SB

219

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SB 219
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: DNR

Title: Establishing Joint Federal and State Navigable Waters Commission for Alaska
BRU: Commissioner's Office
Component: Commissioner's Office

Sponsor: House Resources
Requester: House Resources
Component No.:

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous	200.0					
TOTAL OPERATING	**200.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other-CIP Receipts-1061	200.0					
TOTAL	**200.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Legislative Finance Division
Phone 465-3795
Division
Date/Time 4/2/02 8:36 AM
Approved by:
Date 4/2/2002
Agency

(Revised 9/2001 OMB)

22-LS0965\C
Cook
3/27/02

CS FOR SENATE BILL NO. 219( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATOR HALFORD

A BILL

FOR AN ACT ENTITLED

"An Act establishing and relating to the Joint Federal and State Navigable Waters Commission for Alaska; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATE POLICY. The legislature determines that the efficient and orderly development of the state will be better achieved if the state and the federal governments join together in a carefully coordinated approach to land and water use planning and management. The legislature recognizes that, although the state is the primary trustee of public trust resources, it is in the best interest of the citizens if the state and federal governments, as designated stewards of these resources, cooperate to the maximum extent possible in determining their uses. The state is particularly blessed with abundant water resources that are invaluable in numerous ways to state residents and all citizens of the United States. Because of the massive numbers of navigable waterways and bodies of water in the state, the

task of resolving submerged land ownership and navigable water determinations has been painfully slow, counter-productive from an orderly resource management standpoint, and costly as the state, private landowners, and the federal government attempt to initiate long-range planning processes. For this reason, it is determined by the legislature that the State of Alaska and the United States should cooperate in establishing a joint commission to proceed efficiently and effectively to

(1) expedite the process of quieting legitimate title to the state's submerged lands;

(2) determine, to the extent possible, which bodies of water are navigable or non-navigable; and

(3) provide recommendations to the state and the federal governments concerning ways to improve the process of making water use and navigability decisions and ways to quiet title to the state's submerged lands fairly and expeditiously.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

JOINT FEDERAL AND STATE NAVIGABLE WATERS COMMISSION FOR ALASKA. (a) A Joint Federal and State Navigable Waters Commission for Alaska is established as authorized by federal law.

(b) The governor or the governor's designee and the member appointed by the President of the United States shall serve as co-chairs of the commission. The initial meeting of the commission shall be called by the co-chairs.

(c) Three state and three federal members of the commission constitute a quorum. All decisions of the commission shall require concurrence by at least three state and three federal members of the commission.

(d) A vacancy in the membership of the commission does not affect its powers. The vacancy shall be filled in the same manner in which the original appointment was made.

(e) Subject to procedures adopted by the commission, the co-chairs, in accordance with applicable state and federal laws, may

(1) appoint and fix the compensation of the commission staff and personnel as they consider necessary; and

(2) procure temporary and intermittent services.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

STATE MEMBERSHIP OF THE COMMISSION. (a) The state membership on the Joint Federal and State Navigable Waters Commission for Alaska is composed of the governor or the governor's designee, two members appointed by the governor, one member appointed by the president of the senate, and one member appointed by the speaker of the house, all of whom serve at the pleasure of the appointing authority.

(b) At least one member appointed by the governor shall be an Alaska Native.

*** Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to read:

COMPENSATION AND PER DIEM. (a) A state member of the Joint Federal and State Navigable Waters Commission for Alaska who is a state officer or employee serves without compensation in addition to that received for regular employment. Other state members of the commission receive compensation as authorized for the Board of Fisheries under AS 16.05.290.

(b) State members of the commission are entitled to per diem and travel expenses authorized by law for boards and commissions under AS 39.20.180.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DUTIES OF THE COMMISSION. The Joint Federal and State Navigable Waters Commission for Alaska shall

(1) establish a process for researching navigability determinations that affect land title;

(2) develop procedures for involving private landowners and the general public in the navigability determination process of the commission;

(3) undertake a process of navigable waters identification under criteria established in law;

(4) make recommendations to improve coordination and consultation between the state and federal governments in making water use and navigability decisions and decisions concerning title to submerged lands.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to

read:

HEARINGS. The Joint Federal and State Navigable Waters Commission for Alaska or, on the authorization of the commission, any subcommittee or member of the commission may, for the purposes of carrying out its duties, hold hearings, take testimony, receive evidence, print or otherwise reproduce and distribute all or part of commission proceedings and reports, and sit and act at those times and places as the commission, subcommittee, or members consider desirable.

*** Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INFORMATION FOR THE COMMISSION. Each agency, department, board, or commission of the state government is authorized to furnish to the Joint Federal and State Navigable Waters Commission for Alaska, upon request of a co-chair, information the commission considers necessary to carry out its functions under this Act.

*** Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REPORTS. (a) On or before January 31 of each year, the Joint Federal and State Navigable Waters Commission for Alaska shall submit to the President of the United States, the United States Congress, the governor, and the state legislature a written report describing its activities during the preceding year and its recommendations regarding its duties under sec. 5 of this Act.

(b) The commission shall submit its final comprehensive report at least 10 days before the date the commission is terminated.

*** Sec. 9.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TERMINATION OF THE COMMISSION. The Joint Federal and State Navigable Waters Commission for Alaska is terminated two years after the effective date of this Act.

*** Sec. 10.** The uncodified law of the State of Alaska is amended by adding a new section to read:

REVISOR'S NOTIFICATION. The Attorney General shall notify the revisor of statutes of the effective date specified in sec. 11 of this Act.

*** Sec. 11.** This Act takes effect on the date that formation of a Joint Federal and State

Navigable Waters Commission for Alaska is authorized by federal law.

Alaska State Legislature
President of the Senate

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Official Business

SPONSOR STATEMENT

SENATE BILL NO. 219

ESTABLISHING A JOINT FEDERAL AND STATE NAVIGABLE WATERS COMMISSION FOR ALASKA

Senate Bill No. 219 is designed to highlight a major long-term crisis facing the state and to provide a public forum to discuss possible solutions. This legislation promotes the establishment of a Joint Federal and State Navigable Waters Commission for Alaska by creating the state portion of the Commission. The Commission will become a reality only if Congress provides the same authorization in federal law.

This Joint Commission is patterned after the Joint Federal-State Land Use Planning Commission for Alaska created in federal law within the Alaska Native Claims Settlement Act (1971). Corresponding state legislation was created in Chapter 40 early in 1972.

The purpose of this Commission is not as broad as the mission given to the Land Use Planning Commission. The Navigable Waters Commission is designed specifically to address the major water related problem facing the state – particularly the determination of navigability and the resolution of title to submerged lands within the state.

At statehood in 1959, Alaska – like all new states under the Submerged Lands Act – received title to all submerged lands underlying state navigable waters and marine waters out to three miles. Thus the issue of navigability is critical for the state to quiet title to its rightful interest in those lands.

Since statehood, the federal government has been slow to concede any navigability determinations, and therefore, Alaska has received valid title to very little submerged land. In some cases, the federal government has utilized every possible legal tactic under the Quiet Title Act to impede the state's assertion of ownership. A case in point is the quiet title action by the state of Alaska to resolve submerged lands ownership under the Black, Kandig and Nation Rivers in northeast Alaska. These three Rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska.

Despite the fact that no one contested the state's claim that these streams met the federal courts criteria for determining navigability, this case took nine years and millions of state and federal dollars to litigate, eventually resulting in the state winning two of the three cases and achieving no solution on the third. Alaska contains over 22,000 potentially

navigable rivers and well over 1,000,000 lakes that could qualify as navigable. If, however, the federal government continues to oppose every assertion of title to submerged lands by the state, final determinations of this magnitude will never be resolved in anyone's favor.

It is estimated that the state's submerged lands ownership encompasses over 60+ million acres. Unfortunately, since Alaska entered the Union, only thirteen (13) rivers have been determined to be navigable by the courts. While the Bureau of Land Management is responsible for making navigability determinations for the purpose of calculating acreage entitlements; their determinations cannot be used to clarify title. The ultimate decision of title navigability rests with the federal courts or Congress.

The schizophrenic approach taken by the government agencies in addressing navigability assertions and submerged land title since statehood has resulted in millions of acres of clouded private land titles and a process ultimately designed to fail. Preliminary discussions with the new federal administration have indicated that the time may be right to pursue innovative solutions. A more proactive stance on the part of the state could be the right stimulus at the right time.

The primary purposes of this legislation are to spotlight this dilemma facing the state, to emphasize the importance of proceeding expeditiously with resolving navigability claims, to provide a public forum for discussion and to entice Congress and the federal agencies to participate in a fair and open process. If successful, the Commission could save virtually billions of dollars in litigation costs and significantly reduce jurisdictional and title conflicts.

ALASKA STATE LEGISLATURE

CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

By: Ron Somerville, Resource Consultant
and
Ted Popely, Legal Counsel

Updated: 03/04/02

Statehood Entitlement – Submerged Lands

Alaska became a state in 1959 and under the Equal Footing Doctrine and the Submerged Lands Act inherited title to almost 60+ million acres of submerged lands. Unfortunately, since statehood, only thirteen (13) rivers have been determined to be navigable by the federal courts. Considering the fact that Alaska contains 22,000+ potentially navigable rivers and well over 1,000,000 lakes that could qualify as navigable, it could take several life-times and billions of litigation dollars before Alaska realizes its entitlement, if at all. In addition, the passage of time weakens the state's ability to provide the factual determinations necessary to prove in a federal court that a waterbody was navigable at the time of statehood.

Issues of State Ownership of Submerged Lands

Alaska faces two types of legal hurdles in establishing its entitlement to submerged lands. Its most critical problem is how to establish, in an efficient and timely manner, that the state's rivers and lakes are navigable. Alaska's second hurdle is to establish that the United States did not defeat the state's title to submerged lands within the federal reservations. The state's attempts to resolve these issues are thwarted by the extremely narrow interpretation the United States gives to the Quiet Title Act and by the lack of a non-judicial process to determine title.

