

ALASKA LEGISLATURE

2729

HOUSE and SENATE FINANCE COMMITTEE FILES, 2003-2004



Alaska Outdoor Council
Alaska Fish and Wildlife Conservation Fund

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Director**
Jennifer Yuhas
Fairbanks

23 March, 2004

Representative Ralph Samuels
Chair, Legislative Budget & Audit Committee
State Capitol Building
Juneau, Alaska 99801

Dear Representative Samuels,

The Alaska Outdoor Council, on behalf of its 54 member clubs and a collective membership of nearly 12,000 Alaskans has reviewed CSSB 303 (RES). Many of our members, including members of our board of directors, have direct experience as guides, clients, and as former legislators and staff who have worked on issues related to the big game guiding industry.

We are heartened by efforts by the commercial big game guiding industry to re-establish a board to set and police professional standards for their industry. We believe a high quality corps of guides is good for hunting, and good for our resource. We see a potential problem, however, with creating a guide/outfitter board with regulatory and disciplinary authority over that profession, while at the same time leaving authority over transporters to the department. Transporters should be licensed, and face disciplinary action for unprofessional practices. However, grants of such authority to the former guide board have proven problematic and unsuccessful. Please recall that the one of the complaints against the former Big Game Commercial Services Board, and certainly one that led to its demise, was that the board was perceived as too willing to champion requests by the guiding profession to implement restrictions or roadblocks against transporters. In light of this it seems that regulation of the transporter industry should be removed from the purview of any board that oversees commercial big game guides.

The transporter question will not simply dissipate, and therefore warrants address, we believe however that should be a separate legislative effort which may or may not place transporters under the same board. Absent clear direction and limited scope of authority from the Legislature we see the proposed new Guide/Outfitter Board in danger of creating a similar subjective culture, resulting in abuses of authority against a useful and viable – albeit competing – industry. Therefore, it is our belief that the legislature should act cautiously by authorizing the guide industry to set professional standards for the guide industry alone, and that penalty and enforcement of these standards are best placed as an administrative function following board decision.

Thank you.

Sincerely,

Jennifer Yuhas, Executive Director
Alaska Outdoor Council

Frank H. Murkowski, Governor

Alaska

**Department of Community
and Economic Development**

Memorandum

TO: Sheila Peterson
(Sen. Wilken's Office)

DATE: 4/5/2004
11:00am

FROM: Rick Urion
Director of Occupational Licensing

SUBJECT: Guide Documentation

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

April 5, 2004

Big Game Guides and Transporters

The following is a run-down of areas that should be regulated to enable appropriate enforcement:

Contracts

The majority of complaints that we receive involve contractual disputes -- did the guide/transporter provide all the services that were agreed to, or did he/she not. Most of them don't do written contracts.

The guides need to enter into a written contract with their client before providing any service. *They should be subject to license discipline if they don't fulfill all the terms of the contract.* If, for any reason, the terms need to be changed (shortened hunt, etc.), an amendment should be signed off by both the guide and the client.

Weapons

If a guide/transporter commits a crime against a person involving weapons, or commits a crime involving negligent use of a firearm, he/she should be subject to discipline.

Unfitness

Laws should be in place to protect the public if a guide/transporter is unfit because of a physical or mental disability.

Impairment

Once again, for public protection purposes, laws should be in place regarding addiction to, severe dependency on, or habitual use of alcohol or other drug(s) that may impair the applicant or licensee's ability to perform safely.

Automatic suspension

An automatic license suspension (pending a hearing) should take place if it is revealed that a guide committed any of the following acts:

- a. Wanton waste.
- b. Same day airborne.
- c. Hunting during closed hunting season.
- d. Hunting in an area closed by state or federal regulation.

Transporters

It should be required that all transporters must have all federal and state licenses/permits required to transport by boat (six pack license, etc.).

The supervision of the guide's assistants needs to be addressed clearly. A guide should not be allowed to leave clients alone in the field with Assistant Guides. They don't have the experience that Guides and Class A Assistant Guides do.

Attached are some samples of complaints that we received from clients that were unhappy with the services rendered by guides.

RECEIVED

JAN 26 2004

DIVISION OF
OCCUPATIONAL LICENSING
JUNEAU

USDA
CHUGACH NATIONAL FOREST
FOREST SUPERVISOR
3301 C STREET
STE 300
ANCHORAGE, AK 99503-3998

TO WHOM IT MAY CONCERN:

THIS PAST 2003 GOAT SEASON A FRIEND AND I HAD THE OPPORTUNITY OF VACATIONING AND HUNTING IN ALASKA. WE HAD A WONDERFUL VACATION BUT A DISAPPOINTING HUNT.

THE GUIDE [REDACTED] WE SELECTED TURNED OUT TO BE VERY UNPROFESSIONAL, DECEIVING, UNDERSTAFFED AND JUST NOT A NICE PERSON.

FROM THE BEGINNING I HAD A HARD TIME FINDING AND COMMUNICATING WITH HIM ONCE HE HAD OUR DEPOSITS. HIS LACK LUSTER ATTITUDE AND UNPROFESSIONALISM COST US CLOSE TO 3K DOLLARS DUE TO LACK OF DETAIL AND DISORGANIZATION.

ON OUR HUNT WE WERE NEVER PERMITTED MORE THAN 200 YARDS AWAY FROM THE TENT. WE MADE THE DECISION (AFTER [REDACTED] CONVINCED US) TO END OUR MOUNTAIN HUNT AND HUNT OUR WAY BACK TO THE BOAT FOR BLACK BEAR. WE WERE MISLEAD AND DECEIVED ON THIS PART BECAUSE WE HAD A BLACK BEAR 75 TO 100 YARDS OFF THE TRAIL AND WERE NOT ALLOWED TO SHOOT. THE GUIDE KEPT WALKING AND SAID "THE BEAR WOULD BE THERE TOMORROW."

AT THIS POINT THERE WAS AN OBVIOUS PROBLEM BETWEEN THE GUIDE AND HUNTER. I WOULD APPRECIATTE YOU TAKING THE TIME TO CONTACT ME. MY PHONE NUMBER IS [REDACTED] MY EMAIL IS [REDACTED] TO DISCUSS FURTHER DETAILS.

IN CLOSING I HAVE TO ASK; HOW YOU WOULD FEEL IF YOU WERE LEFT ON A DOCK IN CORDOBA, ALASKA WITH NO PLACE TO STAY AND NO WAY TO ANCHORAGE? WE WERE. CALL OR MAIL ME. I DESERVE TO TELL YOU HOW IT FELT.

AGAIN I HAD A WONDERFUL VACATION IN BEAUITFUL ALASKA. THANK YOU FOR SHARING ALL ALASKA OFFERS. I STRONGLY SUGGEST YOU RECONSIDER WHOM YOU LET GUIDE AND REPERSENT THIS MAGNISIFENT STATE.

RECEIVED

JAN 26 2004

DIVISION OF
OCCUPATIONAL LICENSING
JUNEAU

STATE OF ALASKA
COMMISSIONER
DEPT OF COMMUNITY AND ECONOMIC DEVELOPMENT
PO BOX 110806
JUNEAU, AK 99511-0806

TO WHOM IT MAY CONCERN:

ENCLOSED YOU WILL FIND A COPY OF A LETTER I SENT TO THE USDA. PLEASE TAKE
THE TIME TO READ AND I WOULD LIKE VERY MUCH TO HEAR FROM YOU IN THIS
MATTER.

THANKS,

Walt S

[REDACTED]

1 2 3 4 5



RECEIVED

APR 10 2002

DIVISION OF
OCCUPATIONAL LICENSING
JUNEAU

RECEIVED

MAY 08 2002

DIVISION OF
OCCUPATIONAL LICENSING
ANCHORAGE

April 3, 2002

Dear Cindy,

I wanted to register a complaint against an outfitter I hunted with last year. His name is [REDACTED]. It was suppose to be a 10-day combo hunt for sheep, goat and brown bear. The tags were purchased and up the mountain we go. The first morning of hunting [REDACTED] twists his knee and tears several ligaments. He lets me know that he is going to be air lifted out ASAP and he has no backup guide to continue the hunt. He suggests going out on my own for the day, which I do. There were only two legal rams on the whole mountain. I go after the bigger of the two but he was inaccessible to hunt. So I went after the other one. I stalked him and get close but its just not the quality of ram I wanted to take. But I felt it was this or nothing so I take him. I bone him and cape him and pack everything back to camp, which took 8 hours.

When I bring up my feelings of how I feel I was cheated out of a hunt, Mr. [REDACTED] opinion was that was my hunt. That he provided everything in our agreement, end of story. He never even apologized or would admit he ruined my hunt. I asked if he would consider letting me hunt something else at no cost or coming back next year or a partial refund. He declined all options. I sat in a motel room for 7 days at my expense waiting for Mr. [REDACTED] to come up with something. He finally offered to reduce the cost of a goat to \$500 but by that time it was time to fly home.

I've been on over 20-guided hunts around the world and without question this is the worst outfitter I've ever been involved with. Even if he hadn't hurt his leg I would never give him a good recommendation. He is disorganized and misrepresented the hunt when I booked it. I really don't think this is the type of guide you want in Alaska.

Regretfully yours,

[REDACTED]
[REDACTED]

Rodney S. Gleave, D.M.D.

[REDACTED]

December 19, 2003

Mr. George Weaver
Occupational Licensing
550 West 7th Ave.
Suite 1500
Anchorage, AK 99501

Dear Mr. Weaver,

Thank you for your time spent discussing my hunt in September of 2003 with [REDACTED]. I appreciate your interest in understanding what transpired.

What further prompted me to write this letter are the other hunters with whom I have spoken. They are also very dissatisfied with [REDACTED]. There are several of them. I feel it is inappropriate to characterize their situations in this letter; however, suffice to say that my poor experience apparently is not unique. Most whom I spoke with have felt helpless in doing anything about their dissatisfaction. A few have sent letters of complaint to various hunter support groups. So, one objective in contacting you is that the problems will be corrected so that future hunters, with their hard-earned dollars, will not be at risk. I will share the facts concerning my hunt in summary fashion, and will provide more details, if requested.

Hunt Summary

During the initial discussions with my booking agent [REDACTED], [REDACTED] was represented as a professional organization capable of conducting a quality hunt for all of the species that I desired. After considerable dialog and placing trust in the agent's recommendation, I formally contracted for a multi-specie hunt of 14 days in length. During the booking process, I learned that two of the principals of [REDACTED] would also be hunting there during the same time. This further increased my confidence level.

