

SJR

27

# ALASKA STATE SENATE



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Senator Ralph Seekins  
District D

## Senate Joint Resolution 27 Sponsor Statement

### A Resolution relating to the resolution of land title disputes

Alaska holds over 20,000 rivers and more than 1,000,000 lakes considered to be potentially navigable waterways. This amounts to nearly 60,000,000 acres of submerged lands. Title to all submerged land was to be transferred to Alaska from the federal government *at statehood*. It's important to note that up until statehood this land was held in trust for the future state by the federal government. Now, more than 45 years after Alaska became a sovereign state, the federal government has yet to transfer title to these promised lands.

SJR 27 does three things:

1. It encourages the Secretary of the Interior and the Alaska congressional delegation to support and endorse the continuation of the process for recording federal disclaimers of interest for quieting title to submerged lands;
2. It requests the Alaska congressional delegation to introduce legislation in the Congress to provide for federal participation in the proposed state and federal Navigable Waters Commission for Alaska; and
3. It requests the introduction of legislation in the Congress to amend the Quiet Title Act to ensure federal cooperation in resolving submerged land title disputes.

The dilemma is clearly illustrated in the U.S. 9<sup>th</sup> Circuit Court of Appeals case *Alaska v. USA* (decision filed on January 28, 2000). Circuit Judge Andrew Kleinfeld authored the opinion of the court excerpted as follows:

*It is undisputed that when the Union [United States of America] 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.*

*Under [the Quiet Title Act] . . . the federal government takes the position that its sovereign immunity shields it from the state government's claim [to clear title to submerged lands] 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 (45 years) 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.*

In a nutshell, the federal government's preferred method for reconciling these disputes appears to be to wait the state out. When (if ever) the government decides to make a claim against state ownership, only then does Alaska have an opportunity to protect its ownership interest. This is accomplished by filing a quiet title suit against the federal government – just as it did in the case cited above relating to the Nation, Kandik and Black Rivers.

The bottom line? That which should be indisputable – that Alaska holds title to its submerged lands – has, in fact, been effectively disputed as a function of the federal government's foot dragging. Without doubt, the existing processes of resolving submerged lands title disputes are inadequate and exceptionally slow. SJR 27 seeks resolution to this extraordinarily unfair dilemma.

# FISCAL NOTE

**STATE OF ALASKA**  
**2004 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SJR 27  
 (S) Publish Date: 2/19/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Natural Resources  
 Title Submerged Land Title Disputes RDU Resource Development  
 Component RS2477 and Navigability  
 Sponsor Sen. Seekins  
 Requester Senate Resources Component No. 2226

**Expenditures/Revenues** (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2004) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

There is no fiscal impact to DNR associated with passage of a resolution.

Prepared by: Dick Mylius Phone 907-269-8532  
 Division Mining, Land & Water Date/Time 2/17/04  
 Approved by: Thomas Irwin, Commissioner Date 2/17/04  
 Agency Natural Resources

# U.S. 9th Circuit Court of Appeals

ALASKA v USA  
9636041

STATE OF ALASKA,  
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA; BRUCE  
No. 96-36041  
BABBITT, Secretary of the Interior;  
TOM ALLEN, Alaska State Director,  
D.C. No.  
Bureau of Land Management;  
CV-93-00437-JKS  
ROBERT BARBEE, Field Director,  
OPINION  
Alaska Field Office, National Park  
Service, and DAVID ALLEN, Alaska  
Regional Director, United States  
Fish and Wildlife Service,  
Defendants-Appellants.

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

Argued and Submitted  
December 2, 1997--Seattle, Washington

Filed January 28, 2000

Before: Thomas M. Reavley, I Robert Boochever and  
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

## SUMMARY

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## Real Estate/Public Lands

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a state's action under the Quiet Title Act (QTA), the federal government cannot avoid jurisdiction by refusing to admit or deny the state's allegation that it has title to a riverbed based on a prior administrative adjudication of navigability at statehood, in which the United States asserted a litigation position of non-navigability.

In a dispute with Alaska Native corporations and appellant Bureau of Land Management (BLM), Doyon, Ltd. alleged that appellee State of Alaska's Kandik and Nation Rivers were owned by the State because they were navigable when Alaska became a state in 1959. Doyon took this position because it would get more land outside the riverbeds (and not have the riverbeds charged against its federal statutory acreage entitlement) if the State owned the rivers. BLM decided that the rivers were nonnavigable at statehood. Doyon appealed.

An administrative law judge (ALJ) decided in favor of Doyon, concluding that the two rivers were navigable at statehood, so that the state owned them; that they were therefore unavailable for selection by Doyon; and that they could not count against Doyon's entitlement. The Alaska Native Claims Appeals Board upheld the ALJ's decision.

The federal government withheld asserting its position on the Black River until after Doyon's administrative litigation was resolved as to the Kandik and the Nation. The BLM then determined that the Black River was navigable at statehood, and declined to assert any claim as to the Black.

Alaska brought a declaratory action under the QTA, alleging that it owned all three riverbeds because their rivers were navigable at statehood. The federal government took the position that the district court lacked QTA jurisdiction because sovereign immunity shielded it from the State's claims until the United States itself made a claim. Alaska countered that the federal government had already asserted claims to the Kandik and the Nation in the Doyon administrative litigation.

Alaska alleged, and the federal government admitted, that the United States did not consider itself bound by the past

determinations that the three rivers were navigable at statehood. The United States refused to admit or deny the State's allegation that the three rivers were navigable at statehood. Under the QTA, its filing of a disclaimer would have destroyed jurisdiction.

