

**BRIEFING:  
WATERWAY  
MANAGE-  
MENT  
ISSUES**

# Audit Report

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DEPARTMENT OF NATURAL RESOURCES  
DEPARTMENT OF FISH AND GAME  
DEPARTMENT OF LAW

WATERWAY MANAGEMENT ISSUES

March 28, 1997

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Audit Control Number:

10-4540-97

Division of Legislative Audit

P.O. Box 113300, Juneau, Alaska 99811-3300

# LEGISLATIVE BUDGET AND AUDIT COMMITTEE

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### DIVISION OF LEGISLATIVE AUDIT

Randy S. Welker, CPA  
Legislative Auditor  
Merle R. Jenson, CPA  
Deputy Legislative Auditor

P.O. Box 113300  
Juneau, Alaska 99811-3300

(907) 465-3830, Juneau  
(907) 561-1445, Anchorage  
(907) 465-2347, Juneau FAX

# ALASKA STATE LEGISLATURE

## LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



P.O. Box 113300  
Juneau, AK 99811-3300  
(907) 465-3830  
FAX (907) 465-2347  
Internet e-mail address:  
legaudit@legis.state.ak.us

March 28, 1997

Members of the Legislative Budget  
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF NATURAL RESOURCES  
DEPARTMENT OF FISH AND GAME  
DEPARTMENT OF LAW

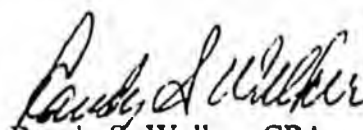
WATERWAY MANAGEMENT ISSUES

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The objective of this audit was to evaluate the effectiveness of the State's programs to resolve issues of ownership, access, and resource allocation concerning public waterways.

The audit was conducted in accordance with generally accepted government auditing standards. Field work procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section. Audit results can be found in the Report Conclusions and the Findings and Recommendations sections.

  
Randy S. Welker, CPA  
Legislative Auditor

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## OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we conducted an audit of the State's programs for managing its waterways.

### Objectives

The objectives of the audit were as follows:

- To evaluate the extent to which the "public trust doctrine" requires the State to allocate resources for waterway issues.
- To evaluate the State's system for establishing its ownership of the land underlying navigable waterways.
- To evaluate the State's system for establishing its rights to manage fisheries within its navigable waterways.
- To evaluate the State's system for establishing public access routes that connect waterways to public land and other parts of the state transportation network.
- To evaluate the State's system for allocating its available water among competing users.
- To evaluate alternatives for resolving the interference which private parties sometimes present to passage on waterways by state employees and the general public.

### Scope and Methodology

Our audit examined the State's programs for management of its waterways during the period from July 1, 1995 through the present. Field work for this audit included the following.

- Interviews with the staff of the Department of Natural Resources (DNR), Department of Fish and Game (DFG), Department of Law (DOLaw), Department of Transportation and Public Facilities (DOTPF), and the U.S. Bureau of Land Management (BLM).
- Review of pertinent policies, correspondence, public information materials, maps, research studies, and records produced by DNR, DFG, DOLaw, DOTPF, BLM, and the U.S. Geological Survey.
- Review of statutes, regulations, court cases, attorney general opinions, and professional literature.

- Review of testimony at legislative committee hearings and legislative staff research conducted in support of those hearings.
- Review of the State's response to navigability reports issued by BLM during FY 95 and FY 96.
- Review of the State's response to representative notices of proposed easements issued by BLM during FY 96.
- Review of materials published by the following organizations:

Legislative Research Agency

University of Alaska, Institute for Social and Economic Research

University of Alaska, Justice Center

Alaska Natives Commission

Alaska Bar Association

Alaska Law Review

Land and Water Law Review

- Observation of interdepartmental navigability team meetings.

## ORGANIZATION AND FUNCTION

Responsibilities for managing the State's waterways are divided among four departments: the Department of Natural Resources (DNR), the Department of Fish and Game (DFG), the Department of Law (DOLaw), and the Department of Transportation and Public Facilities (DOTPF).

As described below, one or more of these departments address the following waterway issues:

- *Ownership of submerged land.* Legal determinations of whether the land beneath a particular waterway is now owned by the State.
- *Fishery management.* Whether state rules or federal rules will govern fishing in a given waterway.
- *Public access.* Establishment of public routes across private land that provide legal access between waterways, public land, and other parts of the State's transportation network.
- *Traditional water rights.* Allocation of available water among competing users.
- *Waterway obstruction.* Resolution of various forms of interference encountered by state employees and the general public.

### Ownership of submerged land

As a general rule, land underlying a waterway is owned by the State if the waterway was navigable at the time of statehood. Federal case law considers a waterway to have been navigable at statehood if it was actually used for commerce or could have been used for that purpose. These navigability determinations arise in two contexts.

First, the State may take the initiative and file a suit to determine ownership of submerged land. The historical research in support of this suit to "quiet title" is conducted by personnel from DNR and DFG.

Second, the federal Bureau of Land Management (BLM) may make a navigability determination as part of land selections under the Statehood Act or Alaska Native Claims Settlement Act (ANCSA). If a waterbody was navigable, title to underlying land automatically passed to the State at statehood and will thus not be conveyed by BLM as part of a land selection.

At each stage in BLM's conveyance process, BLM sends a notice to DNR. Recently, BLM also began including DFG in this important mailing. Both departments review BLM's

proposed navigability findings and submit a written response. If either DNR or DFG disagrees with BLM's final decision, DOLaw can represent the State in an appeal to the federal Interior Board of Land Appeals. Such appeals are rare and take several years to resolve.

Alaska has 17,000 identified streams and rivers. Lakes with more than 50 acres are estimated to number 2 million. For thousands of these waterbodies, ownership of the submerged land depends upon a navigability determination that remains to be made. Such ownership is hardly an abstract issue; DNR income from the mineral deposits therein is at stake as well as DOTPF's ability to extract gravel for public works.

In the current state approach for establishing a waterway's navigability, the State files an action to quiet title in the federal district court. Each of these suits involves only a few waterbodies out of the thousands that probably meet the criteria for navigability. The waterbodies for these "test cases" are selected with hope that a favorable determination for the State will result in a valuable precedent for eventual negotiations with the federal government.

Unfortunately, the federal government has taken a "never surrender" approach when joined as a party to these quiet title actions. Even in instances where BLM has already conceded navigability on an administrative level, attorneys representing the federal government refuse efforts at settlement and file technical objections that protract the litigation for years. This resistance is hardly unique to water litigation in Alaska and reflects a long-standing federal approach apparent in other states.

### Fishery management

The existence of federal reserved water rights now determines how responsibilities between the state and federal governments will be divided for managing important fisheries within the State's navigable waterways. Where the federal government has reserved water rights in a navigable waterway, fishing will be managed under federal regulations by the Federal Subsistence Board. Where the federal government does not have reserved water rights in a navigable waterway, fishing will be managed under state regulations by DFG.

Federal reserved water rights have been an aspect of state-federal relations since the early 1900s. However, until the 1995 federal *Babbitt* decision,<sup>1</sup> the concept was only used to allocate physical quantities of water between the federal government and competing users. The *Babbitt* decision is so far a unique development in its use of federal reserved water rights as a mechanism for defining the geographical scope of federal management authority on navigable waterways.

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<sup>1</sup> *State of Alaska v. Babbitt (Katie John)*, 72 F.3d 698 (9th Cir. 1995).

DNR indicates that "[o]f the 367.7 million acres in Alaska, almost 49 percent, or more than 178 million acres, are reserved federal lands which may have federal reserved water rights." [Emphasis added.] DNR's lack of precision on this is understandable. Unlike most interests in real estate, unadjudicated federal reserved water rights are unquantified as to their extent and unrecorded as to their existence. In 1985, the chief of DNR's water management section wrote that "*Alaska can expect to be involved in federal reserved water rights adjudications for many years.*"

#### Public access routes between waterways, public land, and the State's transportation network

During the BLM process for conveying ANCSA land selections, the State has the opportunity to request easements for public access to navigable waterways. ANCSA § 17(b) provides these easements for interconnection between waterways, public land, and the various components of the State's transportation system (such as DOTPF operated airstrips).

BLM reviews each ANCSA conveyance for the need for such easements and then provides the State with 90 days to respond with its position. If the State disagrees with BLM's final decision, an appeal can be taken to the federal Interior Board of Land Appeals. Such appeals are rare and take several years to resolve.

BLM's process for reserving 17(b) easements does not involve a public hearing. Rather, BLM reviews every proposed ANCSA conveyance for a potential need for public easements and then sends a notice to DNR and DFG. This notice is sent even when BLM sees no need for public easements. Both DNR and DFG then have 90 days to respond with their positions. As in other BLM conveyancing decisions, DOLaw can take an appeal to the Interior Board of Land Appeals. Such appeals take several years to resolve, as noted above, and DOLaw will attempt to arrive at a settlement with the landowner when possible.

#### Allocation of water rights among competing users

With both a small population and a third of U.S. fresh water, Alaska has so far been spared the water use battles of large western states in the Lower 48. Nevertheless, AS 46.15 provides a DNR permitting system for competing users to register claims to either consume a specific quantity of water or to preserve an existing water level.

The United States Geological Survey (USGS) has divided Alaska into six hydrologic subregions, each of which focuses upon the area's main river systems.<sup>2</sup> The State has a statutory system<sup>3</sup> which would allow it to simultaneously determine all users' water rights for each of these subregions in a single "basin-wide" adjudication. Though such a proceeding is conducted in the state court system, the rights subject to adjudication explicitly include federal reserved water rights.<sup>4</sup>

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<sup>2</sup> See AS 46.15.035(e)(2).

<sup>3</sup> AS 46.15.165-168; 11 AAC 93.400-440.

<sup>4</sup> See AS 46.15.165(b); AS 46.15.166(a); 11 AAC 93.430.

The process for a "basin-wide" adjudication of water rights, also known as a general water adjudication, has had considerable use in state courts for drier areas of the Lower 48. Its value to finalize water rights was promoted in 1952 when Congress passed a statute in which the federal government consented to have its own water rights decided in such state court proceedings.<sup>5</sup>

Unlike the drier western states, Alaska has never used the basin-wide adjudication procedure. DOLaw has traditionally assumed that the adjudication procedure in AS 46.15.165-168 narrowly applies to only one specific water-related issue: the quantities available for consumption by competing users. Since water has been plentiful in most of Alaska, there has been little actual conflict that seemed to justify such a proceeding. Additionally, federal reserved water rights only recently acquired their unexpected importance to fishery management.

As would be expected with a resource that appears unlimited, little effort is currently invested by public or private entities in measuring the amount of fresh water available in Alaska's waterways. Gauging stations are the technical means for this monitoring, but less than one percent of the State's waterways have the installations. To put it another way, Lower 48 waterways average one gaging station for 400 square miles while Alaska averages one for 7,400 square miles.<sup>6</sup>

Alaska may not need the density of gaging stations found outside. Nevertheless, the State could increase the availability of measurements by conditioning water rights upon the installation of gaging stations at the expense of large users. Such arrangements for private sector responsibility have not been the norm so far, though.

#### Waterway obstruction

Obstructions to passage (such as cables) are sometimes placed across navigable waterways by private parties or occur accidentally. In extreme cases, law enforcement personnel may need to respond to intentional efforts that involve the potential for violence. The State seeks an efficient method to legally remove obstructions both to assure public access and to prevent injuries.

Interference also occurs when state employees are confronted as trespassers while present on waterways or their banks for resource management duties. Unlike land surveyors,<sup>7</sup> no statute explicitly grants state employees a privilege for such access.

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<sup>5</sup> 43 USC § 666(a).

<sup>6</sup> Christopher C. Estes, *Annual Summary of Alaska Department of Fish and Game Instream Flow Reservation Applications*, Fishery Data Series No. 95-39 (Ak. Dept. of Fish and Game, Dec. 1995), pp. 9-10.

<sup>7</sup> See AS 34.65.020.

## REPORT CONCLUSIONS

### BLM navigability decisions virtually ignored in FY 95 and FY 96

BLM issues "navigability reports" for waterway drainages involved in large areas that it plans to convey under the Statehood Act, ANCSA, or other federal entitlement legislation. Each report covers numerous selected tracts and details BLM's research as to what portion of a particular waterway qualifies as navigable.

Though BLM annually issues only about a dozen of these navigability reports, they have considerable importance to the State both in terms of submerged land ownership and the acreage counted against the State's selection total. BLM forwards each report to DNR for review and comment. DNR's timely response with additional evidence may result in BLM's voluntary modification of its report, or DNR can protect the State's interest with an appeal to the Interior Board of Land Appeals.

Our field work shows that BLM sent, and DNR received, 13 navigability reports during the time period from September 1, 1994 to June 30, 1996 (a period of almost two fiscal years). With rare exceptions, DNR ignored these BLM notices during the time period under study. For all but two of these notices, we found no written evidence that DNR personnel conducted any review at all of BLM's navigability decisions.<sup>8</sup> Except for the popular Kenai River, DNR's files show no response to BLM and contain no written analysis of the notices' merits.

DNR's files were not necessarily empty concerning the waterways in the BLM notices. Sometimes the DNR files contained pertinent research accumulated over the years; sometimes they did not. However, the routine lack of any written evaluation of the notices' merits constitutes a significant weakness in management controls. This deficiency frustrates accountability for protection of the State's rights and falls short of societal expectations for prudent government behavior.

Uncorrected errors in BLM navigability reports can produce excessive charges against State land selections as well as a cloud on the State's title to submerged land. In fact, the State's failure to contest BLM's factual findings could potentially give them binding effect against the State in later litigation to quiet title.<sup>9</sup>

Our field work revealed some communication difficulties among classified personnel in coordinating on navigability assignments. However, responsibility for this deficiency rests squarely with upper management. The review of BLM navigability reports has been perpetually shuffled between personnel and even between divisions. Technical staff apparently received no unequivocal direction that such review was more than an optional "low priority" duty.

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<sup>8</sup> In fact, the evidence of review for one of these two notices consisted only of a brief hand-written note instructing a subordinate to mark BLM's decisions on a map and put the report in a file. The supervisor indicated to us that this notation implied State agreement with BLM's analysis.

<sup>9</sup> See *Jeffries v. Glacier State Telephone Co.*, 604 P.2d 4, 8 (Ak. 1979).

DNR has indicated its intent to review all future navigability reports received from BLM. As outlined in Recommendation No. 1, we believe that both DNR's review and its response to BLM should be documented in an unequivocal manner.

#### Timely State response to FY 96 BLM notices of public access easements

In contrast to the situation with navigability reports, the State's process with 17(b) easements is carefully monitored to assure that a timely response occurs to every BLM notice.

Every easement-related notice from BLM is entered into a log when received at DNR and the due date for a response computed. The log is continuously reviewed and work effectively scheduled to assure timely responses.

During field work, BLM provided us with a list of easement notices conveyed to DNR during FY 96. Our review of DNR's records shows that these notices were consistently examined by DNR and a written response returned. In other words, we found no indication that the State was ignoring notices and failing to pursue potential easements.

Personnel at DFG directly receive the same BLM easement notices, and their review serves as an independent check on the adequacy of DNR's response process. In fact, the diverse interests protected by the two departments create a healthy "arms length" aspect of this check that enhances its value as an important management control.

BLM staff have commended the State personnel who handle 17(b) easement responses for maintaining a cordial, professional atmosphere of cooperation during the day-to-day negotiations between the two levels of government.

However, these plaudits should not obscure the need for some improvement in DNR's management controls over this process. DNR's easement files do not include documentation which explains DNR's rationale for its responses. The DNR file only contains the BLM notices, DNR's letter to BLM, and a few maps whose significance are not self-evident.

In other words, DNR's files on easement decisions have no trail of accountability. For each decision examined, a concerned party would be required to conduct a time-consuming reconstruction of what evidence was probably reviewed and what rationale probably adopted. This reconstruction would not be possible if personnel had changed or memories faded.

In contrast, DFG documents its easement files with sufficient explanations to understand the rationale for its positions on BLM easement notices.

Recommendation No. 1 addresses our concerns with DNR's documentation.

### Public access easements involve little public input

Though 17(b) easements are meant to assure public access to public lands, both BLM and the State conduct the process with little input from organizations other than government agencies and the affected landowner.

BLM's process for reserving 17(b) easements does not involve a public hearing. However, federal regulations theoretically provide the opportunity for written input from any concerned members of the public. BLM sends a notice of proposed easements, which invites comments, to "all parties that participated in the development of the easement needs and information on major waterways."<sup>10</sup> Another provision directs that BLM consider the easement recommendations of "appropriate Native corporation(s), other Federal agencies, the State, and the public."<sup>11</sup>

BLM's regulations are silent as to the identification of "all parties" and how the public is to initially learn of its need to make a recommendation. Inclusion of a citizen group on the mailing list for an easement notice is thus a matter within BLM's discretion. There is no indication that BLM would be unwilling to honor a request for inclusion, but the burden of initiating such a contact appears to rest with the myriad of citizen groups that could be potentially concerned with particular easements.

During audit field work, BLM provided us with a list of easement notices that BLM had sent to the State during FY 96. We reviewed approximately 50% of these transactions to ascertain the extent that BLM had provided direct notice to potentially interested groups. Less than a half of the selected transactions involved any BLM notice sent to a group other than a government agency or a Native organization. In any particular transaction, BLM sent a notice to no more than two organizations other than government agencies or Native organizations.

The BLM process for these easements is thus largely insulated from the public. DNR and DFG have a responsibility to adequately represent the public's needs in such a situation.

Unfortunately, the easement reviews done by DNR and DFG also lack routine input from the public. Each department endeavors to ascertain the public need for an easement by reference to documents and personnel found within the department itself. Additionally, while DFG field personnel familiar with the site are consulted during DFG's analysis, information from an actual site visit is not feasible for DNR.

Our field work found a sincere effort to select access routes that appeared feasible on paper. However, the easement reserved may very well be only an abstract line drawn on a topographic map rather than a route readily identifiable and useable by the public. As discussed below, public access easements are unsurveyed, usually unmarked, and often not already defined along an existing trail or roadway.

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<sup>10</sup> See 43 CFR § 2650.4-7(a)(9). [Emphasis added.]

<sup>11</sup> See 43 CFR § 2650.4-7(a)(11). [Emphasis added.]

We note that some 17(b) easements are subject to termination by BLM if there is no evidence of public use by the year 2001.<sup>12</sup> Public resources spent in procuring an easement would be wasted in the event of such termination.

Impracticality is not the only risk from failure to consult the public, though. Easement placement may very well involve factors other than terrain. For instance, for one abstractly-determined easement, DNR's review failed to consider the potential for public exposure to two different toxic substance problems that federal agencies had studied for the area in question.<sup>13</sup>

Despite the large amount of territory that these easements can potentially affect, public input is far more rigorously sought for the average variance from a municipal zoning ordinance. Recommendation Nos. 2 and 4 address the need for greater public input.

#### The unmarked state of most easements negates meaningful public access

BLM estimates that approximately 3,500 public access easements have been established in Alaska under ANCSA § 17(b). Some of these easements fall along well-established trails and roadways; however, many others are simply an abstract line drawn on a topographic map. For these latter easements, the public's inability to locate them on the ground may reduce their establishment to a meaningless exercise.

The route for 17(b) easements is described in a general manner in BLM's legal documents that convey the land, but the easements are not surveyed. BLM produces a specialized map, known as an "easement quad," in which the route of an easement is shown with a line superimposed over a USGS 1:63,360 topographic map.

Even if the public successfully conducts the research to learn of an easement, converting the line on a map to a definite path on the ground is no small task. BLM estimates that less than five percent of the easements are marked with signs. No federal law requires easement marking by BLM or the landowner who receives a conveyance.

Additionally, depending upon the mode of transportation, federal regulations establish the easement at only 25 to 60 feet in width.<sup>14</sup> Even using the popular Global Positioning System (GPS) navigation equipment, it would be difficult for the average user to accurately determine an unmarked, abstractly-determined line on the ground that is only 60 feet wide at best. GPS accuracy on a predictable, consistent basis is  $\pm 300$  feet for the type of equipment used for recreational purposes.

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<sup>12</sup> See 43 CFR § 2650.4-7(a)(13).

<sup>13</sup> These problems may or may not have presented an actual need for circumnavigation, but should have at least been considered in DNR's analysis of easement placement. We learned of the potential problems from a USGS public information leaflet for the area in question and from a popular reference on Alaska's rural communities that is available in grocery stores.

<sup>14</sup> See 43 CFR § 2650.4-7(b)(2).

Obviously, without a means of locating the easements, the public is unlikely to use them. As previously noted, BLM is authorized to terminate some easements that are not used by 2001. The current practice of marking an easement on a map, but not on the ground, may be a setup for failure. In many cases, an unmarked easement is, in effect, no easement at all.

Recommendation Nos. 5 and 6 present possible legislative solutions for this problem.

Information concerning public access easements is not readily available to the public

Public access easements are unsurveyed, seldom marked, and frequently not along an easily-recognized road or trail. To further aggravate this uncertainty, information concerning the existence and location of 17(b) easements cannot be obtained from commercially-available publications. The average recreational user needs to consult obscure, specialized materials during research at government offices.

The easements are described in legal documents that can be researched at the BLM public information center or in files kept by DNR's title section. Those offices can also produce a copy of the easement quad map from microfilm. However, research at BLM or the DNR title section must be conducted during the normal business day, Monday through Friday.

For five popular areas, DNR has produced easement atlases that can be examined and purchased at DNR's public information centers (Anchorage, Juneau, Fairbanks, Palmer) during normal business weekdays. Atlases for two more areas are currently in production. Unlike USGS maps, the atlases are not distributed through any private stores.

As shown in the excerpt at Appendix A, the DNR easement atlases are based on USGS topographic maps that have been reduced to a scale of 1 inch = 2 miles and have the easements superimposed. The verbal descriptions of the easements, found in the BLM legal documents, are also included in the atlases.

Production costs and quantities for the seven atlases are shown in Exhibit 1. All but one of the five existing atlases are at least seven years old. Once an area's atlas is printed, DNR does not update it.

Without a means for learning of the easements, the public is unlikely to use them. We once again note that BLM is authorized to terminate some easements that are not used by 2001. Thus, DNR's efforts to acquire the easements may ultimately have limited impact on promoting access to public land and waterways.

Recommendation No. 7 has suggestions for improved dissemination of easement information.

**EXHIBIT 1  
DNR EASEMENT ATLASES**

<i>Atlas Area</i>	<i>Year Published</i>	<i>Number Published</i>	<i>Total Publishing Cost</i>	<i>Publishing Cost Per Atlas</i>	<i>Retail Price</i>
Kodiak	*	2,500	\$24,925	\$9.97	\$10.00
Prince William Sound	*	1,450	25,000	17.24	10.00
Kenai	1993	690	23,336	33.82	15.00
Bristol Bay	1990	500	11,759	23.52	10.00
Nome	1989	500	2,592	5.18	8.00
Kotzebue	1988	500	4,893	9.79	8.00
Copper River	1987	1,000	2,485	2.49	8.00
<i>* Atlas not yet released for sale</i>					

DNR's computerized statewide map and database are noteworthy projects

DNR is completing two noteworthy projects that will, in the near future, enhance the public's ability to quickly determine the navigability information available for waterways on any tract in the State.

A computerized map of all navigability determinations throughout the state is expected to be ready by the end of the current fiscal year.

The other project is a centralized database of all known navigability research for Alaska's waterways. This database can be electronically searched both by name of the waterbody and by hydrologic unit subdivisions. This project is already in use, but existing data continues to be added to bring it to completion.

Both projects are commendable efforts, though we note two significant limitations. First, these tools are available to the public only through DNR offices. Second, the projects concern only the status of the waterways themselves; information on the existence of 17(b) easements is not included.

DNR has produced a noteworthy public information booklet

DNR has produced a public information booklet which thoroughly explains numerous legal issues surrounding the State's management of its waterways. This publication is a noteworthy accomplishment in its lucid presentation of the development of a complex subject over the decades since statehood. The publication is available both in printed form and on DNR's Internet home page.

Limits must, of course, be placed on any publication's treatment of an extensive subject. However, we note that 17(b) public access easements receive only passing mention. DNR may wish to consider enhancing its discussion of this important topic.

#### Statutes of limitation have minimal impact on waterway litigation decisions

Considerable concern was voiced in legislative hearings as to whether the State was foregoing the opportunity to claim submerged land due to a statute of limitations. However, statutes of limitation actually have a quite limited impact on the State's timing of suits to quiet title to such land.

For suits to quiet title that are brought against the federal government, the statute of limitations is found in the Quiet Title Act itself.<sup>15</sup> There is no statute of limitations applicable to such a suit that is brought by a state, except for the following:

- If a state brings a suit against the federal government after more than 12 years, title quieted in submerged land is taken subject to any existing leasehold, easement, or right of way involving "substantial improvements" or "substantial investments."<sup>16</sup>
- If a state brings a suit against the federal government involving land "used or required by the United States for national defense purposes," the suit must be brought within 12 years.<sup>17</sup>

It is important to remember that the above applies to quiet title suits which a state brings against the federal government. The statute of limitations provisions in the federal Quiet Title Act do not apply to actions brought against private parties.<sup>18</sup>

Alaska National Interest Lands Conservation Act (ANILCA) originally contained a statute of limitations which governed when the State would have to file an action to quiet title which involved a navigability determination. However, Congress later repealed that statute of limitations.<sup>19</sup>

If the State brings suit against a private party to quiet title in submerged land, such a suit will be brought under state law and governed by AS 38.95.010:

*No prescription or statute of limitations runs against the title or interest of the state to land under the jurisdiction of the state. No title or interest to land under the jurisdiction of the state may be acquired by adverse possession or prescription, or in any other manner except by conveyance from the state.*

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<sup>15</sup> 28 USC 2409a.

<sup>16</sup> 28 USC 2409a(j).

<sup>17</sup> 28 USC 2409a(h).

<sup>18</sup> *Lee v. United States*, 629 F.Supp. 721, 727-728 (D. Alaska 1985).

<sup>19</sup> See P.L. 100-395, Aug. 16, 1988, 102 Stat. 979.

Alaska Statute 38.95.010 applies to suits brought in state court and indicates that no statute of limitation will deprive the State of its ability to preserve its "title or interest" in land. Though an argument can be made for a six-year statute of limitations under AS 09.10.120, such an argument ignores the special "public trust" status that submerged lands have under *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Ak. 1988).

In *Bunker*, the Alaska Supreme Court found that the public trust doctrine restricted the State's ability to intentionally convey submerged land out of the public domain. The court would thus probably construe AS 38.95.010 and AS 09.10.120 to restrict the State's ability to lose its title to submerged land through mere neglect or accident.

Alaska's public trust doctrine is derived from the state constitution,<sup>20</sup> and the court would probably find that the legislature had no intention for AS 09.10.120 to frustrate a constitutional policy. In other words, AS 38.95.010 and AS 09.10.120 must be read against the unique backdrop of the Alaska Constitution's provisions regarding natural resources.<sup>21</sup>

#### Minimal long-term impact of State's piecemeal approach to waterway litigation

As previously noted, Alaska has 17,000 identified streams and rivers as well as lakes that number in the millions. However, only about a dozen waterbodies are the subject of quiet title actions that have either been decided or are currently pending in the federal court. Year-to-year skirmishes are thus being waged over a minute fraction of the State's navigable waterways.

The emphasis has been on setting precedents, rather than finality and predictability for entire hydrologic subregions. Given the federal government's vigorous resistance to any type of efficient, nonlitigation solution, the State's piecemeal approach has little impact on long-term resolution of waterway status on a statewide basis.