The Basis of the State's Claim of Title to Submerged Lands

Alaska owns the submerged lands underlying navigable waters and marine waters seaward three miles by virtue of the equal footing doctrine and the Submerged Lands Act of 1953. The equal footing doctrine dictates that new states enter the Union with all of the powers of sovereignty and jurisdiction that pertain to the original states. When a state enters the Union, it takes title to the lands underlying navigable waters and between mean high and mean low tide as a matter of constitutional right, subject only to the paramount federal power to control the waters for navigation in interstate and foreign commerce. The Submerged Lands Act conveys lands under marine waters and also includes lands underlying inland navigable waters to confirm their automatic passage under the equal footing doctrine.

For purposes of title to submerged lands, waters are navigable when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted. Unfortunately, only a handful of waterways have been adjudged navigable

since Alaska's statehood, because of the unwillingness of the United States to settle navigability issues outside litigation, and because of the jurisdictional difficulties of litigation navigability against the United States.

Despite the equal footing doctrine and the Submerged Lands Act, the United States claims title to most or all of the state's submerged lands within the 25% of Alaska that the federal government had reserved before statehood. This issue is governed by *Utah Division of Lands v. United States*, 482 U.S. 193 (1987). Commonly referred to as the "Utah Lake" case. In Utah Lake, the court held that in order to establish that it retained title to submerged land within a reservation, the United States must establish (1) that Congress clearly intended to include submerged lands in the withdrawal, and (2) that Congress affirmatively intended to defeat the future state's title to submerged lands. In Utah Lake, the court found that the United States did not establish congress' intent to include the lake bed in the reservation, despite the fact that the purpose of the reservation was to preserve the lake for a reservoir.

Navigable Waters Jurisdictional Issues

Some federal agencies have issued regulations governing activities on navigable waters flowing through federal lands. The extent of their authority to do so is unclear. In some instances the agency may have Commerce Clause authority (e.g. promulgating regulations to implement environmental laws) but the more difficult question is the scope of an agency's authority whose mandates are not directly related to water, but are tied to land management, such as the National Forest Service, National Park Service, National Fish and Wildlife Service and Bureau of Land Management. The Court of Appeals for the Eighth Circuit has held that some agencies may regulate non-public lands under the Property Clause if the activities could negatively affect the purpose of the federal reservation. In Alaska, the more common scenario is an agency restricting public access on navigable waters within a reservation, such as requiring restrictive permits to conduct commercial activities on a waterway.

Navigability Criteria Conflicts

Where title to submerged lands is at stake, the dispositive issue is usually the navigability of the waters that overlie them. The United States Bureau of Land Management (BLM) makes navigability determinations infrequently, only for lakes less than 50 acres and rivers less than three chains (198 feet) wide, and only when it is conveying the adjacent uplands. When waterways are larger than these measurements BLM conveys the adjacent and non-submerged land without navigability determinations. Even when BLM finds a smaller waterway non-navigable, however, it maintains that the determination is relevant only to the amount of acreage it is conveying and does not reflect a federal position on title.

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

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

To resolve these navigability criteria disputes, the State has actively pursued a limited number of court cases challenging particular findings of non-navigability by the federal government. Some of the important cases are:

Gulkana River. In this case, both in the U.S. District Court and on appeal to the U.S. Court of Appeals, the federal courts rejected the federal government's restrictive interpretation of the phrase "highway of commerce" in the title navigability test. The federal district court stated that to demonstrate navigability, it is only necessary to show that the waterbody is physically capable of "the most basic form of commercial use: the transportation of people or goods." Because the Gulkana River can be used for the transportation of people or goods, the Gulkana River was found navigable. The court of appeals found that the modern use of the Gulkana River for guided hunting, fishing, and sightseeing trips is a commercial use and, since the physical characteristics of the river have not significantly changed since 1959, provides conclusive evidence that the river was susceptible of commercial use at statehood. The court also found that modern inflatable rafts can be used to establish navigability. In 1990, the U.S. Supreme Court denied the request to review and overturn the decision and, thus, the Gulkana River precedent is now binding on all future navigability determinations in Alaska.

Kandik and Nation Rivers. In this administrative appeal, the State and Doyon Limited successfully established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by trappers, as well as extensive historic and contemporary canoe use, the agency Board found the Kandik and Nation rivers navigable.

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

Difficulties Quieting Title to Submerged Lands

The State must file a Quiet Title Action in federal court to definitively resolve a dispute with the federal government regarding ownership of a navigable water body. The federal government has made it very difficult to quiet title. The Quiet Title Act provides that the United States may be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S. C. § 2409a(a). The United States has adopted a very narrow view

of the term "claims and interest," asserting that the federal court has no jurisdiction to hear quiet title actions against it unless the federal government actively and expressly asserts an interest in the lands. In the context of the submerged lands, this will occur only in rare circumstances.

While the Ninth Circuit Court of Appeals has decided that a federal non-navigability decision is a sufficient federal claim of interest to give the court jurisdiction under the Quiet Title Act, for these few waterways the State still may be unable to get a judgment, for the following reason. The State receives notice of a non-navigability determination when BLM issues a conveyance decision. Both because the State must give 180 days notice under the Quiet Title Act before filing a complaint, and because a preliminary injunction to prevent the conveyance is unavailable under the Quiet Title Act, the United States will likely convey the lands to a third party before the State can do anything to prevent it, and the State could arguably lose its cause of action against the United States.

Therefore, the State rarely has a viable cause of action to quiet title to submerged lands. The United States is in virtually the same position it was before the Quiet Title Act was passed: it controls when and how a court resolves title disputes. The exception to this general rule will be title disputes based on the issue of whether the United States defeated the State's right to submerged lands before statehood, where the United States has expressly taken a position.

The final legal determination of whether a water-body is navigable is a complex process requiring factual determinations that a waterway had been effectively used for commerce prior to statehood. In the States' litigation to quiet title to the Black, Kandik, and Nation Rivers in northeast Alaska, a panel for the Ninth Circuit Court of Appeals noted in January, 2000:

> "There is also a serious policy concern in favor of allowing resolution of disputes based on the United States' inchoate claim to everything in Alaska but what it has disclaimed. Eventually, all the witnesses will be dead, reducing the reliability of litigation. Someone who used one of these rivers in 1959 at age 20 is now 60. The population in the area was so sparse at all relevant times – probably no more than a couple of hundred people who might have used the three rivers during the relevant time, most too young to have relevant knowledge or too old to have survived the forty years since statehood – that a few deaths by old age can remove most or all the knowledgeable witnesses. Also, a state entitled as of 1959 to all the incidents of ownership in its rivers, yet still deprived of clear title forty years later, is effectively deprived of what it is entitled to under the equal footing doctrine."

In addition, the process has become incomprehensibly complicated and expensive. A case in point is the quiet title action by the State to resolve submerged lands ownership under the Black, Kandik and Nation rivers in northeast Alaska. These three rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska. Despite the fact that no one contested the State's claim that these three rivers met the federal courts criteria for determining navigability, this case took nine years and upwards of a million of state and federal dollars to litigate, eventually resulting in the State winning two of the three cases and achieving no solution on the third.

Solutions Through Federal Legislation

A. **Changes to the Quiet Title Act.** The precise issue in dispute between the state and the United States is what should require the United States to "claim an interest" so as to trigger jurisdiction under the Quiet Title Act. A provision in the Quiet Title Act that defines this phrase broadly enough to permit the state to quiet title to its submerged lands would resolve the issue. This would require a definition that makes the existence of a legal cloud on title sufficient to constitute a federal claim of interest, so that the United States' refusal to take a position as to navigability for title purposes of waters on federal lands would give the state a cause of action in federal court.

B. **Joint State/Federal Navigable Waters Commission.** In 1971, Congress and the State of Alaska respectively created a Joint Federal/State Land Use Planning Commission for Alaska to assist in the massive land-use planning process following passage of the Alaska Native Claims Settlement Act. State legislation (SB 219 and HB 266) have been introduced by Senate President Halford in the Senate and House Speaker Brian Porter in the House to create a similar State/Federal Commission for the purpose of expediting navigability determinations and providing recommendations for ways to improve the process of making water use and navigability decisions in Alaska. Specific recommendations of the Commission concerning navigability or non-navigability are required to be ratified by Congress and the State Legislature.

Examples of Navigability Complexities & Additional Information

Appendix A is a copy of the State of Alaska's August 27, 1992 notice to Secretary of the Interior, Manuel Lujan, Jr. of its intent to quiet title to submerged lands described under 194 specific water-bodies in Alaska. Similarly, Appendix B contains a copy of the official notice to Secretary of the Interior Bruce Babbitt of the State's intent to quiet title to submerged lands described under an additional 9 water-bodies.

Most of the water-bodies listed in Appendix A and Appendix B have been recognized by the Bureau of Land Management as being navigable for land conveyance purposes but have maintained that this assertion is not for title purposes. Clearly, some relief by the Courts or Congress is necessary if the state is ever to receive its statehood entitlement.

Appendix C contains a copy of Senate Bill No. 219 introduced by Senate President Rick Halford on May 2, 2001. House Bill No. 266 introduced by House Speaker Brian Porter is identical.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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Appendix A

August 27, 1992

Manuel Lujan, Jr., Secretary
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Mr. Lujan:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. §2409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§1301 et seq., and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 48 U.S.C. note preceding §21.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Joanne M. Grace
Joanne M. Grace
Assistant Attorney General

JMG/sh
Attachment

cc: J. T. Tangen, Regional Solicitor, Department of Interior
Edward F. Spang, State Director, Bureau of Land Management
Niles Cesar, Area Director, Bureau of Indian Affairs
Walter Stieglitz, Regional Director, Fish and Wildlife Service
John Morehead, Regional Director, National Park Service

8/27 mailed cert return receipt

03-C5LH

Appendix A to letter of August 27, 1992.

