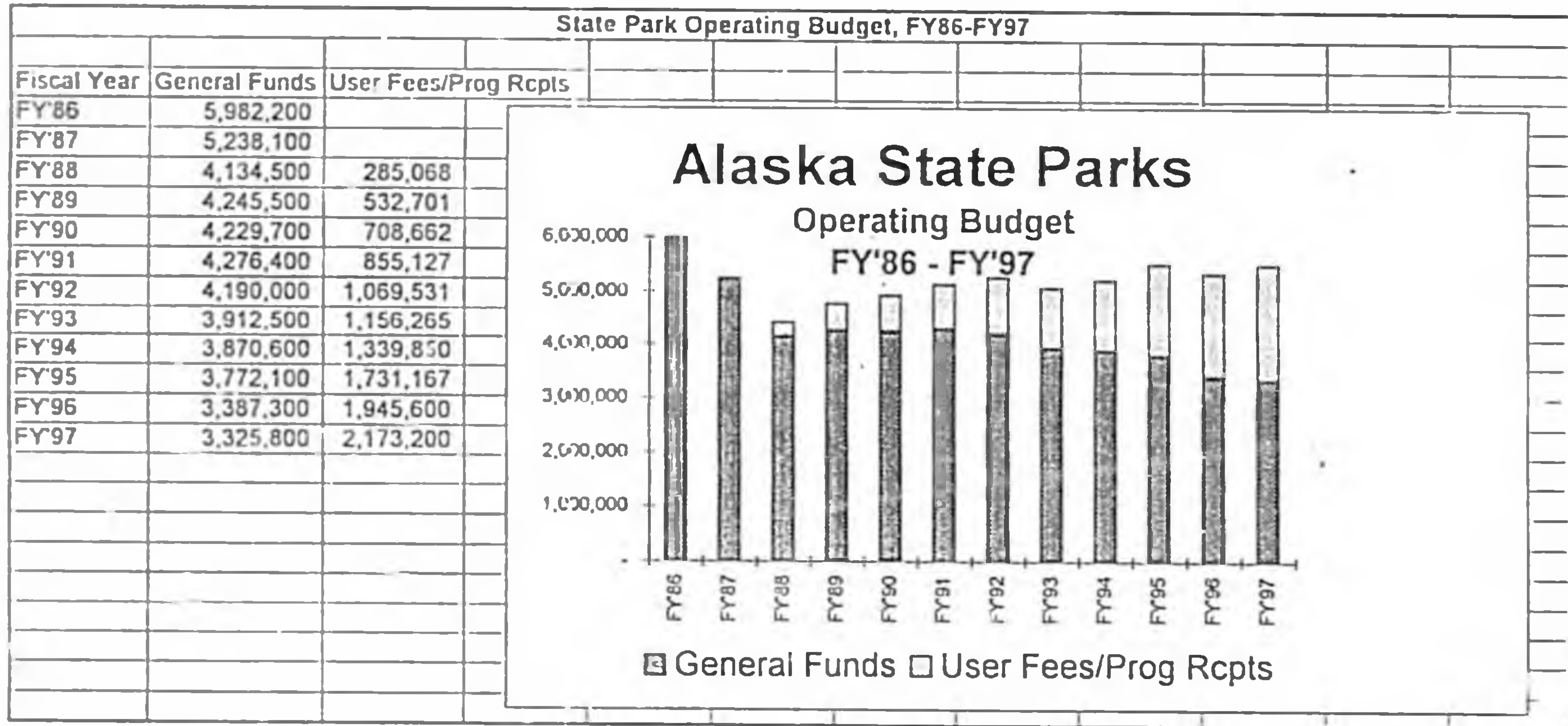
already owns the land under a water body (regardless of size) the acreage does not count against acreages specified in the Alaska Statehood Act, the Alaska Native Claims Settlement Act, and other federal entitlements to the state. To date the state has received title (either as Tentative Approval or Patent) to approximately 89 million acres; whereas, Alaskan Native Corporations have received approximately 30 million acres as Interim Conveyance or Patent. For those lands conveyed to the state, the people of the state own all lands and water. The only question is "Do specific acreages count against entitlements?" For the remaining lands pending transfer to Native Corporations, we understand that BLM is applying the "Gulkana" standard in determining whether certain water bodies are or are not to be counted against a Corporation's entitlement. Most of the remaining acreages to Native Corporations are closely associated with prior conveyances where BLM had already made a determination and acreage charges to many of the same waterbodies.