However, my expectations were dashed in the very early stages of the hunt by the outfit's tremendous disorganization. I did take two of the seven animals on my list, but I attribute whatever success I achieved on these animals to basic luck. We simply bumped into the grizzly that I took, which proved to be the only bear seen and taken by any of the hunters in camp. I also took a Dall sheep, but my guide misjudged him as 36" around the curl. He taped out at 32" instead.

While some of the remaining time was spent attending to trophy care (I agree that this is very important), most of the time was consumed in finding the horses and allocating them to hunter/guide teams. There was considerable time lost while waiting for horses to be found, and for guide/area assignments to be made. Bottom line: not enough horses or guides for the number of people in camp. In some cases, this meant leaving the main camp either to hunt, or to travel out to a spike camp, as late as 4:00pm. In other cases, it meant staying in the main camp and watching TV all day. I spent several days watching TV.

Although, the hunt was represented and formally contracted as a 14-day multi-specie hunt, I was only allowed to hunt 4½ days. Basically, my hunt was "shut down" after I took the two animals, which may have had something to do with nine hunters in camp when I had been told there would only be six.

This all happened despite my booking agent and outfitter being in camp with me. Despite my repeated requests for us (me, the agent, and the outfitter) to discuss and resolve the matter, they elected not to address the issue. [REDACTED] would simply walk away when I approached him. Likewise, my agent asked me to spare him from a potential altercation with the outfitter.

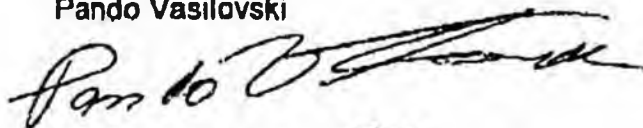
For background purposes, it might be helpful to know that I am a no-frills hunter and a reasonable person who always prioritizes hunting over creature comforts. I also understand the degree of difficulty in planning logistics and implementing a hunting trip in remote country. That said; I also believe in open and honest communication, and it was disappointing to have grown men, supposedly responsible for the way a hunt is represented and conducted, not being able to work together to deliver a hunt that was contracted. They could not and would not even provide answers to reasonable questions. There seems to be a fundamental issue here, such as ignoring obligations to a paying client with a written 14-day contract in hand. This hunt was very poorly executed, and was the worst that I have experienced or could imagine.

In case you may be wondering, I have been addressing this issue with the booking agent as well.

Thanks, again, for your consideration and interest. Please contact me for any additional insights that you may require.

Sincerely,

Pando Vasilovski



12-19-03

[REDACTED]
January 5, 2004

Alaska Chamber of Commerce
217 Second Street, #201
Juneau, AK 99801

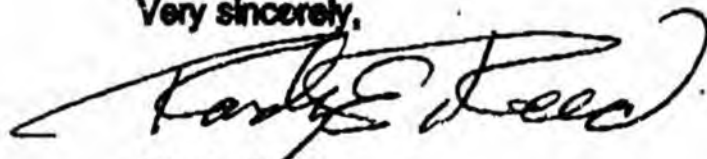
This letter is to register a complaint against [REDACTED]

Please mark your records that this company has cheated two guys from Arkansas out of over half of their hunt for no reason other than greed. As you can see from the attached letter, honoring their contract was not on their list of priorities. We have learned first hand why we must never pay in cash... It makes dates on calendars disappear and it facilitates dishonesty in business. There was no bad weather, no shortage of pilots or planes or fuel, just a company in Alaska that cares more about their bottom line than about what the people in the lower 48 think.

I very rarely complain; however, this was such a blatant rip-off by this business in your state that I had to say something. My brother was the one receiving the worst part of this because it took all of the time we were out for me to do my hunt and the remaining days were going to be for his hunt. If you read the letter, you will see that he never got a chance to hunt at all. And because we were brought back to the city five (5) days early, we incurred expenses that we did not have money for. While it gave income to some other businesses there, it will eventually hurt your state.

Thank you for your time to record this complaint.

Very sincerely,



Randy Reed

[REDACTED]

October 24, 2003

[REDACTED]

Dear Mr. [REDACTED]

This letter is to inform you that my brother and I expect reimbursement from [REDACTED] for the caribou hunt that we contracted for but did not receive. We paid your advertised fee of \$1,495 each for "8 or more days". See copy of your advertisement and copy of my payment which was the 50% deposit required. My brother paid his half "in cash" on August 23, 2003 in your office. I'm sure you have a record of that "cash" payment or you would not have flown us to Whitefish Lake on August 25, 2003. We were told before we paid our deposit that we would have a "mid hunt/meat pickup". Your employee, [REDACTED] verified that in person and even wrote it down and handed it to us. See copy of schedule attached. However, your company did not honor what [REDACTED] wrote, what your employees told us and wrote on your calendar, or what you falsely advertised.

The problem started on August 29, 2003 at 9:30 a.m. when your pilot showed up for what we were told would be the mid-hunt check. He was angry and stated that he had orders to fly us out and gave us 50 minutes to pack and load. He became more belligerent when we tried to explain that there must be some miscommunication. Then he gave us even less time and said for us to pack up and load our shit and get our asses in his plane and we complied with his demands.

When we arrived at your office a few hours later (5 days early), we asked [REDACTED] what happened and he denied knowing anything about our schedule. When my brother asked the guy behind the desk about our schedule, he stated that he had just erased our names from the pickup date of September 3rd. (No one mentioned any safety concerns and there were no conditions over which you did not control.) We were allowed to hunt on Aug. 26, 27 and 28. Three days is far from "8 or more" and we expect a full refund within 10 days from receipt of this letter. Thank you for your prompt settlement of this matter.

Sincerely,



Randy Reed (501) 624-3776

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 11, 2004

SUBJECT: Sectional Summary of CSSB 303(RES); An Act relating to the Big Game Commercial Services Board and to the regulation of big game hunting services and transportation services (Work Order No. 23-LS1655H)

TO: Representative Ralph Samuels
Attn: Henry Webb

FROM: George Utermohle 
Legislative Counsel

You have requested a sectional summary of CSSB 303(RES); an Act relating to the Big Game Commercial Services Board and to the regulation of big game hunting services and transportation services.

As a preliminary matter, note that a sectional summary of a bill is not an authoritative interpretation of the bill. The bill itself is the best statement of its contents.

Throughout the bill wherever the terms "registered guide" or "master guide" are used in statute they are replaced by "registered guide-outfitter" and "master guide-outfitter," respectively.

Section 1 of the bill amends AS 08.01.010(7) to provide that the centralized licensing provisions of AS 08.01 apply to the Big Game Commercial Services Board that is created in sec. 3 of the bill.

Section 2 of the bill sets out the sunset date of the Big Game Commercial Services Board as June 30, 2007.

Section 3 of the bill adds new sections to AS 08.54 to create the Big Game Commercial Services Board, to set out the qualifications of the seven members of the board, and to provide that the board is to receive assistance, information, and data from certain state agencies.

Section 4 of the bill amends AS 08.54.600 to provide for the transfer of responsibility for licensing and regulation of big game commercial services from the Department of Community and Economic Development to the Big Game Commercial Services Board

and to eliminate the roster of registered guides and amend provisions relating to examinations for registered guide-outfitters.

Section 5 of the bill amends AS 08.54.600 by adding a new subsection authorizing the Big Game Commercial Services Board to adopt regulations regarding professional codes of conduct, written contracts with clients of registered guide-outfitters and transporters, and inspections of contracts by the Department of Community and Economic Development.

Section 6 of the bill amends AS 08.54.605(a) to amend provisions regarding eligibility for guide and transporter licenses if a person has been convicted of violating certain statutes or regulations and to insert the terms "registered guide-outfitter" and "master guide-outfitter" in lieu of "registered guide" or "master guide," respectively.

Section 7 of the bill amends AS 08.54.605(c) to insert the terms "registered guide-outfitter" and "master guide-outfitter" in lieu of "registered guide" or "master guide," respectively.

Section 8 of the bill amends AS 08.54.610 to require that applicants for a registered guide-outfitter license have recent big game hunting experience, to provide for the transfer of responsibility for licensing and regulation of registered guides from the Department of Community and Economic Development to the Big Game Commercial Services Board and to replace the terms "registered guide" or "master guide" with "registered guide-outfitter" and "master guide-outfitter," respectively.

Section 9 of the bill amends AS 08.54.620 to provide for the transfer of responsibility for licensing and regulation of class-A assistant guides from the Department of Community and Economic Development to the Big Game Commercial Services Board, to amend the requirements for a class-A assistant guide license, and to replace the terms "registered guide" or "master guide" with "registered guide-outfitter" and "master guide-outfitter," respectively.

Section 10 of the bill amends AS 08.54.630 to provide for the transfer of responsibility for licensing and regulation of assistant guides from the Department of Community and Economic Development to the Big Game Commercial Services Board, to amend the requirements for an assistant guide license, and to replace the term "registered guide" with "registered guide-outfitter."

Section 11 of the bill amends AS 08.54.640(a) to replace the term "registered guide" with "registered guide-outfitter."

Section 12 of the bill amends AS 08.54.640(b) to transfer authority from the Department of Community and Economic Development to the Big Game Commercial Services Board to adopt regulations regarding the suspension of guide licenses held by persons who are

or become law enforcement officers and to replace the term "registered guide" with "registered guide-outfitter."

Section 13 of the bill amends AS 08.54.650(c) to provide that the Big Game Commercial Services Board may specify the information to be supplied in transporter activity reports.

Section 14 of the bill amends AS 08.54.660 to provide that registered guide-outfitters and transporters must sign an affidavit that all required reports have been submitted to the Department of Community and Economic Development before their licenses can be renewed and to replace the term "registered guide" with "registered guide-outfitter."

Sections 15 and 16 of the bill amend AS 08.54.670 and 08.54.680(b), respectively, to replace the term "registered guide" with "registered guide-outfitter."

Sections 17 and 18 of the bill amend AS 08.54.710(a) and (b), respectively, to provide that the Big Game Commercial Services Board is responsible for imposing disciplinary sanctions upon persons licensed under AS 08.54 and to amend the list of acts for which the board may impose disciplinary sanctions.

Section 19 of the bill amends AS 08.54.710(c) to raise the maximum civil fine that can be imposed by the Big Game Commercial Services Board from \$5,000 to \$10,000 and to provide that the Big Game Commercial Services Board is responsible for imposing disciplinary sanctions upon persons licensed under AS 08.54.

Section 20 of the bill amends AS 08.54.710(d) to provide that the Big Game Commercial Services Board is responsible for imposing certain disciplinary sanctions upon persons licensed under AS 08.54.

Sections 21, 22, and 23 of the bill amend AS 08.54.710(e), (h), and (i), respectively, to provide that the Big Game Commercial Services Board is responsible for imposing disciplinary sanctions upon persons licensed under AS 08.54.