Though the suits to quiet title ultimately settle ownership of submerged land, they have so far been conducted in a manner that fails to address the existence of federal reserved water rights. Despite the nebulous nature of these rights, they now have immediate practical significance to the division of responsibilities between the state and federal governments to manage the resources within the State's navigable waterways.

The State's piecemeal approach to waterway litigation also has little impact on long-range allocation of the State's water among competing users. In effect, the current approach assumes an unlimited supply of water.

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<sup>20</sup> *Owsichuk v. State, Guide Licensing*, 763 P.2d 488, 493-496 (Ak. 1988).

<sup>21</sup> *Owsichuk v. State, Guide Licensing*, 763 P.2d 488, 493 (Ak. 1988) (The common use clause of Alaska's Constitution "was a unique provision, not modeled on any other state constitution."). See also Gordon Harrison, *Alaska's Constitution*, 3d ed. (Alaska Legislative Research Agency, 1992), pp. 149-154.

However, the availability of water controls the development of other resources, and the assumption of limitless abundance will probably not be valid throughout the next century. Water-related litigation, in effect, decides the long-term allocation of three interdependent natural resources: water, fish, and submerged minerals.

Additionally, industrialized Pacific Rim countries with less stringent water quality controls may very well face a critical shortage of unpolluted water in the coming decades. Through a permitting system, AS 46.15.035 already recognizes the need for the State to regulate the export of Alaska's fresh water. Indeed, one publication by the Department of Fish and Game notes that "[i]nterest for exporting water from Alaska to other states and countries appears to be increasing" and discusses the arrangements for Alaska water to reach destinations such as Japan and Saudi Arabia.<sup>22</sup>

In Recommendation No. 8, we suggest an approach to waterway litigation that may be more effective for addressing the above issues on a statewide basis.

#### Public trust doctrine does not mandate pursuit of all potential claims

Alaska Constitution Art. III, Sec. 3 ("Common Use") provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for their common use [emphasis added]." The Alaska Supreme Court has noted that this section constitutionalizes "common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters." [Emphasis added.]<sup>23</sup>

This public trust duty applies to the water column itself in all natural waterbodies throughout the State. However, submerged land in State ownership also has this special "public trust" status.

Though the Alaska Supreme Court has adopted the public trust doctrine for Alaska, disagreement exists as to whether it imposes an affirmative duty to initiate legal action on waterway issues or only restricts the State's ability to convey property rights out of the public domain. One position asserts that the State incurs liability for violating the public trust if it fails to aggressively pursue suits involving potential navigability determinations and 17(b) easements. An opposing position asserts that State managers must allocate their use of limited legal resources among a wide variety of projects and that choices to pursue potential claims lie within the manager's discretion.

After examining the interpretations of the Alaska Supreme Court, we conclude that the public trust doctrine does not place the State under a legal duty to pursue every potential claim for assertion of a waterway's navigability or for a 17(b) easement. The number of possible claims is staggering: thousands of the State's waterbodies could probably meet the criteria for navigability.

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<sup>22</sup> Christopher C. Estes, *Annual Summary of Alaska Department of Fish and Game Instream Flow Reservation Applications*, Fishery Data Series No. 95-39 (Ak. Dept. of Fish and Game, Dec. 1995), pp. 14-15.

<sup>23</sup> *Owsichek v. State*, Guide Licensing, 763 P.2d 488, 493 (Ak. 1988).

State managers have discretion to set priorities in the use of their limited legal resources for enforcing public rights. Suits regarding navigability and easements may be pursued as an instrument of public policy; however, they are not mandatory. In other words, the State does not face legal liability for leaving such claims unpursued.<sup>24</sup>

### Criminal prosecution not efficient for removing obstructions

Obstructions to passage (such as cables) are sometimes placed across navigable waterways by private parties or occur accidentally. The State seeks an efficient method to legally remove such items both to assure public access and to prevent injuries. Criminal prosecution is one of the potential legal remedies that the affected departments have been considering.

Alaska Statute 38.05.128 makes it a misdemeanor to "*obstruct or interfere with the free passage by a member of the public on any navigable water . . .*"<sup>25</sup> "*The cost of abatement shall be borne by the violator and is in addition to any penalty imposed by the court.*"<sup>26</sup>

There is a definite seriousness and drama conveyed through criminal prosecution, and it is no doubt appropriate in those rare situations where an upland owner is threatening violence. However, practical realities make prosecution an inefficient remedy for solving the usual obstruction where a landowner simply allows a structure to deteriorate over time and collapse into the waterway. A current example is a tramway cable that formerly ran well above the water but has now fallen and blocks the passage of vessels.

To begin with, the criminal process will not move quickly. Unless the defendant insists that the case rapidly proceed to trial, various forms of customary delays will probably result in a trial within six months to a year.<sup>27</sup> Any appeal is likely to take an additional year, with the court authorized to stay any conditions of the sentence (such as removal of the obstruction) during the appeal.

Even though the offense is a misdemeanor, prosecution is likely to cost more than other legal remedies. Appointment of a public defender may very well be needed for purposes of trial, sentencing, appeal, and probation revocation. Additionally, the offender will be entitled to a jury trial.

Accountability for criminal conduct is governed by the principles at AS 11.16, and mere record ownership of the land may not persuade a jury to convict under those standards. Defenses which involve confusing, hard-to-trace transfers of responsibilities are easy to assert in regulatory cases involving land. They are also difficult for prosecutors to rebut and for jurors to unravel.

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<sup>24</sup> This type of discretion is generally protected from challenge in lawsuits in order to maintain an appropriate separation of powers between the three branches of government. Such discretion is also protected under the statutory immunity for discretionary functions found in AS 09.50.250(1).

<sup>25</sup> The statute provides exceptions for various types of legally-authorized obstructions.

<sup>26</sup> AS 38.05.128(c).

<sup>27</sup> In the absence of violence, the defendant will probably not be placed in pretrial custody for this type of offense. The defendant will thus have little incentive for a quick trial.

In this type of case, the court would presumably fashion a sentence that includes abatement of the nuisance. Such a sentence might require the offender to pay the costs of abatement in the form of a direct sentencing order for restitution or as a condition of probation. An innovative court might also characterize abatement as "community work" and order the offender to personally perform it as a condition of probation.

Such conditions have an obvious attraction but are, unfortunately, hard for prosecutors to enforce in practice. To revoke probation or seek a jail sentence for nonpayment, the prosecution will have the difficult burden of showing that the defendant is willfully failing to comply. To put it another way, the defendant's general assertions of a lack of financial assets or impediments to physical abatement (such as weather, equipment problems, etc.) will be hard for the prosecution to rebut. Meanwhile, abatement of the obstruction continues unaccomplished or at least unreimbursed.

As discussed in Recommendation No. 9, simple expedited civil suits for injunctions will usually be the most efficient means for removing physical obstructions to waterways. Even in those rare situations where deliberate recalcitrance warrants a criminal prosecution, the distinction between the objectives of criminal and civil proceedings may warrant two separate cases. The criminal process, with its emphasis on protections for the accused, is most suited for punishing unacceptable behavior and sending a signal to the community. However, expeditious abatement of physical hazards is more the province of civil injunctive practice.

#### Lack of decisive top-level direction impairs program implementation

The administration has never articulated a unified, decisive strategy to its departments regarding waterway issues. By default, this void has resulted in important actions being decided through ad hoc negotiations between a loose interdepartmental consortium of classified technical staff.

An interdisciplinary sharing of technical expertise is, of course, desirable. However, in the absence of strong policy-level direction, it can, as here, produce fragmented, inconsistent results with questionable long-term benefit to the State.

We noted a troubling level of friction among some classified personnel expected to coordinate waterway activities between departments and even between divisions. Such communication difficulties tend to fester amidst an atmosphere of mixed messages by upper management.

Typical of this frustrating equivocation by top management was the following proposed approach circulated in draft by the DNR commissioner in 1995:

*The Fiscal Year 1996 department budget contains no funding to continue centralized determinations to resolve existing or prospective disputes about State ownership of inland water bodies. Accordingly, the navigability staff has been disbanded and technical advice on the application of the [navigability] criteria described in Department Order 125, Revision No. 4 is no longer routinely available. . . .*

Subsequent events leave it uncertain whether this "draft" was simply funding gamesmanship or, rather, reflected an actual intent to leave navigability unsettled for unstated policy reasons. Nevertheless, the legislature ultimately responded with additional funding, and personnel are now assigned to the necessary duties as detailed above in the Organization and Function discussion of this report.

While a team approach is commendable, it should occur within the context of definite guidelines from top management. Consistent guidelines should be formulated in a coordinated fashion by executives directly accountable to the governor.

Committee hearings by the previous legislature reflected an active interest in waterway management programs. The legislature's \$920,000 FY 97 appropriation clearly signaled this interest to the administration. The responsible commissioners will hopefully respond with a decisive, coordinated program to address the legislature's concerns.

## FINDINGS AND RECOMMENDATIONS

### Recommendation No. 1

DNR personnel who review BLM easement notices and navigability reports should briefly document the rationale for their decisions.

Decisions on which navigability determinations to contest and which easements to pursue lie within DNR's executive discretion. However, this does not eliminate the need for management controls which assure accountability for how that discretion is exercised. Documentation of an agency's rationale enables meaningful review of the adequacy of the process, the factors considered, and the correctness of the decision.

For each BLM easement notice or navigability report reviewed, DNR needs to briefly document the rationale for its response. A short memo to the file should note the specific evidence reviewed (maps, documents, interviews) and its significance to the decision. Both this file documentation and a written response to BLM should occur even if DNR agrees with BLM's navigability decision or concludes that no easements are necessary.

DNR's documentation should enable efficient scrutiny by managers, budget analysts, legal counsel, the courts, the ombudsman, and the public at large. The ability to discern DNR's rationale should not depend upon the institutional memories of individuals.

### Recommendation No. 2

DNR and DFG should facilitate BLM's inclusion of citizen groups in the process for reserving public easements.

DNR and DFG should facilitate the addition of interested citizen groups to BLM's notice list for all easements pertinent to the group's activities. The interests of a given group can no doubt be limited to administratively practical criteria such as geographic areas and easement types.

### Recommendation No. 3

DNR personnel should carefully scrutinize "boilerplate" provisions in easement notices to ensure that the State does not inadvertently waive its right to challenge a finding that a waterbody is not navigable.

Given the federal government's hypertechnical resistance in waterway contests, DNR personnel need to ensure that they do not mistakenly concede by silence that the area subject to an easement notice lacks navigable waterways.

The northern district of BLM, unlike the State's other two districts, routinely includes the following section in its notices of proposed easements:

NAVIGABILITY:

*All water bodies in the selection areas were considered and determined not to be navigable.*

In the context of an easement notice, this appears to be more boilerplate than an actual BLM study of the multitude of lakes and rivers found on maps for some tracts.<sup>28</sup> In fact, easement notices frequently do not concern access to a waterbody. Nevertheless, the State ignores this provision at its peril in any BLM conveyance document. Years later, when the true focus is navigability, BLM may very well cite the State's original silence as a waiver of its right to assert navigability.<sup>29</sup>

We recommend that DNR request BLM's northern district to discontinue the routine insertion of this language in easement notices where access to a waterbody is not an issue. If this cannot be arranged, DNR will need to explicitly protest in its easement response whenever maps show lakes or watercourses of sufficient size to conceivably support navigation.

It would obviously be more efficient for all concerned to leave premature navigability issues for other points in the conveyance process, such as the research for a formal BLM navigability report.

Recommendation No. 4

DNR and DFG personnel who review BLM easement notices should consult BLM case files and local resources in formulating the State's response.

BLM case files contain considerable public material beyond that available at DNR and DFG. This additional material will often be helpful in formulating the State's response to BLM easement notices.

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<sup>28</sup> For instance, during audit field work we noted a BLM notice which contained this language but also characterized a lake four miles long as a "major waterway" under 43 CFR § 2650.0-5(o). This apparent inconsistency should have triggered a comment in DNR's response, but did not. This was not the only instance in which the features shown on the USGS map caused us to question the blanket nonnavigability declaration found in the BLM notice. Another examined notice covered a township which included the east end of a chain of lakes that terminated on a navigable river. Though the eastern-most lake appeared to have a surface area of approximately a square mile and fell partially in the conveyed township, DNR's response was again silent.

<sup>29</sup> BLM employed this tactic in its motion to dismiss in *State of Alaska*, IBLA No. 96-37.

In evaluating easement proposals, DNR and DFG should also contact local resources who are personally familiar with the site in question. Examples of such resources are shown in Exhibit 2.<sup>30</sup> Phone calls should be an adequate means to accomplish these contacts. The calls should be briefly documented in the written rationale included in the easement file (see Recommendation No. 1).<sup>31</sup>

We recognize that a high volume of potential easements must be reviewed by the State and that assigned personnel have quite limited time to study any particular easement. However, a few hours of phone calls does not seem an unreasonable investment in a property interest with such long-term effects.

#### Recommendation No. 5

The legislature should require that airport operating agreements include the marking and maintenance of public access routes.

Public access easements under ANCSA § 17(b) are an important link between public land, navigable waters, and other components of the State's transportation network. One critical component is the system of 266 public airports operated by DOTPF. Many of these public airports serve unincorporated places where the airport is surrounded by privately-owned land and far from the State's highway system. In the absence of easements allowing free passage to public land and navigable waterways, such airports are merely a public subsidy to private landowners.

Alaska Statute 02.15.210 indicates that DOTPF "*may not grant an exclusive right for the use of an airway, airport, or air navigation facility under its jurisdiction.*" Similarly, AS 02.15.120 provides that airports that receive DOTPF assistance for improvements "*shall be at all times available for the use of and accessible to the general public, and maintained as public airports and facilities.*"

**EXHIBIT 2**  
**POTENTIAL LOCAL RESOURCES  
REGARDING ROUTING FOR PUBLIC  
ACCESS EASEMENTS**

- Backcountry outfitters
- Law enforcement officers
- Postmasters
- Store owners
- Air taxi operators
- Barge services
- Charter boat operators
- Snowmachine dealers and clubs
- Mining associations
- Lodge operators
- Airstrip maintenance contractors
- Hunting and fishing guides and associations
- Coast Guard personnel
- Boating associations
- Aircraft owners and associations
- Park rangers
- Mushing associations
- Wilderness guides and associations

<sup>30</sup> Such potential contacts are readily obtainable from common reference works such as the Department of Community and Regional Affairs database on the Internet, the *Alaska Wilderness Guide*, and telephone books for rural communities.

<sup>31</sup> We further note that DNR may wish to include nautical charts in its review of easements near the seacoast, for purposes of both enhanced analysis and facilitating some of these interviews.

The State should condition continued financing of this rural service upon the surrounding landowners' cooperation with access issues such as easement marking. More specifically, these landowners (often village and regional corporations) should be signatories to the airport maintenance contract that DOTPF annually awards to a local person. This is an important contract award in these unincorporated communities, and the operator's duties include such tasks as winter plowing, summer grading, and changing runway light bulbs. Future contracts should include a new requirement that the operator install markers for "airport access easements" and keep them in good repair.

We recognize that easement markers lack the emotional neutrality associated with surveying benchmarks, nautical signals, and the signs that traditionally mark air traffic navigation aids. Nevertheless, the local operator's periodic assurances that easement markers have been examined and repaired should fit acceptably within DOTPF's routine monitoring of compliance with other airport duties.

To implement this recommendation, AS chapter 02.15 should be amended to require airport maintenance agreements to include (1) the operator's easement-related duties and (2) the signatures of the owners of surrounding land through which the easements pass. The legal acceptability of such conditions is analogous to those long imposed upon conventional subdivision plats, such as dedication of land necessary for schools, parks, streets, and drainage.<sup>32</sup> A similar analogy is the permissible requirement that businesses dedicate some of their parking lot spaces to handicapped parking.

#### Recommendation No. 6

The legislature should amend statutes governing the administration of state aid to promote the marking and maintenance of 17(b) access easements.

Several statutes govern the administration of state financial assistance to unincorporated communities and other nongovernment entities: (1) AS 37.05.317 (unincorporated communities); (2) AS 29.60.140 (unincorporated communities); (3) AS 37.05.316 (named recipients). These statutes should be amended to provide that a grant agreement which funds construction or other land use projects will include provisions for the marking and maintenance of any public access easements that traverse the recipient's property.

In further support of this protection of public access, these three statutes should also be amended to provide that compliance with easement marking and maintenance is included among the reporting requirements of the State's audit regulation (2 AAC 45.010).

Once again, these grant conditions are permissible analogies to land use regulation such as subdivision platting conditions.

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<sup>32</sup> See I Zeigler, *Rathkopf's The Law of Planning and Zoning* § 6.10[6]; S Zeigler, *Rathkopf's The Law of Planning and Zoning* § 65.04.

#### Recommendation No. 7

DNR should facilitate the dissemination of easement information through commercially-available outlets rather than publish easement atlases.

DNR atlases are not widely disseminated to the recreational users. Those atlases are also quickly out-of-date, expensive for the State to produce, and limited to a fraction of the State.

We thus recommend that DNR discontinue production of its relatively-unknown easement atlases. DNR should instead facilitate a wider distribution of information for the entire state through popular existing outlets. More specifically, as 17(b) easements are reserved, DNR should contact potential publishers, such as those described in Appendix B, and request that a "public access route" be shown in the respective commercially-available publications.

We also recommend that DNR include easements for access to navigable waters in its new centralized navigability research database.

#### Recommendation No. 8

Alaska's basin-wide adjudication statute has untried potential for long-term resolution of most water-related issues. The legislature should establish a joint committee charged with reviewing this potential.

Resolution of the State's waterway issues is a very long-term project. Water-related adjudications, whether one river or an entire hydrologic unit, span 10 to 20 years. They thus span administrations at both the State and federal levels. To the extent that waterway issues arise from ANCSA conveyances, the State can expect the ANCSA process to continue well into the next century.

The State needs a long-term litigation strategy for finalizing the allocation of three of its most important natural resources (water, fish, submerged land minerals). Future litigation must envision a statewide resolution beyond the traditional issues that have been too narrowly focused in their geography and subject matter. The State should consider the potential for a far more comprehensive form of litigation that might best be characterized as a "waterway status" adjudication.

We believe Alaska's basin-wide adjudication statute<sup>33</sup> has untried potential for long-term resolution of most water-related issues. Each of the six USGS hydrologic subregions for Alaska could provide an appropriate foundation for such an adjudication.

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<sup>33</sup> AS 46.15.165-168.

Basin-wide adjudications resolve "all water rights in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime."<sup>34</sup> Traditional water appropriation rights are included<sup>35</sup> as are rights reserving an instream flow.<sup>36</sup> We believe that federal reserved water rights<sup>37</sup> and a waterway's navigability status can also be resolved within such a state court adjudication.

In 43 USC § 666(a), the federal government consents to have state court systems adjudicate both its "rights to the use of water of a river system or other source" and "the administration of such rights." The U.S. Supreme Court has ruled that federal reserved water rights are included within the "all-inconclusive" scope of this federal consent.<sup>38</sup>

The *Babbitt* case indeed places some limits on the State's management of waterway resources. However, we believe that this unique decision also presents a new opportunity for the State to resolve a waterway's navigability as part of a basin-wide adjudication in the State's own court system.

Until *Babbitt*, the concept of federal reserved water rights was only used to allocate physical quantities of water. However, *Babbitt* defines the geographical scope of federal management authority as dependent upon two factual findings: (1) a waterway's navigability and (2) the existence of federal reserved water rights. This issue of management authority should lie within the "administration" of federal water rights for the purposes of both 43 USC § 666 and AS 46.15.165(i). The latter provision envisions the State's adjudication as including the "action necessary for the efficient and fair administration and use of the state's water. . . ."

More specifically, if the State sues the federal government in a suit to directly determine the ownership of land underlying a waterway, that suit must be filed under the federal Quiet Title Act<sup>39</sup> and litigated in the federal district court.<sup>40</sup> However, since *Babbitt*, the factual issue of a waterway's navigability is an essential element of "administration" and should now be subject to determination in the State court as part of an adjudication of water-related issues for an entire system of rivers. Once navigability has been decided in the State's favor, it can treat the underlying land as State-owned. If any party contests the State's ownership, the State court's factual determination should have collateral estoppel effect in later proceedings to directly quiet title.<sup>41</sup>

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<sup>34</sup> AS 46.15.166(a).

<sup>35</sup> See AS 46.15.040.

<sup>36</sup> See AS 46.15.145.

<sup>37</sup> AS 46.15.166 explicitly cites 43 USC § 666 and provides for an adjudication of federal reserved water rights in superior court. In fact, AS 46.15.165 and 11 AAC 93.410-430 allow for adjudication of federal reserved water rights in a DNR administrative proceeding if the federal government consents. Despite federal resistance to the quiet title actions, there has been some cooperation in administratively determining federal reserved water rights through the DNR water rights permitting system.

<sup>38</sup> See *United States v. District Court for Eagle County*, 401 U.S. 520, 524 (1971).

<sup>39</sup> 28 USC § 2409a. See *McIntyre v. United States*, 789 F.2d 1408, 1411 (9th Cir. 1986); *Block v. N.D. ex rel. Bd. of University & Sch. Lands*, 461 U.S. 273, 286 (1983).

<sup>40</sup> 28 USC § 1346(f).

<sup>41</sup> Cf. *Jeffries v. Glacier State Telephone Co.*, 604 P.2d 4, 8 (Ak. 1979).

Clearly, our suggested approach to waterway litigation is a matter of first impression. The State has never pursued a basin-wide adjudication, nor have federal reserved water rights ever been addressed in Alaska's state court system. Also, the *Babbitt* case, along with its ANCSA and ANILCA origins, are uniquely Alaskan in their application.

In response to our management letter, the attorney general expressed his doubts that the federal court would allow our suggested approach to be encompassed within the scope of "administration" under 43 USC § 666. We have reviewed the two cases he cited in support of his hesitation and believe them not to be determinative of the issue.<sup>42</sup> It remains an untried matter of first impression.

Nevertheless, there is a genuine question whether the current approach of litigating waterbody by waterbody can have any real impact in the foreseeable future. In fact, the current approach results in wasted effort as passing administrations pursue various blind alleys. A noteworthy example of this futility was the State's 1992 notice to the federal government that envisioned an intent to quiet title to land beneath 200 waterways. DNR opines that the notice lacks current significance because it was restricted to portions of waterways for which an agreement with the federal government seemed likely at the time.

Portions of a basin-wide adjudication may be done under AS 46.15.165 and 11 AAC 93.410 as an administrative adjudication conducted by the DNR commissioner. Decisions made by the commissioner may then be incorporated into the judgment entered by the court system concerning other parts of the case.<sup>43</sup>

During the course of an administrative adjudication, AS 46.15.165(i) authorizes the DNR commissioner to "take action necessary for the efficient and fair administration and use of the state's water. . . ." The commissioner is authorized by AS 46.15.168(c) to use arbitration, and AS 46.15.165(i) would presumably support other alternative dispute resolution systems that some of the parties find acceptable.

The authority of AS 46.15.165(i) should also enable a basin-wide adjudication to address the means for long-term monitoring of the amount of fresh water available. As the adjudication addresses traditional water use allocation, the State should condition allocations upon the installation of gauging stations at the expense of large users.<sup>44</sup> Though such arrangements

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<sup>42</sup> The attorney general cited *South Delta Water Agency v. U.S. Dept. of Int.*, 767 F.2d 531 (9th Cir. 1985) and *United States v. Hennen*, 300 F.Supp. 256 (D. Nev. 1968). Both cases hold that a basin-wide adjudication of all parties' rights in a river system is a prerequisite to application of 43 USC § 666. Such a system-wide adjudication is precisely what we are recommending. Contrary to the attorney general's assertion, court decisions have broadly construed the statute to allow state courts to adjudicate a considerable spectrum of federal water-related rights. See Michael D. White, *McCarran Amendment Adjudications—Problems, Solutions, Alternatives*, 22 Land and Water Law Review 619, 624 (1987); *United States v. District Court for Eagle County*, 401 U.S. 520, 524 (1971).

<sup>43</sup> AS 46.15.166(d).

<sup>44</sup> We note that the DNR commissioner is authorized by AS 46.15.100 to issue permits for appropriation "subject to terms, conditions, restrictions, and limitations necessary to protect the rights of others, and the public interest." Also, the need for accurate measurements of appropriated water is implicit in the public interest criteria listed by AS 46.15.080(b) for granting such permits. The commissioner's options are more specifically described in the implementing regulations at 11 AAC 93.120(c)(2), 11 AAC 93.130(c)(1), 11 AAC 93.146(d)(1), and 11 AAC 93.141.

have not been the norm so far, the State needs to use this authority to assure that the private sector assumes a role in correcting the shortage in measurements of the State's fresh water.

Basin-wide adjudications for the six hydrologic subregions would need to be structured as a conservative investment over several decades. Some entities, such as the federal government, can be expected to insist upon a full judicial resolution. However, others would probably elect the far more efficient options of administrative hearings, arbitration, and alternate dispute resolution as encouraged under Alaska's progressive statute.

We recommend that the legislature establish a joint committee for further study of the potential for basin-wide adjudications to resolve the State's long-term waterway issues.

### Recommendation No. 9

The Department of Law should use simple expedited suits for injunctions as the most efficient remedy to abate waterway obstructions.

An obstruction to free passage on a navigable waterway is subject to abatement as a public nuisance under AS 38.05.128(c). For the purpose of civil suits against public nuisances, the landowner is legally accountable for conditions resulting from use of the property.

The most efficient legal remedy will usually be a civil suit for an injunction that mandates removal. If the case proceeds all the way to a permanent injunction, the trial will be conducted before a judge and without a jury. Such a trial should also be eligible for expedited handling under the court's "fast-track" system.

Prior to trial, the State should be able to obtain a preliminary injunction based on the public interest at stake and the probability of ultimately prevailing at the trial. The preliminary injunction, like the permanent one, will mandate abatement. However, the motion for a preliminary injunction should usually be decided using affidavits and exhibits rather than extensive courtroom testimony. Additionally, the hearing on this motion should occur within a month of filing the case.

Follow-up enforcement of the preliminary injunction is obviously critical. The most efficient approach is for this injunction to include a self-effectuating enforcement provision. If the obstruction is not removed within a stated time limit, the State is authorized in advance to make its own arrangements to remove the obstruction under the supervision of a peace officer.

Most of these cases should be resolved at the stage of preliminary injunction and other pretrial motions. A full trial should not usually be necessary. The final judgment should include all costs of abatement and be collectable through attachment of permanent fund dividends, a lien against the land, and other debt collection process.

### Recommendation No. 10

The legislature should enact a statutory amendment that explicitly authorizes peace officer assistance in the enforcement of injunctions abating waterway obstructions.

As discussed above, an obstruction on a navigable waterway is a public nuisance under AS 38.05.128(c) and subject to an injunction which requires abatement by the landowner. The self-effectuating abatement order we suggest lies within the inherent power of the court to fashion a remedy in a suit against a nuisance.

However, we note that abatement orders with peace officer assistance are explicitly authorized in suits against private nuisances brought under AS 09.45.230-255:

*If judgment is in favor of the plaintiff, an order may issue at any time within six months of the date of the judgment at plaintiff's request directing the issuance of a warrant to a peace officer to abate the nuisance. The expense of abating the nuisance is a part of the judgment and may be enforced by execution against the property of the defendant.<sup>45</sup>*

We also note that AS 09.45.255 defines a "nuisance" as "a substantial and unreasonable interference with the use or enjoyment of real property, including water." [Emphasis added.]

We recommend that AS 38.05.128(c) be amended to explicitly provide for peace officer assistance like the statute governing suits against private nuisances. In the alternative, we recommend that AS 09.45.230(a) be amended to explicitly apply to suits against public as well as private nuisances.