The Kandik-Nation-Black final determination will provide a supplemental set of criteria for determining ownership of land beneath inland waters.

Under Department Order 125, Revision No. 5, the ownership assertion process would continue, but the cost associated with a navigability determination would be responsibility of the agency or party making the request for a use dependent upon state ownership. DNR would still have the overall responsibility to provide technical assistance to the Attorney General and other state departments in resolving, avoiding, or litigating state/federal/private disputes, and preparation of assertions when there are significant public use or resources at risk.

Accordingly, the present policy of the Commissioner to reprogram from available funds seems appropriate for projects that can be done within existing funds. However, we reserve the option to request project funding for a specific project where the work exceeds the capability of available funding and technical staff. The only major work that is not being done that should be seriously considered is the pro-active program between the federal government and the state to reduce water body by water body litigation. At this time it is not known whether there is sufficient funding or commitment at the federal level to re-establish the program that was terminated when the Navigability Project became an unfunded mandate.

cc: J. Shively, M. Rutherford



State Park Operating Budget, FY86-FY97

Fiscal Year	General Funds	User Fees/Prog Rcpts
FY'86	5,982,200	
FY'87	5,238,100	
FY'88	4,134,500	285,068
FY'89	4,245,500	532,701
FY'90	4,229,700	708,662
FY'91	4,276,400	855,127
FY'92	4,190,000	1,069,531
FY'93	3,912,500	1,156,265
FY'94	3,870,600	1,339,850
FY'95	3,772,100	1,731,167
FY'96	3,387,300	1,945,600
FY'97	3,325,800	2,173,200

Land Status Geographic Information System Project

Brief Background:

The Land Status Geographic Information System (LSGIS) project automates the Department of Natural Resources graphic land records, called ***status plats***. These are the State of Alaska's official land status maps for all state owned land. They are organized by township, and it takes multiple maps to depict all state activity within one township of state land. This project converts manually drawn mylar maps to a digital database and produces camera ready plat maps that are distributed on aperture card throughout the department and to other land management organizations in the state, such as boroughs and the University of Alaska. Please see the FY97 IRM budget document for a complete description of the information portrayed on the status plats and the project details.

Status Report as of January 31, 1996:

From inception to date, the LSGIS project has converted and automated 6,223 townships, represented by 12,144 separate plat maps. There are currently 1,440 township left to automate. An additional 260 townships will be completed in FY96, leaving fewer than 1,200 townships to complete the job. By July 13, 1996 the project will be over 80% complete.

Why LSGIS is important to laska:

The LSGIS project creates a digital database that is at the core of all resource development and environmental work that takes place in Alaska. Before any project begins, the developer, regulatory compliance consultant, or government agency must determine who owns the land and what types of permits are required. For state land, this information is contained on the status plats. By turning this information into a digital database, Alaskans are no longer limited to a particular map in a particular office. The information can be made available electronically statewide through the State of Alaska's wide area network and can be at our citizens fingertips through their computers.

As resource and environmental information is automated, state agencies can re-engineer their permitting processes to take advantage of these electronic databases. For instance, when an application is received by the Department of Natural Resources, the adjudicator can pull up the electronic status plat for the area, determine whether a coastal zone review is necessary, put an electronic package together of the pertinent information for that application, and ship it simultaneously through the state's wide-area network to the other departments responsible for reviewing the application, i.e. Fish and Game, Environmental Conservation, etc. The electronic package can contain a scanned image of the application, an electronic version of the status plat with the new application depicted, and a cover memorandum outlining what needs to be addressed. The receiving agency can take information from their databases, overlay it with the electronic status plat, and intelligently respond to the issues raised in the application. I.e. Fish and Game could pull in anadromous stream data to see if the application affects any critical water bodies and respond accordingly without having to transpose DNR's information onto DF&G's maps, etc.

Without an electronic base, the status plats, agencies and the public are forced to continue the paper process for distributing and reviewing applications - a time consuming endeavor. Agencies and the private sector will continue to make redundant databases because the information is not readily

available in electronic form that is necessary for processing the many applications that are submitted each year to the various agencies. The state cannot realize true government streamlining without re-engineering the basic government processes and utilizing electronic networks to share these government databases.

