

SB

295

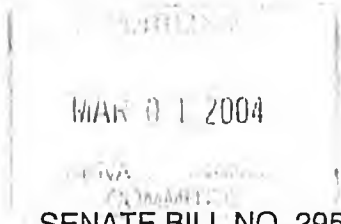
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FILE

SENATE FINANCE COMMITTEE REPORT

DATE: 2/19/04

FURTHER:



DATE TURNED IN TO OFFICE: March 1, 2004

Finance Committee considered

SENATE BILL NO. 295

SB 295 EXTEND NAVIGABLE WATERS COMMISSION

"An Act extending the termination date of the Navigable Waters Commission for Alaska; and providing for an effective date."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
House Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero.	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
DNR	2/18/04		✓		1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS ✓	DO NOT PASS	NO REC	AMEND
<i>Frank...</i>	✓			
<i>...</i>			✓	
<i>...</i>			✓	
<i>Ben Stevens</i>	✓			
COCHAIR: <i>Lyle, Green</i>	✓			
COCHAIR:				

FISCAL NOTE

MAR 9 1 2004

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 295
(S) Publish Date: 2/19/04

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
Title: Extend Navigable Waters Commission RDU: Resource Development
Sponsor: Senator Therriault Component: RS 2477/Navigability
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						
TOTAL OPERATING						

**** INDETERMINATE ****

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

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

**** INDETERMINATE ****

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)
SB 295 extends the Navigable Waters Commission for Alaska until September 18, 2006. The Commission is charged to establish a joint state/federal process for determining what waters in Alaska are navigable and are therefore, state owned. DNR assumes that a joint federal/state commission would share the costs of the Commission. This Commission has not been established on the state or federal side. In addition, there has been no funding appropriated for establishment of the state Commission.

DNR assumes that the Commission will not be established and staffed until the federal counterpart to the Commission is established. The State costs are therefore unknown and there is currently no federal legislation pending. DNR submits an indeterminate fiscal note.

Prepared by: Dick Mylius Phone 907-269-8532
Division: Mining, Land & Water Date/Time 2/18/04
Approved by: Thomas Irwin, Commissioner Date 2/18/04
Agency: Natural Resources

Alaska State Legislature

SENATOR

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Senate

Sponsor Statement SB295

Senate Bill 295: "An Act extending the termination date of the Navigable Waters Commission for Alaska; and providing for an effective date."

Sponsor: Senator Gene Therriault

Senate Bill 295 would extend the life of the Joint Federal and State Navigable Waters Commission for Alaska until 2006.

The commission's purpose is to expedite the title process to the state's submerged lands, to determine which bodies of water are navigable or non-navigable, and to recommend ways to improve the water navigability determination process and quickly clear title to the state's submerged lands. It would consist of seven federal and seven state representatives.

At statehood, Alaska was granted title to all the submerged land under the state's navigable waters and marine waters out to three miles off shore, with the exception of federal land withdrawn at statehood. But the state and federal governments have been locked in a decades-old dispute over which waters are navigable, and fewer than 20 rivers have been deemed navigable by federal courts. The ownership of more than 60 million acres is at stake.

In 2002, the Twenty-Second Alaska State Legislature passed Senate Bill 219 to authorize the state's portion of the commission. Unfortunately, the federal authorization did not pass that year, and the state's authorization is now set to expire. Senate Bill 295 will extend the sunset date for an additional two years in the hope that federal lawmakers will grant the federal authorization needed to create this commission.

Chapter 071
Chapter: CH071
Source: CSSB 219(FIN)
Action Date: June 20, 2002
Effective Date: September 18, 2002

02

AN ACT

Establishing and relating to the Navigable Waters Commission for Alaska.