Section 24 of the bill amends AS 08.54.720(a) to provide that it is unlawful for a person licensed under AS 08.54 to commit or aid in the commission of a violation of a state or federal wildlife or game, guiding, or transportation services statute, to fail to report a violation of a state or federal wildlife or game, guiding, or transportation services statute by a client or employee within 20 days after the violation, to fail to have a valid Alaska hunting license in possession when guiding, or to remain on state, federal or private land without prior approval. Also, the term "registered guide" is replaced with "registered guide-outfitter" in several places.

Section 25 of the bill amends AS 08.54.720(f) to provide that the Big Game Commercial Services Board is responsible for suspending guide licenses and transporter licenses when ordered by a court.

Section 26 of the bill amends AS 08.54.730 to provide that the Big Game Commercial Services Board may obtain an injunction to halt certain violations of AS 08.54.

Section 27 of the bill amends AS 08.54.740 to provide that a registered guide-outfitter or transporter is equally responsible for violations of federal wildlife laws by their employees and to replace the term "registered guide" with "registered guide-outfitter."

Section 28 of the bill amends AS 08.54.750 to prohibit registered guide-outfitters from withdrawing or amending a use area registration during a calendar year, to allow the Big Game Commercial Services Board to amend the boundaries of use areas, and to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter" and with the transfer of authority from the Department of Community and Economic Development to the Big Game Commercial Services Board.

Section 29 of the bill adds new subsections to AS 08.54.750 to provide that registered guide-outfitters may register for additional use areas to guide hunts for certain big game predator species under certain conditions and that transporters may be required to provide advance notice to the Department of Community and Economic Development before providing transportation services in a use area.

Section 30 of the bill amends AS 08.54.760 to provide that the Department of Community and Economic Development may make hunt records and activity reports available to federal and other law enforcement agencies and to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter" and with the transfer of authority from the Department of Community and Economic Development to the Big Game Commercial Services Board.

Section 31 of the bill amends AS 08.54.770 to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter" and to clarify that the Department of Fish and Game is responsible for issuing hunting licenses.

Section 32 of the bill amends AS 08.54.790 to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter" and to add a definition of "board."

Sections 33 - 37 amend AS 16.05.407(a), 16.05.407(f), 16.05.408(a), 16.05.408(c), and AS 23.10.055, respectively, to make technical changes necessary to conform to the replacement of the term "registered guide" with "registered guide-outfitter."

Section 38 of the bill amends AS 39.50.200(b) by adding the Big Game Commercial Services Board to the list of boards and commissions whose members are subject to public officers financial disclosure.

Representative Ralph Samuels

March 11, 2004

Page 5

Section 39 of the bill amends AS 41.23.420(d) by substituting the Big Game Commercial Services Board for a reference to the Department of Community and Economic Development.

Section 40 of the bill amends AS 44.62.330(a)(35) by substituting the Big Game Commercial Services Board for a reference to the Department of Community and Economic Development in the list of agencies that are subject to the administrative adjudication provisions of the Administrative Procedure Act.

Section 41 of the bill provides for the initial appointment of the members of the Big Game Commercial Services Board.

Section 42 of the bill provides for the issuance of registered guide-outfitter licenses and master guide-outfitter licenses to persons who currently hold registered guide licenses and master guide licenses.

Section 43 of the bill is the Savings Clause.

Section 44 of the bill provides that secs. 3, 41, 42, and 43 of the bill take effect immediately.

Section 45 of the bill provides that the remaining provisions of the bill take effect on the day that the Big Game Commercial Services Board holds its first meeting.

If I may be of further assistance, please advise.

GU:mdr

04-094.mdr

March 18, 2003

Senate President Gene Therriault
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

House Speaker Pete Kott
Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Dear Senator Therriault and Speaker Kott:

The Board of Game met in Anchorage from March 6 - March 15, 2003. One of the miscellaneous topics discussed in detail was the necessity for the reestablishment of a Big Game Commercial Services Board. The Board would once again like to request that this issue be seriously considered by the Legislature.

The Board of Game and the Department of Fish and Game are responsible for managing Alaska's varied wildlife resources. While the Department has the responsibility for implementation of the state's management programs, the Board has the responsibility for establishing hunting and trapping regulations in concert with the dictates of the Constitution and the statutes. We are also responsible for identifying and establishing intensive management programs, predator control programs and plowing through convoluted subsistence processes and procedures to establish coherent wildlife management policies and programs. One of the biggest stumbling blocks has been the inability of the state to establish some reasonable controls on the guiding and transporter industries.

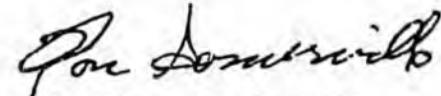
Unregulated guiding operations and uncontrolled access by transporters to the remote areas of our state have created significant and unnecessary conflicts. Congestion, wanton waste, complaints from clients, safety concerns and major conflicts with local hunters has created a climate of hostility in some areas. In addition, the present situation does little to improve the image of Alaskan fish and wildlife management programs and the users dependent on them.

The most logical solution is to recreate a Board that has the function of overseeing the big game guiding and transporter industries. Standards for licensing of guides, safety standards, testing where appropriate, monitoring and investigating client complaints, enforcing reporting requirements and the establishment and enforcement of ethics standards are some of the responsibilities that could be delegated to a Commercial Services Board.

With the complexities surrounding wildlife management in Alaska today, it only makes sense to exercise some regulatory control over all substantial commercial and non-commercial activities that create serious user conflicts and contribute to growing management problems. In addition, the maintenance of both healthy and well-regulated guide and transporter industries are important to the state.

Thank you for considering this recommendation from the Board of Game.

Sincerely,


Ron Somerville, Vice Chair
Board of Game

cc: Senator Scott Ogan
Representative Bud Fate
Acting Commissioner Kevin Duffy

Audit Report



DEPARTMENT OF COMMUNITY AND
ECONOMIC DEVELOPMENT
DIVISION OF OCCUPATIONAL LICENSING
GUIDES AND TRANSPORTERS

October 16, 2003



Audit Control Number:

08-30025-03

Division of Legislative Audit
P.O. Box 113300, Juneau, Alaska 99811-3300

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

DIVISION OF LEGISLATIVE AUDIT

The Legislative Budget and Audit Committee is a permanent interim committee of the Alaska Legislature. The committee is made up of five senators and five representatives, with one alternate from the Senate and two from the House. The chairmanship of the committee alternates between the two chambers every legislature.

The committee is responsible for providing the legislature with audits of state government agencies. The programs and activities of state government now cost more than \$6 billion a year. As legislators and administrators try increasingly to allocate state revenues effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by the Division of Legislative Audit helps provide that information.

As a guide to all their work, the Division of Legislative Audit complies with generally accepted auditing standards established by the American Institute of Certified Public Accountants and with government auditing standards established by the U.S. General Accounting Office.

Audits are performed as mandated by Alaska Statutes or at the direction of the Legislative Budget and Audit Committee. Individual legislators or committees can submit requests for audits of specific programs or agencies to the committee for consideration. Copies of all completed audits are available from the Division of Legislative Audit's offices in Juneau, Anchorage, or at our web site <http://www.lcgaudit.state.ak.us/>

BUDGET AND AUDIT COMMITTEE

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Representative Mike Hawker
Representative Beth Kerttula
Representative Vic Kohring
Representative Jim Whitaker
Representative Reggie Joule (alternate)
Representative Bill Williams (alternate)

Senator Gene Therriault, Vice Chair
Senator Ben Stevens
Senator Gary Wilken
Senator Con Bunde
Senator Lyman Hoffman
Senator Lyda Green (alternate)

DIVISION OF LEGISLATIVE AUDIT

Pat Davidson, CPA
Legislative Auditor

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

(907)465-3830, Juneau
(907)561-1445, Anchorage
(907)465-2347, Juneau Fax
(907)561-1452 Anchorage Fax

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: 3-8-04

Resources Committee considered SENATE BILL NO. 303

SB 303 BIG GAME GUIDE BOARD & SERVICES

"An Act relating to the Big Game Commercial Services Board and to the regulation of big game hunting services and transportation services; and providing for an effective date."

and recommends:

be replaced with _____ CS SB 303 (RES)

adopt previous _____ CS _____ (_____)

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to _____ Committee

Senate Bill:

- Same Title
 New Title

House Bill:

- Same Title
 Technical Title Change
 New Title w/ SCR # _____

NEW FISCAL NOTE(S):

| Department | Date | Fiscal | Indet. | Zero | FN# |
|------------|---------|--------|--------|------|-----|
| JCED | 2/10/04 | ✓ | | | 1 |
| F+G | 2/19/04 | | | ✓ | 2 |
| | | | | | |
| | | | | | |
| | | | | | |

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 |
|---------------------------------|---------|-------------|--------|-------|
| Waynes: <i>Thomas H. Wapner</i> | ✓ | | | |
| Lincoln: <i>[Signature]</i> | | | ✓ | |
| B. Skovins: <i>Ben Skovins</i> | ✓ | | | |
| | | | | |
| | | | | |
| CHAIR: <i>Scott O'Farrell</i> | | | ✓ | |

Waynes:
Lincoln:
B. Skovins

O'Farrell

SENATE FINANCE COMMITTEE

SIGN-IN

SB 303-BIG GAME GUIDE BOARD & SERVICES

NAME: Matt Robus Subject/Bill No: SB 303
Co./Dept./Title: ADF&G Phone: 465 4191
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____
Co./Dept./Title: _____ Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____
Co./Dept./Title: _____ Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____
Co./Dept./Title: _____ Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

SENATE FINANCE COMMITTEE

SIGN-IN

SB 303-BIG GAME GUIDE BOARD & SERVICES

NAME: MATT ROBOS Subject/Bill No: SB 303
Co./Dept./Title: DIRECTOR, WILDLIFE, ADF&G Phone: X 4191
Address: ADF&G Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: Rick Urion Subject/Bill No: _____
Co./Dept./Title: Occupational Licensing Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: Paul Dand Subject/Bill No: _____
Co./Dept./Title: Leg Audit Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: Bryana Wilson Subject/Bill No: _____
Co./Dept./Title: Transporter Phone: 789-3296
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

SENATE FINANCE COMMITTEE

SIGN-IN

SB 303-BIG GAME GUIDE BOARD & SERVICES

NAME: Ron Somerville Subject/Bill No: SB 303
Co./Dept./Title: Board of Game Phone: 280-4812
Address: Inc Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: Pat Davidson Subject/Bill No: SB 303
Co./Dept./Title: Leg Audit Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____
Co./Dept./Title: _____ Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____
Co./Dept./Title: _____ Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

SENATE FINANCE COMMITTEE

SIGN-IN

SB 303-BIG GAME GUIDE BOARD & SERVICES

NAME: WAYNE REGELIN Subject/Bill No: S. B. 303
Co./Dept./Title: DEPUTY COM, ADF&G Phone: X 4100
Address: JUNEAU Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: Brian Somerville Subject/Bill No: SB 303
Co./Dept./Title: Board of Game Phone: 463-3830
Address: JUNEAU Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____
Co./Dept./Title: _____ Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

NAME: _____ Subject/Bill No: _____
Co./Dept./Title: _____ Phone: _____
Address: _____ Zip: _____
Do you wish to testify? Yes No Respond To Questions

Bill History/Action Display



BILL: SB 303

SHORT TITLE: BIG GAME GUIDE BOARD & SERVICES

BILL VERSION:

CURRENT STATUS: (S) FIN

STATUS DATE: 03/08/04

SPONSOR(s): RLS BY REQUEST OF LEG BUDGET & AUDIT

TITLE: "An Act relating to the Big Game Commercial Services Board and to the regulation of big game hunting services and transportation services; and providing for an effective date."