Colville Region

Mouth of Colville River to Nuka River
Mouth of Kuna River to Chefornak

Northwest Region

Mouth of Agiapuk River to American River
Mouth of American River to Budd Creek
Mouth of Buckland River to West Fork
Mouth of Fish River to Omilak Creek
Mouth of Niukluk River to Council
Mouth of Kobuk River to Lower Kobuk Canyon
Mouth of Koyuk River to Dime Landing
Mouth of Kuzitrin River to Noxapaga River
Mouth of Noxapaga River to Turner Creek
Mouth of Noatak River to Aniuk River
Mouth of Selawik River to Kugarak River
Shaktoolik River
Throat River
Ungalik River
Mouth of Unalakleet River to Tenmile Creek

Koyukuk River Region

Mouth of Hogatza River to Hog Landing
Mouth of Koyukuk River to Bettles
Mouth of Middle Fork to Wiseman

Upper Yukon Region

Mouth of Bearpaw River to Diamond
Mouth of Beaver Creek to Victoria Creek
Birch Creek
Mouth of Black River to Boundary
Mouth of Chandalar River to North and West Forks
Mouth of Charley River to Bear Creek
Mouth of Chatanika River to Steese Highway Bridge
Christian River
Mouth of Coleen River to Lake Creek (59 miles)
Mouth of Crooked Creek to Bridge
Grass River
Mouth of Hess Creek to North and South Forks
Mouth of Hodzana River to Pitka Fork (79 miles)
Jim Lake
Mouth of Kandik River to Boundary
Mouth of Nation River to Boundary

Mouth of Porcupine River to Boundary
Ray River
Mouth of Seventymile River to Barney Creek
Mouth of Sheenjek River to Thluickohnjik Creek
Mouth of Tatonduk River to Boundary

40 Mile Area

Forty Mile River
Mouth of North Fork Forty Mile River to Kink
Mouth of South Fork Forty Mile River to Mosquito Fork

South Central Region

Mouth of Chulitna River to Tokositna River
Mouth of Kasilof River to Tustumena Lake
Mouth of Kenai River to Kenai Lake
Kenai Lake
Knik River
Lake Louise and outlet
Lake Tustumena
Mouth of Skwentna River to Portage Creek
Susitna Lake
Mouth of Susitna River to Indian River
Mouth of Talkeetna River to Chunilna Creek
Mouth of Tokositna River to Home Lake Outlet
Tyone Lake
Mouth of Tyone River to Tyone Lake
Mouth of Yentna River to confluence of its East and West Forks
Johnson River
Red River

Tanana Region

Mouth of Chena River to North Fork
Mouth of Chisana River to Scottie Creek
Mouth of Goodpasture River to Central Creek
Harding Lake
Healy Lake and outlet
Johnson River
Mouth of Kantishna River to Lake Minchumina
Lake George and outlet
Lake Mansfield and outlet
Mouth of Nabesna River to Nabesna Mine
Mouth of Nenana River to Healy River
Mouth of Salcha River to Paldo Creek
Mouth of Tanana River to Nabesna and Chisana Rivers
Mouth of Teklanik River to near Comma Lake
Mouth of Tetlin River to Tetlin Lake
Mouth of Tolovana River to West Fork
Mouth of Wood River to Fish Creek

Middle Yukon River

Mouth of Innoko River to Cripple Creek
Mouth of Iditarod River to Iditarod
Khotol River
Little Melozitna River
Melozitna River
Mouth of Nowitna River and Sulstna Rivers to Tamarack Creek
Tozitna River

Lower Yukon Region

Anvik River
Bonasila River
Kotlik River
Nulato River
Pastolik River

Kuskokwim River Region

Mouth of Aniak River to Salmon River
Mouth of Big River to Otter Creek
Mouth of Chukowan River to Gemuk River
Crooked Creek
Mouth of East Fork Kuskokwim River to Slow Fork and Tonzona River
Mouth of Gemuk River to Beaver Creek
Mouth of George River to Julian Creek
Mouth of Holitna River to Chukowan River
Hoholitna River
Mouth of Johnson River from Mud Creek Portage to Crooked Creek
Mouth of Johnson River to Nunapitchuk and Atmautluak
Kisaralik River
Mouth of Kuguklik River to Kipnuk
Kulik Lake
Mouth of Kuskokwim River to North Fork
Little Tonzona River
Mouth of Middle Fork and Big River to Salmon River
Mouth of Middle Fork Kuskokwim River to Pitka Fork
Mouth of Nixon Fork to its West Fork
Mouth of North Fork Kuskokwim to Lake Minchumina Portage
Mouth of South Fork Kuskokwim River to Tatina River
Mouth of Stoney River to Lime Village
Mouth of Swift Fork to Highpower Creek
Mouth of Tokotna River to Fourth of July Creek
Mouth of Talbiksok River to Yukon-Kuskokwim Portage
Mouth of Tuluksak River to Upper Land
Whitefish Lake and outlet

Bristol Bay Region

Alec River chignik
Aniakchak River chignik

Black Lake Chignik
Mouth of Chignik River to Black Lake chignik
Chikuminuk Lake
Chilikadrotna River
Chulitna River
Clark River
Mouth of Copper River to Falls
Dago Creek - Ugashik
Dog Salmon River Ugashik
Eek River
Egegik River and Becharof Lake Naknek
Gibralter Lake and outlet
Mouth of Goodnews River to Watlamuse Creek
Mouth of Igushik River to Amanka Lake
Illiamna Lake
Mouth of Illiamna River to Forks
Mouth of Kanektok River to Kagati Lake
Kakhonak Lake
Mouth of King Salmon River to Olds Creek Ugashik
Mouth of Kvichak River to Illiamna Lake
Lake Aleknagik
Lake Chavekuktuli
Lake Clark
Lake Beverly
Lake Kulik Mt. Katmai
Lake Nerka
Lower Pike Lake and outlet Ugashik
Kokwok River
Koktuli River
Muklung River
Mouth of Mulchatna River to Summit Creek
Mouth of Naknek River to Naknek Lake Naknek/Mt. Katmai
Negukthlik River
Newhalen River
Nishlik Lake
Mouth of Nushagak River to New Stuyahok
Mouth of Nuyakuk River to Nuyakuk Lake
Ongoke River
Osviak River
Quigmy River
Pile River
Ruth Lake and outlet Ugashik
Mouth of Smelt Creek to Smelt Lake Naknek
Mouth of Snake River to Nunavaugaluk Lake
Stuyahok River
Tazmina River
Mouth of Togiak River to Togiak Lake
Tunulk River
Ualik Lake
Mouth of Ugashik River to Lower and Upper Ugashik Lakes Ugashik
Upnuk Lake
Weary River

Mouth of Wood River to Lake Aleknagik

Copper River Region

Mouth of Bering River to near Bering Lake
Mouth of Chitna River to Tana River
Mouth of Copper River to Batzulnetas (above Slana)
Crosswind Lake
Mouth of Eyak River and Eyak Lake
Mouth of Klutina River to Klutina Lake
Lowe River
Miles Lake and outlet
Nelchina River
- Tasnuna River
- Mouth of Tazlina River to Tazlina Lake

Southeast Region

Chilkat River
Chilkoot River
Stikine River

Kodiak Island and Shelikof Straight Region

Afognak Lake
Mouth of Afognak River to the remains of the Bridge
Akalura and Red Lakes
Mouth of Aniakchak River to Albert Johnson Creek
Karluk Lake
Mouth of Karluk River to Karluk Lake

Statewide Region

Yukon River

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

Appendix B

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 451-2811
FAX: (907) 451-2846

P.O. BOX 110300-DIMOND COURT HOU
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-6735

December 17, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Bruce Babbitt
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Mr. Babbitt:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. § 2409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§ 1301 *et seq.*, and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 48 U.S.C. note preceding §21.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Joanne M. Grace
Joanne M. Grace
Assistant Attorney General

Attachment

cc: Laurie Adams, Regional Solicitor, Department of Interior
Tom Allen, State Director, Bureau of Land Management
Niles Cesar, Area Director, Bureau of Indian Affairs
David B. Allen, Regional Director, Fish and Wildlife Service
Robert Barbee, Regional Director, National Park Service

03-C5LH

APPENDIX A

Copper River Region
Copper River

Northern Region
Kuk River
Meade River
Kukpowruk River

Bristol Bay Region
Arolik River
Kanektok River
Kisaralik River
Goodnews River
Togiak River

201 F.3d 1154
00 Cal. Daily Op. Serv. 699, 2000 Daily Journal D.A.R. 1087
(Cite as: 201 F.3d 1154)

State of ALASKA, Plaintiff-Appellee,

v.

UNITED STATES of America; Bruce Babbitt, Secretary of the Interior; Tom Allen, Alaska State Director, Bureau of Land Management; Robert Barbee, Field Director, Alaska Field Office, National Park Service, and David Allen, Alaska Regional Director, United States Fish and Wildlife Service, Defendants-Appellants.

No. 96-36041.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 2, 1997

Filed Jan. 28, 2000

State of Alaska brought action against United States to quiet title to three riverbeds. The United States District Court for the District of Alaska, James K. Singleton, Chief District Judge, entered judgment on the pleadings quieting title in State based on navigability at statehood. United States appealed. The Court of Appeals, Kleinfeld, Circuit Judge, held that: (1) District Court had jurisdiction over State's claims with respect to Kandik and Nation riverbeds, inasmuch as United States claimed interest in them, and (2) District Court lacked jurisdiction over State's claims with respect to Black riverbed, inasmuch as United States did not claim interest in it.

Affirmed in part; reversed and remanded in part.

[1] FEDERAL COURTS k776
170Bk776
A dismissal on the pleadings is reviewed de novo.

[2] NAVIGABLE WATERS k36(7)
270k36(7)
United States "claimed an interest" in Kandik and Nation riverbeds within meaning of Quiet Title Act, and district court thus had jurisdiction over State of Alaska's action to quiet title to riverbeds, where Bureau of Land Management (BLM) had taken position before Alaska Native Claims Appeal Board that Kandik and Nation Rivers were not navigable at statehood and thus belonged to United States, United States refused in present action to file disclaimer because it wanted to retain power to assert future claim, and United States pleaded that it did not consider itself bound by its sometime position that rivers were navigable. 28 U.S.C.A. § 2409a(a).
See publication Words and Phrases for other judicial constructions and definitions.

[3] UNITED STATES k125(6)
393k125(6)
The Quiet Title Act must be construed strictly because it waives sovereign immunity. 28 U.S.C.A. § 2409a.

[4] QUIETING TITLE k18.1
318k18.1
In enacting the Quiet Title Act, Congress had the purpose of furnishing a means by which state governments could remove clouds on their title created by federal assertions of claims. 28 U.S.C.A. § 2409a.