The State asserted that its inability to ascertain with finality whether the United States conceded navigability at statehood for purposes of title impeded its resource management and ability to provide public information.

The federal government and aligned Native corporations moved to dismiss on the ground that QTA jurisdiction was absent because the United States was not asserting a claim, and sovereign immunity had not been waived under the statute. The Native corporations stood to obtain title to the riverbeds if the rivers were held to be nonnavigable at statehood.

The district court denied the motion to dismiss, concluding that the lack of a binding determination on the navigability of the rivers created a cloud on the State's title that the QTA could remedy, and that there was a ripe controversy because the United States had refused to bind itself by disclaiming an interest. The United States appealed.

[1] The QTA allows suits against the United States to adjudicate disputed titles in real property in which the United States claims an interest.

[2] There was 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 would be dead, reducing the reliability of litigation. Also, a state entitled as of 1959 to all the incidents of ownership in its rivers, yet still deprived of clear title 40 years later, is effectively deprived of what it was entitled to under the equal footing doctrine.

[3] For the Nation and Kandik Rivers, the United States actively asserted a claim of ownership. The BLM took the position in the Doyon case, before the ALJ and the Alaska Native Claims Appeals Board, that the Kandik and Nation were not navigable at statehood. By its own litigators, the United States did claim an interest (that would pass to Doyon) in the riverbeds.

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DOCUMENT(S)  
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ORIGINAL  
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[4] That the United States did not say the same thing now as then did not eliminate the cloud on Alaska's title that its claim created. [5] If the State could not get QTA jurisdiction, the potential claim would lurk over the shoulder of state officials as they tried 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.

[6] 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, regardless of whether the United States has ceased to actively assert its claim. Because the United States had asserted a claim, and retained authority to assert it again, the past assertion operated as a present cloud on the state's title. If the United States elected to drop its claim, it could unilaterally destroy jurisdiction over the QTA suit simply by filing a disclaimer.

[7] In this case, 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. Since the statute provides that the United States can destroy jurisdiction by filing a disclaimer, it would have been illogical to construe it to mean that the United States can also destroy jurisdiction by filing a refusal to make a disclaimer.

[8] The district court was correct 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. There remained a live dispute between the United States and Alaska regarding whether the Nation and Kandik Rivers were navigable at statehood. That sufficed for jurisdiction.

[9] The United States applied the administrative decision for the Kandik and Nation Rivers in deciding what its position would be on the Black River. That cut in favor of jurisdiction, because the state officials knew that the federal government considered the Black to be like the Kandik and the Nation, and if it asserted a claim on those rivers, it would most proba-

bly assert a claim on the Black. But the United States had never expressly asserted a claim on the Black, which cut against jurisdiction.

[10] Because the QTA requires that a title be disputed, there must be a dispute between the United States and the plaintiff in a QTA suit. There had never been a dispute between the United States and Alaska over the Black River. There may be a dispute at some time, but whatever dispute there may be, it had not yet occurred. [11] The district court was without jurisdiction to quiet title in the Black River. The court of appeals had to reverse the judgment insofar as it spoke to the Black River.

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#### COUNSEL

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

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

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#### OPINION

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 gov-

ernment 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.<sup>2</sup>

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.<sup>3</sup> Under that statute, as is explained in more detail below, the federal government takes the position that its sovereign immunity 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.

#### 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.<sup>4</sup> Their land selections were limited to those lands not already owned by someone else, such as the State of Alaska.

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 poll 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 cloudburst 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.

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 carts 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.<sup>5</sup> 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 than 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.

#### 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 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. 6 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 States 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 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.

## ANALYSIS

We review dismissal on the pleadings de novo.<sup>7</sup>

### I. "Claims an interest."

[1] 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."<sup>8</sup> 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.

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,<sup>9</sup> 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.

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 enor-

mous 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.

[2] 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.

[3] 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 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.

[4] 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.

[5] 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. 10 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. 11 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.

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,<sup>12</sup> once it decided the case 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.<sup>13</sup>

[6] 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"<sup>14</sup> 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.<sup>15</sup> 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.

[7] 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*<sup>16</sup> 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.

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.<sup>17</sup> As is often true in cases filed by private citizens nominally on behalf of the United States, the private citizen's claim did not 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.

[8] By contrast, in the case at bar, the United States itself has formally claimed that the Kandik and Nation were non-navigable 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."<sup>18</sup> 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."<sup>19</sup> 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."<sup>20</sup> Thus the district court was correct under Rule 821 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.<sup>22</sup>

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.

"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 . . . ." <sup>23</sup> 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.<sup>24</sup> Where a party does not ask the district court for leave to amend, "the request [on appeal] to remand with instructions to permit amendment comes too late."<sup>25</sup> 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 naviga-

bility 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.

#### The Black River

[9] 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*,<sup>26</sup> 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 *Schultz* and disputes over title that would give rise to possessory rights in *Michel v. United States*.<sup>27</sup> 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<sup>28</sup> has been cut loose from the jurisdiction-terminating provision barring private actions unless brought within twelve years of "the date upon which it accrued."<sup>29</sup>

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."<sup>30</sup>

[10] Our recent decision in *Leisnoi*<sup>31</sup> 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,"<sup>32</sup> there must be a dispute between the United States and the plaintiff in the Quiet Title Act suit.<sup>33</sup> There has never 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.

[11] 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,"<sup>34</sup> the district court erred in

not entering a judgment excluding such lands.<sup>35</sup> 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."