Bill Root: [Display Bill Root](#) [Next Bill](#)

[Full Text](#) [Fiscal Notes](#)

[Committee Action with Bill History](#)

| Jrn-Date | Jrn-Page | Action: |
|----------|----------------------|-------------------------------------|
| 02/06/04 | 2089 | (S) READ THE FIRST TIME - REFERRALS |
| 02/06/04 | 2089 | (S) RES, FIN |
| 03/08/04 | 2456 | (S) RES RPT CS FORTHCOMING 2DP 2NR |
| 03/10/04 | 2480 | (S) RES CS RECEIVED SAME TITLE |
| 03/08/04 | 2456 | (S) NR: OGAN, LINCOLN; DP: WAGONER, |
| 03/08/04 | 2456 | (S) STEVENS B |
| 03/08/04 | 2456 | (S) FN1: (CED) |
| 03/08/04 | 2456 | (S) FN2: ZERO(DFG) |
| 03/08/04 | 2456 | (S) REFERRED TO FINANCE |

- Similar Subject Match or Exact Subject Match
- [AVIATION](#)
 - [BOARDS & COMMISSIONS](#)
 - [FISH & GAME \(GAME\)](#)
 - [GUIDES](#)
 - [REGULATIONS](#)
 - [TOURISM](#)

Bill Root: [Display Bill Root](#) [Next Bill](#)

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[Return to Basis Main Menu \(23 Legislature\)](#)

[Return to Legislature Home Page](#)

SB

305

HFIN

FILE

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 305
 (S) Publish Date: 2/19/04

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
 Title ASSERTING STATE TITLE TO RDU Resource Development
SUBMERGED LAND Component RS2477 and Navigability
 Sponsor Sen. Theriault
 Requester Sen. 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 | 141.5 | 111.5 | 74.5 | | | |
| Travel | 5.0 | 3.0 | 3.0 | | | |
| Contractual | 25.0 | 25.0 | 10.0 | | | |
| Supplies | 5.0 | 5.0 | 5.0 | | | |
| Equipment | 10.0 | 3.0 | 2.0 | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 186.5 | 147.5 | 94.5 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|--|--------------|--------------|-------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 186.5 | 147.5 | 94.5 | 0.0 | 0.0 | 0.0 |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type-Do not abbreviate) | | | | | | |
| TOTAL | 186.5 | 147.5 | 94.5 | 0.0 | 0.0 | 0.0 |

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 | 2 | 2 | 1 | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This bill requires the department to maintain an inventory and maps of navigable waters in Alaska, and to notify ANCSA corporations about state ownership. DNR will need to review DNR, ADF&G and BLM files to locate, compile and map (in GIS) all existing state, federal, and court navigability determinations. Though some of this work has been completed through the Recordable Disclaimer project and DNR staff work, substantial additional work is needed to complete this project.

This project will require the following positions:

- One (1) Natural Resource Specialist for 1.5 years (FY05 and FY06) at a cost of \$90,000 (\$60,000/year), to complete the research and compile the determinations

CONTINUED

Prepared by: Bob Loeffler, Director Phone 269-8600
 Division Mining, Land and Water Date/Time 2/17/04
 Approved by: Thomas Irwin, Commissioner Date 2/17/04
 Agency Natural Resources

FISCAL NOTE #1

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. SB 305

ANALYSIS CONTINUATION

- One Cartographer II position for 2 years (FY05 and FY06) at a cost of \$74,500/year to create and depict the information on 1:63,360 scale maps or photo imagery, and
- One Analyst Programmer III for two months (one month each in FY05 and FY06) at a cost of \$7,000 per month to create corresponding data base.

In FY07, one Cartographer II position would be requested to add this compiled information to DNR's land status plats. The primary work associated with this is the need to create new status plats for the many areas of the state where they do not currently exist. State status plats exist primarily for areas where there is already a state ownership interest or water right. DNR does not have plats for townships where there is currently no state land depicted.

Other costs include travel to research navigability information in BLM, DNR or ADFG files in Fairbanks, Glennallen, Nome, or other communities. Contractual includes office space rental (\$6,000 per person/year), phones, photo-copying (we intend to xerox any navigability information in BLM's files), postage, etc. Supplies include basic office supplies and computer/software purchases.

7.30.04
Adopted

23-LS1489Q
Bullock
4/13/04

HOUSE CS FOR SENATE BILL NO. 305()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS THERRIAULT, Dyson, Ogan, Stedman, Cowdery, Bunde, Wilken, Green, Seekins,
Wagoner

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to state ownership of submerged land underlying water that was
2 navigable at the time Alaska achieved statehood."

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

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

6 FINDINGS AND INTENT. (a) The legislature finds that

7 (1) at the time Alaska achieved statehood, the state took title to submerged
8 land underlying navigable waterways within its boundaries;

9 (2) the state acquired title to this submerged land under the equal footing
10 doctrine, which arises under the United States Constitution and requires that new states enter
11 the Union with the same powers and attributes of sovereignty as were held by the original 13
12 colonies;

13 (3) sec. 6(m) of the Alaska Statehood Act (P.L. 85-508, 72 Stat. 339)
14 incorporated 43 U.S.C. 1301 - 1315 (Submerged Lands Act of 1953), and application of this

1 law to the state confirmed passage of title under the equal footing doctrine;

2 (4) states have title to submerged land within their borders because each has
3 an obligation to hold navigable waterways open for the public to use for navigation, fishing,
4 and commerce;

5 (5) in conveying federal land in the state before 1989, the United States
6 Department of the Interior, Bureau of Land Management, applied incorrect standards to
7 determine whether rivers and lakes passing through the land were navigable and sometimes
8 purported to convey to private parties submerged land whose title had been transferred to the
9 state at the time the state achieved statehood;

10 (6) in 1989, the United States Court of Appeals for the Ninth Circuit ruled that
11 the Bureau of Land Management had applied incorrect standards in determining navigability
12 for its land conveyances; however, the Bureau of Land Management has not reconsidered
13 most of its pre-1989 determinations;

14 (7) the Bureau of Land Management may have included state-owned
15 navigable water in certain conveyances to Native corporations established under 43 U.S.C.
16 1601 - 1629e (Alaska Native Claims Settlement Act); state-owned navigable water may have
17 been mistakenly counted against the entitlements of the corporations;

18 (8) Native corporations that have received conveyances of federal land may
19 request that the Bureau of Land Management redetermine whether the water crossing their
20 land was navigable at the time the state achieved statehood and, if found navigable, that the
21 submerged land not be counted against the corporations' entitlements;

22 (9) the state does not concede title to the submerged land that the Bureau of
23 Land Management erroneously conveyed under its pre-1989 standards and continues to assert
24 title to any water that was navigable at the time the state achieved statehood;

25 (10) while the state cannot lose its title by failing to file suit to quiet title, the
26 pre-1989 determinations by the Bureau of Land Management create public confusion about
27 ownership of this land;

28 (11) the state cannot definitively establish its title to submerged land easily but
29 generally must obtain a recordable disclaimer of interest issued by the Bureau of Land
30 Management under 43 C.F.R. 1864 or litigate disputed title and obtain a court judgment,
31 which is time-consuming and expensive; and

1 (12) the public would be served by having the state determine the navigability
2 of water at the time the state achieved statehood in order to identify submerged land to which
3 the state asserts title.

4 (b) It is the intent of the legislature that this Act will result in the identification of
5 submerged land underlying navigable water at the time the state achieved statehood and
6 public notice of that submerged land to which the state claims title.

7 * Sec. 2. AS 38.04 is amended by adding a new section to article 3 to read:

8 **Sec. 38.04.062. Identification of state submerged land.** (a) Except as
9 provided in (f) of this section, the state owns all submerged land underlying navigable
10 water to which title passed to the state at the time the state achieved statehood under
11 the equal footing doctrine or 43 U.S.C. 1301 - 1315 (Submerged Lands Act of 1953).

12 (b) The commissioner shall compile, maintain, and make public a list and map
13 of all water in the state that the commissioner, the United States Department of the
14 Interior, Bureau of Land Management, or a state or federal court determines was
15 navigable water at the time the state achieved statehood. The submerged land
16 underlying that navigable water shall be included in the inventory of state land
17 prepared under AS 38.04.060.

18 (c) The commissioner shall also maintain and make public a list of all water in
19 the state that the commissioner determines, in consultation with the commissioner of
20 fish and game, was nonnavigable at the time the state achieved statehood.

21 (d) Water not included on the lists described in (b) or (c) of this section is not
22 considered either navigable or nonnavigable until the commissioner has made a
23 determination as to its navigability at the time the state achieved statehood. In
24 addition, the commissioner may make corrections and alterations to the lists described
25 in (b) and (c) of this section to maintain the accuracy of each list.

26 (e) A determination made by the commissioner under this section

27 (1) does not create an interest in or right of entry onto any real property
28 that does not otherwise exist under state law;

29 (2) may not be recorded; and

30 (3) does not constitute final agency action.

31 (f) Submerged land that the state conveyed under AS 38.05.820 and 38.05.825

1 is not subject to the state's assertion of ownership under (a) of this section.

2 (g) In this section,

3 (1) "navigable water" means water that, at the time the state achieved
4 statehood, was used, or was susceptible of being used, in its ordinary condition as a
5 highway for commerce over which trade and travel were or could have been
6 conducted in the customary modes of trade and travel on water; the use or potential
7 use does not need to have been without difficulty, extensive, or long and continuous;

8 (2) "nonnavigable water" means surface water that was not navigable
9 water at the time the state achieved statehood.