### Recommendation No. 11

The attorney general should aggressively pursue unfulfilled promises to substitute easements under the Andrus agreement.

As discussed in our conclusions, the attorney general's decision as to whether to initiate any particular public trust lawsuit is entrusted to executive discretion. However, as a matter of public policy, we believe that the State needs to aggressively enforce its rights to 17(b) easements promised 20 years ago by landowners involved in litigation.

Prior to 1977, BLM reserved continuous 17(b) easements along waterway shorelines. Parties selecting affected tracts filed litigation challenging those easements, but they did not wish their ANCSA conveyances delayed while awaiting the outcome. Most of these parties thus entered into written agreements with BLM that had the following terms:

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<sup>45</sup> AS 09.45.240.

- The conveyance would proceed on schedule as though the easements were not in dispute.
- Any easement found invalid by the court would be vacated.
- In the event that a reserved easement was found invalid, the landowner committed itself in advance to substitute an unspecified replacement easement for the one found invalid.

In 1977, the federal district court declared the easements in dispute to be invalid.<sup>46</sup> In the years since that decision, some of the prevailing landowners have provided the replacement easements as agreed. However, we understand from DNR that a large number of the promises to substitute easements still remain unfulfilled.

The State ultimately asked the Interior Board of Land Appeals (IBLA) for a ruling that BLM is required to pursue the promised replacement easements. In December 1996, IBLA ruled that it did not have authority to intervene concerning such inaction.<sup>47</sup> The attorney general has apparently not decided whether to seek enforcement of the landowners' promises through other forms of litigation.

Because the invalid easements were extinguished before replacements were obtained, BLM appears to take the position that it now has little power to require the promised substitutes. We disagree. For pending conveyances, decisive steps remain in BLM's process before a final patent will be issued. Additionally, as with other legally binding contracts, BLM can seek judicial enforcement.

Though IBLA has ruled that it lacks authority to resolve this internal BLM matter, the State can still pursue legal remedies available through the federal district court. We thus recommend that the attorney general consider the following options for litigation to enforce the unfulfilled promises.

The State can pursue an injunction compelling BLM to progress with reservation of the replacement easements under a court-supervised schedule. This suit would be based upon legal theories of equitable estoppel,<sup>48</sup> abuse of executive discretion,<sup>49</sup> third-party beneficiary, and fiduciary duties associated with BLM's implied agency relationship with the State when the agreements were entered.

For any landowners who refuse BLM's request to provide the promised easements, the State can pursue injunctions ordering conveyance of the promised easements based upon legal theories of promissory estoppel, third-party beneficiary, unjust enrichment, constructive fraud, and an implied holding of the replacement easements in a constructive trust.

<sup>46</sup> See *Alaska Public Easement Defense Fund v. Andrus*, 435 F.Supp. 664 (D. Alaska 1977).

<sup>47</sup> See *State of Alaska (Koniag, Inc.)*, IBLA 94-130 (Dec. 2, 1996).

<sup>48</sup> See *Municipality of Anchorage v. Schneider*, 685 P.2d 94 (Ak. 1984).

<sup>49</sup> Cf. *Vick v. Board of Electrical Examiners*, 626 P.2d 90, 95 (Ak. 1981).

Neither BLM nor the State have kept statistics as to the proportion of promised replacement easements that still remain to be fulfilled. In assessing the need to seek enforcement, the affected State departments should establish this number without delay. Federal regulations reflect an overall theme that 17(b) easement issues be finalized by the year 2001.<sup>50</sup> Easements not used by then could be lost.

#### Recommendation No. 12

The legislature should amend the surveyors' entry statute to include State employees whose duties require access to the State's waterways.

State employees are sometimes confronted as trespassers while present on waterways or their banks for resource management duties. Unlike land surveyors, no statute explicitly grants state employees a privilege for such access.

We note that private land surveyors are currently protected by AS 34.65.020 in regards to entry upon "public or private land or water" for the performance of surveying duties. These private persons not only receive the privilege of entry but are additionally given a public enforcement mechanism: "*[t]he attorney general may bring an action in the name of the state to restrain and prevent the obstruction of entry . . . .*"<sup>51</sup>

We recommend that AS 34.65.020 be amended to grant public employees the same privilege for the access necessary to perform their resource management duties along waterways. In making this recommendation, we realize that government entries upon private property are subject to scrutiny under constitutional protections against unreasonable searches and privacy invasions.<sup>52</sup> However, the entry proposed lies within "open fields" rather than the "curtilage" of a landowner's home, and it should thus not run afoul of such restrictions.<sup>53</sup>

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<sup>50</sup> See 43 CFR § 2650.4-7(a)(13).

<sup>51</sup> AS 34.65.020(e).

<sup>52</sup> See *Woods & Rohde, Inc. v. State, Dep't of Labor*, 565 P.2d 138 (Ak. 1977) (warrantless administrative inspection of business premises is unconstitutional).

<sup>53</sup> See *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170 (1984); *Ingram v. State*, 703 P.2d 415, 427 (Ak. App. 1985), *affirmed*, 719 P.2d 265 (Ak. 1986).

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## APPENDIX A

### WATERWAY MANAGEMENT

#### Excerpt From DNR's Kenai Easement Atlas (1993)

**Auditor's note:** The following two pages are an actual-size excerpt from DNR's 1993 atlas of public access easements on the Kenai Peninsula. The excerpt shows DNR's depiction of easements in the popular Seldovia area.

For the area shown, 15 public access easements were reserved. However, for 10 of these easements,<sup>54</sup> we understand that the public has no means for actually locating them on the ground because they are unmarked and do not coincide with an existing geographic feature.

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<sup>54</sup> EIN 15; EIN 16 (two one-acre sites); EIN 17 (proposed road and proposed trail); EIN 23; EIN 26a; EIN 27; EIN 28; EIN 29.

## SELDOVIA B-4

### ■ RESERVED EASEMENTS

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#### ADL 67551

An easement 5 feet in width for an existing trail from FAS 4040 in T 8 S, R 13 W, Sec 34, SM eastward to Kachemak Bay State Park and Tutka Bay.

#### EIN 1

An easement for that portion of the existing road from Seldovia to Windy Bay beginning at FAS 4040 in Sec 10, T 9 S, R 13 W, SM and ending at Windy Bay. (60-foot road)

#### EIN 15

A one-acre site easement (approx. 200 feet x 200 feet) for camping and float plane tie-up at the outlet of Scurvy Lake in Sec 29, T 10 S, R 13 W, SM. (one-acre site)

#### EIN 16

An easement for an existing trail from FAS 4040 in the vicinity of the Kenai Chrome Mine southeastward to public land in Sec 27, T 9 S, R 13 W, SM. (25-foot trail)

#### EIN 16

A one-acre site easement located at the junction of road EIN 1 and trail EIN 23. (one-acre site)

#### EIN 16

A one-acre site easement located at the head of Picnic Harbor. (one-acre site)

#### EIN 17

An easement for a proposed trail from FAS 4040 northwestward to public land in Sec 17, T 9 S, R 13 W, SM. (25-foot trail)

#### EIN 17

An easement for a proposed road from road EIN 1 to site EIN 15 on Scurvy Lake in Sec 29, T 10 S, R 13 W, SM. (60-foot road)

#### EIN 23

An easement for a proposed trail from road EIN 1 eastward through the Port Dick drainage on the south side of Port Dick Creek to public land. (25-foot trail)

#### EIN 26a

A one-acre site easement on the north shore of Rocky Lake with an additional 25-foot wide easement on the bed of Rocky Lake along the entire waterfront of the site. (one-acre site)

#### EIN 26b

An easement for an existing trail from road EIN 1 to site EIN 26a at Rocky Lake. (25-foot trail)

#### EIN 27

An easement for a proposed trail from FAS 4040 westward about 0.25 mile to public land and US Mineral Survey 2156. (25-foot trail)

#### EIN 28

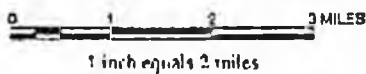
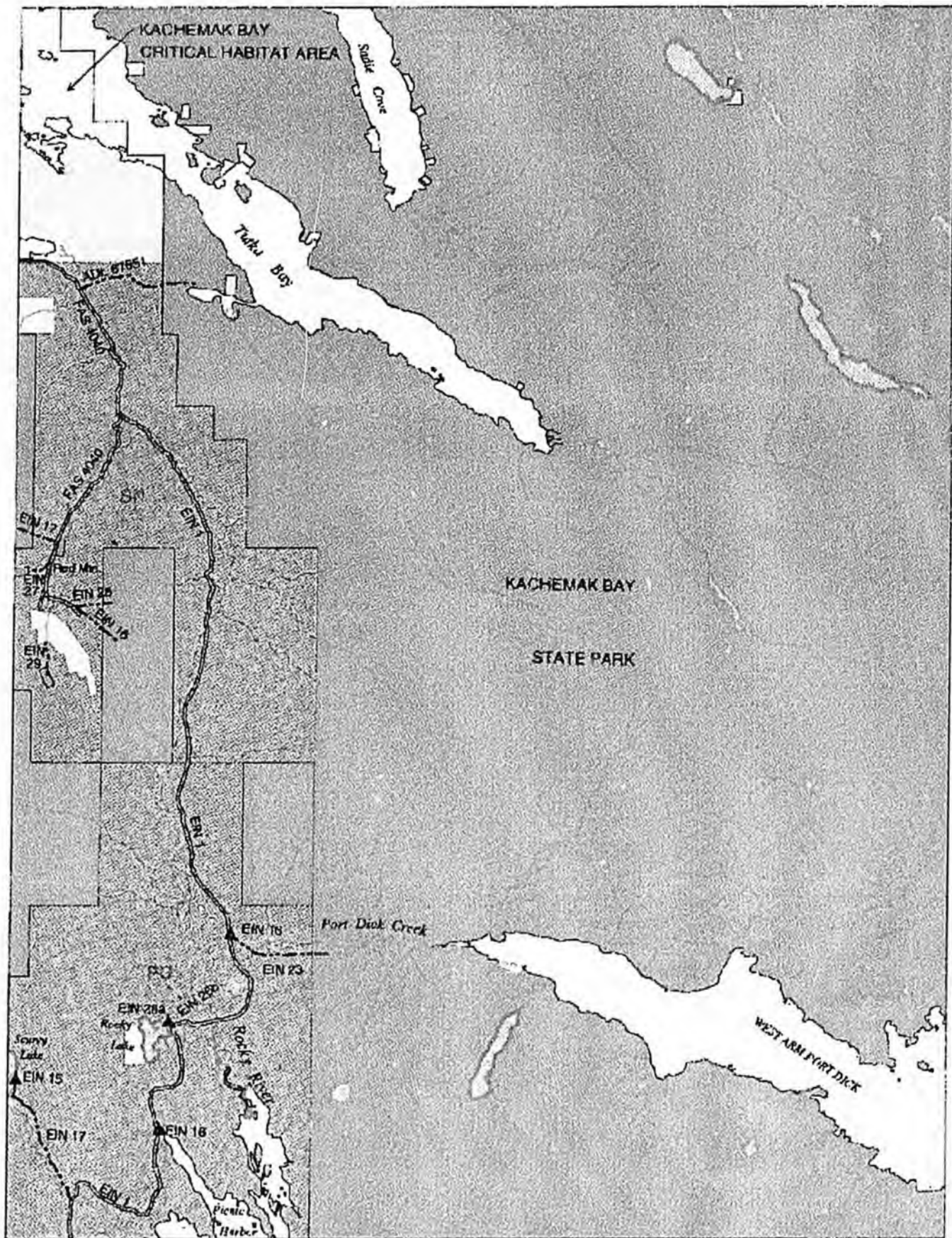
An easement for a proposed trail from FAS 4040 near the Kenai Chrome Mine eastward about 0.25 mile to public land. (25-foot trail)

#### EIN 29

An easement for a proposed trail from FAS 4040 near the Kenai Chrome Mine southward to public land and US Mineral Survey 2158. (25-foot trail)

#### FAS 4040

An easement 100 feet in width for the existing road between Jakolof Bay and the Kenai Chrome Mine on Red Mountain. Locally known as Red Mountain Road. (Omnibus Road)



**KENAI EASEMENT ATLAS**

1993

**LAND OWNERSHIP**

- |                     |  |
|---------------------|--|
| Federal             | Private - includes Mental Health University of Alaska, Alaska Railroad & Native Allotments |
| State               | State Determined Navigable Water   |
| Borough & Municipal | Federal Determined Navigable Water   |
| ANSCA Corporation   |  |

**ROADS & TRAILS**

- |                        |                 |
|------------------------|-----------------|
| State-Maintained Roads | Foot Trails     |
| Improved Roads         | Alaska Railroad |
| 4WD Trails             |                 |
| ATV Trails             | <b>MISC</b>     |
| Snowmachine Trails     | Atlas Boundary  |
| Horse Trails           |                 |

**SITES**

- |              |                     |
|--------------|---------------------|
| Canoe Launch | Landing Strip       |
| Ski Launch   | Public Cabin        |
| Campsite     | Vehicle Information |
| Parking Area |                     |
| Picnic Area  |                     |

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## APPENDIX B

### WATERWAY MANAGEMENT

#### Potential Publishers Of Information Regarding Public Access Easements

- United States Geological Survey (widely-available topographic maps).
- National Oceanic and Atmospheric Administration (widely-available nautical charts that include adjacent land).
- Forest Service (maps of national forests and adjacent land).
- Trails Illustrated (large-scale topographic maps for popular recreation areas).
- Alaska Road & Recreation Maps (large-scale topographic maps for popular recreation areas near the state highway system).
- DeLorme Mapping Co. (popular *Alaska Atlas & Gazetteer*, a paperback collection of topographic maps covering the entire state).
- Northwest Publishers (widely-available *Alaska Wilderness Guide*; access routes to public land should be noted in its extensive descriptions for Alaska rural communities off the highway system).
- Northwest Publishers (widely-available *Alaska Milepost*; access routes to public land should be noted in its descriptions for communities along the highway system).
- National Oceanic and Atmospheric Administration (widely-available *Alaska Supplement* directory of airstrips; access routes to public land should be noted in the Remarks section of each airstrip's data.)
- Alaska Airmen's Association (*Logbook* directory of Alaska airstrips; access routes to public land should be noted in its descriptions).
- Aircraft Owners and Pilots Association (national directory of airports; access routes from Alaska airstrips to public land should be noted in its descriptions).

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# STATE OF ALASKA

## DEPARTMENT OF NATURAL RESOURCES

### OFFICE OF THE COMMISSIONER

June 25, 1997

Mr. Randy S. Welker  
Legislative Auditor  
Alaska State Legislature  
Legislative Budget and Audit Committee  
Division of Legislative Audit  
PO Box 113300  
Juneau, AK 99811--3300

Dear Mr. Welker:

The Department of Natural Resources has developed this coordinated response with the departments of Fish and Game and Law to your "CONFIDENTIAL" preliminary audit report on *Waterway Management Issues, March 28, 1997*. Your report offered both conclusions and recommendations and we have responded to both. We appreciate the time you and your staff devoted to become knowledgeable about our programs and methods employed by our agencies. We are available to help clarify any issues, and would be able to meet with you and the Legislative Budget and Audit (LB&A) committee to discuss this report. Please contact Jane Angvik, Director, Division of Land, at 269-8503, Tina Cuning, ADF&G Commissioner's Office at 267-2248, and Joanne Grace, Assistant Attorney General at 269-5237 to let us know when the committee will discuss this report.

#### Response To Report's Conclusions

Conclusion (page 7): BLM navigability decisions virtually were ignored in FY 95 and 96.

Response: This assessment is correct, however, the report should acknowledge that the Department's navigability project was drastically reduced due to budget cuts during this period. In FY 94, the navigability project was a responsibility of the Division of Water. The Division of Water was merged with the Division of Mining at the end of FY 94. In FY 94, the Division of Water budgeted \$132,000 for the navigability project. In the FY 95 budget, the legislature did not fund this \$132,000 program, and therefore, BLM navigability decisions were not reviewed. In April, 1996 the legislature provided a supplemental appropriation for navigability and the Division of Land resumed responsibility for the program. The Division of Land staff had been reduced by more than 30 percent (from FY 91 to FY 96), with no reduction in workload. The Department simply lacked resources in FY 95 and FY 96 to carry out the navigability project. Therefore, significant budget reductions, rather than politics or "imprudent governmental behavior," as the report states, resulted in the Department not reviewing navigability decisions in FY 95 and FY 96. We agree that the navigability project is important and BLM navigability reports should and will be reviewed as long as resources are provided to do so.

TONY KNOWLES, GOVERNOR

400 WILLOUGHBY AVENUE  
JUNEAU, ALASKA 99801-1796  
PHONE: (907) 465-2400  
FAX: (907) 465-3888

3601 C STREET, SUITE 1210  
ANCHORAGE, ALASKA 99503-5921  
PHONE: (907) 269-8431  
FAX: (907) 269-8918

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Conclusion (page 8): Timely state response to FY 96 BLM notices of public access easements.

Response : See response to recommendation 1 on page 4.

Conclusion (page 9): Identification of Public access easements involve little public input.

Response : See response to recommendations 2 and 4 on page 5.

Conclusion (page 10): The unmarked state of most easements negates meaningful public access.

Response : We agree that more needs to be done to locate and mark 17(b) easements. In addition to recommendations 5 and 6 in the report, we believe the state should encourage federal public land managers to take a more active role. In the Glennallen area, for example, BLM has been actively marking 17(b) trail heads and trails. Other federal land managers should follow BLM'S lead.

There are, however, limitations. In some instances 17(b) easements denote future, rather than existing trails. This is because in some areas of the state there was no clearly defined trail used for access across ANCSA lands. The state's goal in these areas is to ensure there is a legal right of access, the exact location of the easement may need to be resolved working with the ANCSA corporation in the future. Additionally, see response to recommendations 5 and 6 on page 6.

Conclusion (page 11): Information concerning public access easements is not readily available to the public.

Response : See response to recommendation 7 on page 7.

Conclusion (page 12): DNR's computerized statewide map and database are noteworthy projects.

Response : We agree.

Conclusion (page 12): DNR has produced a noteworthy public information booklet.

Response : DNR is currently updating the booklet.

Conclusion (page 13): Statutes of limitation have minimal impact on waterway litigation decisions.

Response : No comment.

Conclusion (page 14): Minimal long - term impact of state's piecemeal approach to waterway litigation.

Response : While we agree that the federal government's "never surrender" approach to quiet title actions greatly frustrates the state's efforts to assert navigability, we strongly disagree that our past strategy has not had a long term impact. The state's strategy has generally been to pursue litigation that will set precedents applicable in future federal land conveyance decisions. The state's landmark victories in the Gulkana River, Kandik and Nation Rivers, Alagnak River, and other cases established new navigability standards that benefit all Alaskans and have greatly influenced federal navigability determinations. The state's pursuit of the pre-statehood land withdrawal issue, through current litigation and past efforts such as the amicus brief filed in the landmark case *Utah Division of State Lands v. United States* 482 U.S. 193 (1987) serve to further clarify rules regarding navigability.

Despite these successes, we have learned in recent years that filing quiet title actions against the federal government on all potentially navigable waters would be an overwhelming legal and data collection effort, and we agree a different approach is needed. See our response to recommendation 8, including a suggested alternative to the basin wide adjudication approach suggested in the report.

Conclusion (page 15): Public Trust Doctrine does not mandate pursuit of all potential claims.

Response : We agree.

Conclusion (page 16): Criminal prosecution not efficient for removing obstructions.

Response : See response to recommendation 9 on page 11.

Conclusion (page 17): Lack of top level direction impairs program implementation.

Response: We disagree. The state has a unified, decisive strategy regarding waterway issues. The strategy includes the following:

1. Assert through administrative process, and when necessary, litigate, state ownership of navigable waters. This includes the following tasks:
  - A) Appeal or otherwise respond to BLM administrative decisions regarding navigable waters.

B) When necessary assert through quiet title actions or other litigation state ownership of waterways. Focus on litigation that can establish precedents with broad regional or statewide implications.

C) Review Federal plans, regulations, and other actions to ensure that state ownership and public uses are protected.

2. Assert the public's right to use navigable waters and inform the public of these rights.

A) Provide the public with information about it's right to use waters that constitute "public or navigable waters" as provided in the Alaska Constitution regardless of who owns the underlying lands.

B) Make information on navigable waters more easily understood and better accessible to the public.

3. Retain navigable waters in the state's ownership. Ensure that all state land conveyances such as leases, sales, municipal entitlements, and other disposals retain navigable waters in state ownership and provide for public use and access.

We take offense at the report's description of decisions through "ad hoc negotiations between a loose interdepartmental consortium of classified technical staff." The state's current navigability efforts are coordinated through the interagency navigability team. Team meetings are chaired by Jane Angvik, Director of the Division of Land, who works directly for the Commissioner of Natural Resources. The Alaska Department of Fish and Game is represented at the meetings by Tina Cuning, who works for the commissioner's office and brings years of waterway issues experience to the group. The Department of Law is represented by Joanne Grace, a senior attorney in the Natural Resource Section of the Department of Law.

Much of the day to day project effort is coordinated by technical staff. This is the most efficient use of government employees' time.

We further take offense at references on page 18 to a three-year-old draft budget statement. More recent budgets by DNR indicate that we have reprioritized in response to the desires of the legislature.

#### Response to report recommendations

**Recommendation No. 1:** "DNR personnel who review BLM easement notices and navigability reports should briefly document the rationale for their decisions."

We agree DNR should document its decisions on easement notices and navigability reports. DNR will briefly document the rationale for its responses to navigability reports in a daily computer log. A short note to the file documenting the specific evidence reviewed (maps, documents, interviews) and its significance will be completed. A written response has been sent to BLM on each 17(b) easement notice since December 1994. A copy of the response has been placed in DNR's easement casefiles. A companion log is also maintained. This will enable efficient scrutiny by managers, budget analysts, legal counsel, the courts, the ombudsman, and the public.

We disagree that a response to BLM is always necessary or appropriate when the state agrees with BLM's decision. Besides being time consuming, BLM may use the letters against us in

administrative and judicial proceedings. In addition, commenting when we have nothing to comment on consumes limited staff time that would better serve other tasks.

**Recommendation No. 2:** " DNR and ADF&G should facilitate BLM's inclusion of citizen groups in the process for reserving public easements."

We are currently doing this, however in a less formal manner than the report suggests. In the past DNR and DFG convinced BLM to include interested citizen groups on BLM's notice list for all easements pertinent to the groups activities. The interest groups failed to respond in any meaningful manner. BLM considered the option of limiting the interest to geographic areas or easement types, but thought this would be an administrative burden. Instead of including citizen groups in a formal process, DNR and ADF&G contact specific individuals within interest groups when they know that an individual has knowledge of a specific area. We found personal contact with interest groups by the state or BLM adjudicator to be a much more effective approach.

In addition, past public input is used from the Federal State Land Use Planning Commission's reports and maps, as well as the responses to the first round of public notices that are in BLM's easement files. The easement identification number identifies the original easement sponsor, which serves as additional information (i.e. EIN 1 C3, D1, L: C3=BLM, D1=Division of Land, L= General Public.)

**Recommendation No. 3:** "DNR personnel should carefully scrutinize "boilerplate" provisions in easements notices to ensure that the State does not inadvertently waive its right to challenge a finding that a waterbody is not navigable."

We agree with this recommendation. Use of the language by the northern district of BLM's referred to on page 20 of the draft report in its notices of proposed easements is inconsistent with BLM policy. ANILCA provides that no administrative recourse to a BLM navigability decision is available. Since the passage of ANILCA, the Attorney General's office has advised that no response is necessary. We have discussed this problem with the northern district of BLM and they have agreed to stop using the boilerplate language. Navigability determinations for lands identified for conveyance under ANCSA will be made on a case by case basis when requested by the State of Alaska.

**Recommendation No. 4:** "DNR and DFG personnel who review BLM easement notices should consult BLM case files and local resources in formulating the State's response."

We agree with this recommendation regarding BLM files. BLM case files contain considerable public material beyond that available at DNR and DFG. This additional material is helpful in formulating the State's response to BLM easement notices. DNR or ADF&G will review the BLM file and consult with BLM staff prior to signing off on future decisions.

We agree that local resources should be consulted and we are already doing this. In evaluating easement proposals, DNR and DFG contact local resources who are personally familiar with the site in question. DNR and ADF&G rely heavily upon local ADF&G, DOT/FF, State Parks,

and State Forestry personnel stationed in the immediate area as they are easy to contact and are reliable and accurate sources of information on local use of trails and waters. The contacts will be briefly documented in the written rationale include in the easement file ( see Recommendation No. 1).

**Recommendation No. 5:** "The legislature should require that airport operating agreements include the marking and maintenance of public routes."

The following response was prepared by the Department of Transportation and Public Facilities (DOT&PF). The legislative audit recommendation 5 proposes that "... airport operating agreements include the marking and maintenance of public access routes." The meaning of "airport operating agreements" is not clear, but we assume the recommendation is for DOT&PF to somehow arrange for the marking and maintenance of the access routes. DOT&PF has two fundamental problems with this proposal - cost and safety.

Cost - At a typical small community airport, DOT&PF constructs and maintains a short connector road between the aircraft parking apron and the nearest local public road or street. Capital construction grants are not available from the FAA for the acquisition or construction of public access that is any more extensive than that.

DOT&PF's airport maintenance funding is extremely limited. DOT&PF simply does not have the resources to maintain anything at small community airports except the runway, taxiway, apron, and the short connector road. Neither does DOT&PF have the funding to "mark" the public access ways between the airport and a navigable river or 17(b) easement.

To properly mark such a route, the department would first have to locate it (perform land ownership research, survey rights-of-way, etc.) and then install and maintain appropriate markers. At this point, we have no estimate of these costs, but clearly they would be substantial.

Safety - At some airports, 17(b) easements may intersect the runway at locations that are unsafe for vehicle or pedestrian traffic. In the interest of safety, we prohibit vehicles and pedestrians from moving across or along the runway. In some cases, where the trail is on the opposite side of a runway from the aircraft parking apron, the only way to provide safe access from an aircraft to the trail would be to build a road or trail around the runway. In the absence of adequate funding for construction or maintenance of an access connection, DOT&PF must place airport safety above trail access and bar the public from crossing the runway.

We do not oppose the general concept of public access between state airports and public easements or waterways in the surrounding area. It already exists at most state airports. However, that access cannot be marked and maintained as easily as the legislative audit recommendation seems to suggest. We cannot compromise airport safety or DOT&PF's extremely limited airport maintenance funding in the interest of solving an off-airport access problem.

**Recommendation No. 6:** "The legislature should amend statutes governing the administration of the state aid to promote the marking and maintenance of 17(b) access easements."

We support increased marking and maintenance of 17(b) access easements. We have no objection to the proposed changes to statutes as long as funding is also provided for its implementation.

**Recommendation No. 7:** "DNR should facilitate the dissemination of easement information through commercially-available outlets rather than publish easement atlases."

DNR agrees that easement information could be better disseminated through commercially available outlets. We also agree that DNR's access atlases could be better publicized. We anticipate wider public visibility when we distribute the two recently completed atlases for Prince William Sound and Kodiak.

We have suspended any additional work on atlases because we have no funding to prepare them. We prepared the last two atlases, in part, with Exxon Valdez Restoration money. In our planning for future atlases, we will contact some of the potential publishers mentioned in Appendix B to see if we can better coordinate efforts.