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.<sup>36</sup> 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.<sup>37</sup> The Alaska Native Allotment Act did not reserve title to submerged lands for future allotment awards.<sup>38</sup> Lands granted as Native allotments exclude lands under navigable waters.<sup>39</sup>

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.

#### 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.

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#### FOOTNOTES

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

2 43 U.S.C. SS 1301-1315; *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989).

3 28 U.S.C. S 2409a.

4 43 U.S.C. S 1601 et seq.

5 86 Interior Dec. 692 (1979).

6 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).

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

8 28 U.S.C. S 2409a(a).

9 Block v. North Dakota,  
461 U.S. 273, 287  
(1983).  
10 Longview Fibre Co., v. Rasmussen, 80 F.3d 1307, 1311 (9th Cir.  
1996).  
11 P.L. 99-595, 100 Stat. 3351 (1986).  
12 43 C.F.R. S 4 1(b)(5) (1980).  
13 See, e.g., Knapp v. United States, 636 F.2d 279, 283 (10th Cir. 1980).  
14 28 U.S.C. S 2409(a).  
15 28 U.S.C. S 2409a(e).  
16 Leisnoi, Inc. v. United States, 170 F.3d 1188 (9th Cir. 1999).  
17 28 U.S.C. S 2409a(c).  
18 Amended complaint P 30; Answer P 30.  
19 Id. PP 21, 22, 23.  
20 United States v. Appalachian Electric Power Co.,  
311 U.S. 377  
, 404-  
05 (1940); see also New York State Dept. of Environmental Conservation,  
954 F.2d 56, 60 (2d Cir. 1992).  
21 Fed. R. Civ. P. 8(d).  
22 28 U.S.C. S 2409a(a).  
23 Jovanovich v. U.S., 813 F.2d 1035, 1037 (9th Cir. 1987).  
24 Black v. Payne, 591 F.2d 83, 89 (9th Cir. 1979); Jackson v. American  
Bar Association, 538 F.2d 829, 833 (9th Cir. 1976).  
25 Jackson, 538 F.2d at 833.  
26 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).  
27 Michel v. United States, 65 F.3d 130 (9th Cir. 1995).  
28 28 U.S.C. S 2409a(a).  
29 28 U.S.C. S 2409(g).  
30 State of California v. Yuba Goldfields, Inc., 752 F.2d 393, 397(9th  
Cir. 1985).  
31 Leisnoi, Inc. v. United States, 170 F.3d 1188 (9th Cir. 1999).  
32 28 U.S.C. S 2409a(a).  
33 Leisnoi, 170 F.3d at 1191-92.  
34 28 U.S.C. S 2409a(a).  
35 Appellant's Brief, 40-41.  
36 State of Alaska v. Babbitt, 182 F.3d 672 (9th Cir. 1999).  
37 Montana v. United States,  
450 U.S. 544, 551  
-52 (1981); Shively v.  
Bowlby,  
152 U.S. 1  
, 49 (1894); Pollard's Lessess v. Hagan, 44 U.S. (3  
How.) 212 (1845).

38 43 U.S.C. SS 270-1, 270-3 (1970) (repealed in 1971).  
39 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).

# ALASKA STATE LEGISLATURE

## CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

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Updated: 02/11/04

### 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, less than 20 rivers have been determined to be navigable by the federal courts. Although BLM has made numerous navigability determinations and the Department of the Interior is presently working positively with the state to identify and issue a "Recordable Disclaimer of Interest" for navigable waterways, the process is still painfully slow. Considering the fact that Alaska contains 20,000+ 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 to establish, in an efficient and timely manner, which of the state's rivers and lakes are navigable. Alaska's second hurdle is to determine which submerged lands the United States legally withdrew prior to statehood. The state's attempts to resolve these issues are thwarted by the extremely narrow interpretation the United States gives to the federal 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 litigating 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, Nation and Black Rivers.** In this case, 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 federal courts found the Kandik and Nation rivers navigable and, due to a technical interpretation of the federal Quiet Title Act, failed to rule on the Black River. The Department of the Interior issued a "Recordable Disclaimer of Interest" for the Black River, however, in 2003.

**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.

From the standpoint of the public, the state and the federal governments both contribute to the confusion over navigability determinations. The State Policy on Navigability adopted by the Alaska Department of Natural Resources includes the following explanations:

“When information is lacking, and it must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on maps and aerial photographs. In these cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 70 feet wide) and having an average gradient over the length of the stream of no more than 50 feet per mile.”

“Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 50 feet per mile and are at least 10 miles.”

“If a lake is totally isolated, it will be included on the state’s navigability maps if it is at least 1 ½ miles long. That length insures that the lake can be used as a highway.”

“An isolated lake might need to be 2-3 miles long to be included on the state’s navigability maps.”

“...those lakes which are shown on maps and aerial photographs as having a navigable water connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size of the lake.”

#### Clouded Titles Due to Erroneous Navigability Determinations

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

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

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

In 1983, the Department of the Interior agreed that the standard rules of survey should be followed for land conveyances in Alaska. The recipients of conveyances from the federal government are charged only for the amount of public land is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams. This decision by the Department of the Interior was legislatively approved in 1988.

Despite the fact that the use of these survey procedures has eliminated many of the land conveyance problems after 1983, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are the hundreds of erroneous non-navigability decisions and the resulting submerged land conveyances made to ANCSA corporations in previous years. This issue becomes more critical as efforts are made by the federal government to establish a deadline for completing land conveyances. ANCSA corporations may be unable to replace erroneously conveyed submerged lands if the selection process had been terminated.