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

12 NOTICE TO UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU
13 OF LAND MANAGEMENT, AND NATIVE CORPORATIONS. Within 180 days after the
14 effective date of this Act, the commissioner of natural resources shall send a written notice to
15 the Bureau of Land Management and to each regional corporation established under 43
16 U.S.C. 1606 (sec. 7, Alaska Native Claims Settlement Act) and each village corporation
17 established under 43 U.S.C. 1607 (sec. 8, Alaska Native Claims Settlement Act). The
18 purpose of the notice is to advise the recipients that

19 (1) errors in land conveyances to Native corporations under 43 U.S.C. 1601 -
20 1629h (Alaska Native Claims Settlement Act) may have occurred as described in sec. 1(a)(5)
21 of this Act;

22 (2) the state asserts ownership interest in submerged land that may have been
23 erroneously included in a conveyance or patent described in sec. 1(a)(5) of this Act; and

24 (3) an erroneous conveyance or patent described in sec. 1(a)(5) of this Act
25 should be corrected and the affected Native corporation granted eligible substitute land in
26 order to satisfy that corporation's land entitlement under 43 U.S.C. 1601 - 1629h (Alaska
27 Native Claims Settlement Act).

ALASKA STATE LEGISLATURE

SENATOR
Gene Therriault
119 N. Cushman Suite 101
Fairbanks, Alaska 99701
(907) 488-0857
FAX (907) 488-4271



While in Juneau
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797
FAX (907) 465-3884

Senate
Senate District F

Senate Bill 305

"An Act relating to state ownership of submerged land underlying water that was navigable at the time Alaska achieved statehood."

SPONSOR: Senator Gene Therriault

SPONSOR STATEMENT:

With the exception of withdrawn federal lands, at statehood in 1959 Alaska received title under the equal footing doctrine to all submerged lands under state navigable waters and marine waters out to three miles. Unfortunately, the federal government has been slow to concede any navigability determinations. Since Alaska entered the Union, the federal courts have determined fewer than 20 rivers navigable. Unless the state is pro-active in asserting its claims, it stands to lose up to 60 million acres of its statehood entitlement.

In some cases, the federal government has used every possible legal tactic under the Federal Quiet Title Act to impede the state's assertion of ownership. The Black, Kandig and Nation Rivers in northeast Alaska are examples. These three Rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska.

Although no one contested the state's claim that these streams met the federal criteria, this case took nine years and millions of state and federal dollars to litigate. Eventually the state won two of the three cases. The third was resolved by a Federal Recordable Disclaimer of Interest in 2003.

In addition, prior to 1989 the federal government applied incorrect standards to determine navigability and may have mistakenly conveyed state-owned land to Native corporations, clouding the title to hundreds of thousands, if not millions, of acres. This is a critical topic as Congress considers a deadline for completing the land selection and conveyance processes.

Contributing to the problem is the lack of a reasonable and efficient way for the state to secure title to its submerged lands. SB 305 takes three steps to begin the process of identifying state claims.

First, SB 305 provides notice to all parties that the state is laying claim to all submerged lands, except those withdrawn at the time of statehood, that meet the standards and criteria established in the Submerged Lands Act and in various federal court decisions.

Second, it provides authority for state agencies to identify, in accordance with the appropriate federal and state laws, which waterbodies the state claims as navigable and non-navigable. This will help the state clarify criteria for identifying navigable waters, address conflicts involving clouded titles due to inaccurate conveyances from the Bureau of Land Management, and more clearly delineate its title claims.

Third, the bill directs the Department of Natural Resources to give notice to all private property owners, including native corporations created under the Alaska Native Claim Settlement Act, that may have received title to lands that could have erroneously included state submerged lands in their conveyances. This is critical to resolve future problems regarding mineral development, gravel extraction, access and other related land uses.

This legislation is only one step for the state to eventually resolve the title disputes over its submerged lands, and deals only with the issue of state title to submerged lands. It does not address conflicts over federal fish and wildlife management in state navigable waters created by federal reserved water rights claims.

Subject: [Fwd: S.B. 305]

Date: Thu, 29 Apr 2004 13:18:12 -0800

From: Bill Williams <Representative_Bill_Williams@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Peter Ecklund <Peter_Ecklund@legis.state.ak.us>

Subject: S.B. 305

Date: Thu, 29 Apr 2004 13:17:13 -0800

From: "Richard or Mary Bishop" <rmbishop@ptialaska.net>

To: "Rep. John Harris" <Rep_John_Harris@legis.state.ak.us>,
"Rep. Bill Williams" <Representative_Bill_Williams@legis.state.ak.us>

CC: <aoc@alaska.net>

Dear Co-Chairman Harris and Williams:

Please include this testimony in the House Finance Committee record on SB 305.

I am testifying on behalf of the Alaska Outdoor Council, POB 73902, Fairbanks, AK, 99707, of which I am president.

The Alaska Outdoor Council strongly supports passage of SB 305.

It is essential to clear up the uncertainties surrounding the ownership status of navigable waters and submerged lands, which negatively affect the interests of the State of Alaska, Native corporations, and the general public, as the bill's findings explain.

A clear picture of the extent and identity of navigable waters, and their proper ownership, will benefit everyone. Resolution of the existing uncertainties is long overdue, and this legislation will accelerate that resolution.

Thank you.

Sincerely

Dick Bishop

>

> I would like to send my comments regarding SB305

> that will be discussed today at 130pm.

>

> I am TOTALLY AGAINST the STate claiming ownership

> of submerged lands that erroneously included inthe conveyance

> to ANC.

> Sandra M. Jefko

> 139 Chicagobear Lane

> Fairbanks, AK997712

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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 1/2 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. HICKEL, GOVERNOR

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August 27, 1992

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.

Colville Region

Mouth of Colville River to Nuka 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 Nwapaga River
Mouth of Nwapaga River to Turner Creek
Mouth of Noatak River to Anluk River
Mouth of Selawik River to Kugarak River
Snaktoolik River
Throat River
Ungalik River
Mouth of Unalakleet River to Ternile Creek

Koyukuk River Region

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

Upper Yukon Region

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

Mouth of Porcupine River to Boundary
Ray River
Mouth of Seventymile River to Barney Creek
Mouth of Sheenjek River to Thluickohnjik Creek
Mouth of Tatonjuk 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
Kuk 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 Faldo Creek
Mouth of Tanana River to Nabesna and Chisana Rivers
Mouth of Teklanik River to near Corra 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
 Khotoi River
 Little Melozitna River
 Melozitna River
 Mouth of Novitna 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 Genuk River
 Crooked Creek
 Mouth of East Fork Kuskokwim River to Slow Fork and Tonzona River
 Mouth of Genuk 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 Attauatluak
 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 Line 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 Chavekukpuli
 Lake Clark
 Lake Beverly
 Lake Kulik Mt. Katmai
 Lake Nerka
 Lower Pike Lake and outlet Ugashik
 Kokwak River
 Kokuuli River
 Muktung 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 Munavugaluk Lake
 Stuyahok River
 Tazmina River
 Mouth of Togiak River to Togiak Lake
 Tunulik 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

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

Stawide 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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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



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State Policy on Navigability

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 - Conclusion
-

Policies and Procedures on Ownership and Management of Navigable and Public Waters

June 18, 1996 State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution. *Utah v. United States*, 482 U.S. 193 (1987). Under the doctrine, all states enter the Union on an equal footing with respect to sovereign rights and powers, title to the beds of navigable waters in Alaska vested in the newly formed State of Alaska in 1959. In addition, under the Alaska Constitution and the public trust doctrine, all waters in the state are held and managed by the state in trust for

the use of the people, regardless of navigability and ownership of the submerged lands under the Equal Footing Doctrine.

The purpose of this paper is to describe the State of Alaska's policies and procedures for identifying and protecting the state's title to the beds of navigable waters. In addition, this paper outlines the legal and policy considerations which guide the ownership and management of submerged lands and public waters.

I. IDENTIFYING AND PROTECTING STATE TITLE TO THE BEDS OF NAVIGABLE WATERS

Identification and management of the beds of navigable waters is an important policy of the State of Alaska. In 1980, the state established a comprehensive navigability program to respond to federal land conveyances and land management activities under the Alaska Statehood act, the Alaska Native Claims Settlement Act (ANCSA), and the Alaska National Interest Lands Conservation Act (ANILCA). Pursuant to the provisions of those acts, the federal government has issued navigability determinations for thousands of lakes, rivers, and streams throughout the state in an effort to determine whether the state or federal government owns the submerged lands. Navigability determinations are also made prior to many state land disposals to insure that adequate public use easements are reserved.

The basic purpose of the state's program is to protect the public rights associated with navigable waters, including, in particular, the state's title to the submerged lands. Because state and native land selections and federal conservation units blanket the state, navigability questions have arisen for rivers, lakes, and streams throughout Alaska. The navigability of many of those waterbodies has already been established. There are hundreds of others, however, where navigability is not yet determined.

To help resolve these navigability disputes, a major goal of the state's navigability program is to identify the proper criteria for determining title navigability in Alaska and to gather sufficient information about the uses and physical characteristics of individual waterbodies so that accurate navigability determinations can be made as disputes arise. Other important aspects of the program include monitoring federal land conveyance and management programs to identify particular navigability disputes, seeking cooperative resolution of navigability problems through negotiations and legislation, and preparing for statewide navigability litigation.

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RIPARIAN RIGHTS AND STATUTE OF LIMITATIONS

Disputes over ownership of submerged lands in Alaska have arisen under a variety of circumstances. The principal source of the disputes in Alaska is the survey and acreage accounting system used by the federal government for conveying land to the state and native corporations.

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

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

Because of these conveyance procedures, the navigability of waterbodies in Alaska 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, following years of negotiations, lawsuits and legislative attempts to solve the navigability problems created by the unusual survey and conveyance procedures in Alaska, the State of Alaska, the United States Department of the Interior and the Alaska Federation of Natives (AFN) agreed that the standard rules of survey should be followed for land conveyances in Alaska. The effect of that decision was to treat Alaska surveys and land conveyances like federal land surveys and conveyances in other states. The recipients of conveyances from the federal government are charged only for the amount of public land that is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams.

The use of these survey procedures has eliminated many of the problems associated with the federal land conveyance programs in Alaska. Submerged lands are no longer being conveyed to fulfill acreage entitlements. With the exception of lakes smaller than 50 acres and streams narrower than 198 feet, navigability determinations are no longer being made prior to federal land conveyances. Determinations of ownership of submerged lands can be put off until a natural resource use or conflict requires resolution, such as issuance of an oil and gas

lease, mining claim, or a gravel sale.