We disagree, however, with the report's assessment of the limited value of the atlases to the public. Local governments, recreation users, federal land managers, and Native Corporations have all used past atlases. In fact, the Copper River Easement Atlas is sold out. The Bristol Bay Native Corporation has expressed interest in helping pay to have the information in the Bristol Bay Easement Atlas automated for future planning and land management. Furthermore, the land status information used in the atlases serves other purposes, such as development of land use plans for state land and planning for the development of recreational facilities in Prince William Sound.

Regarding the suggestion that we include easements for access to navigable waters in the centralized research data base, we will consider this in future updates to the data base. However, DNR will not have resources available to undertake such an extensive effort in the next fiscal year.

**Recommendation No. 8:** "Alaska's basin-wide adjudication statute has untried potential for long-term resolution of most water-related issues. The legislature should establish a joint committee charged with reviewing this potential."

We disagree with the recommendation that the state may use Alaska's basin-wide adjudication statute to resolve title to submerged lands. This is legally impossible. The idea is based on a fundamental misunderstanding both of the holding in *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), and the scope of the McCarran amendment, 43 U.S.C. § 666, the provision by which Congress waived the United States' sovereign immunity as to state general water adjudications.

The misunderstanding is based on the notion that a waterway's navigability is a prerequisite to federal fisheries regulatory authority. The report concludes that navigability is a necessary

factual element of this authority because the United States Court of Appeals for the Ninth Circuit held in *State v. Babbitt* that navigable waters in which the United States has a federal reserved water right are "public lands", as defined in ANILCA, 16 U.S.C. § 3102, subject to federal regulation if state law does not provide a qualifying statewide priority for hunting and fishing for subsistence uses. Although the plaintiffs in the *Babbitt* case framed the issue as whether or not navigable waters in which the United States has a federal reserved water right are public lands, they did this because the issue did not exist as to non-navigable waters.

A federal reserved water right arises when the United States withdraws lands from the public domain and reserves them for a federal purpose, and by implication reserved appurtenant waters then unappropriated. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Thus, with certain exceptions, the water right exists in rivers or lakes on federal lands. The plaintiffs did not need to litigate the issue of whether non-navigable waters subject to a reserved water right might constitute "public lands", because the United States already defined this term to include all non-navigable waters on federal lands by virtue of federal ownership of the submerged lands (under state law, the adjacent landowner owns the lands underlying non-navigable waters to the mid-point of the waterway). Moreover, as a practical matter, the United States has a reserved water right in non-navigable waters within a particular reserve to the same extent it has one in navigable waters, so the "navigable" modifier would be superfluous even if non-navigable waters had not already been included.

Consequently, the navigability of a waterway is irrelevant to federal fisheries management and is not included in the United States' waiver of sovereign immunity to permit state courts to determine water rights or their administration. A state court would have no reason for determining a waterway's navigability in adjudicating water rights. Courts strictly construe waivers of sovereign immunity, and would not accept an interpretation of 43 U.S.C. § 666 that is so far beyond the intended purpose of the provision.

The report also misinterprets the meaning of the waiver providing that state courts may administer water rights. The McCarran amendment, 43 U.S.C. § 666, states that the United States waives sovereign immunity (1) to adjudicate water rights or (2) for the administration of such rights. The report maintains that the issue of fisheries management authority should lie with the second part of this statute, which permits the "administration" of federal water rights. The statute and the caselaw interpreting it clearly indicate, however, that it refers only to the administration of water rights, which has no bearing whatever on fisheries management. Waiver of sovereign immunity for the administration of water rights means that once the state agency or court has determined the rights of various claimants to use the water, the United States can be included in subsequent suits to enforce or clarify these rights. See *South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985) ("Congress intended a waiver of immunity under subsection (2) only after a general stream determination under subsection (1) has been made .... [If] there has been no prior adjudication of relative general stream water rights ... there can be no suit for administration of such rights' within the meaning of the McCarran Amendment.")

The plaintiffs and the court in *Babbitt* never suggested that reserved water rights have any relation to fisheries management authority except as a means to include waterways in the definition of "public lands" subject to a priority for hunting and fishing for subsistence uses. ANILCA defines "public lands" as (1) The term land means lands, water and interests therein. (2) The term "federal Land" means lands the title to which is in the United States after

December 2, 1980. (3) The term "public lands" means land situated in Alaska which after December 2, 1980 are federal lands [except for certain lands selected by the state or Native corporations.] The court accepted the United States' argument that "public lands" include waters subject to the federal reserved water right because it "owns" an interest in these waters. Thus, although the federal reserved water right gives the United States a basis for defining public lands subject to its regulatory authority, the administration of water rights does not include determining where federal fisheries management exists.

The report also misstates the purpose and significance of the State's 1992 notice to the federal government of intent to file quiet title actions on nearly 200 waterways. The report characterizes the notice as a "wasted effort" and a "blind alley," and claims that DNR believes that the notice lacks current significance. The State gave notice on the waterways because the Solicitor of the Department of Interior at the time invited it to do so, suggesting that the State file quiet title actions on the waters that the State and the United States agreed were navigable, assuring that the United States would disclaim interest and the court would enter a judgment in favor of the State. When the State filed its first case on three of the rivers noticed, however, the United States did not disclaim interest, but raised jurisdictional obstacles that the parties are still litigating four years later. DNR did not suggest, as the report implies, that the notice lacks current significance. The notice still provides the necessary prerequisite to filing quiet title actions on the waterways included in it, and when the State resolves the jurisdictional disputes raised in the case currently being litigated, it will file such actions on other waters that were named in the notice.

Despite these disagreements, the report correctly characterizes many of the difficulties in resolving navigability issues. With this in mind, the Departments of Law, Fish and Game, and Natural Resources have developed a strategy to better achieve the goal of making the public aware of which waterways they may use and how.

If the state's only goal were to determine whether it has title to the many waterways in Alaska, it would be faced with formidable obstacles. Federal court litigation generally progresses very slowly, and as the report indicates, the United States takes a "never surrender" approach to submerged lands quiet title actions. Even state navigability determinations require significant research and can rarely be completed quickly.

The state's goal in resolving navigable waters issues is not limited to settling title, however; while some waterways issues depend upon definitely determining title to the submerged lands, others do not. One of the most important issues the state faces is how to respond to citizens who want to know what personal rights they have to use particular waterways. The state can answer this question without a title determination. If a waterway is "navigable" as defined by state statute, then the public has a right to use it regardless of who owns the bed.

The public's right to use waters that are navigable in fact is provided in the Alaska Constitution:

"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."

Alaska Constitution, art. VIII sec. 14; *see also* art. VIII sec. 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."). The legislature has defined "navigable waters" very broadly, to include all waters navigable in fact regardless of ownership of the submerged lands:

"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. AS 38.05.965(12).

Further clarification of the legislature's intent came in 1985, 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 stated:

Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the state to use and have access to the water for recreational purpose or any other public purposes of which the water is used or capable of being used consistent with the public trust.

*Id.*, §1. The legislature also made it a class B misdemeanor to obstruct or interfere with passage by a member of the public on any navigable water as defined by AS 38.05.965. AS 38.05.128.

Because the public has a right to use "navigable waters," as defined by AS 38.05.965, the state does not need a court judgment or even a state determination that it owns the submerged lands in order to assure citizens that they may float any given waterway. The state needs only to determine that a waterway meets the criteria of AS 38.05.965, that it is navigable for purposes of the Alaska Constitution. The state can conduct a "public use" determination much faster, with significantly fewer resources, and with significantly greater certainty than it can conduct a traditional navigability determination or litigate title. The agencies could make these determinations at a rate sufficient to cover the most frequently-used waterways in Alaska in a few years, and would provide them to the public.

At the same time, the agencies would continue to conduct title navigability determinations and litigation where resolution of conflicts truly depends upon ownership of the submerged lands.

While the Alaska Constitution and statutes make clear that the public has the right to use waters that are navigable under the statutory definition, the precise scope of that right is unclear. While the public clearly may navigate such waters, courts in Alaska have not addressed whether this right includes fishing from the banks, portaging around obstacles, or camping below ordinary high water (usually on gravel bars). Because the right arises from the Alaska constitution, the question is strictly one of Alaska law, and the scope of public rights in other states would not necessarily be helpful in making this determination. The agencies

would like the legislature to consider legislation that clarifies exactly what rights the public has to use a waterway that is navigable in fact, but in which the submerged lands are privately owned. Such legislation would have to strike a balance between the rights of the public to use public waterways and the rights of private landowners to keep the public off their property.

**Recommendation No. 9:** "The department of Law should use simple expedited suits for injunctions as the most efficient remedy to abate waterway obstructions."

In recommendation nine, the report suggests use of the civil injunction to abate obstructions on state waterways. The Department of Law will consider use of this tool when faced with obstructions on waterways, particularly when the obstructer does not respond to the State's written request to remove them (typically the state's first reaction). The Department of Natural Resources also has raised the possibility of an amendment to AS 38.05.128 to permit the Commissioner to abate an obstruction administratively, without resort to court action.

The Departments of Natural Resources, Fish and Game, and Law also have adopted as a proactive strategy to avoid future problems a public awareness campaign to educate the public and property owners as to their rights and responsibilities on public lands and watercourses. As part of this campaign, the state will publish and disseminate periodic public bulletins. This information will specifically notify property owners that they must allow access through all navigable corridors and remove any obstructions to such access.

**Recommendation No. 10:** "The legislature should enact a statutory amendment that explicitly authorizes peace officer assistance in the enforcement of injunctions abating waterway obstructions."

We agree with the report's suggested amendment of Alaska law to expressly allow peace officer assistance in the enforcement of injunctions abating waterway obstructions. Although peace officers may already have this authority, the statutes' silence in this regard, while expressly authorizing peace officer assistance in suits against private nuisances, make the express inclusion of authority advisable.

**Recommendation No. 11:** "The attorney general should aggressively pursue unfulfilled promises to substitute easements under the Andrus agreement."

The Attorney General's office will evaluate the report's proposal to pursue litigation against the Bureau of Land Management. Before committing to such litigation, the Attorney General must consider jurisdictional issues, sovereign immunity, and possible causes of action.

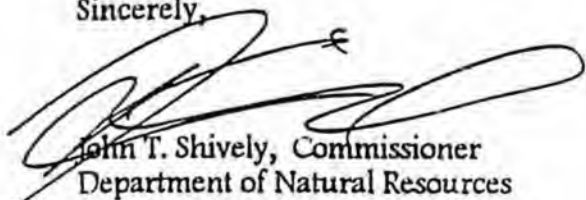
**Recommendation No. 12:** "The legislature should amend the surveyors' entry statute to include State employees whose duties require access to the State's waterways."

The issue of access across private lands to navigable waterways for resource management by state employees has not been discussed as a major problem during the navigability project.

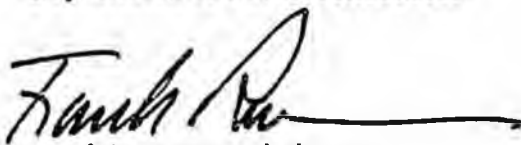
More analysis should be included in the report as to whether or not this is a significant problem and to explain why there is a need to change Alaska Statutes 34.65.020 as proposed.

Again, we are willing to discuss any of these issues with your staff or the Legislative Budget and Audit Committee. If you need more information or clarification of any of your comments, please contact Joanne Grace at 269-5100 regarding legal issues, Jane Angvik at 269-8503 regarding land management, land title, and easement issues, or Tina Cuning at 267-2248 regarding fish and wildlife management issues.


Sincerely,



John T. Shively, Commissioner  
Department of Natural Resources



Frank Rue, Commissioner  
Department of Fish and Game



Bruce M. Botelho  
Attorney General

CC: Jane Angvik, Director, DNR Division of Land  
Tina Cuning, ADF&G, Commissioner's Office  
Joanne Grace, Assistant Attorney General  
Jim Culbertson, DNR, Navigability Project Manager  
Clyde Stoltzfus, DOT/PF, Commissioner's Office

# ALASKA STATE LEGISLATURE

## LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



P.O. Box 113300  
Juneau, AK 99811-3300  
(907) 465-3830  
FAX (907) 465-2347  
Internet e-mail address:  
legaudit@legis.state.ak.us

July 8, 1997

Members of the Legislative Budget  
and Audit Committee:

We have reviewed the combined response from the Department of Natural Resources, Department of Fish and Game, and Department of Law (collectively "the agencies") concerning our preliminary audit report on the State's waterway management programs. Nothing contained in the response gives us cause to reconsider our findings. However, we offer the following additional observations concerning three subjects addressed in the response.

### Recommendation No. 5

The legislature should require that airport operating agreements include the marking and maintenance of public access routes.

The agencies indicate that their response to this airport-related item was prepared by the Department of Transportation and Public Facilities (DOTPF).

DOTPF has misunderstood our recommendation. We merely suggest that state maintenance of rural airports be conditioned upon arrangements for airport access easements. We see no need to increase the amounts paid to vendors servicing the airport maintenance contracts, as the effort required should be quite insignificant. Rather, each community that benefits from such an airport would need to cooperate with the vendor as a condition of continuing to receive the service. We further note that our recommendation would enhance, not detract from, DOTPF's ability to ensure that access easements safely transition the airport environment.

Recommendation No. 8

Alaska's basin-wide adjudication statute has untried potential for long-term resolution of most water-related issues. The legislature should establish a joint committee charged with reviewing this potential.

The agencies apparently do not challenge the following underpinnings for the potential use of basin-wide adjudications:

- Both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to use the basin-wide adjudication process if it chooses to do so.
- Both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to join the federal government as a party to a basin-wide adjudication.
- Both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to determine federal reserved water rights in the context of a basin-wide adjudication.
- Except in the context of an action to directly quiet title against the federal government, state courts have the authority to routinely make factual findings of navigability to resolve property disputes.
- State statutes and regulations make factual findings of navigability pertinent to some of the water rights issues subject to a basin-wide adjudication.<sup>1</sup>
- In the event that a state court makes findings of navigability during a basin-wide adjudication, those findings may have binding effect against the federal government in any later litigation to directly quiet title in the federal court.<sup>2</sup>
- State statutes and regulations provide broad, though untested, authority for state courts to require private entities to fund the means for measuring the impact of their water use (e.g., gauging stations).<sup>3</sup>

Nevertheless, the agencies voice two types of concerns about the potential for basin-wide adjudications. First, they assert that federal law (specifically the McCarran Amendment<sup>4</sup>)

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<sup>1</sup> See AS 46.15.080(b)(8) ("the effect upon access to navigable or public water"); AS 46.15.145(a)(3) ("navigation and transportation purposes"); 11 AAC 93.120(e)(2)(A)(iii) ("navigation"); 11 AAC 93.130(c)(1)(C) ("protection of navigation"); 11 AAC 93.141(3) ("navigation and transportation purposes").

<sup>2</sup> Cf. *Jeffries v. Glacier State Telephone Co.*, 604 P.2d 4, 8 (Alaska 1979).

<sup>3</sup> See AS 46.15.165(i); AS 46.15.100; AS 46.15.080(b); 11 AAC 93.120(e)(2); 11 AAC 93.130(c); 11 AAC 93.146(d)(1); 11 AAC 93.141.

bars joining the federal government as a party to any basin-wide adjudication in which the state court will look at factual issues of navigability. Second, the agencies argue that federal reserved water rights and navigability are irrelevant to the allocation of fishery management authority between the state and federal governments.

However, these objections are framed in the rhetoric of advocacy (e.g., "legally impossible," "fundamental misunderstanding") rather than meaningful references to the actual state of the law today. Despite our repeated requests for citations to specific legal precedents, the rhetoric remains unsupported. We conclude that the potential limits on a basin-wide adjudication simply remain an open, unsettled area of the law at this time.

In regards to the agencies' first argument concerning the McCarran Amendment, they cite only the case of *South Delta Water Agency v. U.S., Dept. of Int.* We note that this case did not even involve a basin-wide adjudication. The court explicitly observed:

*The parties agree that the instant suit does not meet the requirements of subsection (1) of the McCarran Amendment because the suit does not involve a general stream adjudication.*<sup>5</sup>

The agencies have correctly noted that a suit under the federal Quiet Title Act is generally the sole means to directly challenge federal title to real estate. However, the agencies have ignored the explicit exception which the Quiet Title Act contains for suits brought under the McCarran Amendment:

*[N]or does it [the Quiet Title Act] apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666) [the McCarran Amendment].*<sup>6</sup>

The agencies also seem to implicitly argue that the basin-wide adjudication must decide all parties' rights in an initial case and then require them to return with a second case for "administration" of those rights. If this is in fact the agencies' argument, it disregards guidance from the U.S. Supreme Court that "administration" under the McCarran Amendment "obviously includes water rights previously acquired by the United States through appropriation or presently in the process of being so acquired."<sup>7</sup> No precedent

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<sup>4</sup> 43 U.S.C. 666.

<sup>5</sup> *South Delta Water Agency v. U.S., Dept. of Int.*, 767 F.2d 531, 540 (9th Cir. 1985).

<sup>6</sup> 28 U.S.C. § 2409a (a).

<sup>7</sup> *United States v. District Ct., County of Eagle, Colo.*, 401 U.S. 520, 524 (1971).

brought to our attention indicates that a basin-wide adjudication cannot address both rights and administration for a hydrologic unit in a single efficient proceeding.

Also, contrary to the agencies' assertion, the U.S. Supreme Court has construed the McCarran Amendment broadly, not narrowly, to allow state courts to decide a considerable spectrum of federal water-related rights during a basin-wide adjudication:

*[W]e deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights.*<sup>8</sup>

The agencies further assert that federal reserved water rights and a waterway's navigability are irrelevant to which level of government prescribes the rules for fishery allocation between subsistence and other users. Indeed, in the recent *Totemoff* case, the agencies were successful in convincing the Alaska Supreme Court that federal reserved water rights should not be a factor.<sup>9</sup> However, the court's decision still hinged upon a factual finding that a waterway was navigable and thus subject to state authority.

Nevertheless, in *Babbitt*, the agencies were quite unsuccessful in persuading the U.S. Court of Appeals to disregard federal reserved water rights and navigability. The plain language of that court's decision makes them key factors in which level of government gets to write the rules:

*By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.*

*For these reasons, we hold to be reasonable the federal agencies' conclusion that the definition of public lands include those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters.*<sup>10</sup>

This ruling from the *Babbitt* case is unique, unprecedented, unpopular with the State's attorneys, and at variance with the Alaska Supreme Court. However, all of this does not

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<sup>8</sup> *United States v. District Ct., County of Eagle, Colo.*, 401 U.S. 520, 524 (1971) [Emphasis added].

<sup>9</sup> See *Totemoff v. State*, 905 P.2d 954, 961-968 (Alaska 1995).

<sup>10</sup> *State of Alaska v. Babbitt*, 72 F.2d 698, 703-704 (9th Cir. 1995).

change the case's status as a mandate to federal agencies. who we doubt will defer to the conflicting guidance of the Alaska Supreme Court.

To put it bluntly, unless the extent of federal reserved water rights gets established in the State court system, federal regulators will do it themselves. The State's current approach, which denies the significance of federal reserved water rights, leaves the State by default in a posture of waiting to react to whatever those regulators might decide is best for Alaska. In fact, those regulators may ultimately decide that federal authority exists in entire waterways from their source to the sea, even if only a portion of the waterway passes by federal land.

The agencies' current posturing of "irrelevance" appears to be a recent adaptation. During a House Resources Committee hearing on April 28, 1995, the Department of Law expressed considerable concern on how federal agencies would attempt to regulate fishing in waterways that are navigable and have federal reserved water rights. The minutes from that hearing describe that concern as follows:

*MR. WHITE [Assistant Attorney General] said during the break he was able to talk with the attorney who is representing the state in all of the federal/state fish and wildlife cases. He stated the question he struggled with earlier is how far away from the federal reservations does the federal reserve water rights extend in regard to allowing federal management. He noted unfortunately the answer is not clear since the Ninth Circuit did not say anything about it other than the federal reserve water rights allow the federal government to manage navigable waters which are necessary to serve the purposes of the federal reserves. . . .*

*MR. WHITE told committee members the federal government, before the Ninth Circuit, also advocated the position that the court held--that is, the federal reserve water rights allow some management over navigable waters but they did not clarify what that meant. He said the plaintiffs in the case argued, under various theories and will argue under the federal reserve water rights, that the federal government should manage all the way out to the ocean. [Emphasis added.]*

Similarly, in a House Resources Committee hearing on February 21, 1996, the commissioner of the Department of Fish and Game noted his concern with the role of navigability in allocating state-federal management authority. The minutes from that hearing state:

*FRANK RUE, Commissioner, Department of Fish and Game (ADF&G) said the department is in a support role to the Department of Law and the Department of Natural Resources and share the concern that we want to be aggressive in asserting navigability for a number of reasons. Recently with*

dual management in subsistence, it may be important for the state's management of fish and wildlife that we assert navigability. Also, primarily, for public use, public access to fish and wildlife, the navigability issue can become significant. So, we have supported the Department of Law and the Department of Natural Resources in various litigations and/or assertions and that has been our role. We give information and point out areas where we think the federal agencies are overreaching and trying to restrict public uses on what believe are navigable waters. [Emphasis added.]

It is important to remember that our Recommendation No. 8 advised the legislature to establish a joint committee to review the potential for basin-wide adjudications to resolve some long-term issues. It is disturbing that the agencies apparently do not wish the legislature to even consider the possibility. Short-term posturing is no substitute for long-term planning.

The full potential for basin-wide adjudications under Alaska's unique circumstances remains an open and untested legal frontier. However, we suspect that the agencies' true concern with a basin-wide adjudication lies more with internal administrative preferences than the state of the law. Such adjudications have historically required states to make a serious, long-term allocation of their legal resources. We are not unsympathetic with this concern and would not expect such a refocus in the State's litigation to be undertaken lightly. However, we still feel basin-wide adjudications should be one of a spectrum of alternatives that the legislature considers in devising a strategy for resolving the State's waterway issues.

Though the outer limits for use of basin-wide adjudications are unsettled, both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to use the basic process to decide water rights. Thus, in a February 7, 1997 letter to the attorney general, we requested his projection of the annual personnel funding required from the legislature to support basin-wide adjudications. Unfortunately, the attorney general did not respond to our request for this estimate.

The agencies propose that their current litigation approach can be rehabilitated with a public information campaign which disseminates agency opinions concerning navigability ("public use determinations"). Such a sharing of technical information with the public is, of course, a commendable governmental function.

However, a good portion of land within the State's borders will ultimately be owned by corporate entities that wish to fully exercise their rights to control entry. Disputes in such situations concerning the use of waterways, shorelines, portages, gravel bars, and islands frequently involve conflicting values rather than a mere lack of information.<sup>11</sup> Resolution of

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<sup>11</sup> Cf. Debra Stein, *Overcoming Community Opposition*, Land Development (Winter 1997), pp. 10-12; Thomas Morehouse & Marybeth Holleman, *When Values Conflict: Accommodating Alaska Native Subsistence*, (Inst. of Social and Economic Research, University of Alaska, June 1994), pp. 1-10, 44-46.

those disputes will require legally-binding determinations. The agencies need to develop a broader vision of a systematic means for settling waterway status disputes in a mandatory, permanent fashion.

Some binding, systematic effort beyond information brokerage was no doubt envisioned by the electorate when they adopted AS 38.05.500-38.05.505 in a 1982 initiative. Alaska Statute 38.05.502 provides that the State holds the title to unappropriated land "in trust for the people of the state." Alaska Statute 38.05.505(b) provides that "[a]n individual may institute a civil action to recover damages for injury or loss sustained . . . for the failure of the state to enforce its trust responsibilities to the people of the state." Though the decision to pursue an individual case lies within executive discretion, these sections may impose a duty upon the State to adopt some form of binding program to pursue public access.

### Report Conclusions

#### Lack of decisive top-level direction impairs program implementation

The agencies are understandably disturbed by our finding that deficiencies in teamwork have resulted from a lack of decisive top-level executive direction. The agencies' audit response insists that the administration's navigability program is now being decisively implemented through a coordinated team.

Though not widespread, we did encounter instances in which too much energy was diverted into turf wars and employees' record-building concerning their perceptions of co-worker deficiencies. Based on the audit response, responsible executives have hopefully rectified this divisive behavior.

For a program of this magnitude, we believe that a team approach should be designed within definite guidelines formulated by executives directly accountable to the governor. We remind the administration of the important distinction between the roles which the State Personnel Act assigns to classified technical staff and nonclassified executives:

*The personnel board, upon written recommendation of the commissioner of administration, may extend the partially exempt service to include any position in the classified service that, in the judgment of the board,*


- (1) involves principal responsibility for the determination of policy; [or]*
- (2) involves principal responsibility for the way in which policies are carried out; . . .<sup>12</sup>*

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<sup>12</sup> AS 39.25.130(a).

We trust that the administration will assign policymaking responsibilities and classify personnel as necessary to assure strong leadership with sufficient accountability to the governor. For example, a governor, commissioner, or director may decide to substantially delegate that position's policymaking in a specialized area to an individual with particular talents, skills, or experience.<sup>13</sup> The State Personnel Act envisions that such delegation will occur in the context of reclassification or reassignment to a position as an assistant under the exempt or partially-exempt service.<sup>14</sup> This status provides the control necessary to ensure that the assistant will faithfully promote the administration's programs and work most cohesively with the administration's other appointees.

The success of this program is very much dependent on it receiving top-level direction. Given the number of agencies involved, this direction must be focused through a team effort. This was one of the reasons we requested a single response from the agencies as a team. The audit response demonstrated the top-level attention and teamwork essential to a program of this complexity and importance. We hope the focus of this attention and teamwork can now be transferred toward the program itself.



Randy Welker, CPA  
Legislative Auditor

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<sup>13</sup> See AS 44.17.010; AS 44.17.040; AS 44.17.070.

<sup>14</sup> See AS 39.25.120(c)(8) (special assistants); AS 39.25.120(c)(1) (assistant commissioners); AS 39.25.110(20) (governor's office).



Official Business

# ALASKA STATE LEGISLATURE

## SENATE RESOURCES COMMITTEE

State Capitol  
Juneau, AK 99801

Chairman: Senator Rick Halford  
Vice Chair: Senator Lyda Green  
Senator Loren Leman  
Senator Bert Sharp  
Senator Robin Taylor  
Senator John Torgerson  
Senator Georgianna Lincoln

### AGENDA

3:30 TO 5:00 p.m.

Friday, January 30, 1998

Briefing: Waterway Management Issues

I Presentation of Legislative Audit:

Waterway Management Issues  
March 28, 1998

Audit Control Number 10-4540-97

Pat Davidson, Acting Legislative Auditor  
Dane Larsen, Staff Auditor  
Mike Marsh, Staff Auditor

II Agency Response to Questions

Department of Natural Resources  
John Shively, Commissioner  
Jane Angvik, Director, Division of Lands \*  
Dick Mylius, Division of Lands \*

Department of Fish and Game  
Janet Kowalski, Director, Division of Habitat  
Tina Cunning, ANILCA Program Manager \*  
Christopher Estes, In-stream Flow Coordinator  
Robin Willis, Access Defense Manager \*

Department of Law  
Joanne Grace, Assistant Attorney General

\* via teleconference

NEXT MEETING

Wednesday, February 4

ADJOURN



Official Business

# ALASKA STATE LEGISLATURE

## SENATE RESOURCES COMMITTEE

State Capitol  
Juneau, AK 99801

Chairman: Senator Rick Halford  
Vice Chair: Senator Lyda Green  
Senator Loren Leman  
Senator Bert Sharp  
Senator Robin Taylor  
Senator John Torgerson  
Senator Georgianna Lincoln

### MEMORANDUM

TO: Members, Senate Resources Committee

FROM: Senator Rick Halford, Chairman  
Senate Resources Committee

DATE: 31 January, 1998

SUBJECT: Waterway Management Briefing

Attached you will find a copy of the written testimony of the Legislative Auditors from yesterday's briefing on their Waterway Management Issues audit of March, 1997.