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

STATE POLICY. The legislature determines that the efficient and orderly development of the state will be better achieved if the state and the federal governments join together in a carefully coordinated approach to land and water use planning and management. The legislature recognizes that, although the state is the primary trustee of public trust resources, it is in the best interest of the citizens if the state and federal governments, as designated stewards of these resources, cooperate to the maximum extent possible in determining their uses. However, the legislature also recognizes that, even without federal participation, the state must proceed to make management decisions. The state is particularly blessed with significant water resources that are invaluable in numerous ways to state residents and all citizens of the United States. With the abundance of navigable waterways and bodies of water in the state, the task of resolving submerged land ownership and title determinations has been painfully slow, counter-productive from an orderly resource management standpoint, and, mostly as the state, private landowners, and the federal government attempt to initiate long-range planning processes. For this reason, it is determined by the legislature that the State of Alaska and the United States should cooperate in establishing a joint state and federal commission or, if the federal government elects not to participate, a state commission must be established to proceed efficiently and effectively to

- (1) expedite the process of quieting legitimate title to the state's submerged lands;
- (2) determine, to the extent possible, which bodies of water are navigable or non-navigable; and
- (3) provide recommendations to the state and the federal governments concerning ways to improve the process of making navigability determinations and ways to quiet title to the state's submerged lands fairly and expeditiously.

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

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

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

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

(d) A vacancy in the membership of the commission does not affect its powers. The vacancy shall be filled in the same

manner in which the original appointment was made.

- (c) Subject to procedures adopted by the commission, the chair or co-chairs, in accordance with applicable laws, may
- (1) appoint and fix the compensation of the commission staff and personnel as they consider necessary; and
 - (2) procure temporary and intermittent service .

* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to read:
MEMBERSHIP OF THE COMMISSION. (a) The state membership on the Navigable Waters Commission for Alaska is composed of the governor or the governor's designee, two members appointed by the governor, two members appointed by the president of the senate, and two members appointed by the speaker of the house, all of whom serve at the pleasure of the appointing authority.

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

* Sec. 4. The uncodified law of the State of Alaska is amended by adding a new section to read:
COMPENSATION AND PER DIEM. (a) A state member of the Navigable Waters Commission for Alaska who is a state officer or employee serves without compensation in addition to that received for regular employment. Other state members of the commission receive compensation as authorized for the Board of Fisheries under AS 16.05.290.

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

* Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section to read:
DUTIES OF THE COMMISSION. The Navigable Waters Commission for Alaska shall

- (1) establish a process for researching navigability determinations that affect land title;
- (2) develop procedures for involving private landowners and the general public in the navigability determination process of the commission;
- (3) undertake a process of navigable and non-navigable waters identification under criteria established in law;

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

* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to read:
HEARINGS. The Navigable Waters Commission for Alaska or, on the authorization of the commission, any subcommittee or member of the commission may, for the purposes of carrying out its duties, hold hearings, take testimony, receive evidence, print or otherwise reproduce and distribute all or part of commission proceedings and reports, and sit and act at those times and places as the commission, subcommittee, or members consider desirable.

* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to read:
INFORMATION FOR THE COMMISSION. Each agency, department, board, or commission of the state government is authorized to furnish to the Navigable Waters Commission for Alaska, upon request of a chair or co-chair, information the commission considers necessary to carry out its functions under this Act.

* Sec. 8. The uncodified law of the State of Alaska is amended by adding a new section to read:
REPORTS. (a) On or before January 31 of each year, the Navigable Waters Commission for Alaska shall submit to the President of the United States, the United States Secretary of the Interior, the United States Congress, the governor, and the state legislature a written report describing its activities during the preceding year and its recommendations regarding its duties under sec. 5 of this Act.

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

* Sec. 9. The uncodified law of the State of Alaska is amended by adding a new section to read:
TERMINATION OF THE COMMISSION. The Navigable Waters Commission for Alaska is terminated two years after the effective date of this Act.

**Statement of
Abigail Kimbell
Associate Deputy Chief, National Forest System
Forest Service
United States Department Of Agriculture**

Before the

**Subcommittee on Public Lands and Forests
Committee on Energy and Natural Resources
United States Senate**

**on
July 30, 2002**

Concerning

**S. 2565 The Wild Sky Wilderness Act of 2002
S. 2587 Joint Federal and State Navigable Waters Commission for Alaska Act
S. 2612 Clark County Conservation of Public Land and Natural Resources Act of
2002
S. 2652 Florida National Forest Land Management Act of 2002
S. Con. Res. 107 Sense of Congress on the Western Governors Association
"Collaborative 10-year Strategy for Reducing Wildland Fire Risks to Communities
and the Environment."**

regulations and planning direction. It may be that some other backcountry designation would be more suitable for these acres.