[5] QUIETING TITLE k7(1)
318k7(1)
Once the United States has formally asserted a claim to an interest in land, a state government is entitled to treat the land as "real property in which the United States claims an interest" subject to Quiet Title Act, regardless of whether the United States has ceased actively to assert its claim. 28 U.S.C.A. § 2409a(a).

[6] FEDERAL COURTS k624
170Bk624
Court of Appeals would not consider for first time on appeal issue whether district court should have permitted United States to amend its answer in quiet title action to respond to State of Alaska's averment that rivers were navigable at statehood, and that State thus had title to riverbeds, inasmuch as review was not necessary to prevent miscarriage of justice or to preserve integrity of judicial process; United States had taken positions on both sides of the proposition and had obdurately refused to answer averment of navigability. 28 U.S.C.A. § 2409a.

[7] FEDERAL COURTS k624
170Bk624
Where a party does not ask the district court for leave to amend a complaint, a request on appeal to remand with instructions to permit amendment comes too late.

[8] NAVIGABLE WATERS k36(7)
270k36(7)
United States did not "claim an interest" in Black riverbed within meaning of Quiet Title Act, and district court thus lacked jurisdiction over State of Alaska's action to quiet title to riverbed, even though United States had expressly reserved right to assert that Black River was not navigable at statehood and that United States thus had title to it, where United States had never expressly asserted claim to riverbed; reservation of rights was not to revert to position previously held but to adopt position never previously taken. 28 U.S.C.A. § 2409a(a).
See publication Words and Phrases for other judicial constructions and definitions.

[9] UNITED STATES k125(22)
393k125(22)
A colorable claim that land is Indian trust or restricted land defeats Quiet Title Act jurisdiction,

but a claim that is not even colorable does not. 28 U.S.C.A. § 2409a(a).

[10] NAVIGABLE WATERS k36(7)
270k36(7)
Judgment quieting title in navigable rivers in State of Alaska would not be amended to exclude Indian lands from its scope pursuant to Quiet Title Act's prohibition against suits to quiet title with respect to Indian lands, inasmuch as riverbeds of Alaska navigable rivers could not contain Indian lands; such lands were held in trust for Alaska by United States prior to statehood and passed to Alaska on statehood, Alaska Native Allotment Act did not reserve title to submerged lands for future allotment awards, and lands granted as Native allotments excluded lands under navigable waters. 28 U.S.C.A. § 2409a.

*1156 Jeffrey C. Dobbins, Department of Justice, Washington, DC, for the defendants-appellants.

Joanne Grace, Assistant Attorney General, Anchorage, Alaska, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Alaska James K. Singleton, Chief District Judge, Presiding

Before: REAVLEY, [FN1] BOOCHEVER and KLEINFELD, Circuit Judges.

FN1. The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the 5th Circuit, visiting judge.

KLEINFELD, Circuit Judge:

This case involves a dispute between a state government and the federal government over title to the beds of three rivers. The issues arise under the Quiet Title Act.

FACTS

Judgment was on the pleadings, under Federal Rule of Civil Procedure 12(c), so we take the facts as pleaded.

Three remote Alaskan rivers are at issue, the Kandik, Nation and Black. They are about 200 miles east and a little north of Fairbanks, Alaska, near the border with the Yukon Territory. Alaska was admitted to the Union as a state on January 3, 1959. Navigability as of that date determines which government owns the riverbed. If the river was navigable at statehood, then the state owns the bed; if not, the federal government owns it. It is undisputed that when the Union was created, each of the thirteen original states retained title to the lands covered by navigable waters, and that under the "equal footing doctrine" each new state succeeds upon statehood to the federal interest in these lands. The Submerged Lands Act gave Alaska title to the beds of navigable rivers on January 3, 1959. [FN2]

FN2. 43 U.S.C. §§ 1301-1315; State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th

Cir.1989).

The State of Alaska pleads that the three rivers were navigable at statehood. The United States does not deny the fact. That would be the end of the case, but for the intricacies of the Quiet Title Act. [FN3] Under that statute, as is explained in more detail below, the federal government takes the position that its sovereign immunity ***1157** shields it from the state government's claims until the federal government itself makes a claim. Because Alaska is very large, much of it is wilderness, and there are innumerable waters, the federal government has not had time yet to determine what claims it wishes to make. Therefore, the state government must wait until the federal government makes a claim, if it ever does, before settling whether it has title.

FN3. 28 U.S.C. § 2409a.

The Kandik and Nation Rivers

Alaska pleads that the United States has asserted claims to two of the three rivers. The context was a dispute with a native corporation after the Alaska Native Claims Settlement Act was passed. That act provided that Alaska Native regional groupings and villages were to establish corporations, which would receive about $1 billion in cash and forty million acres in land. [FN4] Their land selections were limited to those lands not already owned by someone else, such as the State of Alaska.

FN4. 43 U.S.C. § 1601 et seq.

When Doyon, Ltd., a regional corporation in Interior Alaska, made its land selections, the Bureau of Land Management ("BLM") made a decision that the Kandik and Nation Rivers were nonnavigable at statehood. Doyon did not claim the rivers. What it claimed was that the rivers were navigable at statehood, so the state owned them. Doyon's interest was in claiming navigability, so that it could get more land outside the riverbeds, and not have the riverbeds charged against its acreage entitlement. But the Bureau of Land Management claimed that the rivers were nonnavigable at statehood, so that Doyon would be stuck with them and its dry land acreage entitlement reduced accordingly.

Doyon appealed the BLM decision. The administrative law judge took extensive evidence and decided in favor of Doyon. He found that the rivers were navigable at statehood, so the state owned them, they were unavailable for selection by Doyon, and they could not count against Doyon's entitlement.

The area has temperatures varying from 70 below Fahrenheit to 90 above. Much of the time all water is frozen, but when it rains, permafrost prevents water from soaking into the soil. The streams vary a great deal, sometimes braided and nearly dry, sometimes flooding, sometimes blocked by log-jams, sometimes open and four or five feet deep. Few if any people lived in the area in the 1950's, but people did live there by hunting, fishing, trapping and trading in the 1930's, 1940's, and 1960's. The Kandik was used by a man who had a supply contact with the International Boundary Commission in 1910-1912 to pole and line two tons of supplies upstream

to the Yukon border by scow It took a month to get the supplies upstream, but only six hours to get down, because a cloudbu.st immediately before the return trip made the river high and swift. The ALJ concluded that it was likely that supplies were similarly brought up the Nation River to Hard Luck Creek.

Fur prices stimulated the heaviest trapping in the area in the 1920's, 1930's, and 1940's. During that period sternwheelers would deliver supplies at the mouths of the Nation and Kandik, and the trappers would haul them upstream by boat or canoe in the summer, or dogsled in the winter. There were two known trappers on the Kandik in the 1920's and 1930's, and both poled boats up the stream. A trapping family used a boat with an inboard motor to get supplies up the Nation. Several other trappers used boats and canoes to get supplies up the Nation and furs down (to be taken to Eagle for sale to middlemen) in the 1930's.

The ALJ found that after statehood, the Kandik and Nation became popular recreational streams. This popularity was measured by Alaska standards, with at least two parties on the Kandik in 1978, when the evidence was taken, and three parties in one day on the Nation.

*1158 The ALJ made a finding of fact that both rivers, the Kandik and Nation, were "navigable all the way from the Yukon River to the Canadian border." He expressly determined that the test was navigability for purposes of title in the State of Alaska; navigability in each river's natural condition at the time Alaska obtained statehood. Because there were (and are) no roads in the area, people bringing supplies upstream or furs and game downstream could hardly put their canoes on car-tops and drive them from one good channel to another; they had to get them from the mouth to their cabins, and the cabins to the mouth, dealing with shallows by such means as poling and lining. Although a decline in fur prices had caused all activity on the rivers to cease as of the time of statehood, their use before and after showed that they remained navigable. That the rivers were frozen for seven months of the year did not defeat navigability, because the rivers were the only means of ground transport (as opposed to bush planes) between breakup and freezeup.

The BLM, having lost on its claim of nonnavigability before the ALJ, filed exceptions, maintaining its position of nonnavigability which would cause the riverbeds to be charged against Doyon's entitlement. The Alaska Native Claims Appeal Board adopted the ALJ's findings, conclusions and recommended decision. [FN5] The BLM took exception on the basis that use by a few trappers was not enough to establish historical navigability. The Appeal Board held that because there were no settlements on either river at any time, that a few trappers used the rivers showed the existence rather the nonexistence of navigability. During the twenty years before fur prices dropped, 21 trappers used the Kandik, and 7 used the Nation, by the canoes, motor boats and pole boats that were regularly used to transport freight in that region, which in the Alaska wilderness was enough to establish historical navigability.

FN5. 86 Interior Dec. 692 (1979).

The Black River

As explained above, Doyon won its case establishing that the Kandik and Nation Rivers were navigable at statehood, so the rivers belonged to the State of Alaska and could not be counted against Doyon's acreage. The Bureau of Land Management had fought the case, claiming that the Kandik and Nation were nonnavigable at statehood, so belonged to the United States (and after its land selection, Doyon). After Doyon won the Kandik and Nation Rivers case, the BLM had its historian prepare a study of the Black River. It is another obscure river in the exceedingly lightly populated eastern part of Interior Alaska.

The Black flows about 300 miles toward the northwest, from some mountains north of the Yukon, past an abandoned Indian village called Salmon Village, through the Yukon Flats near the presently occupied village of Chalkytsik, and into the Porcupine River about 25 miles upstream from where the Porcupine flows into the Yukon. Before the Alaska Purchase in 1867, the Hudson's Bay Company maintained an important post at Fort Yukon just below the confluence of the Porcupine and Yukon Rivers, and mapped the Black River, so probably was buying furs from trappers up the Black. The economy probably declined after the United States purchased Alaska, because the War Department compelled the Hudson's Bay Company to move its trading post up the Porcupine River to Rampart House, on the other side of the Yukon Territory border.

During the first half of the century, local Athabascans, the Tranjik Kutchin, traveled upriver in the fall in canoes for winter hunting in the headwaters, and came downriver in the spring for fishing. White trappers and prospectors explored the area beginning in the first decade of the twentieth century, and operated several trading posts from time to time along the river. Trading posts sold some supplies to *1159 the local Athabascans in exchange for furs they trapped.