I expect to receive additional information from the agencies in response to requests made by the committee including: a matrix of 17(b) easements that were invalidated by the court, but had contractual stipulations upon conveyance mandating replacement easements for those that were found invalid; copies of past public access atlases produced by the DNR; a copy of the easement vacation in Unalaska referred to by the department; and a detailed breakdown of agency funding allocations expended relating to waterway management issues.

I hope to have most of this information before we continue our briefing this Wednesday.

As I announced yesterday, I believe that Navigability and RS 2477 Rights-of-way are important issues which warrant in-depth attention by the committee.

Senate Resources Committee  
Waterway Management Issues Briefing  
January 30, 1998

Legislative Audit:  
Pat Davidson  
Dane Larsen  
Mike Marsh

After several decades of statehood, the legislature is understandably concerned about whether we've made any real progress in settling the public's rights concerning Alaska's waterways. The short answer is that it's a very slow journey, and we've barely begun.

Perhaps this isn't too surprising. Alaska has 17,000 identified rivers and streams, as well as an estimated two million lakes larger than 50 acres. The status of only a handful of these waterbodies has been addressed so far.

We completed a review of various waterway management issues last March that covered FY 96 and 97. It included the departments of Law, Natural Resources, and Fish & Game.

Our overall objective was to evaluate the effectiveness of the State's programs in resolving issues of ownership, access, and resource allocation concerning public waterways.

We identified a number of areas where improvements could be made. Our recommendations ranged from relatively minor "house keeping" suggestions to a very substantial proposal to rethink the way the State is attempting to resolve these issues. Some of these problems have already been addressed. However, we still have concerns in four major areas that we'll talk about today.

Those four areas of concern are:

First, public access easements under ANCSA section 17(b). These are public routes across private land. They link public land, navigable waterways, and other parts of the State's transportation network.

Second, the allocation of the State's water supply among competing users. This is the subject of traditional water rights.

Third, federal reserved water rights. As a State, we didn't pay much attention to them until the *Babbitt* case said their presence determines an important issue, that is, whether State rules or federal rules will govern fishing in a given waterway.

Fourth, the ownership of submerged land. This involves legal determinations as to whether the land beneath a particular waterway is owned by the State. This is one of the traditional reasons we care about whether a particular waterway gets classified as "navigable."

We'll take a look at each of these four areas in depth.

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### 17(b) easements

Our first area of concern is the public access easements under section 17(b) of ANCSA. These easements, once again, establish public access routes across private land. More specifically, they provide legal access between waterways, public land, and other parts of the State's transportation network, such as rural airports maintained by DOTPF.

These easements arise during the BLM process for conveying ANCSA land selections. BLM writes the State a letter concerning each proposed conveyance and gives the State, specifically DNR and Fish & Game, the opportunity to request any easements they feel are necessary for public access.

Though these easements are meant to assure public access to public lands, BLM's process is, unfortunately, largely insulated from the public. There is no public hearing, and both BLM and the State conduct the process with little input from organizations other than government agencies and the affected landowner.

In our report, we provide detailed recommendations on how the State can, at minimal expense, facilitate input from citizen groups and, just as importantly, from the people who actually live and work in the area involving the easement.

To put it bluntly, despite the large amount of territory that these easements can potentially affect, the average variance from a local zoning ordinance involves a more rigorous search for public input.

Thus, the public is seldom consulted in the initial decision as to whether there needs to be an easement. However, we also found that once these easements have been reserved, the public remains largely unaware of their existence. Though BLM estimates that there are 3,500 of these easements in Alaska, less than five percent are marked on the ground with any sort of signs.

Some of the easements fall along well-established trails and roadways; however, many others are simply an abstract line drawn on a map. For these latter easements, the public's inability to locate them on the ground may reduce their establishment to a meaningless exercise.

Federal regulations establish the easements at only 25 to 60 feet in width, depending upon the mode of transportation involved. Even using the popular Global Positioning Satellite system, it would be difficult for the average user to accurately determine an unmarked, abstractly-determined line on the ground, when it is only 60 feet wide at best. This is because GPS accuracy on a predictable, consistent basis is  $\pm 300$  feet for the type of equipment used by recreational users.

To further aggravate this uncertainty, information concerning the location of 17(b) easements cannot be obtained from commercially-available publications. In all too many cases, the average recreational user would need to research obscure legal materials kept at government offices.

Without a means for learning of the easements, and for finding them on the ground, the public is unlikely to use them. An unpublicized, unmarked easement is, in effect, no easement at all.

And to make matters worse, we note that some 17(b) easements are subject to termination by BLM if there is no evidence of public use by the year 2001. In the event of such termination, the efforts to secure these easements on paper will have been nothing more than a waste of public time and money.

Our report recommends that various forms of State financial assistance be conditioned upon the marking and maintenance of easements across land under the recipient's control. For State aid related to land use, such conditions are analogous to those long imposed upon subdivision plats, such as the dedication of land necessary for schools, parks, streets, and drainage. A similar analogy is the requirement that businesses dedicate some of their parking lot spaces to handicapped parking.

For such State grants, related to land use, we suggest that compliance with easement marking and maintenance be added to the list of items which private CPA firms are required to verify under the state single audit act.

We discovered one further serious problem concerning the State's pursuit of 17(b) easements.

Prior to 1977, BLM reserved easements that ran continuously along waterway shorelines. Parties selecting affected tracts filed litigation challenging those easements. However, these parties did not wish their ANCSA conveyances delayed while awaiting the outcome. Most of these parties thus entered into written agreements with BLM that had the following special terms:

- The conveyance would proceed on schedule as though the easements were not in dispute.
- Any easement found invalid by the court would be vacated.

- In the event that a reserved easement was found invalid, the landowner committed itself in advance to substitute a replacement easement for the one found invalid.

In 1977, the federal court did in fact find the easements in dispute to be invalid. In the 20 years since that decision, some of the prevailing landowners have kept their word and provided the replacement easements as they promised. However, we understand from DNR that a large number of the promises to substitute easements have not been honored.

Unfortunately, neither BLM nor the State have kept track of the number of promised easements that were never provided. In deciding whether to enforce the contracts — or to just let the matter slide, the affected State departments need to determine this number without delay. Federal regulations reflect an overall theme that 17(b) easement issues will be finalized by the year 2001.

In short, we believe that the State should make a conscious choice whether to hold landowners to their contracts, or to just let this slide. Such an important matter should not be decided simply by ignoring the question. In the event that the State decides to enforce its rights to the promised easements, our report details a variety of legal remedies that the State can pursue.

#### Allocation of the State's water supply among competing users

With both a small population and a third of the nation's fresh water, Alaska has so far been spared the water-use battles of large western states in the Lower 48. Frankly, our current approach to this waterway issue simply assumes that we have an unlimited supply of water — and that it's just one of those things you don't need to worry about.

However, the availability of water controls the development of other resources, and Alaska's assumption of limitless abundance will probably not be valid throughout the next century.

One indicator of the future comes from industrialized Pacific Rim countries with less stringent water quality controls than we have here in Alaska. Those countries may very well face a critical shortage of unpolluted water in the coming decades.

Through a permitting system, our water statutes already recognize the need for the State to regulate the export of Alaska's fresh water. Indeed, one publication by the Department of Fish and Game notes that "*Interest for exporting water from Alaska to other states and countries appears to be increasing*" The publication goes on to discuss the arrangements for Alaska water to reach destinations such as Japan and Saudi Arabia.

As would be expected with a resource that appears unlimited, we make little effort to even determine the amount of fresh water that's available in our waterways. The technical means for

monitoring this is through gauging stations, but less than one percent of the State's waterways have such equipment. To put it in perspective, Lower 48 waterways average one gauging station for every 400 square miles while Alaska averages one per 7,400 square miles.

Frankly, Alaska may not need the density of gauging stations found Outside. Nevertheless, the State could do better by conditioning the water rights of large users upon the installation of gauging stations at their own expense. Such arrangements for private sector responsibility have not been the norm so far, though.

To look at the much bigger picture of all of this, it's helpful to start by noting that the U.S. Geological Survey has divided our State into six hydrologic subregions, each of which focuses upon the area's main river systems.

Though it's long forgotten and never been used, the legislature a while back enacted a procedure which would allow the court system to simultaneously determine everybody's water rights for an entire subregion — all in a single case. The procedure established in the statute is called a "basin-wide" water rights adjudication. And, interestingly enough, though such a proceeding is conducted in the State court system, the rights subject to adjudication explicitly include federal reserved water rights — which we will be talking about shortly.

This process for a "basin-wide" adjudication of water rights, also known as a general water adjudication, has had considerable use in State courts for drier areas of the Lower 48. Its value to finalize water rights was greatly promoted when Congress passed a statute in 1952. Through that statute, the federal government consented to have its own water rights decided in such State court proceedings.

However, unlike the drier western states, Alaska has never used the basin-wide adjudication procedure. The Department of Law has traditionally assumed that it narrowly applies to only one specific water-related issue, that is, the quantities available for consumption by competing users. Since water has been plentiful in most of Alaska, there has been little actual conflict that seemed to justify such a proceeding. Additionally, federal reserved water rights only recently acquired their unexpected importance to the management of fisheries.

We feel the Department of Law is underestimating the possibilities for basin-wide adjudications. We think that an Alaska basin-wide adjudication has the potential to resolve a whole host of water-related issues.

Now, we're not saying that you need to immediately run out and buy a basin-wide adjudication, but we are saying that you need to take a very serious look at it as something that could be a lot more effective than what we're doing now. So, as we continue to look at some other waterway issues, we'll keep coming back to the topic of this untried procedure.

### Federal reserved water rights

So, with that in mind, let's take a closer look at why we suddenly care about federal reserved water rights – another one of those water topics that we never really cared about until the federal courts gave us a reason.

The existence of federal reserved water rights now determines how responsibilities will be divided up between the State and federal government for managing important fisheries. Where the federal government has reserved water rights in a navigable waterway, fishing will be managed under federal regulations by the Federal Subsistence Board. Where the federal government does not have reserved water rights in a navigable waterway, fishing will be managed under State regulations by Fish & Game.

Actually, federal reserved water rights have been around since the early 1900s. However, until the *Babbitt* case in 1995, the concept was only used to allocate physical quantities of water between the federal government and competing users. The *Babbitt* decision is so far a unique development in its use of federal reserved water rights as a mechanism for defining the geographical scope of federal management authority.

And, we, of course, now have every reason to be interested in federal reserved water rights. DNR estimates that just under half of the State consists of federal land that may have such reserved rights.

The State's current approach is to simply wait for the Federal Subsistence Board to announce where it claims such rights exist. We're telling you, though, that there is another possibility: for each of the State's six hydrologic basins, the State court system can decide the extent of federal reserved water rights within the context of a basin-wide adjudication.

### Navigability/ownership of submerged land

Now let's turn to our fourth major area of concern: navigability determinations, also known as the battle for title of submerged land.

As a general rule, land underlying a waterway is owned by the State if the waterway was navigable at the time of statehood. Federal case law considers a waterway to have been navigable at statehood if it is was actually used for commerce or could have been used for that purpose.

In the current State approach for proving a waterway's navigability, the State files an action to quiet title in the federal court. However, each of these suits involves only a few waterbodies out of the thousands that probably meet the criteria for navigability. The State selects the waterbodies for these "test cases" with the hope that a victory will serve as a valuable precedent in eventual negotiations with the federal government over other waterways.

Unfortunately, the federal government has taken a "never surrender" approach when joined as a party to these quiet title actions. Even in instances where BLM has already conceded navigability on an administrative level, attorneys representing the federal government refuse efforts at settlement and file technical objections that protract the litigation for years.

This federal "bad attitude" is hardly unique to water litigation in Alaska. We're simply victims of a long-standing federal approach apparent in other states over many years.

As we mentioned earlier, Alaska has 17,000 identified streams and rivers as well as lakes that number in the millions. However, only about a dozen waterbodies are the subject of quiet title actions that have either been decided or are currently pending in the federal court. In other words, year-to-year skirmishes are being waged over a minute fraction of the State's navigable waterways.

And these narrowly-focused cases take forever. Water-related adjudications, whether one river or an entire hydrologic basin, span 10 to 20 years. They thus span administrations at both the State and federal levels. The joke in the trade among water lawyers is that you'd have to start as a very young lawyer to ever work one of these cases from beginning to end.

A fine example would be the *Dinkum Sands* case that was decided less than a year ago by the U.S. Supreme Court. Alaska fought the federal government for 18 years on that one and, in the end, Alaska walked away empty-handed.

In other words, the State's emphasis has been on setting precedents, rather than finality and predictability for entire hydrologic areas. Given the federal government's vigorous resistance to any type of efficient, nonlitigation solution, the State's piecemeal approach has little impact on the long-term resolution of the State's waterway issues.

We do not mean to suggest that there's a problem with the quality of the State's lawyering. We do mean to suggest that it's time for the legislature to consider finding a different way of litigating all of this.

If the State sues the federal government in a suit to directly determine the ownership of land under a waterway, the State has no option but to file that suit under the federal Quiet Title Act and litigate it in the federal courts. However, we feel that there may be a more effective alternative.

More specifically, the factual issue of a waterway's navigability should be subject to determination in the State courts as part of an adjudication of water-related issues for an entire system of rivers. Once navigability has been decided in the State's favor, it can treat the underlying land as State-owned. If any party contests the State's ownership, the State court's factual determination should have binding effect in later proceedings to directly quiet title.

To repeat our position, we feel that a basin-wide adjudication set in the State court system has the potential for an eventual resolution of the navigability status of all water bodies found within the basin – not just a few. It also has the ability to decide the extent of federal reserved water rights within that basin, as well as the traditional allocation of water among competing users.

Clearly, our suggested approach to waterway litigation is a matter of first impression. The State has never pursued a basin-wide adjudication, nor have federal reserved water rights ever been addressed in Alaska's State court system. Also, the *Babbitt* case, along with its ANCSA and ANILCA origins, are all uniquely Alaskan.

The affected State departments have expressed doubts that the courts would allow our suggested approach. We have reviewed the two cases that these departments have cited in support of their hesitation, and we do not find those cases applicable to the issue. The bottom line is that it simply remains an untried matter of first impression.

It is important to note that the affected departments do not seem to challenge the basic underpinnings for the potential use of basin-wide adjudications. Let's take a look at those undisputed underpinnings:

- Both a State statute and the U.S. Supreme Court provide clear legal authority for Alaska to use the basin-wide adjudication process if it chooses to do so.
- Both a State statute and the U.S. Supreme Court provide clear legal authority for Alaska to join the federal government as a party to a basin-wide adjudication.
- Both a State statute and the U.S. Supreme Court provide clear legal authority for Alaska to determine federal reserved water rights in the context of a basin-wide adjudication.
- Except in the context of an action to directly quiet title against the federal government, State courts have the authority to routinely make factual findings of navigability to resolve property disputes.
- State statutes and regulations make factual findings of navigability pertinent to some of the water rights issues subject to a basin-wide adjudication.

- In the event that a State court makes findings of navigability during a basin-wide adjudication, those findings may have binding effect against the federal government in any later litigation to directly quiet title in the federal court.

To summarize all of this, we see resolution of the State's waterway issues as a very long-term project. The State needs a long-term litigation strategy for finalizing the allocation of three of its most important natural resources, that is, water, fish, and submerged land minerals. We believe Alaska's basin-wide adjudication statute has untried potential for this long-term resolution of most water-related issues.

### The Public Trust Doctrine

Before concluding our presentation, I want to comment in passing on what the public trust doctrine does, and does not, require from the State in regards to its limited resources for pursuing lawsuits.

Though the Alaska Supreme Court has adopted the public trust doctrine for Alaska, debate continues as to whether it imposes an affirmative duty to initiate legal action on waterway issues — or only restricts the State's ability to convey property rights out of the public domain. One position asserts that the State incurs liability for violating the public trust if it fails to aggressively pursue suits involving potential navigability and 17(b) easements. An opposing position asserts that State managers must allocate their use of limited legal resources among a wide variety of projects, and that choices to pursue potential claims lie within the executive's discretion.

After examining the interpretations of the Alaska Supreme Court, we conclude that the public trust doctrine does not place the State under a duty to pursue every potential claim for assertion of navigability or for a 17(b) easement. The number of possible claims is staggering: thousands of the State's waterbodies could probably meet the criteria for navigability.

State managers have discretion to set priorities in the use of their limited legal resources for enforcing public rights. Suits regarding navigability and easements may be pursued as an instrument of public policy; however, they are not mandatory. In other words, the State does not face legal liability for leaving such claims unpursued.

However, we still note the provision in Title 38 which says "*An individual may institute a civil action to recover damages . . . for the failure of the state to enforce its trust responsibilities to the people of the state.*" Though the decision to pursue an individual case lies within executive

discretion, this section may impose a duty upon the State to adopt some form of binding program to pursue issues such as public access. This remains an untested question in Alaska law.

State Navigability Project - Status Report  
February 4, 1998

**Accomplishments - FY 98 to date**

Public Information

- navigability information made available to the public on World Wide Web through DNR Navigability Web Site and ADFG Access sites
- published public information brochure for Karluk River, available on ADFG web site
- responded to numerous inquiries from public and other agencies, particularly related to Karluk River, Chuit River, Kanektok River, Arolik River, Cottonwood Creek, Prairie Creek, and Iliamna Lake area
- distributed public access atlases for Prince William Sound and Kodiak Island

Public Access Protection

- met with Koniag, Tyonek, and Quinhagak Native Corporations to address and seek solutions for access problems that occurred during summer 1997 fishing season
- worked with US Fish and Wildlife Service to address problems on navigable waterways within Togiak NWR and the Kisarlik River (Yukon Delta NWR)

Litigation

- oral arguments before federal court on Kandik/Nation/Black rivers lawsuit
- continued research to support state's intervention in Peratrovich case (Tongass tidelands). Prepared GIS map of all federal withdrawals that effected Tongass NF
- filed notice of intent (180 day notice) with US to assert navigability of Russian River
- re-evaluated North Slope litigation after US Supreme Court Dinkum Sands decision

Navigability Determinations

- continued research on 90 rivers to address BLM decisions, to make navigability determinations, or support possible litigation
- reviewed navigability status of rivers proposed for Wild and Scenic Designations in the Tongass and Chugach National Forest
- issued navigability determination for Fish Creek (Susitna Valley)
- provided navigable waters information for state leases and disposals

Statewide Navigability Information

- made final revisions to statewide navigability map - including incorporating results from Supreme Court "Dinkum Sands" decision
- completed computer linkage between mapped and tabular statewide data

Respond to BLM and other federal actions

- Responded to BLM decisions regarding three areas - Tyonek, Cordova, and Alatna/Allakaket
- appealed BLM decision regarding Ayakulik River (Kodiak Island)
- reviewed all BLM conveyance decisions to ensure that navigable waterbodies are excluded

Navigability Project - Status Report - page 2 of 3

**Work in Progress - FY 98**

Public Information

- publish and distribute Chuitna brochure
- publish and distribute statewide brochure (the team concluded a generalized statewide brochure was needed before doing additional individual river brochures)
- revise Department Order 125 (state navigability policy)
- respond to public inquiries about navigability
- update web page with revised policy, court decisions, and maps

Public Access Protection

- work with US Fish and Wildlife Service concerning Togiak Refuge planning
- participate in BLM's planning effort for the Gulkana River
- meet with Native Corporations and other upland owners to resolve access problems that arise

Litigation

- continue work on PLO 82 appeal
- prepare briefing for Peratrovich (Tongass tidelands) litigation
- continue work on Kandik/Nation/Black rivers litigation

Navigability Determinations

- continue research on 90 rivers, make navigability determinations where there is sufficient conclusive information
- provide navigable waters information for state leases and disposals

Statewide Navigability Information

- make final revisions to statewide map, publish and distribute map
- make maps and tables available on world-wide-web through the navigability home page

Respond to BLM and other federal agency actions

- currently drafting response to 3 BLM decisions that affect navigable waters
- respond to all future BLM navigability decisions

**Major Accomplishments - FY 97**

- Established an interagency team to coordinate all navigability work and policy issues. Includes departments of Natural Resources, Fish and Game, and Law. Other state agencies (such as Fish and Wildlife Protection Division and DOTPF) participate as needed.

Public Information

- began to develop prototype public information brochures to explain public and landowner's rights along navigable and public waters
- responded to numerous inquiries from public and other agencies, particularly related to Kanektok River, Arolik River, Fish Creek, and other areas.
- prepared public access atlases for Prince William Sound and Kodiak Island
- developed DNR Navigability web site

Public Access Protection

- met with Native Corporations and other upland owners to resolve problems with public access and public use of navigable waterbodies

Litigation

- developed list of issues to litigate (list issues) and identified waterbodies that may best serve as candidates to file Quiet Title actions on (Hot Waters List)
- developed detailed outline of data needed to support future litigation
- systematically evaluated all the rivers on the hot water list for possible litigation
- filed notice of intent (180 day notice) with US to assert navigability of ten rivers
- continued ongoing litigation on navigability, including NPRA, PLO 82, Kandik/Nation/Black rivers,

Statewide Navigability Information

- consolidated all DNR navigability records in one location and established centralized records system to facilitate future research on navigability
- inventoried all state, BLM, and Court navigability determinations, entered this information into a data base and onto maps
- prepared preliminary statewide navigability map
- DNR hydrologists evaluated USGS maps and other sources to identify navigable waterbodies based on state criteria
- identified the location of avulse tidelands in eastern Prince William Sound, reviewed proposed BLM conveyances to ensure avulsed lands are not conveyed to private upland owners

Respond to BLM and other federal actions

- researched 34 rivers to address BLM decisions, to make navigability determinations, or support possible litigation
- reviewed all BLM conveyance decisions to ensure that navigable waterbodies are excluded

## NAVIGABILITY CRITERIA EVALUATION FORM

NAME OF WATERBODY: \_\_\_\_\_

WATERSHED: \_\_\_\_\_ HUC #: \_\_\_\_\_

ARID#: \_\_\_\_\_ ANADROMOUS STREAM #: \_\_\_\_\_

### SUMMARY OF DATA:

- 1) Other names:
- 2) Lat/Long of river mouth:  
(or northernmost point of lake)
- 3) MTRS of river mouth:  
(or northernmost point of lake)
- 4) USGS Quad name:  
(river mouth or northernmost point of lake)
- 5) Drainage area (mi<sup>2</sup>):
- 6) Average Stream or Lake Length (mi):
- 7) Average Stream or Lake Width (ft):
- 8) Average Stream or Lake Depth (ft):
- 9) Channel Gradient (ft/mi):
- 10) Elevation (range in ft):
- 11) Channel Form (meandering, braided, mixed, straight):
- 12) Point of Discharge:
- 13) Is the waterbody glacial?
- 14) General Description:

Filled in

**A. General Questions:**

1) Have there been any determinations of NON-NAVIGABILITY?

Determined non-navigable by:

Court  BLM  State  Other:

Date of determination:

River segment affected by determination:

Reason given in written documentation for the non-navigability finding:

a) Other determinations of NON-NAVIGABILITY?

Determined non-navigable by:

Court  BLM  State  Other:

Date of determination:

River segment affected by determination:

Reason given in written documentation for the non-navigability finding:

b) Other determinations of NON-NAVIGABILITY?

Determined non-navigable by:

Court  BLM  State  Other:

Date of determination:

River segment affected by determination:

Reason given in written documentation for the non-navigability finding:

Filled in

2) Any determinations of NAVIGABILITY?

Determined navigable by:

Court  BLM  State  Other:

Date of determination of navigability:

River segment affected by determination:

Reason given in written documentation for the navigability finding:

a) Other determinations of NAVIGABILITY?

Determined navigable by:

Court  BLM  State  Other:

Date of determination:

River segment affected by determination:

Reason given in written documentation for the navigability finding:

b) Other determinations of NAVIGABILITY?

Determined navigable by:

Court  BLM  State  Other:

Date of determination:

River segment affected by determination:

Reason given in written documentation for the navigability finding:

Filled in

- 3) Who are the upland owners?  
**Please attach status plats, and summarize ownership below:**

<u>River Miles (from mouth)</u>	<u>Owner</u>	<u>Date of conveyance or withdrawal</u>
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- 4) Is there any post statehood special land management classification present (such as Wild & Scenic River, other Federal CSU, etc?):
- 5) If the Federal government is the upland owner, were the lands withdrawn prior to statehood?  
If so, by what order? When?
- 6) Have submerged lands been meandered from federal conveyances or surveys of uplands?
- 7) Has a conveyancing document purported to transfer ownership to the bed of a navigable water body?  
To whom?  
What was the date of the conveyance?
- 8) Has the 180-day (quiet title) notice been given? Yes \_\_\_\_\_ No \_\_\_\_\_  
What was the date of the notice?
- 9) Have Federal Water Rights claims been requested or adjudicated?  
Is the waterbody a Federal Power Withdrawal Site? What is the BLM site code (if known)?

Filled in

**B. Questions relevant to Navigability.**

- 1) Is there evidence that the ordinary water flow is sufficient to
- a) float an 4 or 8 person recreational raft (1000 to 2000 lbs)?
  - b) float a simple raft or canoe, or similar craft such as might have been in use at statehood?

- 2) Is there record of any craft that has floated this waterbody? Are there any first-hand accounts of use?

a) Describe any current or historic evidence of any use of the water body for transportation, trapping access, fishing, hunting or recreational use?

- 3) Are there currently, or historically, any villages, homesteads, or other settlements on, along, or near the water body?

Were there any settlements in the area in 1959?

- 4) Would someone floating the waterway encounter any obstructions such as falls, rapids, riffles, shallows, sandbars, etc?

How far does the obstruction extend (how many miles, or how high is the falls)?

Is there a portage, or possible portage, around the obstruction?

- 5) Characteristics of river channel:

Is the river bed a braided channel?

If it is a braided channel has it been meandered from bank to bank?

Are there sloughs? If so are they interconnected, or dead ended?

Is there any documentation, or other indication that the sloughs were or are used for transportation, hunting, fishing, or other?

- 6) Characteristics of Water Flow:

Filled in

Is it passable only during certain water stages? If so, describe these water stages, when they occur, and how long they last.

During the times when the water is passable, is it widely relied upon for travel or transportation of goods?

For what periods or during what months is the waterbody frozen?

Is it used for travel or transporting goods while frozen?

What types of vehicles are known to have been used on the waterbody while frozen?

**C. Questions relevant to access & use of the waterbody:**

- 1) Is someone interfering with the use of or access to the waterway?  
(If No, skip to next part; if Yes, answer the following questions:)
- 2) Identity of person(s) or group interfering with use and claiming right or interest to the water or the submerged lands? (Federal Agency, Native Corp., other upland owner)
- 3) Specifically, what use is being interfered with? (camping on sandbars, fishing, floating, etc)
- 4) Is the interference with use or access based upon upland owner's or land manager's claim of title?

If yes, what is the title claim based upon.

- 5) Is there interference with state agency staff conducting state activities? If yes, describe.
- 6) Specifically, identify the method of interference with use:

- obstruction/blocked
- attempt to charge fee
- attempt to require permit
- chilling presence signaling claim to superior right to use the water

Filled in

-attempting to establish conditions and regulate use without  
requiring a permit

7) If a permit is being required, is it a permit to use the waterway or the uplands?  
What conditions does the permit place on the use of the waterway?

8) Do the users ONLY use the WATERWAY. Is it claimed or, in fact, do the users  
touch the uplands?