Within the proposed wilderness in S. 2565, there are lands that could meet the 1964 Wilderness Act goals for preservation and protection of lands in their natural condition. To that end, the Department would like to work with the Committee to make a few adjustments. The lands that would help meet the goals of the Wilderness Act, approximately 70-75,000 acres, consist of all of the Eagle Rock Roadless Area and portions of Glacier Peak A, B, K, and L. These areas retain their undeveloped character and are largely without permanent improvements or human habitation. Limiting the wilderness designation to these lands would address many of the Department's concerns.

The areas we propose for exclusion from wilderness designation and an alternative backcountry designation include low elevation forests that have been utilized for timber harvest and mining over the last 80 years, still showing visible evidence of railroad logging and mining activities. The areas also include approximately 35 miles of existing roads, some of which are all weather, drivable, and graveled. Several of the roads receive high levels of visitor use associated with recreation opportunities. The Rapid River Road is such a travel way and we recommend its exclusion from wilderness designation. The types of recreation experiences enjoyed by users along the Rapid River Road corridor include driving for pleasure, nature photography, fishing, picnicking and dispersed camping at a number of pull-off sites along the road. In the winter snowmobiles utilize this road as a part of the snowmobile trail system, traveling to its end point.

Another concern lies with roads outside and adjacent to the proposed wilderness boundary that have narrow corridors subject to landslide. This situation poses significant public safety and resource management issues, as the close proximity of the proposed boundary could result in constraints related to necessary repairs and road reconstruction work. We would like to work with the Committee on more appropriate boundaries.

We propose the exclusion of the area encompassing approximately 2,426 acres of private fee patented mining claims and private timberlands. We also would suggest excluding the Evergreen Mountain Lookout, a widely used recreation rental cabin, from the proposed wilderness in order to continue offering this developed recreation opportunity to visitors.

A boundary adjustment would also accommodate a likely future expansion of the existing Bonneville Power Administration's (BPA) right of way. S. 2565 includes a 200-foot wilderness boundary setback from the edge of the BPA power line right-of-way. While the proposed wilderness boundary follows the power line right-of-way for only 1.5 miles, the boundary is too close to allow for additional power lines which would be required in the likely event that increased power capacity is needed for the greater Seattle area. This concern could be eliminated if the wilderness boundary was offset a minimum of 500 feet uphill from the existing right-of-way.

Further, Lake Isabel has substantial floatplane use and we would like to work with the committee to clarify intent regarding this use.

The Department is supportive of the administrative provisions in the bill, particularly provisions for a repeater site in order to provide improved communications for safety and health purposes. The Department is also supportive of the provisions for land exchange in the Glacier Peak Wilderness and provisions for management of the existing Snotel site in that wilderness.

S. 2587—Joint Federal and State Navigable Waters Commission for Alaska Act

The purposes of the bill are threefold: (1) to expedite the process of quieting title to the submerged lands

in the State of Alaska; (2) to facilitate determinations of which bodies of water in Alaska are navigable and which are not navigable; and (3) to recommend to both the Federal and State governments ways to improve the process for water use and navigability decision making.

The bill would establish a joint Commission composed of senior executives representing the highest levels of both Federal and State governments. Representatives of the President of the United States and the Governor of the State of Alaska would serve as co-chairpersons of the commission.

The Commission would make recommendations to the Secretary of the Interior and the State of Alaska regarding navigability determinations. The Commission would also focus on developing procedures to include private landowners, Native Corporations and the general public in the process. The Commission would have two years to complete its task and would then be terminated.

The issue of navigability is central to the ownership of submerged lands. Generally, title to lands underlying a navigable body of water passed to the state upon its admission to the Union, unless those lands were retained as part of a Federal reservation. Navigability is based on a factual determination as to whether the waterway was used, in the customary modes of trade and travel on water, as a highway for commerce as of the date of the States' admission to the Union.

The enactment of S. 2587 could have value in expediting determinations of navigability on fresh water rivers, lakes and streams in Alaska by establishing the Commission to help provide factual information to be considered in these determinations. However, the courts have generally rejected formula approaches to navigability determinations, opting instead to inquire into the facts of each case. The Department is concerned that the proposed Commission, during its short, two-year duration might not be capable of effectively conducting the necessary historical research to determine the factual underpinnings of navigability for thousands of waterways in remote areas of Alaska.