After a school was built at Chalkytsik (formerly the summer fish camp known as Fishhook Village), the local Indians began settling there year round. By 1945, Chalkytsik had about 80 people, and by 1970, the population had risen to about 95 people, with 26 houses, two stores, and two churches. Pilots started flying bush planes in around 1940, and by 1970 bush planes were the usual means for trappers to bring in supplies and bring out their furs. Trapping was the main industry, but a considerable portion of village income was earned by firefighting. In the summer, when trapping and hunting are no good, the villagers made regular boat trips down the Black River and the Porcupine to Fort Yukon to visit relatives and fly out for jobs. But the river continued to be used for these purposes as well.

The BLM State Director decided in 1980 that the Black River was navigable at statehood from the Porcupine up to Wood River, based on its historian's report. Part of the river consists of dead-end sloughs and oxbow lakes during the summer, but at the request of the Village of Chalkytsik, the BLM determined that they were navigable too.

The State of Alaska's complaint pleads, and the United States admits, that the United States "does not consider itself bound" by these past determinations that all three rivers were navigable at statehood. The state claims that its inability to ascertain with finality whether the United States concedes navigability at statehood for purposes of title in the state impedes its land and water resource management and its ability to provide public information. It therefore sought a

declaratory judgment against the United States and the native regional and village corporations owning land along the rivers, Doyon and Chalkytsik, to establish that the three rivers as described above were navigable at statehood, and that the state held title to their beds.

The federal government and the Native corporations moved to dismiss. Their theory was that because the United States was not at that time asserting a claim, sovereign immunity had not been waived under the Quiet Title Act, so the court had no jurisdiction to establish that the United States' claim, if it ever chose to assert one, was invalid. The Native corporations stood to obtain title to the riverbeds, apparently in addition to the title they had already obtained to other land on the assumption that they would not receive the riverbeds, if the rivers were held to be nonnavigable at statehood.

The district judge denied the motion to dismiss. [FN6] He reasoned that "the lack of a binding determination regarding the navigability of the affected rivers leads precisely to the kind of cloud on the State's title that quiet title statutes exist to remedy," and there was a ripe controversy because the United States refused to bind itself by disclaiming an interest, and "behind the rhetoric ... there was in fact a dispute between the parties over ownership of the riverbeds." The United States refused to admit or deny the State of Alaska's averment that the three rivers were navigable at statehood, on the theory that navigability was a pure question of law. The district court held that it was a question of fact or a mixed question, so that it had to be denied or else be deemed admitted. Less abstractly, the district judge characterized the United States as "playing dog in the manger." That refers to a dog that finds food for chickens and ducks in a manger, does not eat it, but keeps the ducks and chickens out so that they cannot eat the food to which they are entitled. "When the United States casts itself in the role of dog in the manger, [it has] made a sufficient 'claim' to the grain it will not consume" for its claim to be ***1160** cognizable under the Quiet Title Act, and "we should send it on its way." Judgment was entered quieting title to the riverbeds of the three rivers in the State of Alaska based on navigability at statehood. The United States has appealed, but the Native Corporations affected have not.

> FN6. The United States filed an interlocutory appeal, before judgment was entered. It was dismissed because there was no final judgment. Alaska v. United States, 64 F.3d 1352 (9th Cir.1995).

ANALYSIS

[1] We review dismissal on the pleadings de novo. [FN7]

> FN7. McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir.1996).

I. "Claims an interest."

The Quiet Title Act allows suits against the United States to adjudicate disputed titles in real property "in which the United States claims an interest." [FN8] The United States argues that because it refused to take a position in its answer as to whether it claimed or did not claim an interest in the riverbeds, they were not land in which it "claims an interest," so the district court lacked jurisdiction.

FN8. 28 U.S.C. § 2409a(a).

[2][3] The United States' argument is that it currently makes no formal assertion of any claim to the rivers, that the final determinations in the disputes regarding Doyon's objection to counting the Kandik and Nation riverbeds against its acreage established that it had no claim as of that time, and it has not interfered with any assertion of a claim or usage by the state of the three rivers. The United States also argues that until it "claims an interest," the dispute is not ripe for purposes of Article III jurisdiction. We need not consider the Constitutional argument, because it is in this case nothing more than a restatement of the statutory argument, and the case can be resolved fully on the statutory questions. The Quiet Title Act must be construed strictly because it waives sovereign immunity, [FN9] but that is too general a point to resolve the case. There is no controlling authority closely in point, and neither side cites any, on the question of what conduct by the United States amounts to "claim[ing] an interest" for purposes of Quiet Title Act jurisdiction.

FN9. Block v. North Dakota, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983).

The United States argues as a matter of policy that we should be chary of allowing the State of Alaska to burden the federal government by requiring it to study all the waters of its expanse on pain of losing title to them. Basically it says it has to be a "dog in the manger," because the State of Alaska is too big for it to know about in any detail. This is a serious point, though in the forty years since statehood, with its enormous fleets of federal aircraft, satellite photographs, archives of aerial photographs, and large staffs of employees patrolling Alaska, the federal government has not been entirely helpless in its ability to make decisions about its interests in the state.

There is also a serious policy concern in favor of allowing resolution of disputes based on the United States' inchoate claim to everything in Alaska but what it has disclaimed. Eventually all the witnesses will be dead, reducing the reliability of litigation. Someone who used one of these rivers in 1959 at age 20 is now 60. The population in the area was so sparse at all relevant times--probably no more than a couple of hundred people who might have used the three rivers during the relevant time, most too young to have relevant knowledge or too old to have survived the forty years since statehood--that a few deaths by old age can remove most or all the knowledgeable witnesses. Also, a state entitled as of 1959 to all the incidents of ownership in its rivers, yet still deprived of clear title forty years later, is effectively deprived of what it is entitled to under the equal footing doctrine.

For the Nation and Kandik Rivers, there can be no question that the United States did in fact actively assert a claim of ownership. The Bureau of Land Management took the position in the Doyon case, before the administrative law judge and *1161 before the Alaska Native Claims Appeal Board, that the Kandik and Nation were not navigable at statehood. Its argument for why that should not satisfy the "claims an interest" requirement of the Quiet Title Act floats away when we try to get hold of it. The United States government, by its own litigators, in a formal, considered way, for the purpose of reducing the amount of dry land it had to give Native corporations, did claim an interest (which would pass to Doyon) in the riverbeds.

That the United States does not say the same thing now as then does not eliminate the cloud on the State of Alaska's title that its claim created. After all, the federal government has now taken three positions: (1) the rivers were not navigable at statehood, so we retained ownership, and now Doyon owns them so they reduce the amount of dry land Doyon can get from us; (2) the rivers were navigable at statehood, so we did not retain title and they do not count against Doyon's acreage (after the BLM lost at two levels in the administrative adjudication against Doyon); (3) we refuse to take a position on whether the rivers were navigable at statehood, so the State of Alaska cannot settle title one way or the other. These positions are not consistent, and have nothing in common except that (1) and (3) served whatever was the federal government's interest at the time. There is apparently nothing to stop the United States from taking again the position at any time in the future, that the rivers were not navigable at statehood. Its first position, against Doyon, establishes that at least one federal bureau's personnel believed that that is the correct position.

[4] By reading the statute itself and performing the traditional exercise of attributing a rational purpose to the legislature, we can attribute to Congress a purpose of furnishing a means by which state governments can remove clouds on their title created by federal assertions of claims. [FN10] The United States has claimed nonnavigability, implying federal ownership, before, and expressly reserves the freedom to assert it again. If the state cannot get Quiet Title Act jurisdiction, then the potential claim will lurk over the shoulder of state officials as they try to implement a coherent management plan for state waterways. To oppose any management initiative that differed from federal policies, the federal government could revive its claim, and thereby prevent state regulation of the affected river and destroy coherence in state policy to the extent that its program for some rivers was coordinated with its program for others. Congress expressly provided a scheme by which the state governments can quiet titles against federal claims. When the state governments were frustrated by the statute of limitations in the Quiet Title Act, Congress removed it to give states more power to quiet title against the federal government. [FN11] Congress must have meant to empower state governments to eliminate clouds on their claimed title to state lands, yet it would have accomplished very little indeed if the United States could obtain a dismissal of any state quiet title suit by adopting a litigation position of refusing to state whether it asserted a claim or not.

FN10. Longview Fibre Co., v. Rasmussen, 980 F.2d 1307, 1311 (9th Cir.1996).

FN11. P.L. 99-595, 100 Stat. 3351 (1986).

Both sides urge us to examine snippets of legislative history. Even were legislative history to be determinative, there is nothing in any of the snippets cited answering the question of just what the United States must do to "claim[ ] an interest" for purposes of Quiet Title Act jurisdiction. The United States quotes one snippet that says "claims an interest," as the statute does, as though the identical words in the legislative history somehow explain or strengthen the words in the statute. They do not.

The United States argues that because the Alaska Native Claims Appeal Board made the final

decision for the Department of the Interior, [FN12] once it decided the case *1162 against the BLM, the BLM's claim was no longer the position of the Department. That argument does not go far enough, because until the Board ruled, the BLM's position was the position of the Department. There can be no question that from the time the BLM asserted its position until the time Doyon defeated it before the Board, the Department actively and positively asserted claims on behalf of the United States to the Kandik and Nation riverbeds. And a past assertion of a claim by the Bureau of Land Management has been held to be sufficient to amount to an assertion of a claim for statute of limitations purposes. [FN13]

FN12. 43 C.F.R. § 4.1(b)(5) (1980).

FN13. See, e.g., Knapp v. United States, 636 F.2d 279, 283 (10th Cir.1980).

[5] Once the government has formally asserted a claim to an interest in land, a state government is entitled to treat the land as "real property in which the United States claims an interest" [FN14] regardless of whether the United States has ceased actively to assert its claim. Because the United States has asserted a claim, and retains authority to assert it again, the past assertion operates as a present cloud on the state's title. If the United States does elect to drop its claim, it can unilaterally destroy jurisdiction over the Quiet Title Act suit simply by filing a disclaimer. [FN15] Once it files a section (e) disclaimer pursuant to the statute, then it becomes plain that it no longer "claims an interest" for purposes of section (a). The coherent scheme of the Quiet Title Act requires the filing of a section (e) disclaimer to eliminate the title dispute arising out of the government's claim.