Through the joint efforts of the State of Alaska, AFN, and the Department of the Interior, the 1983 decision to use the standard survey procedures for land conveyances in Alaska was legislatively approved in August 1988 when the United States Congress passed legislation (94 Stat. 2430) amending Section 901 of the Alaska National Interest Lands Conservation Act, codified at 43 U.S.C. 1631. The 1988 amendment, sometimes referred to as the Alaska Submerged Lands Act, requires that the standard rules of survey in the BLM Manual of Surveying Instructions be used for all federal surveys under the Alaska Statehood Act and ANCSA. The 1988 amendment also repealed the Section 901 statute of limitations that would have required the state to file a lawsuit within a very short period of time in order to preserve its title to the beds of navigable waters conveyed to native corporations by the federal government as a result of erroneous navigability determinations, poor maps, surveys or whatever.

Even with this legislation, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are the hundreds of erroneous non-navigability decisions and the resulting submerged land conveyances made to ANCSA corporations in previous years. In addition, to comply with the meandering requirements of the BLM Survey Manual, the federal government is still required to make navigability determinations for lakes smaller than 50 acres and rivers or streams narrower than 198 feet in width to determine if these waters must be meandered.

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NAVIGABILITY CRITERIA

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

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

consideration.

The federal test for determining navigability was established over a hundred years ago. In the landmark decision of *The Daniel Ball*, 77 U.S. (19 Wall.) 557, 563, (1870), the Supreme Court declared:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Although *The Daniel Ball* test is accepted as the correct standard for determining navigability, there has been a lot of disagreement over application of many of the terms and phrases used in *The Daniel Ball* test to the specific uses of Alaska's lakes, rivers and streams. The State of Alaska uses the following interpretation of that test as the basis for its navigability program.

The Waterbody Must Be Usable As a Highway For the Transportation of People or Goods. Interpreting the requirements that navigable waterbodies be used or usable as "highways of commerce", the courts have ruled that the central theme of title navigability is that the waterbody be capable of use as a highway which people can use for transporting goods or for travel. Neither the types of goods being transported nor the purpose of the travel are important in determining navigability. Transportation on water associated with recognized commercial activities in Alaska, such as mining, timber harvesting, and trapping is, evidence of navigability. The use of waterbodies for transportation in connection with natural resources exploration or development, government land management, management of fish and game resources, or scientific research is also evidence of navigability. Travel by local residents or visitors for the purpose of hunting, fishing, and trapping, or as a means of access to an area can be used to establish navigability. The same holds for recreational transportation, including personal travel and professionally guided trips.

Waters Which Are Capable of Being Used For Transporting Persons and Goods, Although Not Actually Used, Are Navigable. It is not necessary that a waterbody be actually used for transportation to be found navigable. It is enough that it is susceptible, or physically capable, of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth, and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable.

The susceptibility element of title navigability is very important for the identification of navigable waterbodies in Alaska. Because of Alaska's sparse population and lack of development, there are hundreds of remote rivers, lakes, and streams where there is little or no

evidence of actual use. Because of their physical characteristics, however, many of these remote waterbodies could be used for transporting people or goods if there was a need. Under these circumstances, they are considered legally navigable.

Transportation Must Be Conducted In the Customary Modes of Trade and Travel On Water. A finding of navigability does not require use or capability of use by any particular mode of transportation, only that the mode be customary. The courts have held that customary modes of transportation on water include all recognized types and methods of water carriage. Unusual or freak contrivances adapted for use only on a particular stream are excluded. Customary modes of trade and travel on water in Alaska include, but are not limited to, barges, scows, tunnel boats, flat-bottom boats, poling boats, river boats, boats propelled by jet units, inflatable boats, and canoes. In places suitable for harvesting timber, the flotation of logs is considered a customary mode of transportation.

The mode of travel must also be primarily waterborne. Boats which may be taken for short, overland portages qualify. The courts have ruled that the use of a lake for takeoffs and landings by floatplanes is insufficient, in and of itself, to establish navigability.

Without expressly rejecting the claim, at least two court decisions in Alaska have suggested that winter travel on the surface of a frozen river or lake is probably not evidence of navigability. The rivers involved in the two adjudicated cases were both found navigable based upon summer use by boats, however, and it appears likely that most waterbodies in Alaska that are used as highways in winter can also be travelled by at least small boats in the summer. Because of this, the state need not rely upon winter travel to support navigability.

Waters Must Be Navigable In Their Natural and Ordinary Condition. A waterbody which can be used for transportation only because of substantial man-made improvements to the condition of the watercourse is not navigable for title purposes. However, if transportation does or could occur on the waterbody even without the improvements and the improvements would only make transportation easier or faster or possible for larger boats (e.g., dredging), it is still considered navigable for title purposes.

The presence of physical obstructions to navigation (rapids, falls, log-jams, etc.) does not render a waterway non-navigable if the obstruction can be navigated despite the difficulties or if the obstruction can be avoided by other means, such as portaging, lining, or poling. A waterbody is also navigable even if seasonal fluctuations do not allow it to be navigated at all times of the year. However, a waterbody which is only navigable at infrequent and unpredictable periods of high water is not normally considered navigable. The fact that a waterbody may be frozen for several months of the year does not render it non-navigable if it is navigable in its unfrozen condition.

Title Navigability Is Determined As Of The Date Of Statehood. To be considered navigable for title purposes, the waterbody must have been

navigable in 1959 (when Alaska became a state). This element of the navigability test focuses on the physical characteristics of the waterbody and whether those characteristics have changed significantly since statehood. Most waterbodies have not physically changed enough since statehood to alter their navigability. Assuming there have been no significant changes in the physical characteristics of the waterbody, a waterbody that is navigable today would be considered legally navigable in 1959 as well. Exceptions might include the creation, by natural or man-made causes after statehood, of a totally new lake, river, or canal now used for navigation. Such a waterbody would not be considered navigable for title purposes. Conversely, a waterbody which was navigable in 1959 but, because of natural or man-made physical changes, is no longer navigable in fact would still be considered navigable for title purposes.

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NAVIGABILITY CRITERIA DISPUTES

Because of differing legal interpretations of court navigability decisions, several aspects of the criteria used by the state to determine navigability have been disputed by the federal government. As a direct result of these criteria disputes, many waterbodies considered navigable by the state have been determined non-navigable by the federal government.

The major criteria dispute has been over the type or purpose of the transportation required to establish navigability. The federal government has asserted that a waterway must be used, or capable of use, for transporting commerce to be considered navigable. Other, "noncommercial" transportation uses are not considered sufficient to establish navigability. In this context, the federal government has claimed that the only relevant "commercial" transportation is the distribution of goods for sale or barter, or the transportation for hire of people or things. The federal government has admitted that professionally guided transportation on Alaska's rivers, lakes and streams constitutes commerce, but nevertheless has argued that the waters are not being used as a navigable "highway" when recreation is involved, but rather more as an amusement park. The federal government has therefore claimed that waters used only for commercial recreation are legally nonnavigable even though they may be navigable in fact.

Through the work of the state's navigability program, this definition has been repeatedly rejected by the courts, most recently in the Gulkana River case. *Alaska v. United States*, 662 F.Supp.455 (D.Alaska 1986), affirmed sub nom. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). Applying the correct definition of navigability, many of the submerged lands that the federal government attempted to convey to ANCSA corporations should have been recognized as belonging to the state. The state appealed many conveyances to protect its title. As occurred in the Kandik-Nation Rivers appeal, *Appeal of Doyon*, 86 I.D. 692 (ANCAB 1979), Alaska Native Corporations also found it necessary to

challenge erroneous federal determinations of non-navigability to insure they would not be deprived of any portion of their entitlement by being charged for submerged land owned by the state.

The federal government has also argued that aluminum boats, boats propelled by jet units, inflatable boats, and canoes are not customary modes of travel for the purpose of determining navigability in Alaska. As a result, many waterbodies navigated by these types of watercraft have been found legally non-navigable by the federal government. The claim is that these boats represent post-statehood technological advances, are too small to be considered "commercial", or that most "commercial" use of the watercraft developed after statehood.

Another navigability dispute involves remote, isolated lakes. The federal government has found many of these lakes legally non-navigable, even though they are physically capable of being navigated. The federal government's contention is that a navigable connection to another area is necessary to make travel on a remote lake worthwhile. Otherwise, the federal government views the lack of development in the area around the isolated lake as an indication that the lake will never be used for commercial transportation.

To resolve these navigability criteria disputes, the state has actively pursued a limited number of court cases challenging particular findings of non-navigability by the federal government. With the sole exception of floatplanes, the courts have agreed with the navigability criteria presented by the State of Alaska and have rejected the limitations suggested by the federal government. These cases include:

Gulkana River. In this case, both in the U.S. District Court and on appeal to the U.S. Court of Appeals, the federal courts rejected the federal government's restrictive interpretation of the phrase "highway of commerce" in the title navigability test. The federal district court stated that to demonstrate navigability, it is only necessary to show that the waterbody is physically capable of "the most basic form of commercial use: the transportation of people or goods." Because the Gulkana River can be used for the transportation of people or goods, the Gulkana River was found navigable. *Alaska v. United States*, 662 F.Supp.455 (D.Alaska 1987). On appeal, the court of appeals affirmed the district court's finding of navigability. *Alaska v. Ahtna, Inc.*, 892 F.2d 1401 (9th Cir. 1989). The court of appeals found that the modern use of the Gulkana River for guided hunting, fishing, and sightseeing trips is a commercial use and, since the physical characteristics of the river have not significantly changed since 1959, provides conclusive evidence that the river was susceptible of commercial use at statehood. The court also found that modern inflatable rafts can be used to establish navigability. In April 1990, the United States Supreme court denied a request by Ahtna, Inc. to reconsider and overturn the court of appeals decision. The Gulkana River precedent is now binding on all future navigability determinations in Alaska.

Kandik and Nation Rivers. In this administrative appeal, the State of Alaska and Doyon Limited, an ANCSA regional corporation, successfully

established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by fur trappers, as well as extensive historic and contemporary canoe use, the court found the Kandik and Nation rivers, in Interior Alaska, navigable. Appeal of Doyon, 86 I.D.692 (ANCAB 1979).

Alagnak River. In this federal district court case, the Alagnak River, the Nonvianuk River, Kukaklek Lake and Nonvianuk Lake were all found navigable. These interconnected waterbodies are located in the Bristol Bay region of Alaska, south of Lake Iliamna. Their primary transportation use is for commercially guided hunting, fishing, and sightseeing and for government research and management. They also serve as a means of access for local residents to their homes and to the surrounding areas for subsistence hunting and fishing. After several years of litigation, the federal government conceded that these rivers and lakes are navigable. Alaska v. United States, No. 82-201 (D.Alaska Feb. 2, 1985).