What it takes to complete the LSGIS Project:

This project is scheduled to be completed in two years using in-house staff who have specialized training in converting land status to digital format. The cost is $350.0 in FY97 and $350.0 in FY98. Funding covers the salaries of the status specialists and incremental supplies. Without CIP funding, the project will not be completed.

Can the Conversion Effort be Contracted Out?

This is really a question of cost. The costs of out-sourcing the remaining work would be significantly higher because the conversion effort is interwoven with our on-going operating requirements. Detailed status records are complex. CIP staff frequently interact with the production staff in the operating budget to resolve questions on the old mylars. The original source documents cannot be released and would require copying and indexing. The quality control portion of work stays with DNR because we are responsible for the legal record. The data required to complete the project are part of the central DNR computers and would have to be duplicated, managing changes and assuring consistency during the contract period would be time consuming. The customized software used for both operating and CIP work would have to be duplicated onto contract computers making it expensive to keep separate systems synchronized.

We are looking into "out-tasking" which would deliver logical portions of the project. We don't know if this will save money or speed the process. The test area will involve automating surveys.

Can the Project be Completed Using the Operating Budget?

The project cannot be completed without incremental funding. The department's operating budget is devoted to maintaining the daily changes on the status plats, not converting manual plats to digital format. On average, the department posts 12,000 annual changes to the status plats and distributes over 80,000 aperture cards of the plats statewide. With the operating reductions over the last several years, the department already has a backlog of over 11,000 actions to post to its records. The operating budget cannot absorb the work being accomplished by the Land Status GIS project.

If you have further questions on this project, please contact Richard McMahon, LRIS Section Chief, at 269-8836 or via email at Richard_McMahon@dnr.state.ak.us

Attachment: February 1, 1996 Progress Map

DNR BUDGET OVERVIEW

SENATE FINANCE COMMITTEE

JANUARY 31, 1996

DISCUSSION OF NAVIGABILITY

Senator Frank: Opened discussion by expressing concern about deletion of navigability section in DNR and subsequently blaming legislature. Indicated that navigability should be high priority. Really concerned.

Comm. Shively: Doesn't mean he will not determine navigability. Only place navigability can be determined is in federal court. Many body of waters there will be no argument. Some bodies will contested. His strategy is to look at where conflicts take place. Three rivers ripe for determination. DNR will provide support and DOL has been asked to pursue those. May be river on Kenai and west side of Cook Inlet where there may be a dispute and DNR will support those. DNR will not generate litigation for litigation sake. It is an endless hole to pour money. No one is going to litigate the Yukon River but there are small lakes and rivers where there will be disagreements. DNR will concentrate on these.

Senator Frank: We have a document saying you will not be doing navigability.

Comm. Shively: Doesn't say exactly that. Will concentrate on three rivers conflicts.

Senator Frank: Are there other areas being disposed by the federal government where there are potential losses of navigability.

Comm: Shively: No statute of limitation on navigability. Navigability is determined at statehood.

Senator Frank: What were the two people doing – $130,000.

Comm. Shivoly: I don't know.

Senator Frank: Need to get back and discuss this more fully. Legislature is extremely concerned.

Commissioner Shively: State interest only goes when state interest is being challenged.

Sen. Reiger: Has any body of water been determined as being non-navigable this past year. In other words has any state interests been lost?

Commissioner Shively: Not to my knowledge.

Sen. Reiger: No statute of limitation.

Comm. Shively: State cannot stipulate away. No administrative procedure for determining navigability. We can agree not to litigate.

Sen. Reiger: Has that happened?

Comm. Shively: Not to my knowledge.

Sen. Halford: Asked about language included in BLM transfer documents which acknowledges that navigable waters belong to state - in title patent to third parties. You stopped that effort.

Comm. Shively: No. The bulk of those land transfers to native people has taken place. I don't know the answer.

Sen. Halford: Is your position that the transfer documents should contain language that navigable waters belong to state?

Comm. Shively: I believe it would be a good idea. I don't believe it would make any difference, however.

Sen. Halford: Isn't that the reservation that was in the patent?