FN14. 28 U.S.C. § 2409(a).

FN15. 28 U.S.C. § 2409a(e).

By contrast, in the case at bar, the United States once actively claimed in litigation that it owned the riverbeds, and in this litigation when put to the test by the district court refused to file a disclaimer, because it wanted to retain the power to assert a claim in the future. Since the statute provides that the United States can destroy jurisdiction by filing a disclaimer, it would be illogical to construe it to mean that the United States can also destroy jurisdiction by filing a refusal to make a disclaimer.

Our recent decision in Leisnoi, Inc. v. United States [FN16] facilitates decision. In Leisnoi, the federal government had never at any time asserted a claim. A Native corporation sued to quiet title because a private individual had filed a lawsuit in state court asserting that the Native corporation did not properly obtain its conveyance from the United States, and that the United States should decertify the Native corporation and revoke its conveyance. In contrast to the case at bar, the United States expressly and consistently denied that it had any claim, and filed a disclaimer of interest in the Quiet Title Act lawsuit. We held that the case was properly dismissed for lack of jurisdiction, and that the district court properly refused to confirm the disclaimer because it had no jurisdiction to do so, because the government had never disputed the Native corporation's title. Although the private claimant purported to dispute the title on

behalf of the United States, at the time the Quiet Title Act lawsuit was dismissed the state court had rendered judgment against his claim and expressly removed any claim the private claimant had placed on the Native corporation's title.

FN16. Leisnoi, Inc. v. United States, 170 F.3d 1188 (9th Cir.1999).

By contrast with Leisnoi, in the case at bar the United States rather than a private party has disputed the State of Alaska's title. Nor has it clarified and dissipated any ambiguity in its previous assertion of title to the Nation and Kandik Rivers. In Leisnoi the United States attempted to file a formal disclaimer of all interest under the Quiet Title Act. [FN17] As is often true in cases filed by private citizens nominally on behalf of the United States, the private citizen's claim did not ***1163** at all represent any position that the United States had ever taken, and there was and had been no dispute at all between the United States and the defendant in the "on behalf of" lawsuit.

FN17. 28 U.S.C. § 2409a(e).

By contrast, in the case at bar, the United States itself has formally claimed that the Kandik and Nation were nonnavigable at statehood so that it retained title and the State of Alaska did not obtain title. The United States formally admitted the State of Alaska's averment that the United States "does not consider itself bound for purposes of title by the BLM's past navigability determinations." [FN18] That is, the United States pleaded that it did not consider itself bound to maintain its sometime position that the rivers were navigable. In response to the State of Alaska's averments that the Kandik, Nation and Black were navigable at statehood, the United States pleaded that these allegations of navigability "consist of conclusions of law not requiring an answer." [FN19] This was not merely an early pleading before the United States settled on its position; it was the considered position of the United States maintained to preserve what it saw as a right to elect at any time in the future to assert nonnavigability. The Supreme Court has held that navigability "involve[s] questions of law inseparable from the particular facts to which they are applied," and navigability of a particular river is, of course, a factual question." [FN20] Thus the district court was correct under Rule 8 [FN21] in treating the government's "failure to deny" the factual averments of navigability as admissions of the fact, and the express reservation of its right to change its position and assert nonnavigability as maintaining the dispute. The United States can no more refuse to answer the mixed question averment of navigability than a personal injury defendant could refuse to answer the mixed question averment that it had acted negligently. There remains a live dispute between the United States and the State of Alaska regarding whether the Nation and Kandik Rivers were navigable at statehood. That suffices for jurisdiction under subsection (a) of the statute. [FN22]

FN18. Amended complaint ¶ 30; Answer ¶ 30.

FN19. Id. ¶¶ 21, 22, 23.

FN20. United States v. Appalachian Electric Power Co., 311 U.S. 377, 404-05, 61 S.Ct. 291, 85 L.Ed. 243 (1940); see also New York State Dept. of Environmental

Conservation, 954 F.2d 56, 60 (2d Cir.1992).

FN21. Fed.R.Civ.P. 8(d).

FN22. 28 U.S.C. § 2409a(a).

[6] The United States, in its brief before us, argues that "even if the question of navigability requires an answer, the district court should have permitted the United States to amend its answer to provide one." That would be a strong argument, had the United States asked the district court for leave to amend. But it did not. Even after it lost in district court on navigability, and filed a motion for reconsideration, the United States did not seek leave to amend. The United States stuck so firmly to its contention that it did not have to answer the navigability averment, that it never asked for permission to answer the averment even after the district court decided it had to answer. Where a party never asked for permission, its argument that the "district court should have permitted" is without force.

[7] "We have permitted only narrow and discretionary exceptions to the general rule against considering issues for the first time on appeal. They are (1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process...." [FN23] In two other cases, Black and Jackson, we held that where a party did not seek leave to amend a pleading in the lower court, we would not remand with instructions to grant leave to amend. [FN24] Where a party does not ask the *1164 district court for leave to amend, "the request [on appeal] to remand with instructions to permit amendment comes too late." [FN25] This case does not fall within the exception for miscarriages of justice and preserving the integrity of the judicial process. The United States has at various times taken positions on both sides of the proposition that the Kandik and Nation Rivers were navigable at statehood. There is no injustice in holding the United States to a determination of navigability based upon its obdurate refusal to answer the averment of navigability; the United States reached the same conclusion in the determination of the Alaska Native Claims Review Board, an adjudicative organ of the Department of the Interior.

FN23. Jovanovich v. U.S., 813 F.2d 1035, 1037 (9th Cir.1987).

FN24. Black v. Payne, 591 F.2d 83, 89 (9th Cir.1979); Jackson v. American Bar Association, 538 F.2d 829, 833 (9th Cir.1976).

FN25. Jackson, 538 F.2d at 833.

The Black River

[8] The Black River is a harder case for the State of Alaska, because the federal government held off on asserting its position until after Doyon's administrative litigation was resolved as to the Nation and Kandik, and then threw in the towel without forcing Doyon through another administrative proceeding. It is plain from the record that the United States applied the administrative decision for the Kandik and Nation Rivers in deciding what its position would be on the Black River, and would probably have followed it had it come out the other way. That

cuts in favor of jurisdiction, because the state officials know that the federal government considers the Black to be like the Kandik and Nation, and if it asserts a claim on those rivers, it will most probably assert a claim on the Black. **But the United States has never, so far as the record shows, expressly asserted a claim on the Black, which cuts against jurisdiction.**

Arguably under our decision in Shultz v. Department of Army, [FN26] the United States has not done enough to make a cause of action regarding the Black River to accrue, for purposes of the statute of limitation. But it is possible that a claim is substantial enough for jurisdiction even if limitations against a private litigant has not yet begun to run. We distinguished between easement cases like Shultz and disputes over title that would give rise to possessory rights in Michel v. United States. [FN27] Also, because Congress in 1986 eliminated the Quiet Title Act statute of limitations where state governments bring the suits, the "claims an interest" language in the jurisdiction-granting subsection [FN28] has been cut loose from the jurisdiction-terminating provision barring private actions unless brought within twelve years of "the date upon which it accrued." [FN29]

> FN26. Shultz v. Department of Army, 886 F.2d 1157 (9th Cir.1989) (even building a fence, gate, and guardhouse were not enough to put a person on notice that the army claimed the right to control a right of way).
>
> FN27. Michel v. United States, 65 F.3d 130 (9th Cir.1995).
>
> FN28. 28 U.S.C. § 2409a(a).
>
> FN29. 28 U.S.C. § 2409(g).

We have held that the statute of limitations portion of the Quiet Title Act "does not require that the United States communicate its claim in clear and unambiguous terms," which argues in favor of jurisdiction, but that a cause of action does not accrue for limitations purposes "when the United States' claim is ambiguous or vague." [FN30]

> FN30. State of California v. Yuba Goldfields, Inc., 752 F.2d 393, 397(9th Cir.1985).

Our recent decision in Leisnoi [FN31] seems to us to be an insuperable barrier to jurisdiction regarding the Black River. Leisnoi holds that because subsection (a) of the Quiet Title Act requires that title be "disputed," [FN32] there must be a dispute between the United States and the plaintiff in the Quiet Title Act suit. [FN33] There has never ***1165** been a dispute between the United States and the State of Alaska over the Black River. The United States reserves the right to start a dispute, and has not disclaimed any interest. There may well be a dispute at some time, considering that the federal position on the Black simply followed the administrative determination on the Kandik and Nation, and it has taken conflicting positions on those rivers. But whatever dispute there may be, it has not yet occurred. The express federal reservation of rights is not to revert to a position previously held, as with the Kandik and Nation, but to adopt a position never previously taken.

FN31. Leisnoi, Inc. v. United States, 170 F.3d 1188 (9th Cir.1999).

FN32. 28 U.S.C. § 2409a(a).

FN33. Leisnoi, 170 F.3d at 1191-92.

This is not to say that the State of Alaska ought not to be able to sue to quiet title in the Black River. Arguably it should. Forty years after statehood, it ought to be able to manage its property knowing what is its property. And the litigation, if there is to be litigation, ought to take place while witnesses with personal knowledge are still alive to testify. The district court's concerns about the federal "dog in the manger" posture are well taken. But the statutory language as construed in Leisnoi nevertheless leaves the district court without jurisdiction to quiet title in the Black River. A title cannot be said to be "disputed" by the United States if it has never disputed it. The statute as it stands does not enable us to repair this practical problem. We are compelled to reverse the district court's judgment insofar as it spoke to the Black River, and remand the case so that the claim can be dismissed for lack of jurisdiction as to the Black River.

II. Indian lands.

The United States argues that, to the extent we affirm, the district court should be required to reword its judgment to exclude Indian lands from its scope. The Native corporations have not appealed.

The United States argues that because the Quiet Title Act does not permit suit against it to quiet title with respect to "trust or restricted Indian lands," [FN34] the district court erred in not entering a judgment excluding such lands. [FN35] The United States did not plead or otherwise allege that there are any trust or restricted Indian lands affected by the judgment, but its answer did say that "preliminary research indicates the possible presence of individual landowners or Native allotment claimants on the specified rivers."