#### 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 Administrative Action – Recordable Disclaimer of Interest**

Following meetings with the Legislative leadership in 2002, the Department of the Interior offered to examine the possibility of using a “Recordable Disclaimer of Interest” as a means of resolving submerged lands title disputes between the state and the federal government. In 2003, the Department of the Interior issued a “Recordable Disclaimer of Interest” in the Black River located in Northeast Alaska. This River was one of three rivers in that region that the ownership of the submerged lands was not resolved through litigation.

The legislature, through Legislative Budget and Audit, has funded a special project for the Alaska Departments of Natural Resources and Fish and Game to expedite the petition process to the Department of the Interior for issuing “Recordable Disclaimers of Interest” for navigable waters and RS 2477 Rights-of-way. The major emphasis of the project has been directed at navigable waters. Some petitions are pending and others are due to be submitted early in 2004.

#### **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. The State Legislature passed a bill in 2002 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. Similar legislation was introduced in Congress by the Alaska delegation to create the federal portion of the Commission. Unfortunately, this legislation did not pass as the federal and state administrations looked for other ways to accelerate title dispute resolutions.

#### 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.

# STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. MICKEL, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200  
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FAX: (907) 276-3697

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

P.O. BOX 110200 - STATE CAPITOL  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 463-5295

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

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

Appendix A to letter of August 27, 1992.

*See index  
w/le index*

Colville Region

Mouth of Colville River to Muka River  
Mouth of Kina River to Chefarnak

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 Termile Creek

Koyukuk River Region

Mouth of Hoqatza 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 Kasilok 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 Conna 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 Atnautluak  
Kisaralik River ✓  
Mouth of Kuguklik River to Kipruk  
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  
Gibraltar 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  
Kokwak 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 Munavaugaluk Lake  
Stuyahok River  
Tazmina River  
Mouth of Togiak River to Togiak Lake  
Tunuk River  
Ualik Lake  
Mouth of Ugashik River to Lower and Upper Ugashik Lakes ugashik  
Upruk 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

Loe River

Miles Lake and outlet

Nelchina River

- Tasmuna River

- Mouth of Tazlina River to Tazlina Lake

Southeast Region

Chilkat River

Chilkoot River

Stikine River

Kodiak Island and Shelikof Straicht 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

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

TONY KNOWLES, GOVERNOR

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100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
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JUNEAU, ALASKA 99811-0330  
PHONE: (907) 465-3500  
FAX: (907) 465-6735

APPENIDIX 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

# MEMO

STATE OF ALASKA  
DEPARTMENT OF LAW  
NATURAL RESOURCES SECTION

To: Jane Anvik  
Director, Division of Lands  
Alaska Department of Natural Resources

Tina Cunning  
Coordinator, ANILCA Program  
Alaska Department of Fish and Game

From: Joanne Grace  
Assistant Attorney General  
Natural Resources Section

Re: Amendment to the Quiet Title Act

Date: May 12, 1997

This memorandum outlines the need to amend the Quiet Title Act, 28 U.S.C. § 2409a. The United States' current interpretation of the Quiet Title Act arguably renders it almost completely inapplicable to state claims of title to lands underlying navigable waterways and to RS 2477 rights-of-way.

*The change requested:* The state seeks clarification of the Quiet Title Act to indicate that a federal court has jurisdiction over claims by a state to quiet title to lands if a potential interest of the United States clouds the state's title. A "cloud" on the state's title is a possible claim or encumbrance by another that, if valid, would affect or impair the title of the state.

*Why the change is necessary:* The United States has developed an interpretation of the Quiet Title Act that may preclude the state from quieting title to its submerged lands<sup>1</sup> and RS 2477

---

<sup>1</sup> The state took title to lands underlying waters navigable-in-fact at statehood, pursuant to the Equal Footing Doctrine and the Submerged Lands Act of 1953, 43 U.S.C. §1301 et seq. Alaska has thousands of waterways that may be navigable, but the only

rights-of-way.<sup>2</sup> According to the United States' interpretation, the state may bring a quiet title action only when the United States essentially invites it to do so.

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 an 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 submerged lands, this will occur only in rare circumstances. 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 wide, and only when it is conveying the adjacent uplands. When waterways are larger than these measurements BLM conveys the 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 state disputes the United States' view, but even assuming that the state is correct and a non-navigability decision is a sufficient federal claim of interest to give the court jurisdiction under the Quiet Title Act, 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 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 arguably will lose its cause of action

---

way to definitively establish title to the submerged lands by obtaining a court judgment.

<sup>2</sup> Congress granted these rights-of-way by act of July 26, 1866, 43 U.S.C. § 932, Revised Statutes 2477. In *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961), the Alaska Supreme Court stated the general rule about acceptance of this federal grant, holding that before a highway may be created the appropriate public authorities of the state must clearly manifest an intention to accept a grant, or the public must use the right-of-way for such a period of time and under such conditions as to prove acceptance.

against the United States.

If the United States prevails in its jurisdictional theories, therefore, the state will rarely have a viable cause of action to quiet title to submerged lands. The United States will be in virtually the same position it was in before the Quiet Title Act was passed: it controls when and how a court resolves title disputes. The exceptions 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.