Matanuska River. The recommended decision in this administrative appeal agreed with the State of Alaska's position that post-statehood commercial river rafting operations are sufficient to establish navigability. Based upon that type of use, the administrative law judge who heard the case recommended that the Matanuska River, in Southcentral Alaska, be found navigable. The Secretary of Interior, over the state's objections, assumed jurisdiction over the case and stayed implementation of the recommended decision. No action has been taken in the case since that time. Appeal of Alaska, No. 82-1133 (IBLA Rec. Decision Aug. 18, 1983)

Slopbucket Lake. The state claimed that the extensive use of floatplanes on Slopbucket Lake, a twenty acre lake adjacent to Lake Iliamna, was sufficient to establish navigability. The federal courts rejected this view. The courts reasoned that floatplanes do not use the lake as a navigable highway; they just take off and land there. Alaska v. United States, 754 F.2d 851 (9th Cir.) cert denied, 106 S. Ct. 333 (1985).

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IDENTIFICATION OF NAVIGABLE WATERS

Even if the criteria for determining navigability in Alaska were totally agreed upon, it still would be difficult to prepare a complete list of all of the navigable lakes, rivers, and streams in the state. Much of Alaska has not yet been surveyed and many maps are inaccurate and out-of-date. It is an immense and complex task simply to identify and locate all of the thousands of named and unnamed lakes, rivers, and streams in the state which might be considered navigable. Furthermore, once a potentially navigable lake, river, or stream has been

identified, detailed information about its size and uses is necessary for an accurate navigability determination. Because of Alaska's undeveloped and remote character, gathering navigability information is both time consuming and expensive. Finally, administrative navigability determinations made by the state or the federal government are always subject to legal challenge, since only the courts can authoritatively determine title to submerged lands.

Despite these difficulties, both the state and the federal government are frequently called upon to issue navigability determinations. Although the requirement that BLM adhere to the meandering requirements of the BLM Survey Manual has eliminated the need for navigability determinations on the larger rivers, lakes, and streams, which must now be meandered regardless of navigability, navigability determinations are still required for the smaller rivers, lakes, and streams to determine if they are to be meandered at the time of survey. Because of this, some navigability determinations are still made for nearly every federal land conveyance under ANCSA or the Alaska Statehood Act. The management plan for nearly every federal Conservation System Unit (CSU) also addresses the navigability issue.

Federal navigability determinations are reviewed by the state to insure that available information sources were used and interpreted correctly. Where the federal government determines non-navigable a waterbody which is considered navigable by the state, the state may provide the government with supplemental information about the uses and characteristics of the waterbody to obtain a redetermination of navigability. Under some circumstances the state needs to make its own navigability determinations, such as for a oil and gas lease sale, land disposal, material sale, mining claim, or another use of state land or resources requiring a determination of ownership of submerged lands within the affected area.

For large, undeveloped regions of Alaska there may be little or no accurate waterbody use or physical characteristics information available for making navigability determinations. When information is lacking, and it must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on maps and aerial photographs. In these cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 70 feet wide) and having an average gradient over the length of the stream of no more than 50 feet per mile. With rare exceptions, the state's experience has been that streams of this type are deep enough and wide enough to be navigable by boats carrying persons or goods and must, therefore, be considered legally navigable. Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 50 feet per mile and are at least 10 miles.

If there is no public use or physical characteristics information readily available for lakes, those lakes which are shown on maps and aerial photographs as having a navigable water connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size of the lake. These

lakes are part of a system of interconnected navigable waters. If a lake is totally isolated, it will be included on the state's navigability maps if it is at least 1 1/2 miles long. That length insures that the lake can be used as a "highway". Future judicial decisions interpreting the "highway" requirement for isolated lakes could shorten or lengthen this 1 1/2 mile "rule of thumb."

The state recognizes that, under some circumstances, lakes smaller than 1 1/2 miles long can be and are used as navigable highways. In those cases, when known, these smaller lakes are also depicted on the state's navigability map. Moreover, as a matter of administrative policy and convenience only, the state may sometimes make an exception to the 1 1/2 mile standard in the extremely wet regions of the state, including some areas in the Yukon- Kuskokwim Delta, Yukon Flats, and on the North Slope. In these areas, an isolated lake might need to be 2-3 miles long to be included on the state's navigability maps. Although smaller lakes in these areas are capable of being used for transportation and should be found navigable by the courts, the state has decided to concentrate its limited resources in protecting the larger waterbodies first.

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NAVIGABLE WATERS WITHIN PRE-STATEHOOD FEDERAL WITHDRAWALS

Although disputes over which waters in Alaska are navigable are the most frequent cause of submerged land ownership disputes, there is another major legal issue which poses a threat to Alaska's sovereign claim to the beds of navigable waters. Even where navigability is conceded, the federal government often contends that title to the submerged lands did not vest in the state if the area was withdrawn or reserved by the federal government on the date of statehood. Within native conveyance areas, the federal government has used this claim of "reserved submerged lands" to justify its attempts to convey the beds of navigable waters in fulfillment of the native entitlements. Within state selections, the federal government has used the same claim to charge the acreage of submerged lands against the state's entitlement.

The state strongly disagrees with this federal claim and has actively pursued a number of court challenges to resolve the issue. In addition to numerous appeals from federal decisions to convey or charge for the beds of navigable waters, the state was actively involved as a friend of the court in one case before the United States Supreme Court and continues to be involved in another Supreme Court case which presents this issue. The pending case is *United States v. Alaska*, U.S. Supreme Court 84 Original (filed June, 1979).

On June 8, 1987 the Court issued its decision in *Utah v. United States*, No. 85-1772 (filed Oct. 14, 1986). In this case the federal government, in 1976, issued oil and gas leases for land underlying Utah Lake, a navigable waterbody located in Utah. The suit sought a declaratory judgement that Utah, rather than the United States, holds

the lands under navigable waters in the territories in trust for future states, and, absent a prior conveyance by the federal government to third parties, a state acquires title to such land upon entering the Union on an "equal footing" with the original 13 states.

The Supreme Court held that title did pass to the state upon Utah's admission to the Union. They held that there is a strong presumption against finding congressional intent to defeat a state's title, and, that in light of the longstanding policy of the federal government's holding land under navigable waters for the ultimate benefit of future state absent exceptional circumstances, an intent to defeat a state's equal footing entitlement could not be inferred from the mere act of the reservation itself. The United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation, but would additionally have to establish that Congress affirmatively intended to defeat the future state's title to such land.

This decision has significant ramifications within Alaska, since over 95 million acres - more than 25% of the total area of the state - was enclosed within various federal withdrawals and reservations at the time Alaska became a state.

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NAVIGABLE WATERS WITHIN ANILCA CONSERVATION SYSTEM UNITS

On December 2, 1980, the Alaska National Interest Lands Conservation Act became law. This act created or added 104.3 million acres to various federal conservation system units. Because these "withdrawals" occurred after the date of statehood, there is no disagreement between the state and federal governments that navigable waters within the various CSU's are owned by the state. However, there is some disagreement on the amount of authority the federal land managers may have to regulate these state owned submerged lands.

The U.S. Constitution gives Congress certain limited powers to control uses on state owned submerged land. These are known as the Property Clause, Navigational Servitude and the Commerce Clause. The extent of these powers involves complex legal questions. However, even assuming that Congress has the power to regulate state-owned submerged lands in Alaska, the United States Supreme Court has ruled that Congress may choose not to exercise that power, thus leaving regulation totally up to the state. *Eschanaba Co. v. Chicago*, 107 U.S. (17 Otto.) 678 (1883). Whether Congress has done that can only be determined by examining the federal laws passed by Congress dealing with Alaska lands. Another possibility is that the state and federal governments have concurrent jurisdiction, sharing the authority to regulate submerged lands.

In ANILCA, Congress did not take away the state's power to regulate state-owned submerged lands within federal CSU's in Alaska. Numerous

provisions in ANILCA recognize and respect the state's authority over state-owned land. In some cases, however, Congress may have attempted to give the federal land managers some concurrent authority to regulate navigable waters within CSU's.

The state, where possible, cooperates with rather than confronts the federal land managers. This cooperation often takes the form of a memorandum of understanding that discusses management issues and how they will be resolved. Differences do occur, however, over issues such as column management and restrictions on mining.

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II. LEGAL AND POLICY GUIDELINES GOVERNING MANAGEMENT OF SUBMERGED LANDS AND PUBLIC WATERS

PUBLIC TRUST DOCTRINE

The state has special duties and management constraints with respect to state-owned land underlying navigable waters. These special duties and management constraints arise from the Alaska Constitution. The Alaska Constitution contains numerous provisions embracing the principles commonly known as the public trust doctrine. The public trust doctrine is remarkable both for its age and for its vigor. Rooted in the customs of the seafaring Greeks and Romans, it has evolved to become one of the most effective safeguards of public rights. Basically, the trust reflects an understanding of the ancient concept that navigable waters, their beds and their banks, should be enjoyed by all the people because they are too important to be reserved for private use.

In America, the concept of public rights to public waters was recognized since the early days of the Massachusetts Bay Colony where the great Pond Ordinance of 1641 guaranteed the right to fish and fowl in ponds greater than 10 acres, along with the freedom to pass through private property to do so.

By 1821, American courts were pronouncing the law of public trust as we know it today. This does not mean that no water-related development can take place. The public trust doctrine permits states to improve waterways by constructing ports, docks and wharves, thus furthering the purposes of the trust. Generally speaking, the people's trust rights may be alienated only in ways that further overall trust uses, and in relatively small parcels.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892), involved a grant by the State of Illinois of one thousand acres of the bed of Lake Michigan, constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The U.S. Supreme Court held

that the grant was revocable, that the state held the land in trust for the public, and that it was powerless to relinquish its rights as trustee.

The court went on to say that land underlying navigable waters is much more than a simple property right.

[I]t is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties... The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

In the 19th century the purposes of the trust were generally described as "commerce, navigation and fishery." This was logical because the major waterways were essential highways of commerce. But as other values became increasingly important, courts began to recognize recreation and environmental protection among the purposes for which the trust exists. As a California court said in 1971, "with our ever increasing leisure time...and the ever increasing need for recreational areas it is extremely important that the public need not be denied use of recreational water...the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes." *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1044 (1971).

The Alaska constitution provides protections similar to the public trust doctrine protections that cannot be disregarded by the legislature or overruled by the courts. Article VIII, Sec. 3 provides; "Wherever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use." After reviewing the public trust doctrine in *Owsichek v. State, Guide Licensing*, 763 P.2d 488 (Alaska 1988), the Alaska Supreme Court explained that "the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."

In *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988), the Alaska Supreme Court applied the public trust doctrine to tidelands, holding that, even after conveyance, the title remains subject to continuing public easements for purposes of navigation, commerce and fishery.