If there is use of the uplands, is the claimed interference with portaging or for  
other upland uses?

Is all use of the uplands confined to use of 17(b) easements?

9) If the use interfered with is of only the waterway itself, where does the user put in  
and take out of the water?

What is the ownership status of this access point?

10) Does the user touch the bed or banks below ordinary high water of the water  
body? If yes, how?

Does the user touch sand bars above or below ordinary high water?

11) Have the persons responsible for the interference been advised of the illegality  
of their conduct? (by Public Safety, DNR, or ADF&G)?

12) Has there been any attempt to negotiate a settlement of this conflict?

13) Are there any other problems or concerns (such as 17(b) easements, RS2477 or  
other rights-of-way?)

Filled in

**D. Other Information**

1) NAME OF PERSON(S) FILLING OUT THIS FORM:

Name	Agency	Date
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Name	Agency	Date
------	--------	------

2) OTHER CONTACTS:

3) ARE PHOTOGRAPHS, VIDEOS, etc. AVAILABLE FOR THIS WATERBODY? If so, where are they located?

4) SOURCES --(Please be thorough when citing sources. Page numbers need to be provided if possible!)

Concerns regarding the federal regulation that allows for the termination of ANCSA 17(b) easements in the year 2001.

1. Federal regulation states that the BLM State Director shall terminate a public easement if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001, whichever occurs first.
2. The regulation also states that the Director shall not terminate an access easement to isolated tracts of publicly owned land solely because of the absence of proof of public use.
3. Because of the complexity of the conveyance process there is very little chance that land conveyances to the Native Corporations and to the State will be completed prior to the year 2001. Consequently, the requests to terminate easements can begin before there is a clear picture of where public lands still exist.
4. In 1988 there was an MOU signed that disseminated the authority to administer and terminate easements between the federal agencies. The agency whose land was being accessed would then be responsible for marking, managing, and if appropriate, terminating all 17(b) easements in their area. This means that in the year 2002 at least three agencies could simultaneously be requesting the termination of easements in their respective areas. The concern is that if we were inundated with requests for termination that the current staff in DNR, ADF&G, and the AG's office would be unable to evaluate and track the significance of each easement and defend them appropriately.
5. No easement management regulations have ever been adopted because the parties involved could never reach a consensus.
6. Currently it appears that the state would be responsible for defending any easement proposed for termination. We would potentially need to provide evidence of use including public use prior to 1977. As the years progress this historic use is becoming more and more difficult to obtain.
7. Statewide, only a very small percentage of the currently existing easements have been marked on the ground. In addition, BLM currently requires an invitation from the affected Native Corporation prior to marking these easements. We are not aware of any invitations that have been received during the last few years. To their credit, the USFS, in the Chugach Region, obtained money through their agency to mark, plat and publish all 17(b) easements in their area. This work is being done with the cooperation of the Eyak Corporation.

Current example of a request for the termination of an easement on Unalaska Island.

- The U.S. Fish and Wildlife Service manages the easements on Unalaska Island as part of the MOU mentioned in item #4 above. The island is part of the Alaska Maritime Refuge whose headquarters are in Homer.
- The Ounalashka Corporation requested the termination of a 17(b) road easement that accesses Humpy Cove, a favorite sport and subsistence fishing area for the local community. The road has been in existence since 1945 and is the only road access to the coast on the north side of the island reserved under 17(b).
- The tidelands of Humpy Cove, which belong to the public, can only be accessed by the road unless one has a boat they can launch in town, four miles away. Ninety percent of the people who live in Dutch Harbor/Unalaska can not afford boats and the weather conditions in the area make their use potentially hazardous.
- To the state this appears to be a necessary easement providing access to an isolated piece of public water. Unfortunately the corporation and the USFWS want to see the easement terminated so the state has had no choice but to appeal their decision. This is a very time consuming process which has included trying to find individuals who can verify that this road was used prior to 1976 (a somewhat difficult task).

by the State of Alaska or by the United States after the conveyance has been issued, unless the responsible agency waives administration. Where the responsible agency is an agency of the Department of the Interior, administration shall be waived when the conveyance covers all the land embraced by a lease, contract, permit, right-of-way, or easement, unless there is a finding by the Secretary that the interest in the United States requires continuation of the administration by the United States. In the latter event, the Secretary shall not renegotiate or modify any lease, contract, right-of-way, or easement, or waive any right or interest belonging to the grantee until the grantee is notified and allowed an opportunity to present his

#### 4-4 Revenues. [Reserved]

#### 4-5 National forest lands.

Every conveyance which includes lands within the boundaries of a national forest shall, as to such lands, be subject to the same restrictions that apply in national forest reservations that:

(1) Until December 18, 1976, the sale of timber from the land is subject to the same restrictions relating to the disposal of timber from the United States as are applicable to national forest lands in Alaska under rules and regulations of the Secretary of Agriculture; and,

(2) Until December 18, 1983, the land shall be managed under the principles of sustained yield and under management practices for protection and enhancement of environmental quality that are more stringent than such management practices on adjacent national forest lands.

#### 4-6 National wildlife refuge system lands.

Every conveyance which includes lands within the national wildlife refuge system shall, as to such lands, provide that the United States has the right of first refusal so long as such lands remain within the system. The right of first refusal shall be for a period of 120 days from the date of notice to the United States that the owner of the land has received a bona fide offer to purchase. The United States shall

exercise such right of first refusal by giving written notice to the village corporation within such 120-day period. The United States shall not be deemed to have exercised its right of first refusal if the village corporation does not consummate the sale in accordance with the notice to the United States.

(b) Every conveyance which covers lands lying within the boundaries of a national wildlife refuge in existence on December 18, 1971, shall provide that the lands shall remain subject to the laws and regulations governing use and development of such refuge so long as such lands remain in the refuge. Regulations governing use and development of refuge lands conveyed pursuant to section 14 shall permit such uses that will not materially impair the values for which the refuge was established.

#### § 2650.4-7 Public easements.

(a) *General requirements.* (1) Only public easements which are reasonably necessary to guarantee access to publicly owned lands or major waterways and the other public uses which are contained in these regulations, or to guarantee international treaty obligations shall be reserved.

(2) In identifying appropriate public easements assessment shall be made in writing of the use and purpose to be accommodated.

(3) The primary standard for determining which public easements are reasonably necessary for access shall be present existing use. However, a public easement may be reserved absent a demonstration of present existing use only if it is necessary to guarantee international treaty obligations, if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land. When adverse impacts on Native culture, lifestyle, and subsistence needs are likely to occur because of the reservation of a public easement, alternative routes shall be assessed and reserved where reasonably available. The natural environment and other relevant factors shall also be considered.

(4) All public easements which are reserved shall be specific as to use, location, and size. Standard sizes and uses which are delineated in this subsection

may be varied only when justified by special circumstances.

(5) Transportation, communication, and utility easements shall be combined where the combination of such easements is reasonable considering the primary purposes for which easement is to be reserved.

(6) Public easements may be reserved to provide access to present existing Federal, State, or municipal corporation sites; these sites themselves shall not be reserved as public easements. Unless otherwise justified, access to these sites shall be limited to government use.

(7) Scenic easements or easements for recreation on lands conveyed pursuant to the Act shall not be reserved. Nor shall public easements be reserved to hunt or fish from or on lands conveyed pursuant to the Act.

(8) The identification of needed easements and major waterways shall include participation by appropriate Natives and Native corporations, LUPC, State, Federal agencies, and other members of the public.

(9) After reviewing the identified easement needs, the Director shall tentatively determine which easements shall be reserved. Tentative determinations of major waterways shall also be made by the Director and shall apply to rivers, streams, and lakes. All lakes over 340 acres in size shall be screened to determine if they qualify as major waterways. Those smaller than 640 acres may be considered on a case-by-case basis. The Director shall issue a notice of proposed easements which notifies all parties that participated in the development of the easement needs and information on major waterways as to the tentative easement reservations and which directs that all comments be sent to the LUPC and the Director.

(10) The State and the LUPC shall be afforded 90 days after notice by the Director to make recommendations with respect to the inclusion of public easements in any conveyance. If the Director does not receive a recommendation from the LUPC or the State within the time period herein called for, he may proceed with his determinations.

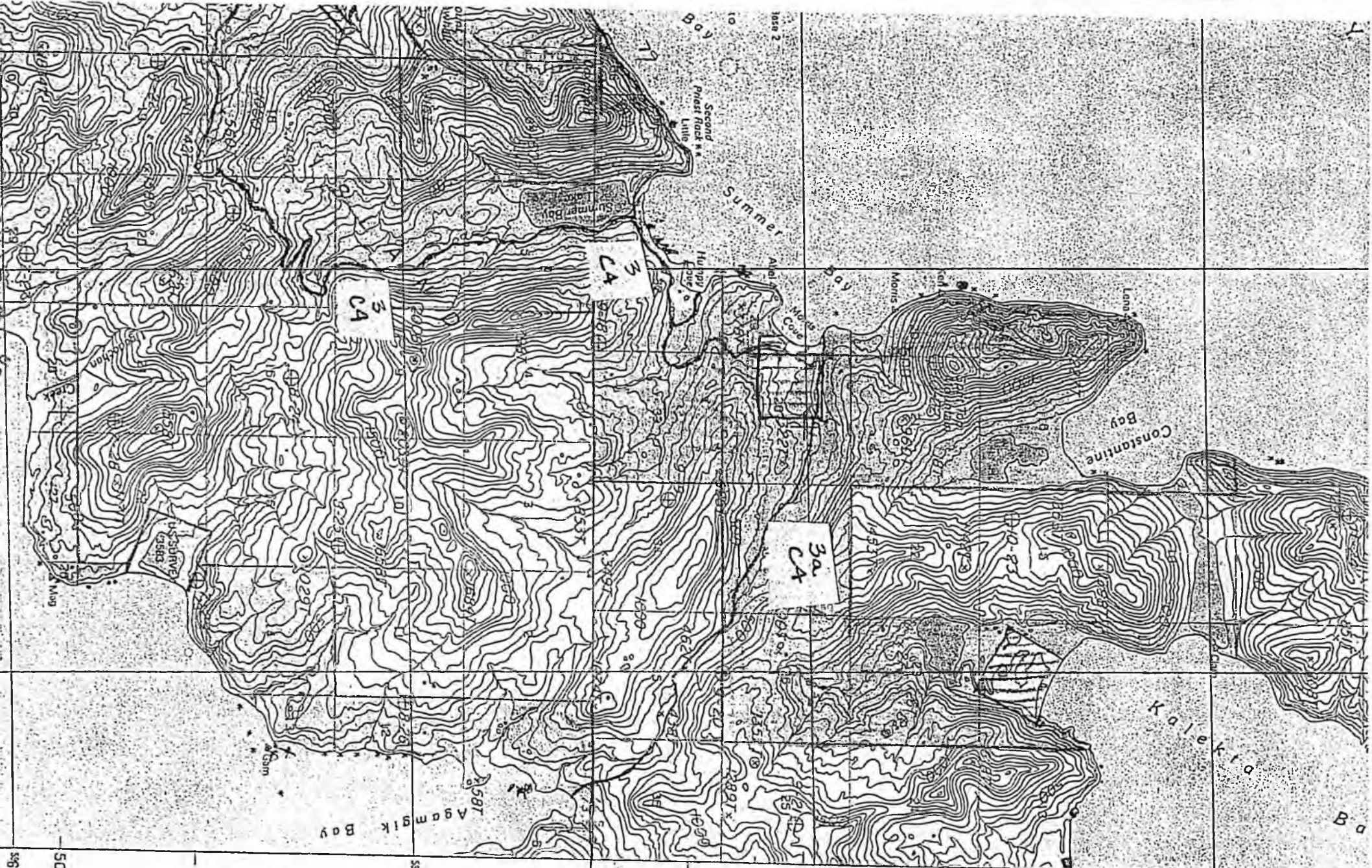
(11) Prior to making a determination of public easements to be reserved, the

Director shall review the recommendations of the LUPC, appropriate Native corporation(s), other Federal agencies, the State, and the public. Consideration shall be given to recommendations for public easement reservations which are timely submitted to the Bureau of Land Management and accompanied by written justification.

(12) The Director, after such review, shall prepare a decision to convey that includes all necessary easements and other appropriate terms and conditions relating to conveyance of the land. If the decision prepared by the Director is contrary to the LUPC's recommendations, he shall notify the LUPC of the variance(s) and shall afford the LUPC 10 days in which to document the reasons for its disagreement before making his final decision. The Director shall then issue a Decision to Issue Conveyance (DIC).

(13) The Director shall terminate a public easement if it is not used for the purpose for which it was reserved by the date specified in the conveyance, if any, or by December 18, 2001, whichever occurs first. He may terminate an easement at any time if he finds that conditions are such that its retention is no longer needed for public use or governmental function. However, the Director shall not terminate an access easement to isolated tracts of publicly owned land solely because of the absence of proof of public use. Public easements which have been reserved to guarantee international treaty obligations shall not be terminated unless the Secretary determines that the reasons for such easements no longer justify the reservation. No public easement shall be terminated without proper notice and an opportunity for submission of written comments or for a hearing if a hearing is deemed to be necessary by either the Director or the Secretary.

(b) *Transportation easements.* (1) Public easements for transportation purposes which are reasonably necessary to guarantee the public's ability to reach publicly owned lands or major waterways may be reserved across lands conveyed to Native corporations. Such purposes may also include transportation to and from communities, airports, docks, marine coastline, groups of private holdings sufficient in



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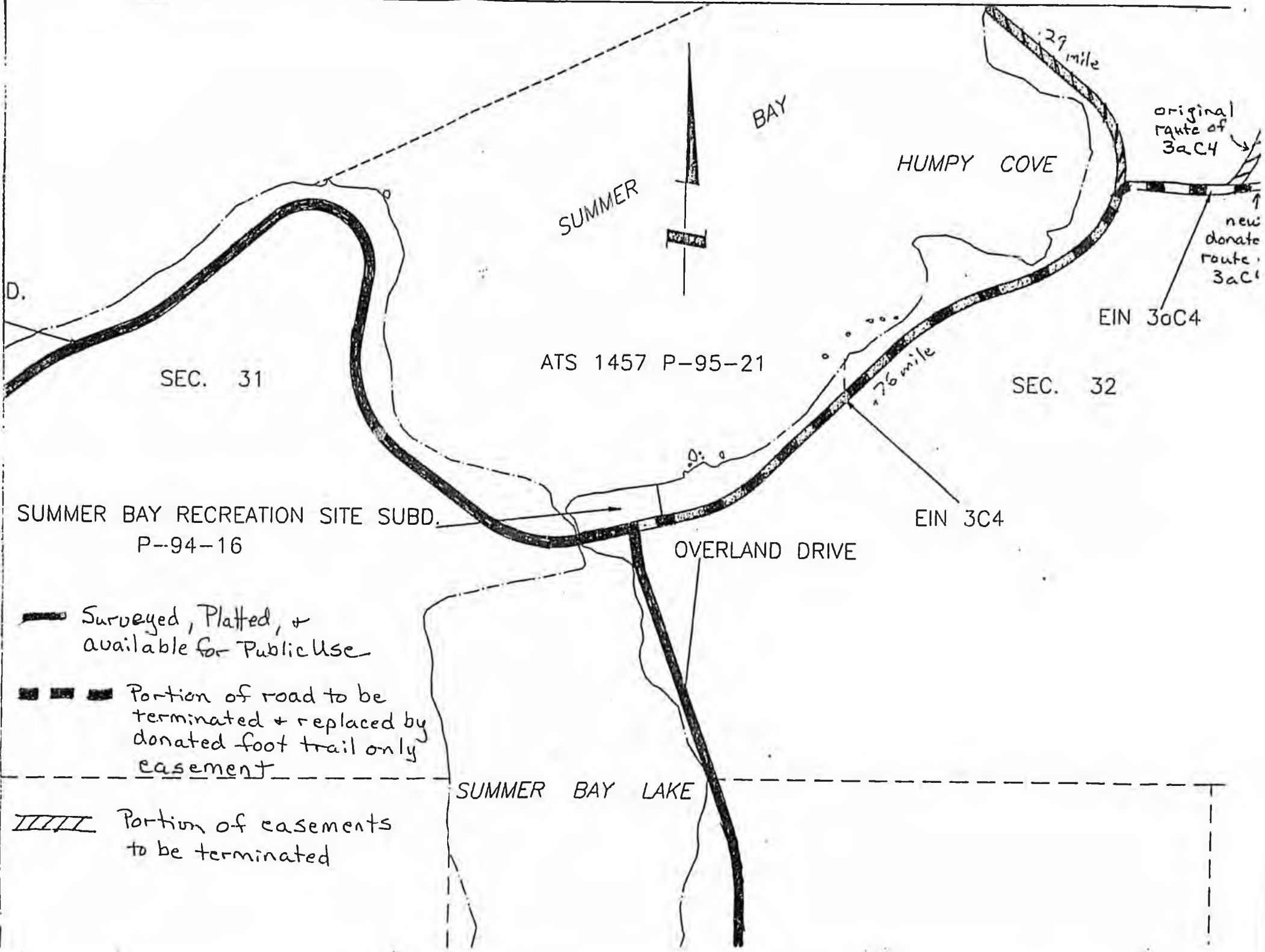
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**—** Surveyed, Platted, & available for Public Use

**▬▬▬** Portion of road to be terminated & replaced by donated foot trail only easement

**////** Portion of easements to be terminated

D.

SEC. 31

ATS 1457 P-95-21

SEC. 32

SUMMER BAY RECREATION SITE SUBD. P-94-16

OVERLAND DRIVE

EIN 3C4

EIN 30C4

original route of 3aC4

new donate route 3aC4

BAY

SUMMER

HUMPY COVE

.29 mile

.76 mile

SUMMER BAY LAKE

## Inter-Agency Meeting

### AGENDA

#### State of Alaska Appeal of the 17(b) Easement Termination at Summer Bay ("Humpy Cove")

#### Ounalashka Corp. Appeal of the *Unalaska Easement Decision* Document

Unalaska, AK

October 30, 1997

### I. Background

- A) Easement (EIN 3C4) first reserved: Interim Conveyance (IC) No. 223 to the Ounalashka Corporation (OC) on 08/15/1979. No site easement reserved at road terminus.
- B) Description of EIN 3C4 changed to clarify "segments" in Patent No. 50-90-0651 to OC on 09/26/1990.
- C) Summer Bay Recreation Site (including portions of both segments) surveyed (10/1993), easement dedicated to public by OC (4/12/1994).
- D) Majority of segment one (Summer Bay Road) surveyed (10/93), easement dedicated to public by OC (7/21/1994).
- E) Segment two (Overland Drive) surveyed (6/96), easement dedicated to public by OC (7/19/96).

### II. FWS Rationale to Terminate Humpy Cove Portion of EIN 3C4

- A) Site easement never reserved at Humpy Cove. *Is there one at Agaulik Bay?*
- B) Present road easement not necessary for access to public lands/waters.
- C) Present use of Humpy Cove is fishing and recreating (contrary to regs).
- D) Lack of dock or boat-launch facility.
- E) Reasonable alternative boat launching sites exist. *(approx. 4 miles)*

*site easements - NA*

*Foot traffic vs 17b provisions*

*Summer Bay - Humpy Cove*

*Access for foot traffic??*

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

*Habitat and Restoration Division*

TONY KNOWLES, GOVERNOR

333 Raspberry Road  
Anchorage, AK 99518-1599  
PHONE: (907) 344-0541  
FAX: (907) 267-2464

### MEMORANDUM

TO: Robin Willis  
Habitat Biologist

FROM: Mike Thompson *MT*  
Habitat Biologist

DATE: November 14, 1997

SUBJECT: Unalaska Easement Meeting

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A meeting was held on October 30, 1997 to discuss the State of Alaska's appeal of the U.S. Fish and Wildlife Service's (USFWS) proposed vacation of a portion of 17b easement EIN 3 C4. This easement is important because it provides the only legal land access to public lands in Summer Bay and is intensely used by local residents who recreate on public lands. Specifically, the USFWS intends to vacate the 0.29 mile spur providing access from state owned tidelands in Humpy Cove to the 17b easement known as Summer Bay Road. I provided you with a copy of the agenda and attendance list after the meeting. Several points were made which I will summarize in bullet format:

- The city is currently maintaining the Summer Bay Road.
- USFWS indicated that people launch boats on both sides of the bridge across the outlet stream from Summer Cove Lake.
- USFWS indicated that the two boat launches at Dutch Harbor and Unalaska provided sufficient alternative access to public lands within Summer Bay.
- I asked about the Summer Bay Recreational Subdivision and if there was dedicated access to the tidelands. I also wanted to know what uses were allowed at the Recreation Site. Although someone said it was for general public use, Dick Davis quickly pointed out that the Recreational Subdivision was private land and allowed uses were subject to change.

- A plat of the Summer Bay Recreation Site Subdivision was requested by DNR and ADF&G.
- I said that maintaining access to public tide and submerged lands was our goal. I pointed out that the boat launches at Unalaska and Dutch Harbor did not provide alternative access for people without boats. USFWS did not really respond to this comment.
- The access spur to Humpy Cove was discussed in some detail. Doug V. offered a drawing with associated pictures to familiarize people with the site. Someone mentioned that there are two trails into the Cove, one high and one low. They said this created trespass problems. I asked who was responsible for managing the easement and was lack of management justification for vacating the easement. Sharon did mention later that USFWS managed the easements and the nearest staff were in Homer so management was difficult. We determined that people did, in fact, travel to and use Humpy Cove tidelands below the mean high tide mark. The issue of a site easement was discussed and Carol stated that the 60 foot easement was established prior to the existence of site easements and that BLM staff charged with reserving easements determined that the width of the easement was sufficient to accommodate a change in mode of transportation.
- As we discussed before the meeting, I mentioned that a dedicated easement at the Recreational Site may offer a reasonable alternative to the Humpy Cove access point. Someone thought it might be easier to vacate this type of easement as opposed to a 17b easement but John B. said any easement could be vacated. We really didn't discuss this as a negotiated agreement but it was definitely viewed as a possibility when the meeting terminated.
- Although I didn't see the Ounalaska appeal, Bob Hume indicated that the it was based on minor editorial points. I think the description of easements to be vacated were as originally described by BLM and did not reflect current familiar names. I was of the impression that their appeal was not going to be a major issue.
- John B. asked for a 30 day extension and Dennis Hopewell agreed.

USFWS staff are actively pursuing vacation of the easement to Humpy Cove. The arguments they offer for justification are not supported by the facts and we should continue in our efforts to protect access to public lands. I did take the map of Unalaska Island in which Kristiann portrayed public lands, private lands, and dedicated public access. I was only able to show the map to Bob Hume, but it is clearly apparent that access is almost non-existent for such a large land mass.

cc: Carol Shobe            John Baker  
Bill Hobbs               Virginia Hancbuth

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this Act to the same extent as they would have participated had they not elected to acquire title to their former reserve as provided by section 19(b): *Provided*, That nothing in this subsection shall affect the existing entitlement of any Regional Corporation to lands pursuant to section 14(h)(8) of this Act: *Provided further*, That no such lands shall be withdrawn from an area previously withdrawn as a forest reserve without prior consultation with the Secretary of Agriculture: *Provided further*, That the foregoing provisions of this subsection shall not become effective unless and until the Village Corporation for the village of Klukwan shall quitclaim to Chilkat Indian Village, organized under the provisions of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of May 1, 1936 (49 Stat. 1250), all its right, title, and interest in the lands of the reservation defined in and vested by the Act of September 2, 1957 (71 Stat. 596), which lands are hereby conveyed and confirmed to said Chilkat Indian Village in fee simple absolute, free of trust and all restrictions upon alienation, encumbrance, or otherwise: *Provided further*, That the United States and the Village Corporation for the village of Klukwan shall also quitclaim to said Chilkat Indian Village any right or interest they may have in and to income derived from the reservation lands defined in and vested by the Act of September 2, 1957, after December 18, 1971, and prior to January 2, 1976.

(2) The lands withdrawn by the Secretary pursuant to paragraph (1) of this subsection shall be located in the southeastern Alaska region and shall be of similar character and comparable value, to the extent possible, to those of the Chilkat Valley surrounding the village of Klukwan. Such withdrawal shall be made within six months of October 4, 1976 and the Village Corporation for the village of Klukwan shall select, within one year from the time that the withdrawal is made, and be conveyed, twenty-three thousand and forty acres. None of the lands withdrawn by the Secretary for selection by the Village Corporation for the village of Klukwan shall have been selected by, or be subject to an outstanding nomination for selection by, any other Native Corporation organized pursuant to this chapter, or located on Admiralty Island. (Amended January 2 1976, P.L. 94-204 §§ 9, 10, 89 Stat. 1150; October 4 1976, P.L. 94-456 § 1(a), (b), 90 Stat. 1934; November 15 1977, P.L. 95-178 § 1, 91 Stat. 1369)

#### NOTES TO DECISIONS

Section 22(i) of act must be read in conjunction with subsection (a). — Section 22(i) of this act, which requires the Secretary to manage the withdrawn and selected land prior to conveyance in accordance with applicable laws and regulations, must be read in conjunction with subsection (a) of this section and § 11(a)(1)-(2) of this act. *Rowe v. United States*, 64 F. Supp. 1060 (D. Alas. 1979), aff'd in part, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970,

101 S. Ct. 2047, 68 L. Ed. 2d 349 (1981).

Section 22(i) explicitly provides that the Secretary of Agriculture must administer National Forest lands withdrawn under this section prior to conveyance. *Cape Fox Corp. v. United States*, 456 F. Supp. 784 (D. Alas. 1978), aff'd in part and rev'd in part, 646 F.2d 399 (9th Cir. 1981).

Applied in *Johnson v. Chilkat Indian Village*; 457 F. Supp. 384 (D. Alas. 1978).

#### JOINT FEDERAL-STATE LAND USE PLANNING COMMISSION FOR ALASKA

Sec. 17. (a) (1) There is hereby established the Joint Federal State Land Use Planning Commission for Alaska. The Planning Commission shall be composed of ten members as follows:

(A) The Governor of the State (or his designate) and four members who shall be appointed by the Governor. During the Planning Commission's existence at least one member appointed by the Governor shall be a Native as defined by this Act.

(B) One member appointed by the President of the United States with the advice and consent of the Senate, and four members who shall be appointed by the Secretary of the Interior.

(2) The Governor of the State and the member appointed by the President pursuant to subsection (a)(1)(B), shall serve as cochairmen of the Planning Commission. The initial meeting of the Commission shall be called by the cochairmen. All decisions of the Commission shall require the concurrence of the cochairmen.

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(3) Six members of the Planning Commission shall constitute a quorum. Members shall serve at the pleasure of the appointing authority. A vacancy in the membership of the Commission shall not affect its powers, but shall be filled in the same manner in which the original appointment was made.

(4) (A) Except to the extent otherwise provided in subparagraph (B) of this subsection, members of the Planning Commission shall receive compensation at the rate of \$100 per day for each day they are engaged in the performance of their duties as members of the Commission. All members of the Commission shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties as members of the Commission.

(B) Any member of the Planning Commission who is designated or appointed from the Government of the United States or from the Government of the State shall serve without compensation in addition to that received in his regular employment. The member of the Commission appointed by the President pursuant to subsection (a) (1) (B) shall be compensated as provided by the President at a rate not in excess of that provided for level V of the Executive Schedule in title 5, United States Code.

(5) Subject to such rules and regulations as may be adopted by the Planning Commission, the cochairmen, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, shall have the power —

(A) to appoint and fix the compensation of such staff personnel as they deem necessary, and

(B) to procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed \$100 a day for individuals.