We are also concerned about the effect of the recommendations submitted by the Commission, and whether the courts would accept those recommendations. It is not clear that the Commission, however constituted, can achieve the bill's purposes of expediting the title adjudication processes and facilitating navigability determinations.

We have an additional concern regarding the composition of the Commission. As the bill is currently written, the Commission is composed of members who each represent an interested party. There is no requirement for any member to have expertise in any aspect of law or land management that would facilitate determinations. We believe the Committee should consider adding expertise as criteria for some of the Commission members.

In addition, OMB advises that the bill has pay-as-you-go implications because of the Commission compensation provision. An estimate has not yet been developed.

The Department is not opposed to the purpose of the bill, but would welcome the opportunity to work with the committee to address these issues so that determinations of navigability could be expedited for Alaskan waterways.

S. 2612 Clark County Conservation of Public Land and Natural Resources Act of 2002

S. 2612 is made up of several titles, only a few of which concern the Forest Service directly. Therefore, I will limit my comments to Title II and Title IV. These titles designate specified Federal lands in Nevada as wilderness and components of the National Wilderness Preservation System. S. 2612 also

ALASKA STATE LEGISLATURE

CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

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

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.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

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

August 27, 1992

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

Appendix A

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

Appendix A to letter of August 27, 1992.

*See - not
in the books*

Colville Region

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

Northwest Region

Mouth of Agiapuk River to American River
Mouth of American River to Budd Creek
Mouth of Buckland River to West Fork
Mouth of Fish River to Omilak Creek
Mouth of Niukluk River to Council
Mouth of Kobuk River to Lower Kobuk Canyon
Mouth of Koyuk River to Dime Landing
Mouth of Kuzitrin River to Noxapaga River
Mouth of Noxapaga River to Turner Creek
Mouth of Noatak River to Anluk 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 Kardik 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 Chumilna Creek
 Mouth of Tokositna River to Home Lake Outlet
 Tyone Lake
 Mouth of Tyone River to Tyone Lake
 Mouth of Yentna River to confluence of its East and West Forks
 Johnson River
 Red River

Tanana Region

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

Middle Yukon River

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

Lower Yukon Region

Anvik River
Bonasila River
Kotlik River
Nulato River
Pastolik River

Kuskokwim River Region

Mouth of Aniak River to Salmon River
Mouth of Big River to Otter Creek
Mouth of Chukowan River to Gemuk River
Crooked Creek
Mouth of East Fork Kuskokwim River to Slow Fork and Tonzona River
Mouth of Gemuk River to Beaver Creek
Mouth of George River to Julian Creek
Mouth of Holitna River to Chukowan River
Hoholitna River
Mouth of Johnson River from Mud Creek Portage to Crooked Creek
Mouth of Johnson River to Nunapitchuk and Atnautluak
Kisaratik 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 - Ugasnik
 Dog Salmon River Ugasnik
 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 Ugasnik
 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 Ugasnik
 Kokwok River
 Kuktuli 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
 Qizmy River
 Pile River
 Ruth Lake and outlet Ugasnik
 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 Ugasnik River to Lower and Upper Ugasnik Lakes Ugasnik
 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

Low 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 Strait 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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APPENDIX A

Copper River Region
Copper River

Northern Region
Kuk River
Meade River
Kukpowruk River

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

**SENATE COMMITTEE REPORT
First Committee of Referral**

DATE: 2/6/04

FURTHER: Finance

Date of 5-Day Notice: 2/12/04
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 2-19-04

Resources Committee considered SENATE BILL NO. 295

SB 295 EXTEND NAVIGABLE WATERS COMMISSION

"An Act extending the termination date of the Navigable Waters Commission for Alaska; and providing for an effective date."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
House Bill:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
DOR	7/18/04		✓		1

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:		DO PASS	DO NOT PASS	NO REC	AMEND
Seelins	<i>Seelins</i>	✓			
E. Stevens	<i>E. Stevens</i>	✓			
Wagoner	<i>Wagoner</i>	✓			
Ellon	<i>Ellon</i>			✓	
ogawa	CHAIR: <i>ogawa</i>	✓			