Comm. Shively: I don't know the answer to that. Federal government cannot transfer away something it does not own.

Sen. Frank: The difference is who is going to litigate - a private party or is the state going to protect its interest. The state doesn't want to back away from asserting its interest in navigable waters.

Comm. Shively: An it shouldn't, if that interest is being directly challenged.

Sen. Frank: Get back to us. We need to understand this issue better.

Sen. Halford: One of highest priorities of Department.

NAVIGABLE WATERS QUESTIONS

UPDATED: 2/6/96

1. Alaskans (guides in particular) are being denied permits to use state owned submerged lands and navigable waters by federal agencies This is occurring statewide and specific examples include the Kisaralik Lake and River, Arolik River, Eagle River, Karluk River, Situk River and Placer River. What is being done about it?

1. Federal agencies like the National Park Service are restricting use of state navigable waters through permitting requirements. Are the states interests being defended? What is being done?

1. The State is in court over the determination of navigability and quiet title on portions of the Black, Kandig, and Nation Rivers. In 1996, Director Tileston write:

> "A final federal court determination on the upstream boundaries of these three river segments has a major and significant impact on the state ownership of a substantial portion of all small to medium sized rivers in Interior, Southcentral, Southwestern, and Northwestern Alaska. The BLM also determined that the interconnected sloughs on the Black River were nagivable. A final court decision on the interconnected slough issue has significant statewide implications."

Does the Department of Law have the information necessary to adequately defend the state's position in this case?

1. The State of Alaska gave notice of it's intent to file quiet title actions on nearly 200 streams in Alaska. What is being done to complete the quiet title process?

1. It is our understanding that there is considerable concern over the navigability determination for the Russian River on the Kenai Peninsula. What is being done to protect the state's interests here?

1. It is our understanding that DNR has an automated navigability database. If determinations are being made by DNR and other agencies based on this database, can you tell me if all navigability files have been entered into this database?

1. Is BLM making navigability determinations now under ANCSA and ANILCA? If the State does not contest a navigability determination, does it lose its rights to later contest that determination, especially if the private landowner proceeds in good faith to develop or utilize their lands?

1. As a result of the Katie John case, federal agencies could attempt to exert management authority over some navigable and non-navigable waters.

1. Has [handwritten: Implement to] DNR Department Order # 125 been adopted?

Supplement to

1. The adopted or proposed DNR Department Order # 125 raises several important questions.

- Who is the lead state agency responsible for reviewing BLM land conveyances?
- How does the public have input into the navigability determination process?
- How are interagency actions coordinated?
-

1. Are all title or navigabiltiy assertions deposited with BLM being reviewed by the State?

1. De[illegible]minations of navigability may be critical to the retention of state jurisdiction over some important fisheries. Are fish and wildlife considerations examined in developing state policies, like DNR Order # 125, or litigation strategies?

1. On December 5, 1995, the National Park Service proposed general regulations which in essence affected state jurisdiction over navigable waters within park boundaries. Did the State Administration comment on these proposed regs? What is the Administration's position? Is the Administration prepared to litigate the regulations or state title to lands under navigable waters within the boundaries of the national parks?

1. Has DNR stopped reviewing federal water right applications? Will the federal agencies institute their own Federal Reserved Water Right program?

MEMORANDUM

Department of Natural Resources

State of Alaska

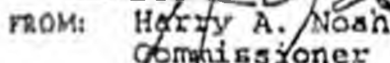
Office of the Commissioner

TO: Deputy Commissioners
Division Directors
Special Assistants

DATE: December 2, 1994

FILE NO: 0.012

TELEPHONE NO: 465-2400
Fax No: 465-3886



FROM: Harry A. Noah
Commissioner

SUBJECT: Department Order No. 125

POLICIES AND PROCEDURES ON
OWNERSHIP AND MANAGEMENT OF
NAVIGABLE AND PUBLIC WATERS

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 that 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.

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 have been issues 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 of 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 stature 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.

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 term 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 it 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 ever 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.

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 1986), 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 Kankik-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).

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 inform--ion 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 last 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 highway. 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.

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.

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.

II. LEGAL AND POLICY GUIDELINES GOVERNING MANAGEMENT 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 (1982), 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 revokable, 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.

> [I]t 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 P2.d 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).

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 or 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.

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.

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.