FN34. 28 U.S.C. § 2409a(a).

FN35. Appellant's Brief, 40-41.

[9][10] A "colorable" claim that land is Indian trust or restricted land defeats Quiet Title Act jurisdiction, but a claim that is not even "colorable" does not. [FN36] There can be no Indian lands in the bed of a navigable river, because such underwater lands as a matter of law were held in trust for the state by the United States prior to statehood, and passed to the State of Alaska on statehood. [FN37] The Alaska Native Allotment Act did not reserve title to submerged lands for future allotment awards. [FN38] Lands granted as Native allotments exclude lands under navigable waters. [FN39]

FN36. State of Alaska v. Babbitt, 182 F.3d 672 (9th Cir.1999).

FN37. Montana v. United States, 450 U.S. 544, 551-52, 101 S.Ct. 1245, 67 L.Ed.2d 493

(1981); Shively v. Bowlby, 152 U.S. 1, 49, 14 S.Ct. 548, 38 L.Ed. 331 (1894); Pollard v. Hagan, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845).

FN38. 43 U.S.C. §§ 270-1, 270-3 (1970) (repealed in 1971).

FN39. In re Frank Rulland, 41 IBLA 207 (1979); In re Hermann Kroener, 124 IBLA 57, 62 (1992); State of Alaska, 119 IBLA 260, 271 (1991).

There being no colorable claim to any Indian lands in the beds of the Kandik and Nation Rivers, the district judge did not err in rejecting the United States' proposed language in the judgment.

***1166** CONCLUSION

The judgment is AFFIRMED with respect to the Kandik and Nation Rivers and REVERSED with respect to the Black River. As to the Black River, the matter is remanded to the District Court with instructions to dismiss for lack of jurisdiction.

STATE OF ALASKA

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November 19, 1996

Honorable Loren Leman
Alaska State Senate

Honorable Joe Green
Alaska House of Representatives
State Capitol
Juneau, Alaska 99801-1182

Re: Navigable Waters of Alaska

Dear Senator Leman and Representative Green:

We are writing to respond to the ten questions you posed about the state's navigable waters in your letter of April 17, 1996. The questions are reprinted below with the responses. Please do not hesitate to contact us if you would like any further information.

Question 1. Background information regarding the state's submerged lands and navigable waters jurisdictions and ownership authorities and responsibilities that are founded in statute and the constitution.

Answer: There are several general principles of states' interests in navigable waters:

A. Title: The state has title to lands underlying inland navigable waters and the territorial sea.

Alaska owns the submerged lands underlying navigable waters and between mean high and mean low tide within its boundaries by virtue of the equal footing doctrine. Under the equal footing doctrine, new states created from federal territories are admitted to the Union with all of the powers of sovereignty and jurisdiction that pertain to the original states. Upon the admission of a state to the Union, the title to lands underlying navigable waters within the state passed to the

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state as a matter of constitutional right, subject only to the paramount federal power to control the waters for navigation in interstate and foreign commerce.

Alaska owns the submerged lands from mean low tide seaward three miles by virtue of the Submerged Lands Act of 1953, 43 U.S.C. § 1301, made applicable to Alaska in section 6(m) of the Statehood Act. This land does not pass under the equal footing doctrine. The Submerged Lands Act also includes lands underlying inland navigable waters and between mean high and low tide, but this was unnecessary, because states take title to these lands automatically.

Prestatehood reservations of federal land may have some impact on state title. Despite the equal footing doctrine and the Submerged Lands Act, the United States claims title to much of the land underlying navigable waterways within the 25% of Alaska that the federal government had in reserved status at statehood. This issue is governed by the *Utah Lake* case, *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987). In *Utah Lake* the Court noted that when Congress intends to convey submerged lands in a territory to a private party, of necessity it must also intend to defeat the future State's claim to the land, but when Congress reserves land to itself, it may not also intend to defeat a future State's title to the land. 482 U.S. at 202. The Court held that even assuming that a reservation could defeat title, the United States could not show that Congress intended this result as to Utah Lake. *Id.* at 203. The Court held that the United States would have to overcome the strong presumption against such a conclusion, and establish two points with respect to the withdrawal and reservation: (1) that Congress clearly intended to include submerged lands in the withdrawal, and (2) that Congress affirmatively intended to defeat the future state's title to the submerged lands. In *Utah Lake*, the Court held that the United States did not establish that Congress had intended to include the lake bed in the reservation, despite the fact that the purpose of the reservation was to preserve the lake for a reservoir.

The upland owner holds title to lands underlying nonnavigable waters to the midpoint of the waterway.

B. The standard for determining if an inland water is navigable:

For purposes of title to submerged lands, waters are navigable in fact when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted. *United*

States v. Holt State Bank, 270 U.S. 49, 56 (1926). Because Alaska took title to all lands underlying navigable waters at statehood, to establish its title, the state must prove that a waterway fell within this definition on January 3, 1959.

C. *The Public Trust Doctrine*:

The public trust doctrine holds that title to lands under navigable waters is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The Alaska Supreme Court adopted the public trust doctrine as enunciated in *Illinois Central* in *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988)(holding that state tidelands are conveyed subject to the public trust easements for navigation, commerce, and fishery); but compare *Hayes v. A.J. Associates, Inc.* 846 P.2d 131 (Alaska 1993)(mining is not a public trust purpose).

The Alaska Constitution provides protections similar to the common law public trust doctrine. Article VIII, section 3 states that:

> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

After reviewing the public trust doctrine in *Owsichek v. State, Guide Licensing*, 763 P.2d 488 (Alaska 1988), the Alaska Supreme Court explained that "the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."

Article VIII, section 14 states:

> 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 be general law regulate and limit such access for other beneficial uses or public purposes.

Pursuant to this grant of authority, the Alaska State Legislature defined "navigable waters" very broadly, much more broadly than the federal definition of

navigable waters for title purposes:

> "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 38.05.365(12). This section defines the types of waterbodies in Alaska available for public use under Alaska statutes. The Legislature further interpreted the constitutional protections for public use of the waters in an act relating to the navigable or public waters of the state, declaring in the preamble that:

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

85 SLA chap. 82, codified as AS 38.05.128 (Under this statute obstruction or interference with passage by a member of the public on any navigable water is a class B misdemeanor). Thus, under the Alaska Constitution and this statute, any

surface waters capable of use for the public defined in AS 38.05.365(12) are available to the public, regardless of streambed ownership. Such public use is not considered a taking and is not subject to inverse condemnation action. Private ownership is subject to the public rights that are protected by the public trust. The precise scope of the public rights is undefined, however. While the public clearly has the right to 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.

D. Federal authority to regulate navigable waters.

Some federal agencies have issued regulations governing activities on navigable waters flowing through federal lands. The extent of their authority to do so is unclear. In some instances the agency may have Commerce Clause authority, e.g., in promulgating regulation to implement environmental laws. The more difficult question, however, is the scope of an agency's authority whose mandates are not directly related to water, but are tied to land management, such as the National Forest Service, the National Park Service, the Bureau of Land Management, etc. The Court of Appeals for the Eight Circuit has held that some agencies may regulate non-public lands under the Property Clause if the activities could negatively affect the purpose of the reservation (for example, a person could not shoot ducks from a navigable lake within a wilderness area where this activity was prohibited). In Alaska, the more common scenario is an agency restricting access on navigable waters within the reservation, i.e. requiring a permit to conduct commercial activity on a waterway. The extent of agency authority to restrict access depends on the authority Congress has delegated to the agency and on the impact of the activity on the land values protected by the reservation.

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

Answer: If the state believes that a waterway is navigable and that it therefore owns the underlying lands, it simply acts as the owner; it does not attempt to get a court judgment before assuming jurisdiction or undertaking any activity absent some dispute as to title. If the state determines that a court judgment to quiet title is necessary, the state may pursue such a judgment. If state title is challenged by the United States, the state must file suit under the Quiet Title Act, 28 U.S.C.

2409a. Under the Quiet Title Act, the federal district court will not have jurisdiction unless the state gives the United States 180 days notice of its intent to file suit before filing the complaint. In answering the complaint, the United States may disclaim interest in all or part of the lands described in the complaint, and the court will enter judgment quieting title in the state to these lands. Generally, the parties will hold a trial to determine the navigability of a waterway in order to establish title to disputed submerged lands, unless the United States' claim to ownership is based on something other than the issue of navigability. If, for example, the United States claims ownership by virtue of a prestatehood withdrawal, the issue may be resolved by a motion for summary judgment.

The state probably would resolve title disputes with parties other than the federal government in state court.

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

Answer:

A. Ownership conflicts: Any conflict as to ownership of submerged lands most likely is based upon one of two issues: whether the lands underlay navigable waters on January 3, 1959, or whether the United States defeated the state's title to submerged lands through a prestatehood withdrawal. See explanations of these principles under the answer to question 1 and a description of the litigation under the answer to question 4.

B. Jurisdictional conflicts: The issue of the boundaries of state and federal jurisdiction over various activities on navigable waters is not precisely clear. According to the United States Supreme Court, states take title to submerged lands at statehood because the sovereign needs to control navigation, fishing, and other commercial activity on rivers and lakes. *Utah Lake*, 482 U.S. at 195. Further, in confirming and conveying title to submerged lands in states in the Submerged Lands Act of 1953, Congress purported to grant not only title, but also the right and power to manage, administer, lease, develop, and use the submerged lands and natural resources in accordance with applicable state law. 43 U.S.C. §1301.

Nevertheless, the United States has some authority to regulate activities on navigable waters. The extent of this authority is not entirely clear and depends upon the nature of the activities. Congress has authority under the Commerce

Clause to regulate economic activity that substantially affects interstate commerce. For decades the Supreme Court interpreted this authority very broadly, but lately has demonstrated that the authority has limits. *See United States v. Lopez*, 115 S.Ct. 1624(1995)(Congress had failed to establish that regulating firearms within a school zone is within its commerce clause authority). The success of any challenge to Congress' commerce clause authority to regulate navigable waters would depend greatly on the facts, on the necessity of the regulation to keep navigable waters open for commerce, or on the impact of the regulation on interstate commerce.