(6) (A) The Planning Commission or, on the authorization of the Commission, any subcommittee or member thereof, may, for the purpose of carrying out the provisions of this section, hold such hearings, take such testimony, receive such evidence, print or otherwise reproduce and distribute so much of its proceedings and reports thereon, and sit and act at such times and places as the Commission, subcommittee, or member deems advisable.

(B) Each department, agency, and instrumentality of the executive branch of the Federal Government, including independent agencies, is authorized and directed to furnish to the Commission, upon request made by a cochairman, such information as the Commission deems necessary to carry out its functions under this section.

(7) The Planning Commission shall —

(A) undertake a process of land-use planning, including the identification of and the making of recommendations concerning areas planned and best suited for permanent reservation in Federal ownership as parks, game refuges, and other public uses, areas of Federal and State lands to be made available for disposal, and uses to be made of lands remaining in Federal and State ownership;

(B) make recommendations with respect to proposed land selections by the State under the Alaska Statehood Act and by Village and Regional Corporations under this Act;

(C) be available to advise upon and assist in the development and review of land-use plans for lands selected by the Native Village and Regional Corporations under this Act and by the State under the Alaska Statehood Act;

(D) review existing withdrawals of Federal public lands and recommend to the President of the United States such additions to or modifications of withdrawals as are deemed desirable;

(E) establish procedures, including public hearings, for obtaining public views on the land-use planning programs of the State and Federal Governments for lands under their administration;

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(F) establish a committee of land-use advisers to the Commission, made up of representatives of commercial and industrial land users in Alaska, recreational land users, wilderness users, environmental groups, Alaska Natives, and other citizens;

(G) make recommendations to the President of the United States and the Governor of Alaska as to programs and budgets of the Federal and State agencies responsible for the administration of Federal and State lands;

(H) make recommendations from time to time to the President of the United States, Congress, and the Governor and legislature of the State as to changes in laws, policies, and programs that the Planning Commission determines are necessary or desirable;

(I) make recommendations to insure that economic growth and development is orderly, planned and compatible with State and national environmental objectives, the public interest in the public lands, parks, forests, and wildlife refuges in Alaska, and the economic and social well-being of the Native people and other residents of Alaska;

(J) make recommendations to improve coordination and consultation between the State and Federal Governments in making resource allocation and land use decisions;

and  
(K) make recommendations on ways to avoid conflict between the State and the Native people in the selection of public lands.

(8) (A) On or before January 31 of each year, the Planning Commission shall submit to the President of the United States, the Congress, and the Governor and legislature of the State a written report with respect to its activities during the preceding calendar year.

(B) The Planning Commission shall keep and maintain accurate and complete records of its activities and transactions in carrying out its duties under this Act, and such records shall be available for public inspection.

(C) The principal office of the Planning Commission shall be located in the State.

(9) (A) The United States shall be responsible for paying for any fiscal year only 50 per centum of the costs of carrying out subsections (a) and (b) for such fiscal year.

(B) For the purpose of meeting the responsibility of the United States in carrying out the provisions of this section, there is authorized to be appropriated \$1,500,000 for the fiscal year ending June 30, 1972, and for each succeeding fiscal year.

(10) The Planning Commission shall submit, in accordance with this paragraph, comprehensive reports to the President of the United States, the Congress, and the Governor and legislature of the State with respect to its planning and other activities under this Act, together with its recommendations for programs or other actions which it determines should be implemented or taken by the United States and the State. An interim, comprehensive report covering the above matter shall be so submitted on or before May 30, 1976. A final and comprehensive report covering the above matter shall be so submitted on or before May 30, 1979. The Commission shall cease to exist effective June 30, 1979.

(b) (1) The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: Provided, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

(3) Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

(c) In the event that the Secretary withdraws a utility and transportation corridor across public lands in Alaska pursuant to his existing authority, the State, the Village Corporations and the Regional Corporations shall not be permitted to select lands from the area withdrawn.

(d) (1) Public Land Order Numbered 4582, 34 Federal Register 1025, as amended, is hereby revoked. For a period of ninety days after the date of enactment of this Act all unreserved public lands in Alaska are hereby withdrawn from all forms of appropriation under the public land laws, including the mining (except locations for metalliferous minerals) and the mineral leasing laws. During this period of time the Secretary shall review the public lands in Alaska and determine whether any portion of these lands should be withdrawn under authority provided for in existing law to insure that the public interest in these lands is properly protected. Any further withdrawal shall require an affirmative act by the Secretary under his existing authority, and the Secretary is authorized to classify or reclassify any lands so withdrawn and to open such lands to appropriation under the public land laws in accord with his classifications. Withdrawals pursuant to this paragraph shall not affect the authority of the Village Corporations, the Regional Corporations, and the State to make selections and obtain patents within the areas withdrawn pursuant to section 11.

(2) (A) The Secretary, acting under authority provided for in existing law, is directed to withdraw from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, and from selection by Regional Corporations pursuant to section 11, up to, but not to exceed, eighty million acres of unreserved public lands in the State of Alaska, including previously classified lands, which the Secretary deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Provided, That such withdrawals shall not affect the authority of the State and the Regional and Village Corporations to make selections and obtain patents within the areas withdrawn pursuant to section 11.

(B) Lands withdrawn pursuant to paragraph (A) hereof must be withdrawn within nine months of the date of enactment of this Act. All unreserved public lands not withdrawn under paragraph (A) or subsection 17(d) (1) shall be available for selection by the State and for appropriation under the public land laws.

(C) Every six months, for a period of two years from the date of enactment of this Act, the Secretary shall advise the Congress of the location, size and values of lands withdrawn pursuant to paragraph (A) and submit his recommendations with respect to such lands. Any lands withdrawn pursuant to paragraph (A) not recommended for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems at the end of the two years shall be available for selection by the State and the Regional Corporations, and for appropriation under the public land laws.

(D) Areas recommended by the Secretary pursuant to paragraph (C) shall remain withdrawn from any appropriation under the public land laws until such time as the Congress acts on the Secretary's recommendations, but not to exceed five years from the recommendation dates. The withdrawal of areas not so recommended shall terminate at the end of the two year period.

(E) Notwithstanding any other provision of this subsection, initial identification of lands desired to be selected by the State pursuant to the Alaska Statehood Act and by the Regional Corporations pursuant to section 12 of this Act may be made within any area withdrawn pursuant to this subsection (d), but such lands shall not be tentatively approved or patented so long as the withdrawals of such areas remain in effect: Provided,

That selection of lands be affected by such v granted as authoriza any areas withdra Corporations or the made available for time periods establi extend to the ext subsection (2).

(3) Any lands w Secretary under ap to grant leases, p withdrawal. (Amer

Cross references. - Alaska lands, see AS 3

- I. General Considerat
- II. Public Easeme
  - A. In General.
  - B. Constructic
- III. Lands Withdri

**I. GENERAL**

Commission's p to native lands. - the Land Use Plan and make recomme of lands remaining also to undertake so spect to native lands. the public use of the Defense Fund v. Anc 1977).

Action of Secret from oil and gas l discretion. - See (9th Cir. 1975), cert 2171. 48 L. Ed. 2d 7

Applied in Alask: Andrus, 435 F. Supp Mgt. of Alas. Lands F. Supp. 753 (D. Ala States, 456 F. Supp and rev'd in part Stratman v. Watt, dismissed, U.S. 170 (1982).

Cited in Chugac F.2d 723 (9th Cir. 1 Supp. 1060 (D. Ala

**II. PU**

The entire eas Alaska Native t tained in this su Defense Fund v. 1977).

Purpose of pu justifiably concern which were to re

poration and Regional Planning Commission necessary.

transportation corridor the State, the Village and to select lands from

1025, as amended, is actment of this Act all forms of appropriation ons for metalliferous ie the Secretary shall ortion of these lands w to insure that the ddrawal shall require and the Secretary is o open such lands to ications. Withdrawals age Corporations, the in patents within the

ing law, is directed to l laws, including the ka Statehood Act, and to, but not to exceed, of Alaska, including ole for addition to or and Wild and Scenic the authority of the is and obtain patents

be withdrawn within ed public lands not ilable for selection by

nactment of this Act, nd values of lands tions with respect to ot recommended for ife Refuge, and Wild ble for selection by nder the public land

ph (C) shall remain til such time as the d five years from the ed shall terminate at

tial identification of hood Act and by the ade within any area l not be tentatively n in effect: Provided,

That selection of lands by Village Corporations pursuant to section 12 of this Act shall not be affected by such withdrawals and such lands selected may be patented and such rights granted as authorized by this Act. In the event Congress enacts legislation setting aside any areas withdrawn under the provisions of this subsection which the Regional Corporations or the State desired to select, then other unreserved public lands shall be made available for alternative selection by the Regional Corporations and the State. Any time periods established by law for Regional Corporations or State selections are hereby extended to the extent that delays are caused by compliance with the provisions of this subsection (2).

(3) Any lands withdrawn under this section shall be subject to administration by the Secretary under applicable laws and regulations, and his authority to make contracts and to grant leases, permits, rights-of-way, or easements shall not be impaired by the withdrawal. (Amended January 2 1976, P.L. 94-204 § 7, 89 Stat. 1149)

Cross references. — For the steering council for Alaska lands, see AS 38.95.100 — 38.95.140.

## NOTES TO DECISIONS

- I. General Consideration
- II. Public Easement
  - A. In General.
  - B. Constructive
- III. Lands Withdrawn

### I. GENERAL

**Commission's report to native lands.** — the Land Use Plan and make recommendations of lands remaining also to undertake some planning functions with respect to native lands, those functions did not relate to the public use of these lands. Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

**Action of Secretary in withdrawing lands from oil and gas lease entry held not abuse of discretion.** — See Burglin v. Morton, 527 F.2d 486 (9th Cir. 1975), cert. denied, 425 U.S. 973, 96 S. Ct. 2171, 48 L. Ed. 2d 796 (1976).

**Applied in Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977); Citizens for Mgt. of Alas. Lands v. Department of Agriculture, 447 F. Supp. 753 (D. Alas. 1978); Cape Fox Corp. v. United States, 456 F. Supp. 784 (D. Alas. 1978), aff'd in part and rev'd in part, 646 F.2d 399 (9th Cir. 1981); Stratman v. Watt, 656 F.2d 1321 (9th Cir. 1981), cert. dismissed, U.S. , 102 S. Ct. 1744, 72 L. Ed. 2d 170 (1982).**

**Cited in Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723 (9th Cir. 1978); Rowe v. United States, 464 F. Supp. 1060 (D. Alas. 1979).**

### II. PUBLIC EASEMENTS.

#### A. In General.

**The entire easement selection process of the Alaska Native Claims Settlement Act is contained in this sub-section.** Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

**Purpose of public easements.** — Congress was justifiably concerned that certain portions of the state which were to remain in the public domain would

ecome inaccessible, or landlocked by native lands. It appears, therefore, that the public easements were to be reserved to provide access to the lands not selected, and they were not intended to provide the public with right to use the native lands for recreational activities. This construction of the act is supported by its language and legislative history. Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

**The purpose of the easements along the courses of major waterways is to provide a place for docks, campsites and such facilities to service those who are properly using the public waters.** This purpose is apparently accommodated by the reservation of site easements under the order of the Secretary of the Interior. Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

**Subsection does not create cloud on title.** — It seems rather certain from the general purpose of the Alaska Native Claims Settlement Act that Congress did not envision the narrow purpose of this subsection as creating a cloud on the title and usability of all the natives' land. Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

**Pursuant to the Alaska Statehood Act, the Submerged Lands Act of 1953 applies to Alaska.** Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

#### B. Construction.

**This act prevails where there is conflict with other law.** — This act contains a preemption section which states: "To the extent that there is a conflict between any provision of this act and any other federal laws applicable to Alaska, the provisions of this act shall govern." Pub. L. 92-203, 85 Stat. 688, § 26. Apparently this section was not codified. Alaska Pub. Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alas. 1977).

NATIVE CORPORATIONS WHICH HAVE A 17(b)  
AGREEMENT WITH THE DEPARTMENT OF INTERIOR  
February 4, 1998

<u>Village Corporation</u>	<u>IC</u>	<u>Regional Corporation</u>
Akutan Corporation	255	Aleut Corporation
Arctic Slope Regional Corp.	055	Arctic Slope Regional Corp.
Arctic Slope Regional Corp.	068	Arctic Slope Regional Corp.
Atkasook Corporation	049	Arctic Slope Regional Corp.
Atkasook Corporation	090	Arctic Slope Regional Corp.
Atxam Corporation	159	Aleut Corporation
Bay View, Inc.	038	Bristol Bay Native Corp.
Bay View, Inc.	036	Bristol Bay Native Corp.
Belkofski Corporation	133	Aleut Corporation
Bethel Native Corporation	142	Calista Corporation
Chaluka Corporation	125	Aleut Corporation
Chignik Lagoon Native Corp.	083	Bristol Bay Native Corp.
Choggiung Limited	008	Bristol Bay Native Corp.
Choggiung Limited	233	Bristol Bay Native Corp.
Choggiung Limited	026	Bristol Bay Native Corp.
Choggiung Limited	141	Bristol Bay Native Corp.
Cook Inlet Region, Inc.	046	Cook Inlet Region, Inc.
Cook Inlet Region, Inc.	116	Cook Inlet Region, Inc.
Cully Corporation	056	Arctic Slope Regional Corp.
Cully Corporation	058	Arctic Slope Regional Corp.
Doyon, Limited	013	Doyon, Limited
Doyon, Limited	028	Doyon, Limited
Doyon, Limited	078	Doyon, Limited
Doyon, Limited	089	Doyon, Limited
English Bay Corporation	020	Chugach Natives, Inc.
English Bay Corporation	022	Chugach Natives, Inc.
Eyak Corporation	127	Chugach Natives, Inc.
Eyak Corporation	127	Chugach Natives, Inc.
False Pass Corporation	187	Aleut Corporation
Far West, Inc.	081	Koniag, Inc.
Kaguyak, Inc.	114	Koniag, Inc.
Kaktovik Inupiat Corporation	052	Arctic Slope Regional Corp.
Kaktovik Inupiat Corporation	085	Arctic Slope Regional Corp.
Karluk Native Corporation	105	Koniag, Inc.
Kenai Native Association, Inc.	001	Cook Inlet Region, Inc.
Kikiktagruk Inupiat Corporation	004	NANA Regional Corporation
Kikiktagruk Inupiat Corporation	062	NANA Regional Corporation
Kikiktagruk Inupiat Corporation	006	NANA Regional Corporation
Kikiktagruk Inupiat Corporation	024	NANA Regional Corporation
King Cove Corporation	151	Aleut Corporation
Kwethluk, Inc.	213	Calista Corporation
Levelock Natives, Limited	193	Bristol Bay Native Corp.
Manokotak Natives, Limited	181	Bristol Bay Native Corp.
Meshik, Inc.	091	Bristol Bay Native Corp.

Page 2

Native Corporations which have a 17(b) agreement with the Department of Interior

NANA Regional Corporation	010	NANA Regional Corporation
Natives of Afognak, Inc.	103	Koniag, Inc.
Natives of Afognak, Inc.	060	Koniag, Inc.
Natives of Akhiok, Inc.	135	Koniag, Inc.
Natives of Kodiak, Inc.	097	Koniag, Inc.
Nelson Lagoon Corporation	167	Aleut Corporation
Ninilchik Native Assc, Inc.	095	Cook Inlet Region, Inc.
Ninilchik Native Assc, Inc.	095	Cook Inlet Region, Inc.
Nu-Nachk Pit, Inc.	1t7	Koniag, Inc.
Nunamiut Corporation	069	Arctic Slope Regional Corp.
Oceanside Corporation	080	Bristol Bay Native Corp.
Old Harbor Native Corporation	165	Koniag, Inc.
Olgoon Corporation	042	Arctic Slope Regional Corp.
Olgoon Corporation	043	Arctic Slope Regional Corp.
Olgoonik Corporation	075	Arctic Slope Regional Corp.
Ounalashka Corporation	123	Aleut Corporation
Ounalashka Corporation	040	Aleut Corporation
Ouzinkie Native Corporation	064	Koniag, Inc.
Ouzinkie Native Corporation	053	Koniag, Inc.
Port Graham Corporation	018	Chugach Natives, Inc.
Port Graham Corporation	137	Chugach Natives, Inc.
Port Graham Corporation	023	Chugach Natives, Inc.
Port Graham Corporation	066	Chugach Natives, Inc.
Saguyak, Incorporated	119	Bristol Bay Native Corp.
Saguyak, Incorporated	199	Bristol Bay Native Corp.
Saguyak, Incorporated	201	Bristol Bay Native Corp.
Seldovia Native Assoc., Inc.	196	Cook Inlet Region, Inc.
Seldovia Native Assoc., Inc.	139	Cook Inlet Region, Inc.
Seldovia Native Assoc., Inc.	183	Cook Inlet Region, Inc.
Seldovia Native Assoc., Inc.	016	Cook Inlet Region, Inc.
Seldovia Native Assoc., Inc.	185	Cook Inlet Region, Inc.
Seldovia Native Assoc., Inc.	101	Cook Inlet Region, Inc.
Shumagin Corporation	121	Aleut Corporation
St. George Taneq Corporation	129	Aleut Corporation
St. Mary's Native Corporation	169	Calista Corporation
Tanadguisix Corporation	149	Aleut Corporation
Tatitlek Corporation	153	Chugach Natives, Inc.
Tatitlek Corporation	144	Chugach Natives, Inc.
Tatitlek Corporation	131	Chugach Natives, Inc.
Tigara Corporation	050	Arctic Slope Regional Corp
Twin Hills Native Corporation	076	Bristol Bay Native Corp.
Tyonek Native Corporation	173	Cook Inlet Region, Inc.
Tyonek Native Corporation	087	Cook Inlet Region, Inc.
Ukpeagvik Inupiat Corporation	044	Arctic Slope Regional Corp
Ukpeagvik Inupiat Corporation	045	Arctic Slope Regional Corp
Unga Corporation	111	Aleut Corporation
Yak-Tat Kwan, Inc.	003	Sealaska Corporation
Yak-Tat Kwaan, Inc.	155	Sealaska Corporation

NATIVE CORPORATIONS WHICH HAVE RECEIVED PATENT  
AND MAY OWE 17(B) EASEMENTS

February 4, 1998

<u>Village Corporation</u>	<u>Patent</u>	<u>Region Corporation</u>
Afognak Natives, Inc.	50-79-0125	Koniag, Inc.
Afognak Natives, Inc.	50-77-0094	Koniag, Inc.
Akutan Corporation	50-80-0008	Aleut Corporation
Bethel Native Corporation	50-79-0046	Calista Corporation
Cape Fox Corporation	50-78-0083	Sealaska Corporation
Chenega Corporation	50-79-0106	Chugach Natives Inc.
Chignik Lagoon Native Corp.	50-78-0030	Bristol Bay Native Corp
Choggiung Limited	50-76-0091	Pristol Bay Native Corp
Choggiung Limited	50-79-0144	Bristol Bay lative Corp
Eklutna, Inc.	50-78-0015	Cook Inlet Region, Corp
Eklutna, Inc.	50-79-0057	Cook Inlet Region, Corp
Kaktovik Inupiat Corporation	50-77-0046	Arctic Slope Regional Corp.
Kenai Natives Association, Inc.	50-74-0109	Cook Inlet Region, Inc.
Knikatnu, Inc.	50-77-0101	Chugach Natives Inc.
Klukwan, Incorporated	50-74-0155	Sealaska Corporation
Ninilchik Native Assoc., Inc.	50-78-0053	Cook Inlet Region, Inc.
Ninilchik Native Assoc., Inc.	50-78-0053	Cook Inlet Region, Inc.
Ninilchik Native Assoc., Inc.	50-79-0001	Cook Inlet Region, Inc.
Nu-Nachk Pit, Inc.	50-78-0089	Koniag, Inc.
Oceanside Corporation	50-78-0029	Bristol Bay Native Corp
Old Harbor Native Corporation	50-79-0060	Koniag, Inc.
Ounalashka Corporation	50-76-0022	Aleut Corporation
Ouzinkie Native Corporation	50-77-0118	Koniag, Inc.
Seldovia Native Assoc., Inc.	50-79-0072	Cook Inlet Region, Inc.
Seldovia Native ASBOC., Inc.	50-79-0078	Cook Inlet Region, Inc.
Seldovia Native Assoc., Inc.	50-79-0099	Cook Inlet Region, Inc.
Seldovia Native Assoc., Inc.	50-79-0023	Cook Inlet Region, Inc.
St. George Tanaq Corporation	50-79-0008	Aleut Corporation
Tazlina, Incorporated	50-76-0023	Ahtna Inc.
The Port Graham Corporation	50-77-0127	Chugach Hatives, Inc.
Tyonek Native Corporation	50-79-0064	Cook Inlet Region, Inc.
Ukpeagvik Inupiat Corporation	50-75-0153	Arctic Slope Regional Corp.

CONTACT: Jane Angvik

269-8503

**COMPONENT GOALS:**

The Division of Land has two primary responsibilities under this component:

1. RS 2477 Rights-of-way.
2. Navigability.

The goals of the RS2477/Navigability Component are:

1. RS 2477: Defend the state's rights under RS 2477 to protect public access to state land and resources.
2. Navigability: Assert state ownership of and public rights to navigable and public waters. Includes support of litigation, review of all federal administrative actions affecting navigable waters, and providing agencies and the public with information on navigable and public waters.

**EXPENDITURES:**

Personal Services			
Other Program Costs		115.0	115.0
Total		115.0	115.0

FY97  
ACTUAL

FY98  
AUTHORIZED

FY99  
GOVERNOR

**FUNDING SOURCES:**

Federal Receipts			
General Fund Match			
General Fund		115.0	115.0
GF Program Receipts			
GF Des. Prog Rec			
Other Funds			
Total		115.0	115.0

**STAFFING:**

Permanent Full-Time			
Permanent Part-Time			
Temporary			

**DESCRIPTION OF COMPONENT SERVICES:**

This component includes funding for both the RS 2477 program and the Navigability program. Both programs directly impact state rights and the public's rights as addressed through the services provided in these programs.

**RS2477:** This component provides the funding for ongoing activities associated with the RS2477 research project and litigation. Since 1992, the Department has researched more than 1900 routes, identified approximately 585 routes as potential RS2477s, and certified 11 routes through the regulatory process. Further research of trails should be accomplished. Other activities involve response to inquiries from the public that may require further research, administrative actions that must be taken to ensure reservation of these rights across lands conveyed by BLM to third parties, and maintaining the integrity of the information gathered to date. The division also supports litigation efforts by the Dept of Law. (Continued on Page 2.)

**DESCRIPTION OF COMPONENT CHANGES:**

This component was created by the legislature for FY 98. There is no change anticipated for FY 99.

**COMPONENT GOALS AND SERVICES**

Form CF1  
Revised 8/5/98

AGENCY NATURAL RESOURCES

BRU Statehood Defense

COMPONENT RS2477/Navigability #2226

Page 1 of 2

Revised Date:

FY99

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CONTINUATION OF FORM: CF1

**DESCRIPTION OF COMPONENT SERVICES (continued):**

**Navigability:** This component provides funding for on-going activities associated with the Navigability program that 1) provides information to the public and agencies on the location and rights to navigable and public waters; 2) does research and other work to support state litigation asserting state ownership; and 3) reviews all federal decisions and plans to assure that state ownership and public use are protected.

**RS 2477 (\$40.0)**

**Tasks:**

1. Routes to litigation list.
  - \* Continue in-depth research on selected trails
  - \* Do initial identification of land owners and title search at recorder's office, Bureau of Land Management, and on Motzlik for non-certified routes in preparation of future certification action.
2. Continue to complete quality control on files.
  - \* Standardize casefile summaries and LAS input.
  - \* Compare file contents with casefile summaries to verify information is complete in files.
3. Newsletter
  - \* Prepare a one-page newsletter to send to mailing list providing current status of litigation and any changes to the database.
4. Public Inquiries - respond to public or Web page inquiries received.

**Navigability (\$75.5)**

1. Public/agency information:
  - \* Respond to public and agency requests for navigability determinations or information.
  - \* Maintain/update database and web site that provides information on navigability status.
  - \* Develop and distribute maps and public informational brochures for specific waterbodies.
2. Research in support of on-going or new litigation, including litigation with both US Department of Interior and US Forest Service. Includes research into public use, historical use, and possibly hydrology of specific waterbodies. Research done in coordination with Departments of Law and Fish and Game.
3. Review all BLM administrative decisions and all federal land use plans and regulations that may affect state ownership or public use. Provide comments and file appeals as necessary.

**ADDITIONAL EXPLANATION FORM**  
Revised 8/5/96

AGENCY NATURAL RESOURCES

BRU Statehood Defense

COMPONENT RS2477/Navigability #2226

Page 2 of 2  
Revised Date:

FY99

CONTACT:

Jane Angvik

269-8503

**OBJECTIVES AND ACCOMPLISHMENT MEASURES:**

**RS 2477**

1. Review land conveyances for RS2477 conflicts.
2. Assist the Attorney General's Office in research related to RS2477 litigation.
3. Respond to requests submitted by phone, e-mail, RS2477 Web site, letters, etc.
4. Update mapped and tabular statewide RS2477 data. Make data available for public and agency use.
5. Complete standardization of files on LAS and databases.

**Navigability**

1. Issue at least five navigability determinations and review navigability determinations prepared by ADF&G.
2. Respond to all BLM navigability decisions and review BLM land conveyances.
3. Assist the Attorney General's Office in research related to administrative appeals and litigation regarding navigable waters.
4. Provide information to agencies and the public on the navigability of waterbodies. Respond to requests submitted by phone, e-mail, Navigability Web Site, letters, etc.
5. Prepare public information brochures for three more waterbodies. Brochures provide the public with information about land ownership and public access to specific waterways where conflicts/problems have been occurring.
6. Update mapped and tabular statewide navigability data. Make data available for public and agency use.