Similar "claims an interest" problems arise in the context of RS 2477 rights-of-way. Under the United States' interpretation of the Quiet Title Act, the court will have jurisdiction to adjudicate the state's interest only in the few cases where the United States takes an affirmative, express position that rights-of-way do not exist. The United States has a policy of refusing to take a position on the existence of these rights-of-way, however; in general it will not express any opinion about the routes, so that a state cannot establish that the United States has "claimed an interest" as the United States interprets that phrase. The only exception would be a right-of-way that the United States vigorously disputes, but in such cases the United States might sue the state and the Quiet Title Act would not be invoked at all. Again, the United States wants to be in control of which, if any, cases are filed.

*How the change could be effected:* The precise issue in dispute between the state and the United States is what exactly it means for 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 and RS 2477 rights-of-way 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 and general refusal to take a position on RS 2477 rights-of-way would give the state a cause of action in federal court.

4 thereof on issuance of process or institu-  
 6. tion of prosecution of any proceedings  
 does not exempt United States from post-  
 ing appeal bond with state court. U.S.  
 of Dept. of Air Force v. Wilhelm. Tex.Civ.  
 cy App.1977, 535 S.W.2d 498.

Involving United States

It in common or joint tenant owning  
 where the United States is one of such  
 ants, against the United States alone  
 and any other of such owners, shall  
 the same manner as would a similar

court orders a sale of the property or  
 general may bid for the same in behalf  
 United States is the purchaser, the  
 shall be paid from the Treasury upon  
 ury of the Treasury on the requisition

2.)

D STATUTORY NOTES

is similar action between private persons  
 were substituted for "shall proceed as  
 2. other cases for partition by courts of eq-  
 uity, and in making such partition the  
 court shall be governed by the same prin-  
 ciples of equity that control courts of eq-  
 uity, in partition proceedings between  
 private persons," in view of Rule 2 of the  
 Federal Rules of Civil Procedure (this ti-  
 tle).

Changes were made in phraseology.

REFERENCES

ules Civ.Proc. Rule 3, 23 USCA.  
 le 4, 23 USCA.

REFERENCES

nedly in general, see Partition § 10 et seq.  
 ure of proceedings. See C.J.S. Partition § 20

TRONIC RESEARCH

er].  
 ing the Explanation pages of this volume.  
 600

NOTES OF DECISIONS

Construction with Federal Rules of Civil  
 Procedure 1  
 Jurisdiction 2

2. Jurisdiction

This section which waives sovereign  
 immunity for partition suits in which  
 United States is a joint tenant or a tenant  
 in common does not confer subject-mat-  
 ter jurisdiction on district courts. *Prater*  
*v. U.S., C.A.5 (Ga.) 1980, 613 F.2d 157,*  
*on rehearing 613 F.2d 15J.*

1. Construction with Federal Rules of  
 Civil Procedure

Since the Federal Rules of Civil Proce-  
 dure, this title, do not themselves enlarge  
 the jurisdiction of the federal district  
 courts granted by a statute waiving sover-  
 eign immunity, changes made in this sec-  
 tion and § 1347 of this title relating to  
 partition action involving United States,  
 for express purpose of conforming the  
 wording of this section and § 1347 of this  
 title to rule 2, Federal Rules of Civil Pro-  
 cedure, this title, abolishing the procedur-  
 al distinctions between actions at law and  
 suits in equity, could not reasonably be  
 construed to have enlarged the jurisdic-  
 tion of the district courts. *Stanton v.*  
*U.S., C.A.5 (Tex.) 1970, 434 F.2d 1273.*

Statutes authorizing partition and quiet  
 title actions against United States and  
 permitting United States to be named as  
 party in actions affecting property in  
 which United States claims mortgage or  
 lien did not apply to claims seeking to  
 recover South Vietnamese assets blocked  
 under Trading with the Enemy Act  
 (TWEA), and did not provide basis for  
 subject-matter jurisdiction. *Can v. U.S.,*  
*S.D.N.Y 1993, 820 F.Supp. 106, affirmed*  
*14 F.3d 160.*

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil  
 action under this section to adjudicate <sup>may have</sup> ~~disputed~~ title to real prop-  
 erty in which the United States ~~claims~~ an interest, other than a security  
 interest or water rights. This section does not apply to trust or  
 restricted Indian lands, nor does it apply to or affect actions which  
 may be or could have been brought under sections 1346, 1347, 1491,  
 or 2410 of this title, sections 7424, 7425, or 7426 of the Internal  
 Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and  
 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or  
 control of any real property involved in any action under this section  
 pending a final judgment or decree, the conclusion of any appeal  
 therefrom, and sixty days; and if the final determination shall be  
 adverse to the United States, the United States nevertheless may  
 retain such possession or control of the real property or of any part  
 thereof as it may elect, upon payment to the person determined to be  
 entitled thereto of an amount which upon such election the district  
 court in the same action shall determine to be just compensation for  
 such possession or control.

(c) No preliminary injunction ~~shall issue~~ in any action brought  
 under this section.

(d) The complaint shall set forth with particularity the nature of  
 the right, title, or interest which the plaintiff claims in the real

property, the circumstances under, which it was acquired, and <sup>any</sup> the right, title, ~~or~~ interest <sup>or potential</sup> ~~claimed by the United States~~ <sup>that may exist.</sup>

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal

Ch. 161

claim to existing with res mined L

(k) N a State

(l) lan ed lan-

(m) lan-

(n) F lands": 2 of the

(o) any act Federal State's the lan-

(p) against (Added Pub.L. 1936. 1)

Revision 1972 - see 197 News, p

1936 No. 99- see 198 News, p

House U.S. Co 36-3.