The Court of Appeals for the Eighth Circuit has ruled that Congress' property clause power can extend off federal lands under certain circumstances. The cases hold that Congress' power to protect public land extends to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands. Thus, for example, in *Minnesota v. Block*, the court held that the United States had authority to prohibit the use of motorboats on waters subject to state jurisdiction within the borders of the Boundary Waters Canoe Area Wilderness. 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). Under this principle, federal agencies would have authority to regulate activities off federal lands if Congress has given them authority to promulgate regulations to promote the purposes of the reservation. The purpose of the regulations would have to have a fairly direct connection to the federal designation of the land.

Although not entirely clear, existing Ninth Circuit cases suggest that the Ninth Circuit probably would agree with the Eight Circuit ruling in *Block*. *See, e.g., US v. Lindsey*, 595 F.2d 5 (9th Cir. 1979) (upholding federal regulatory authority to prohibit camping and building fires on state-owned river beds within a National Forest in order to protect adjacent federal property from physical harm).

As to particular conflicts, the Departments of Fish and Game and Natural Resources inform the Department of Law when conflicts arise. The agencies will litigate if necessary, but look for other resolutions as well.

Question 4: The status of existing litigation.

Answer:

a. Kandik, Nation, and Black: *Alaska v. United States* (United States District Court No. A93-437 CV (JKS) (Judge Singleton); Ninth Cir. No. 94-36176

state's attorneys: Bonnie Harris; U.S.' attorney: Bruce Landon; Doyon's attorney: Nathan Bergerbest). The state filed suit in November 1993 to quiet title to three rivers in northeast Alaska. The federal government has previously determined that all three rivers, the Kandik, the Nation, and the Black, are navigable.

The United States moved to dismiss, claiming that the state had not properly established that the United States disputed title and that therefore the Court had no jurisdiction to hear the case. The Court denied this motion, agreeing that the mere possibility that the United States might own the riverbeds constituted a cloud on the state's title sufficient to trigger the waiver of sovereign immunity in the Quiet Title Act. The United States appealed the decision to the Ninth Circuit.

The Ninth Circuit ruled in favor of the state, holding that the United States did not have a right to appeal until the decision before the District Court is final, that is, until the District Court determines the underlying navigability claim. Back before the district court, the United States moved for certification for an interlocutory appeal. The court denied the motion. The United States answered the complaint, but refused to admit or deny that the relevant rivers are navigable. Consequently, the state moved for judgement on the pleadings, which the court granted. The United States has appealed the judgment to the Ninth Circuit.

b. PLO 82: *State of Alaska v. United States*, United States District Court, A87-450-CV (HRH); (State's attorney: Joanne Grace; U.S. attorney: Bruce Landon; Intervenor Arctic Slope Regional Corp. attorney: David Crosby). The state brought this action in 1987 to quiet title to the lands underlying inland navigable waters in an area withdrawn in 1943 by Public Land Order 82 (PLO 82). The United States Supreme Court has held that title to submerged lands passes to new states at statehood as a matter of constitutional grace under the equal footing doctrine. At stake in this case is title to the lands underlying the navigable waters on 48 million acres in Northern Alaska. The United States maintains that the submerged lands within PLO 82 did not pass to the state because the area was reserved at statehood (the reservation was revoked in 1960). The state argues that the United States has not overcome the strong presumption against finding that Congress intended both to reserve the submerged lands and to defeat state title to them.

Arctic Slope Regional Corporation intervened in the case because it claims an interest in the submerged lands as well. The parties completed briefing in 1993 and presented oral argument in 1994. The court issued a decision in 1996.

granting summary judgment to the state. Several months after the court issued its opinion, the United States filed a motion to dismiss the case. It argues that the state did not give proper notice before bringing its quiet title claim, and that therefore the court never had jurisdiction over the case. This motion is pending.

c. Dinkum Sands case: *United States v. Alaska*, No. 84, Original, United States Supreme Court (State's attorneys: Tom Koester, John Briscoe, Joanne Grace; U.S. attorney Mike Reed). The United States filed this case in 1979 to determine the boundary between state and federal submerged lands along the Beaufort Sea. The State counterclaimed, raising the issue of title to the submerged lands within the Boundaries of the National Petroleum Reserve and the Arctic National Wildlife Refuge. The United States Supreme Court appointed a Special Master to hear evidence and make recommendations in a report. The Master, Keith Mann, issued the report in 1996, recommending that the United States prevail on all issues except title to the submerged lands in ANWR. The parties have briefed their exceptions to the report, and the Supreme Court will hear oral argument in the Spring of 1997, and issue a decision thereafter.

d. NPRA case: *State v. United States*, U.S. District Court No. A83-343-CV (JWS)(State's attorney: Joanne Grace; U.S. attorney: Bruce Landon; Intervenor Arctic Slope Regional Corp. attorney: David Crosby). The State of Alaska filed this case in federal district court in 1983 to quiet title to the lands underlying certain navigable waters within the National Petroleum Reserve (NPRA); to enjoin disbursement of proceeds received by the United States in disposing of interests in these lands, including proceeds of certain oil and gas lease sales; and for damages. The state's claims present three issues:

(1) Did title to the lands underlying navigable waters within NPRA pass to the state at statehood?

(2) If title to the lands underlying navigable waters within NPRA passed to the state at statehood, are the waterways at issue navigable?

(3) If the state has title to lands underlying the waterways at issue, has the state been damaged and to what extent?

The case has been stayed pending a decision by the United States Supreme Court in *United States v. Alaska*, No. 84, Original, which involves the same parties and raises the same primary issue, among others. The Supreme Court's decision in

Original 84 will determine the result in this case.

e. Moose Creek case: *John Brown v. State of Alaska, Department of Natural Resources* (Alaska Superior Court no. 4FA-95-2269 CIV (Fairbanks, Judge Hodges); State's attorney: Lisa B. Nelson; appellant's attorney: none (pro se). John Brown appealed the state's denial of a mining permit to conduct work on his mining claim on Moose Creek, located in the Kantishna mining area. Because the issue of whether Moose Creek is navigable and whether the submerged lands are owned by the state is unresolved, the state denied the permit. The state withdrew an earlier navigability determination because it was based on insufficient data. Additional study and expenditure of state resources over several years would be necessary to make a navigability determination. The Fairbanks Superior Court will decide whether the state abused its discretion in withdrawing its previous navigability determination and deciding not to spend its limited time and resources on this particular creek at this time. Briefing is complete and a decision is pending.

Question 5: How many acres of tide and submerged lands exist in Alaska?

No one knows precisely the acreage of submerged lands in Alaska, but according to a rough estimation by the Department of Natural Resources, Alaska has 14 - 16 million acres of submerged lands underlying inland navigable waters and 46 million acres of land underlying tidelands and the sea out to the three-mile limit.

Question 6: Why has the state decided not to participate in the Navigability Task Force process offered by the Department of Interior?

The state did not participate in the Navigability Task Force process with the Department of Interior until the navigability program was deleted from the DNR budget by the legislature as of July 1, 1995. Without funding, the state's participation was curtailed and the Task Force ceased to exist. When approached to reestablish the Task Force in 1996, the Department of Interior sought a commitment from the state that funding would be continued past the conclusion of the fiscal year. Since the state could not make such a commitment, the Task Force has not been reinitiated.

Question 7: DNR has a centralized navigability data base. Is that data base current?

DNR has been working to keep its data base current. By its nature, it is an ongoing process, but DNR is now expanding, improving, and updating its navigability data base. It is in the process of tying it together with other databases, such as its hydrology database. This information is available to the public at DNR, and DNR is considering making some or all of the information available on the Internet.

Question 8: If the Department of Interior and the Department of Agriculture continue in their attempts to implement regulatory control over most state and private lands and navigable waters within Alaska through their proposed subsistence regulations, what strategy has been adopted to clear title and management jurisdiction over major navigable waters in Alaska? Assuming that the state's interests are best protected if we have title to submerged lands, it seem prudent to expedite that process over major systems as quickly as possible rather than wait until the inevitable conflict occurs and the state is limited in its litigation options.

Although the Ninth Circuit decision in the *Katie John* case specifies that "public lands" subject to federal subsistence regulation of fish and wildlife include *navigable* waters in which the United States has a reserved water right, the federal agencies already had asserted authority over *nonnavigable* waters flowing on federal lands. Therefore, the federal subsistence board will regulate fisheries in both navigable and nonnavigable waters within federal areas set apart for a use that requires reservation of water. According to the advance notice of rulemaking that the agencies have published, these areas include all National Parks, all National Preserves, all National Wildlife Refuges, all Wild and Scenic River Systems, the National Petroleum Reserve, Conservation and Recreation Areas, and nearly all waters within the Chugach and Tongass National Forests, totally 170-180 million acres, about half the state. In these areas, state assertion of title to the submerged lands will not affect federal authority to regulate fisheries. In other federal areas, i.e. BLM lands, the authority of the federal subsistence board is limited to nonnavigable waters. The state has no policy or plan to quiet title to the waters in these areas, because to date the federal subsistence board has not issued regulations for these areas that differ significantly from the state regulations.

Question 9: What is being done to review navigability determinations and conveyances prior to the "Gulkana" ruling?

The United States will not reconsider navigability of waterways it already has conveyed without the consent of the conveyee. The Department of Natural

has conveyed without the consent of the conveyee. The Department of Natural Resources has been attempting to negotiate consent with some Native corporations, and has been successful in one case to date.

Question 10: Explain what inter-agency process is utilized within the Administration to prioritize navigability assertions and quiet title actions.

Since the legislature funded a navigability program in the supplemental budget last spring, a group of state employees with representatives from the Departments of Fish and Game, Natural Resources, and Law have been meeting periodically. The group has identified navigable waters issues relating to title, jurisdiction and access that it considers to be priorities for the state, and is in the process of identifying particular waterways that the state could use as bases for litigating these issues.

We hope that this sufficiently answers your questions. Again, please let us know if we can provide further information.

Very truly yours,

Bruce M. Botelho
Attorney General

Frank Rue
Commissioner
Department of Fish and Game

John Shively
Commissioner
Department of Natural Resources