**STATUTORY/REGULATORY CITATIONS**

AS 38.05

AS 38.05				

**COMPONENT  
OBJECTIVES AND  
ACCOMPLISHMENT  
MEASURES**  
Form CF2  
REVISED 8/5/96

AGENCY NATURAL RESOURCES

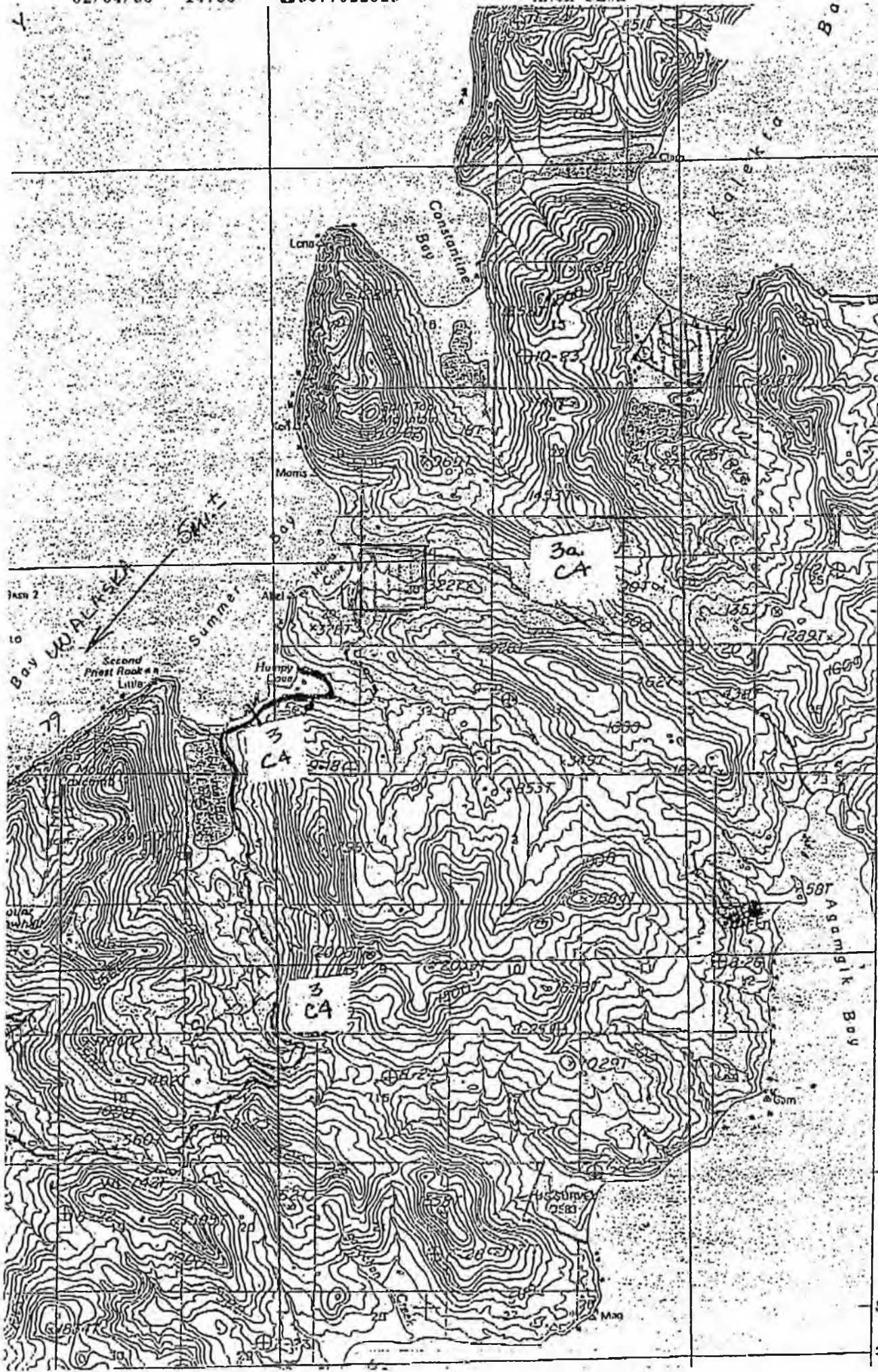
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COMPONENT RS2477/Navigability #2226

Page 1 of 1

Revised Date:

FY99



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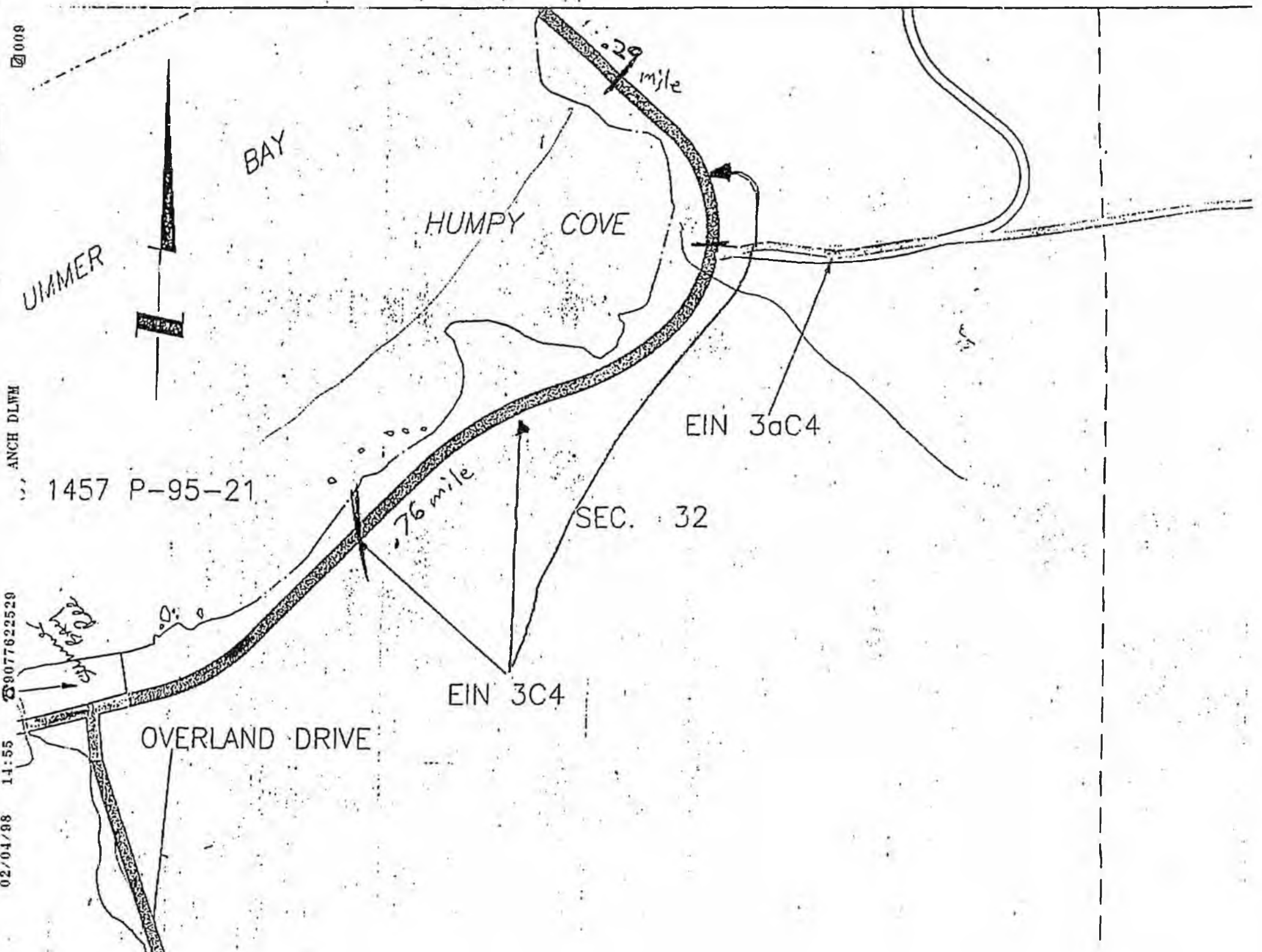
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OVERLAND DRIVE

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0.76 mile



# STATE OF ALASKA

## DEPARTMENT OF NATURAL RESOURCES

### DIVISION OF LAND

TONY KNOWLES, GOVERNOR

3601 C STREET, SUITE 1122  
ANCHORAGE, ALASKA 99503-5947  
PHONE: (907) 269-8503  
FAX: (907) 269-8904

#### MEMORANDUM

TO: Senate Resources Committee

From: Jane Angvik  
Director, Division of Land

Date: February 4, 1998

Sub.: Department of Natural Resources Response to Auditors comments before  
Senate Resources Committee on January 30, 1998

The Legislative Auditors completed and issued their review of waterway management issues in Audit number 10-454-97 on March 28, 1997. It covers the period from July, 1995 through March, 1997. From July 1, 1995 through June 30, 1996 there was no navigability program in DNR due to budget reductions. The interdepartmental Navigability Team was established in August, 1996. Therefore, the audit covers only seven months of its operation. In that time several of the issues identified in the audit were addressed.

The audit raises several issues about 17(b) easements across Native lands. DNR would like to point out to the committee that the 17(b) monitoring program in the Division of Land is not paid for as part of the Navigability project. It is housed in the Realty Services Section and is paid out of the general fund appropriation to the division. The BLM has 14 full time staff who work on the review of 17(b) easements in Native corporation conveyances. The Division of Land has one full time person who reviews conveyances for 17(b) easements. Similarly, the BLM devotes 36 full time positions to the adjudication of Native Allotments and the Division of Land has one full time person who reviews them in order to protect the interests of the state, which includes 17(b) easements, and navigability claims.

The issue of the BLM easement conformance agreements needs additional research to determine the extent of the problem. The Division of Land will report back to the Legislature on our findings with recommendations that may be appropriate.

The auditor's remarks related to the adjudication of water rights will be forwarded to the Division of Mining and Water Management, which has responsibility for this issue. That division will address the adjudication of federal reserve water rights.

# KARLUK RIVER

## Access & Use Information

Located on the southwest end of Kodiak Island approximately one hour by air from the city of Kodiak, the Karluk River area provides excellent opportunities for fishing, hunting, hiking, wildlife viewing, and other wilderness activities.

The Karluk River is 22 miles long. Though all but the lower 8 miles of the river are located within the boundary of the Kodiak National Wildlife Refuge (KNWR), all of the lands adjacent to the river and most of the land surrounding Karluk Lagoon are privately owned. Public use trail and site easements have been reserved at intervals along the river to provide reasonable access to the remaining public land and major waterways. In addition, Koniag, Inc., and Karluk Tribal Council, the owners of most of the lands adjacent to the river, have implemented permit programs to allow the use of their lands along the river.

This brochure will attempt to answer questions regarding access to, and use of, private and public land, and assist the visitor in planning a trip to the Karluk River. The map provided on the opposite side of this brochure depicts the land ownership pattern and the location of public use easements. The map inset provides additional details for visitors beginning or ending their trip at Karluk Village.

No matter where you go or how long you stay, we hope you have a safe and memorable trip. Please remember to be a courteous camper by packing out your waste and, if possible, leaving this beautiful area in better shape than when you arrived.

## Questions and Answers

**Q. "Do I need to get permission from the landowners before I begin my trip?"** **A.** Yes, if you plan to cross, enter, or use private land. Where you intend to begin and end your trip, as well as the length of time you want to spend in a particular area, will determine what land use permits are required. As previously mentioned, there are public use easements available at various locations along the river for anyone to use, but they are limited in number, and there are restrictions on uses.

**Q. "What type of restrictions are there on the use of these easements?"** **A.** The easements exist only to provide access across privately owned lands to reach public lands or major waterways. No hunting or fishing from or on an easement is permitted. There are two types of easements: site easements (marked as a triangle on the map and described as a campsite), and trail easements (marked with bold dashed lines on the map). Site easements may be used for temporary (up to 24 hrs) camping, loading, or unloading; and vehicular parking, including boats and aircraft where appropriate. Trail easements are 25 feet wide and may be used for travel by foot, dogsled, animals, snowmobiles, two and three-wheel vehicles, and small all-terrain vehicles under 3,000 lbs. gross vehicle weight. Camping is not allowed on trail easements. There is no access from trail easements to the river except at one of the designated site easements. If you are on the river and wish to go on the land for any reason, you may do so only at a site easement unless you have permission from the landowner.

**Q. "How do I find these easements?"** **A.** Easements shown on the map are described below in the Easement Descriptions section. Whenever possible, a GPS (Global Positioning System) reading has also been provided. Each easement should be identified by a Bureau of Land Management (BLM) marker, unless the marker has been destroyed by bears. If a marker is not present, easements may be found by the use of landmarks such as islands, stream mouths, etc., or the presence of well worn trails and other signs of use. It is your responsibility to make sure you are located on the easement. For additional information on the location of easements, you may contact the KNWR or BLM. Their addresses and phone numbers are listed elsewhere in this brochure.

**Q. "How often can I use the same easement?"** **A.** There is no explicit restriction on the number of times an easement may be used. However, the reservation of easements was designed to allow for the logical progression of travelers from one location to the next when moving up- and down-river.

**Q. "Do I need a land use permit or permission for crossing or using private lands?"** **A.** Yes, a permit or prior permission from the owner or the owner's designee is required anytime the visitor wishes to enter, cross or use private land, except at designated easements. Use of private land, including travel across the land without obtaining prior permission, may be trespass.

**Q. "Whom do I contact for a land use permit for private lands?"** **A.** The map on the back side of this brochure enables you to determine the appropriate upland owner. Some landowners, such as Koniag, Inc., issue permits for recreational use of their lands. Such uses include fishing, camping, and sometimes hunting. For current information on the uses permitted and the cost of a permit, contact the owners at the addresses listed below:

Koniag, Inc.  
4300 B Street, Suite 407  
Anchorage, AK 99503  
(907) 561-2668

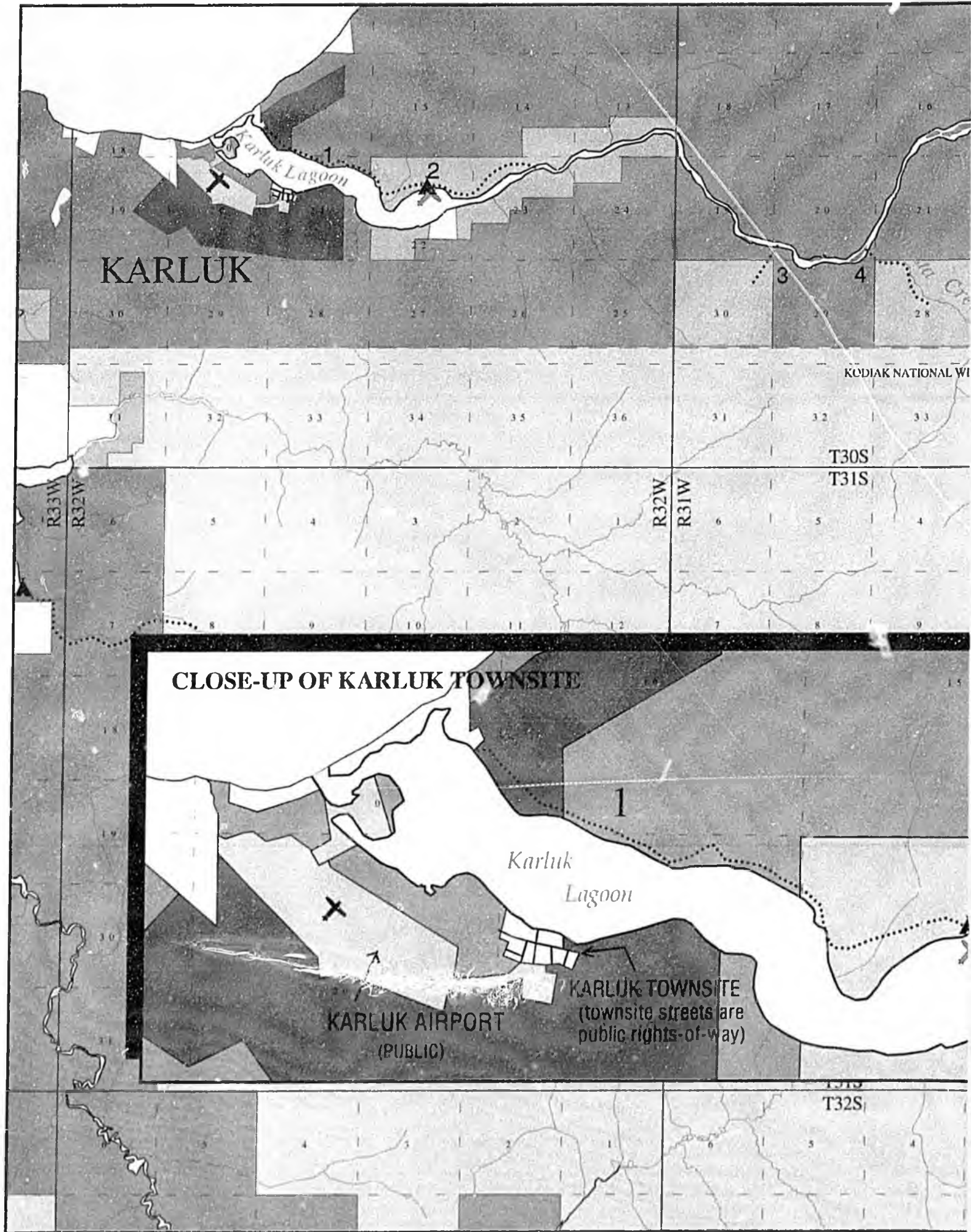
Karluk Tribal Council  
Box 22  
Karluk, AK 99608  
(907) 241-2218

**Q. "May I travel by boat or canoe on the water without obtaining a land use permit?"** **A.** Yes. Under state law, the public has the right to use and have access to the Karluk River. The water is available for public use for the purpose of fishing, boating, and other activities. However, any overnight camping or use of the uplands for any purpose, except at designated public use easements, requires the permission of the upland owner.


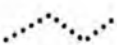











**Q. "May I stand in the river (below the Ordinary High Water Mark) without getting a land use permit?"**

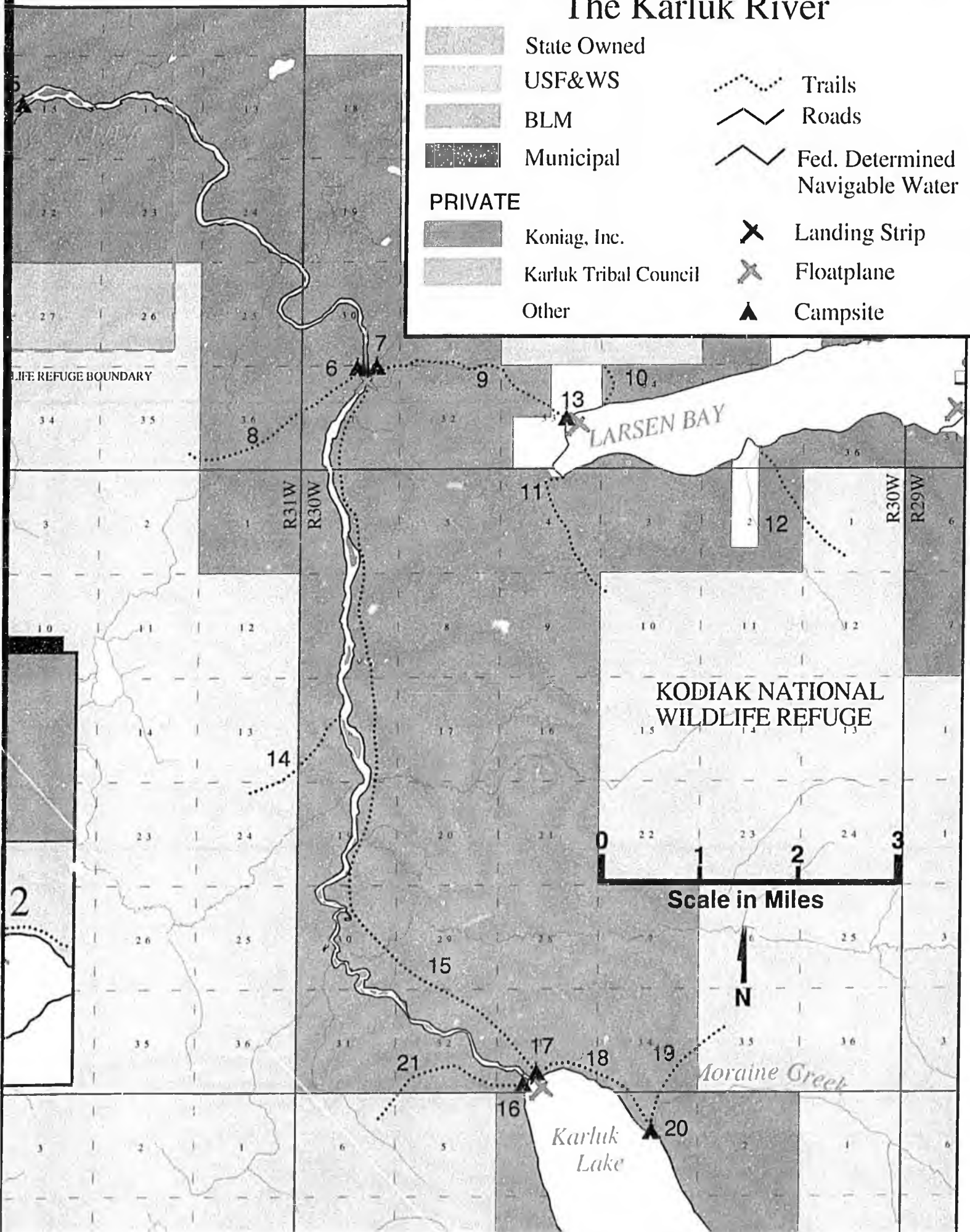
**A.** This is currently an open question. It is the state's position that under state law, members of the public may touch the bed of the river below ordinary high water to the extent reasonably necessary to pull a boat across riffles or across obstructions, and to fish. However, Koniag, Inc., has stated that it considers such activity without a permit to be trespass.

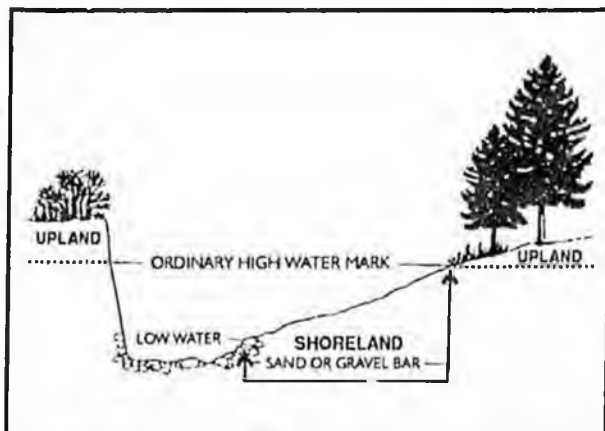
Until the legal issues discussed above are resolved, the state cannot assure the public that a private owner would not pursue a trespass action against them if they stand in the river without a permit.



# The Karluk River

- |   |                       |   |                                 |
|---|-----------------------|---|---------------------------------|
|  | State Owned           |  | Trails                          |
|  | USF&WS                |  | Roads                           |
|  | BLM                   |  | Fed. Determined Navigable Water |
|  | Municipal             |  | Landing Strip                   |
| <b>PRIVATE</b>  |                       |  | Floatplane                      |
|  | Koniag, Inc.          |  | Campsite                        |
|  | Karluk Tribal Council |   |                                 |
|  | Other                 |   |                                 |





## The "Ordinary High Water Mark"

The Ordinary High Water Mark can usually be identified by the vegetation line along the bank or shore, or by other distinctive signs. It is defined as the mark along the bank or shore where the presence and action of water are so common and usual as to leave a natural line impressed on the bank or shore. That line may be indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics.

## Run Timing for Salmon & Steelhead

Run timing for adult salmon returning to freshwater to spawn will impact angling success. Approximate run timing for the Karluk River:

King Salmon	Peak run June 1 - July 10
Red Salmon	June 10 - August 1
Pink Salmon	July 20 - August 20
Silver Salmon	Mid August - September
Steelhead	Mid to late October

## General Sport Fishing Information

The Alaska Department of Fish and Game sponsors the Sport Fish Information Line at (907) 486-5176. The line is updated weekly May to October.

The Alaska Department of Fish and Game publishes sport fishing regulations for the Karluk River in the Sport Fishing Regulations Summary for Kodiak Island and Southwest Alaska. To obtain a copy of these regulations contact:

Alaska Dept. of Fish & Game, Kodiak Office  
211 Mission Road  
Kodiak, AK 99615 phone (907) 486-1880

## Field Tips

Be advised that you are in bear country. In most cases, bears are not a threat, but they deserve your respect and attention. Before travelling in bear country, pick up the brochure "Bear Facts" from any Department of Fish and Game office. There are two key regulations regarding human/bear interactions in Alaska. The first prohibits feeding bears or leaving garbage that attracts them (5 AAC 92.230). The other sets the guidelines for taking bear in defense of your life and property (5 AAC 92.410). State law allows a bear to be shot in self-defense if: (1) you did not provoke the attack by an unreasonable invasion of the bear's habitat; (2) the problem was not caused by negligent storage of food, garbage, or other attractive nuisance; and (3) there is no alternative. If a bear is killed, the hide and skull must be salvaged, and the incident must be immediately reported to the authorities.

It is recommended that river visitors carry suitable containers to dispose of human waste, since there are no facilities along the river.

## Kodiak National Wildlife Refuge

Many trail easements along the Karluk River access public lands within the Kodiak National Wildlife Refuge. The Refuge is responsible for managing all lands and easements within its boundary.

For information regarding Refuge regulations or easements, contact:

Kodiak National Wildlife Refuge  
1390 Buskin River Road  
Kodiak, Alaska 99615 phone (907) 487-2600

## Bureau of Land Management

The Bureau of Land Management manages all other easements. For information on easements outside the Refuge boundary, contact:

Bureau Of Land Management  
Anchorage District Office  
6881 Abbott Loop Road  
Anchorage, AK 99507 phone (907) 267-1248

## Department of Natural Resources

For additional public use information contact:

Alaska Department of Natural Resources  
Division of Land / Navigability Section  
3601 C Street Suite 980  
Anchorage, AK 99503-5937 phone (907) 269-8525  
<http://www.dnr.state.ak.us/land/nav.htm>

## Easement Descriptions\*

The following easements are shown on the map:

1. An existing trail running easterly from the village of Karluk along the north side of Karluk Lagoon to the shore of the Karluk River. (25-foot trail) (EIN 7)
2. A campsite on the north shore of Karluk Lagoon. (two and one-half acre site on record) (EIN 6) (GPS: 57° 33.878' N / 154° 23.951' W)
3. An unimproved trail running southerly from the Karluk River to public lands. (25-foot trail) (EIN 34)
4. An unimproved trail running southeasterly from the Karluk River near the mouth of Shasta Creek to public lands. (25-foot trail) (EIN 33)
5. A campsite on an island in the Karluk River. (site encompassing entire island on record) (EIN 30) (GPS 57° 34.538' N / 154° 14.897' W)
6. A campsite on the left bank of the river at the Karluk River portage. (one-acre site) (EIN 13b) (GPS 57° 32.185' N / 154° 9.517' W)
7. A campsite on the right bank of the river at the Karluk River portage. (one-acre site) (EIN 13a)
8. An existing trail running southwesterly from the west side of the Karluk River portage at easement #6 to public lands. (25-foot trail) (EIN 47)
9. An existing trail from the head of Larsen Bay westerly to the Karluk River. (25-foot trail) (EIN 12)
10. An unimproved trail running northerly from the head of Larsen Bay to public lands. (25-foot trail) (EIN 11)
11. An unimproved trail running southeasterly from the head of Larsen Bay to public lands. (25-foot trail) (EIN 9)
12. An unimproved trail running southeasterly from Larsen Bay to public lands. (25-foot trail) (EIN 8)
13. A one-half acre site and twenty-five foot trail. (LAS AA007120)
14. An unimproved trail running southwesterly from the left bank of the Karluk River to public lands. (25-Foot trail) (EIN 43)
15. An unimproved trail from easement #7 at the Karluk River portage southerly along the right bank of the Karluk River to the outlet of Karluk Lake at easement #17. (25-foot trail) (EIN 17)
16. A campsite on the northwest shore of Karluk Lake and the left bank of the Karluk River. (one-acre site) (EIN 20) GPS 57° 26.365' N / 154° 6.679' W)
17. A campsite on the northwest shore of Karluk Lake and the right bank of the Karluk River. (one-acre site) (EIN 21) (GPS 57° 26.473' N / 154° 6.466' W)
18. An unimproved trail along the north shore of Karluk Lake from the outlet of the lake at easement #17 to the mouth of Moraine Creek. (25-foot trail) (EIN 40)
19. An unimproved trail running northeasterly from Karluk Lake at easement #20 to public lands. (25-foot trail) (EIN 37)
20. A campsite on the shore of Karluk Lake at the mouth of McRane Creek. (one-acre site) (EIN 39)
21. An unimproved trail running westerly from the outlet of Karluk Lake at easement #16 to public lands. (25-foot trail) (EIN 18)

\*For the official record descriptions of the easements described above, contact BLM.