Referen Secic referred (a) to (c Stat. 3e tied to Lands. the Coc

which it was acquired, and the United States.

all interest in the real property if at any time prior to the disclaimer is confirmed by a district court shall cease in any suit on ground other than provided by section 1346(f) of the United States under this section.

tion, except for an action brought it is commenced within the accrued. Such action shall be the plaintiff or his predecessor in title of the claim of the United States.

ned under this section by a State (including land) of the United States if used or required by the United States as determined by the head of the Federal agency which has jurisdiction over the lands involved, if the action is brought more than twelve years after the date the State received notice of the claims of the United States. If, in the absence of such use or requirement, the State is not in compliance with the provisions of section 1346(f) of the United States Code, the Federal agency is not subject to the provisions of this section.

State under this section shall not be barred unless the claimant has made substantial investments or substantial activities pursuant to the improvement, timber harvesting, wildlife habitat improvement, or other activity on the land, or the date the State received notice of the claims of the United States.

ction brought by a State under this section shall not be barred unless the claimant has made substantial investments or substantial activities pursuant to the improvement, timber harvesting, wildlife habitat improvement, or other activity on the land, or the date the State received notice of the claims of the United States.

claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

(Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176, and amended Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-593, Nov. 4, 1986, 100 Stat. 3351.)

#### HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports  
1972 Acts: House Report No. 92-1559, see 1972 U.S. Code Cong. and Adm. News, p. 4547.

1986 Acts: House Conference Report No. 99-341 and Statement by President, see 1986 U.S. Code Cong. and Adm. News, p. 4075.

House Report No. 99-924, see 1986 U.S. Code Cong. and Adm. News, p. 4441.

#### References in Text

Section 208 of the Act July 10, 1952, referred to in subsec. (a), is section 208 (4) to (d) of Act July 10, 1952, c. 651, 66 Stat. 560. Section 208 (a) to (c) is classified to section 666 of Title 43, Public Lands. Section 208(d) is not classified to the Code.

#### Amendments

1986 Amendments. Subsec. (a). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

Subsec. (c). Pub.L. 99-593, § 1(3), added subsec. (c). Former subsec. (c) was redesignated (d).

Subsecs. (d) to (f). Pub.L. 99-593, § 1(2), redesignated former subsecs. (c) to (e) as (d) to (f), respectively. Former subsec. (f) redesignated (g).

Subsec. (g). Pub.L. 99-593, § 1(2), (4), redesignated former subsec. (f) as (g) and, as so redesignated, added "except for an action brought by a State," following "under this section". Former subsec. (g) was redesignated (n).

Subsecs. (h) to (m). Pub.L. 99-593, § 1(5), added subsecs. (h) to (m).

# MEMO

STATE OF ALASKA  
DEPARTMENT OF LAW  
NATURAL RESOURCES SECTION

To: Jane Anvik  
Director, Division of Lands  
Alaska Department of Natural Resources

Tina Cunning  
Coordinator, ANILCA Program  
Alaska Department of Fish and Game

From: Joanne Grade  
Assistant Attorney General  
Natural Resources Section

Re: Amendment to the Quiet Title Act

Date: May 12, 1997

This memorandum outlines the need to amend the Quiet Title Act, 28 U.S.C. § 2409a. The United States' current interpretation of the Quiet Title Act arguably renders it almost completely inapplicable to state claims of title to lands underlying navigable waterways and to RS 2477 rights-of-way.

*The change requested:* The state seeks clarification of the Quiet Title Act to indicate that a federal court has jurisdiction over claims by a state to quiet title to lands if a potential interest of the United States clouds the state's title. A "cloud" on the state's title is a possible claim or encumbrance by another that, if valid, would affect or impair the title of the state.

*Why the change is necessary:* The United States has developed an interpretation of the Quiet Title Act that may preclude the state from quieting title to its submerged lands<sup>1</sup> and RS 2477

---

<sup>1</sup> The state took title to lands underlying waters navigable-in-fact at statehood, pursuant to the Equal Footing Doctrine and the Submerged Lands Act of 1953, 43 U.S.C. §1301 et seq. Alaska has thousands of waterways that may be navigable, but the only

rights-of-way.<sup>2</sup> According to the United States' interpretation, the state may bring a quiet title action only when the United States essentially invites it to do so.

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 an 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 submerged lands, this will occur only in rare circumstances. 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 wide, and only when it is conveying the adjacent uplands. When waterways are larger than these measurements BLM conveys the 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 state disputes the United States' view, but even assuming that the state is correct and a non-navigability decision is a sufficient federal claim of interest to give the court jurisdiction under the Quiet Title Act, 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 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 arguably will lose its cause of action

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way to definitively establish title to the submerged lands by obtaining a court judgment.

<sup>2</sup> Congress granted these rights-of-way by act of July 26, 1866, 43 U.S.C. § 932, Revised Statutes 2477. In *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961), the Alaska Supreme Court stated the general rule about acceptance of this federal grant, holding that before a highway may be created the appropriate public authorities of the state must clearly manifest an intention to accept a grant, or the public must use the right-of-way for such a period of time and under such conditions as to prove acceptance.

against the United States.

If the United States prevails in its jurisdictional theories, therefore, the state will rarely have a viable cause of action to quiet title to submerged lands. The United States will be in virtually the same position it was in before the Quiet Title Act was passed: it controls when and how a court resolves title disputes. The exceptions 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.

Similar "claims an interest" problems arise in the context of RS 2477 rights-of-way. Under the United States' interpretation of the Quiet Title Act, the court will have jurisdiction to adjudicate the state's interest only in the few cases where the United States takes an affirmative, express position that rights-of-way do not exist. The United States has a policy of refusing to take a position on the existence of these rights-of-way, however; in general it will not express any opinion about the routes, so that a state cannot establish that the United States has "claimed an interest" as the United States interprets that phrase. The only exception would be a right-of-way that the United States vigorously disputes, but in such cases the United States might sue the state and the Quiet Title Act would not be invoked at all. Again, the United States wants to be in control of which, if any, cases are filed.

*How the change could be effected:* The precise issue in dispute between the state and the United States is what exactly it means for 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 and RS 2477 rights-of-way 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 and general refusal to take a position on RS 2477 rights-of-way would give the state a cause of action in federal court.

4 thereof on issuance of process or institution of prosecution of any proceedings does not exempt United States from posting appeal bond with state court. U.S. Dept. of Air Force v. Wilhelm. Tex.Civ. App. 1977, 535 S.W.2d 498.

Involving United States

it in common or joint tenant owning where the United States is one of such owners, against the United States alone and any other of such owners, shall be in the same manner as would a similar

court orders a sale of the property or general may bid for the same in behalf of United States is the purchaser, the bid shall be paid from the Treasury upon order of the Treasury on the requisition

2.)

D STATUTORY NOTES

is similar action between private persons were substituted for "shall proceed as in other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity, in partition proceedings between private persons," in view of Rule 2 of the Federal Rules of Civil Procedure (this title).

Changes were made in phraseology.

REFERENCES

Rules Civ.Proc. Rule 3, 28 USCA. Rule 4, 28 USCA.

REFERENCES

Generally in general, see Partition § 10 et seq. of proceedings. See C.J.S. Partition § 20

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er]. See the Explanation pages of this volume. 600

NOTES OF DECISIONS

Construction with Federal Rules of Civil Procedure 1 Jurisdiction 2

2. Jurisdiction

This section which waives sovereign immunity for partition suits in which United States is a joint tenant or a tenant in common does not confer subject-matter jurisdiction on district courts. Prater v. U.S., C.A.5 (Ga.) 1980, 613 F.2d 137, on rehearing 613 F.2d 263.

1. Construction with Federal Rules of Civil Procedure

Since the Federal Rules of Civil Procedure, this title, do not themselves enlarge the jurisdiction of the federal district courts granted by a statute waiving sovereign immunity, changes made in this section and § 1347 of this title relating to partition action involving United States, for express purpose of conforming the wording of this section and § 1347 of this title to rule 2, Federal Rules of Civil Procedure, this title, abolishing the procedural distinctions between actions at law and suits in equity, could not reasonably be construed to have enlarged the jurisdiction of the district courts. Scanton v. U.S., C.A.5 (Tex.) 1970, 434 F.2d 1273.

Statutes authorizing partition and quiet title actions against United States and permitting United States to be named as party in actions affecting property in which United States claims mortgage or lien did not apply to claims seeking to recover South Vietnamese assets blocked under Trading with the Enemy Act (TWEA), and did not provide basis for subject-matter jurisdiction. Can v. U.S., S.D.N.Y. 1993, 820 F.Supp. 106, affirmed 14 F.3d 160.

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate <sup>may have</sup> ~~disputed~~ title to real property in which the United States ~~claims~~ an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction ~~shall issue~~ in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real

property, the circumstances under, which it was acquired, and the right, title, ~~or interest~~ <sup>or potential</sup> ~~claimed by~~ the United States <sup>any</sup> that may exist.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal

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which it was acquired, and in the United States.

all interest in the real property. If at any time prior to the disclaimer is confirmed by a district court shall cease until a suit on ground other than that provided by section 1346(f) of this title is filed in the United States under this section.

tion, except for an action brought, it is commenced within the time accrued. Such action shall be against the plaintiff or his predecessor in title of the claim of the United States.

ned under this section by a State (including land) of the United States, if used or required by the United States as determined by the head of the Federal agency over the lands involved, if the action is brought more than twelve years after the date the State received notice of the claims of the United States. If such use or requirement, the State is not bound by the provisions of this section if the Federal agency is not subject

State under this section, on which substantial investments or substantial activities pursuant to the improvement, timber harvesting, wildlife habitat improvement, or other use or requirement, the State is not bound by the provisions of this section if the Federal agency is not subject

tion brought by a State under this section, on which the United States or easement grantee has made substantial investments or substantial activities pursuant to the improvement, timber harvesting, wildlife habitat improvement, or other use or requirement, the State is not bound by the provisions of this section if the Federal agency is not subject

claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be—

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

(Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176, and amended Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-598, Nov. 4, 1986, 100 Stat. 3351.)

#### HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports  
1972 Acts. House Report No. 92-1559.  
See 1972 U.S. Code Cong. and Adm. News, p. 4547.

1986 Acts. House Conference Report No. 99-841 and Statement by President. See 1986 U.S. Code Cong. and Adm. News, p. 4075.

House Report No. 99-924, see 1986 U.S. Code Cong. and Adm. News, p. 4441.

#### References in Text

Section 208 of the Act July 10, 1952, referred to in subsec. (a), is section 208 (4) to (d) of Act July 10, 1952, c. 651, 66 Stat. 560. Section 208 (a) to (c) is classified to section 666 of Title 43, Public Lands. Section 208(d) is not classified to the Code.

#### Amendments

1986 Amendments. Subsec. (a). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

Subsec. (c). Pub.L. 99-598, § 1(3), added subsec. (c). Former subsec. (c) was redesignated (d).

Subsecs. (d) to (f). Pub.L. 99-598, § 1(2), redesignated former subsecs. (c) to (e) as (d) to (f), respectively. Former subsec. (f) redesignated (g).

Subsec. (g). Pub.L. 99-598, § 1(2), (4), redesignated former subsec. (f) as (g) and, as so redesignated, added "except for an action brought by a State," following "under this section". Former subsec. (g) was redesignated (n).

Subsecs. (h) to (m). Pub.L. 99-598, § 1(3), added subsecs. (h) to (m).



# LAWS OF ALASKA

2002

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Chapter No.  
71

## AN ACT

Establishing and relating to the Navigable Waters Commission for Alaska.

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

THE ACT FOLLOWS ON PAGE 1

AN ACT

1 Establishing and relating to the Navigable Waters Commission for Alaska.

2

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

5 STATE POLICY. The legislature determines that the efficient and orderly  
6 development of the state will be better achieved if the state and the federal governments join  
7 together in a carefully coordinated approach to land and water use planning and management.  
8 The legislature recognizes that, although the state is the primary trustee of public trust  
9 resources, it is in the best interest of the citizens if the state and federal governments, as  
10 designated stewards of these resources, cooperate to the maximum extent possible in  
11 determining their uses. However, the legislature also recognizes that, even without federal  
12 participation, the state must proceed to make management decisions. The state is particularly  
13 blessed with significant water resources that are invaluable in numerous ways to state  
14 residents and all citizens of the United States. With the massive numbers of navigable  
15 waterways and bodies of water in the state, the task of resolving submerged land ownership

1 and navigable water determinations has been painfully slow, counter-productive from an  
2 orderly resource management standpoint, and costly as the state, private landowners, and the  
3 federal government attempt to initiate long-range planning processes. For this reason, it is  
4 determined by the legislature that the State of Alaska and the United States should cooperate  
5 in establishing a joint state and federal commission or, if the federal government elects not to  
6 participate, a state commission must be established to proceed efficiently and effectively to

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

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

11 (3) provide recommendations to the state and the federal governments  
12 concerning ways to improve the process of making navigability determinations and ways to  
13 quiet title to the state's submerged lands fairly and expeditiously.

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

16 NAVIGABLE WATERS COMMISSION FOR ALASKA. (a) A Navigable Waters  
17 Commission for Alaska is established. If authorized by federal law, the commission shall be a  
18 joint federal and state commission.

19 (b) The governor or the governor's designee shall serve as chair of the commission. If  
20 federal participation is authorized by federal law, the member appointed by the President of  
21 the United States or the United States Secretary of the Interior shall serve as co-chair of the  
22 joint commission. The chair or co-chairs of the commission shall call meetings.

23 (c) If a joint commission is formed, four state and four federal members of the  
24 commission constitute a quorum, and all decisions of the commission require concurrence by  
25 at least four state and four federal members of the commission. Otherwise, four state  
26 members of the commission constitute a quorum, and all decisions of the commission require  
27 concurrence by at least four members.

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

30 (e) Subject to procedures adopted by the commission, the chair or co-chairs, in  
31 accordance with applicable laws, may

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

3 (2) procure temporary and intermittent services.

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

6 MEMBERSHIP OF THE COMMISSION. (a) The state membership on the  
7 Navigable Waters Commission for Alaska is composed of the governor or the governor's  
8 designee, two members appointed by the governor, two members appointed by the president  
9 of the senate, and two members appointed by the speaker of the house, all of whom serve at  
10 the pleasure of the appointing authority.

11 (b) The membership also includes individuals appointed under federal law if a joint  
12 commission is authorized.

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

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

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

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

23 DUTIES OF THE COMMISSION. The Navigable Waters Commission for Alaska  
24 shall

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

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

29 (3) undertake a process of navigable and non-navigable waters identification  
30 under criteria established in law;

31 (4) make recommendations to improve coordination and consultation between

1 the state and federal governments in making navigability determinations and decisions  
2 concerning title to submerged lands.

3 \* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to  
4 read:

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

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

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

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

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

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

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

27 TERMINATION OF THE COMMISSION. The Navigable Waters Commission for  
28 Alaska is terminated two years after the effective date of this Act.

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Search Title 43

## Sec. 1745. - Disclaimer of interest in lands

### (a) Issuance of recordable document; criteria

After consulting with any affected Federal agency, the Secretary is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines

(1)

a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or

(2)

the lands lying between the meander line shown on a plat of survey approved by the Bureau or its predecessors and the actual shoreline of a body of water are not lands of the United States; or

(3)

accreted, relicted, or avulsed lands are not lands of the United States.

### (b) Procedures applicable

No document or disclaimer shall be issued pursuant to this section unless the applicant therefor has filed with the Secretary an application in writing and notice of such application setting forth the grounds supporting such application has been published in the Federal Register at least ninety days preceding the issuance of such disclaimer and until the applicant therefor has paid to the Secretary the administrative costs of issuing the disclaimer as determined by the Secretary. All receipts shall be deposited to the then-current appropriation from which expended.

### (c) Construction as quit-claim deed from United States

Issuance of a document of disclaimer by the Secretary pursuant to the provisions of this section and regulations promulgated hereunder shall have the same effect as a quit-claim deed from the United States

[Notes](#)  
[Updates](#)  
[Parallel authorities \(CFR\)](#)  
[Topical references](#)