The 1985 Alaska legislature recognized the constitution application of public trust doctrine principles in Alaska. In an Act relating to the public or navigable waters of the state, the legislature found that "the people of the state have a constitutional right to free access to the navigable or public waters of the state" and that the state "holds

and controls all navigable or public waters in trust for the use of the people of the state". 85 SLA Ch. 82. In the same act, the legislature ruled that submerged lands are "subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public trust."

Courts in other states over the years have defined in somewhat different ways the public uses that are permitted and protected by the public trust as it applies to submerged lands. In reviewing these other cases, it can clearly be seen that through time an ever expanding definition of the public uses protected by the public trust doctrine is being adopted. The California Supreme Court recently held that:

Although early cases had expressed the scope of the public's right in (lands subject to the public trust) as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the (public trust) lands in their natural state as ecological units for scientific study. *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 365 (Cal. 1980)

It is clear under the Alaska Constitution that the State of Alaska has the responsibilities of a trustee with respect to management of land underlying navigable waters. Moreover, the Alaska legislature has adopted a broad view of the public uses protected or permitted by the public trust. Accordingly, the Alaska Attorney General's Office has determined that, until the Alaska Supreme Court rules on the question, the state should assume that a broad definition of public rights protected by the Alaska Constitution and the public trust doctrine applies in Alaska, similar to the one adopted by the California Supreme Court. 1982 Atty. Gen. Op. No. 3 (June 10, 1982).

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PUBLIC WATERS

It is not only the beds of navigable waters in Alaska that are reserved in public ownership for public use. Under article VIII, Section 3 of the Alaska Constitution, all waters occurring in their natural state are reserved to the people for common use. Article VIII, Section 14 of the Alaska Constitution also provides for the broadest possible access to and use of state waters by the general public.

Section 14. Access to Navigable Waters. Free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

Pursuant to this grant of authority, the Alaska State Legislature, in

AS 38.05.365(12), defined "navigable waters" as follows:

"navigable waters" means any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes.

This definition of navigable waters does not define state ownership of submerged land in Alaska. The definition of navigability for ownership purposes was discussed earlier in this paper. This definition, however, does define what types of waterbodies in Alaska are available for public use under the Alaska statutes.

The Alaska State Legislature has broadly construed the constitutional protections for public use of the waters of the state. In an Act (85 SLA chap. 82, codified as AS 38.05.128) relating to the navigable or public waters of the state, the state legislature found:

(a) The people of the state have a constitutional right to free access to the navigable or public waters of the state.

(b) Subject to the federal navigational servitude, the state has full power and control of all of the navigable or public waters of the state, both meandered and unmeandered, and it holds and controls all navigable or public waters in trust for the use of the people of the state.

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

(d) This Act may not be construed to affect or abridge valid existing rights or create any right or privilege of the public to cross or enter private land.

AS 38.05.128 provides:

OBSTRUCTIONS TO NAVIGABLE WATER

(a) A person may not obstruct or interfere with the free passage by a member of the public on any navigable water as defined in AS 38.05.965 unless the obstruction or interference is:

- (1) authorized by a federal or state agency;
- (2) authorized under a federal or state law or permit;

- (3) exempt under 33 U.S.C. 1344(f) (Clean Water Act);
- (4) caused by the normal operation of freight barging that is consistent with law; or
- (5) authorized by the commissioner after reasonable public notice.

(b) A violation of (a) of this section is a class B misdemeanor.

(c) An unauthorized obstruction or interference is a public nuisance and is subject to abatement. The cost of abatement shall be borne by the violator and is in addition to any penalty imposed by the court.

(d) This section may not be construed to affect or abridge valid existing rights.

Thus, under the Alaska Constitution and this statute, any surface waters capable of use by the public defined in AS 38.05.365(12) are available to the public, irrespective of streambed ownership. Further, such public use is not considered a taking and is not subject to inverse condemnation action. Private ownership is subject to the public rights that are protected by the public trust.

In two Montana Supreme Court cases involving the nature of public rights where the submerged lands are privately owned, the court rules that public portaging, anchoring, and other uses incidental to the use of the water are allowed. The court also found that if travel on the water or streambed is obstructed, the public is allowed to use the adjacent private land to portage around the barrier in the least intrusive way possible, avoiding damage to the property holder's rights. However, the public does not have the right to enter into or trespass across private property in order to enjoy the recreational use of state-owned waters. The State of Alaska agrees with this ruling and believes a similar ruling would be made by our state courts.

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BOUNDARIES OF NAVIGABLE WATERS

The state is often asked where public ownership of water bodies ends and private ownership begins. There are two types of water body boundaries to address: 1) non-tidal water boundaries and 2) tidal water boundaries. Non-tidal boundaries are boundaries of lakes, rivers, and streams. Tidal boundaries are the boundaries along any body of water which is influenced by the rise and fall of the tides.

1. Non-tidal Water Boundaries

The boundary between public and private ownership is the "Ordinary High Water Mark" which is defined in 11 AAC 53.900(23) as being - The mark along the bank or shore up to which the presence and action of the non-tidal water are so common and usual, and so long continued in all ordinary years, as to leave a natural line impressed on the bank or shore and indicated by erosion, shelving, vegetation, or other

distinctive physical characteristics. Also see the Alaska State Supreme Court definition in Department of Natural Resources v. Pankrantz 538 P.2d 984, 988-89 (Alaska 1975). The ordinary high water line can usually be observed by the laymen simply by noting the vegetation line or well defined stream banks.

2. Tidal Water Boundaries

The boundary between tidal water bodies and private/public owned uplands is the Mean High Water Line. Mean high water line as defined by 11 AAC 53.900(15) is: The tidal datum plane of the average of all the high tides, as would be established by the National Geodetic Survey, at any place subject to tidal influence.

This line is not readily observable because it is a line of known elevation which intersects the land surface. The mean high water line can be a considerable distance below the vegetation line because extreme high water will denude the beach above the line of mean high water. The only way that the location of mean high water line can be accurately determined is by differential leveling from known bench marks or by operating a tide gauge for a sufficient period of time to determine the mean high water elevation. The line of mean high water line can be approximated by time coordinated observations of the daily predictions for high and low waters, predicted by NOAA, as they relate to the published mean high water elevation. This method can be highly unreliable because small errors in the predictions or observations can transform into large errors in the horizontal location; this is especially true in areas where the beach gradient is very flat.

It is important to note that in some areas, such as Prince William Sound, the mean high water line boundary is considerably higher than the current mean high water line because the boundary became fixed at the 1964 pre-quake location. In this instance the boundary between state-owned tidelands and the uplands would be established at an elevation which equals the sum of the mean high water elevation plus the published amount of uplift or, in some cases, submergence.

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CONCLUSION

This paper describes the state's policies and procedures for managing and protecting state submerged lands and public waters. As further legal and practical developments occur in this area, these policies and procedures will be reexamined by the state and, if necessary, appropriate changes will be made.

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SB

305

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

DATE: 2/19/04

FURTHER:

MAR 01 2004

DATE TURNED
IN TO OFFICE: 3/01/04

Finance Committee considered

SENATE BILL NO. 305

SB 305 ASSERTING STATE TITLE TO SUBMERGED LAND

"An Act relating to state ownership of submerged land underlying water that was navigable at the time Alaska achieved statehood."

and recommends:

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

Senate Bill:
 Same Title
 New Title

House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

NEW FISCAL NOTE(S):

| Department | Date | Fiscal | Indet. | Zero. | FN# |
|------------|------|--------|--------|-------|-----|
| | | | | | |
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PREVIOUS FISCAL NOTE(S):

| Department | Date | Fiscal | Indet. | Zero | FN# |
|------------|---------|--------|--------|------|-----|
| DNR | 2/17/04 | 186.5 | | | 1 |
| | | | | | |
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APPROPRIATION - no fiscal note

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC | AMEND |
|---------------------------------|-------------------------------------|--------------------------|-------------------------------------|--------------------------|
| <i>[Signature]</i> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>[Signature]</i> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
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| COCHAIR: <i>[Signature]</i> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| COCHAIR: <i>[Signature]</i> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

FISCAL NOTE

MAY 01 2004

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 305
 (S) Publish Date: 2/19/04

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
 Title ASSERTING STATE TITLE TO RDU Resource Development
SUBMERGED LAND Component RS2477 and Navigability
 Sponsor Sen. Therriault
 Requester Sen. 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 | 141.5 | 111.5 | 74.5 | | | |
| Travel | 5.0 | 3.0 | 3.0 | | | |
| Contractual | 25.0 | 25.0 | 10.0 | | | |
| Supplies | 5.0 | 5.0 | 5.0 | | | |
| Equipment | 10.0 | 3.0 | 2.0 | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 186.5 | 147.5 | 94.5 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|--|--------------|--------------|-------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 186.5 | 147.5 | 94.5 | 0.0 | 0.0 | 0.0 |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type-Do not abbreviate) | | | | | | |
| TOTAL | 186.5 | 147.5 | 94.5 | 0.0 | 0.0 | 0.0 |

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 | 2 | 2 | 1 | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This bill requires the department to maintain an inventory and maps of navigable waters in Alaska, and to notify ANCSA corporations about state ownership. DNR will need to review DNR, ADF&G and BLM files to locate, compile and map (in GIS) all existing state, federal, and court navigability determinations. Though some of this work has been completed through the Recordable Disclaimer project and DNR staff work, substantial additional work is needed to complete this project.

This project will require the following positions:

- One (1) Natural Resource Specialist for 1.5 years (FY05 and FY06) at a cost of \$90,000 (\$60,000/year) to complete the research and compile the determinations

CONTINUED

Prepared by: Bob Loeffler, Director Phone 269-8600
 Division: Mining, Land and Water Date/Time 2/17/04
 Approved by: Thomas Irwin, Commissioner Date 2/17/04
 Agency: Natural Resources

FISCAL NOTE #1

STATE OF ALASKA
2004 LEGISLATIVE SESSION

BILL NO. SB 305

ANALYSIS CONTINUATION

- One Cartographer II position for 2 years (FY05 and FY06) at a cost of \$74,500/year to create and depict the information on 1:63,360 scale maps or photo imagery, and
- One Analyst Programmer III for two months (one month each in FY05 and FY06) at a cost of \$7,000 per month to create corresponding data base.

In FY07, one Cartographer II position would be requested to add this compiled information to DNR's land status plats. The primary work associated with this is the need to create new status plats for the many areas of the state where they do not currently exist. State status plats exist primarily for areas where there is already a state ownership interest or water right. DNR does not have plats for townships where there is currently no state land depicted.

Other costs include travel to research navigability information in BLM, DNR or ADFG files in Fairbanks, Glennallen, Nome, or other communities. Contractual includes office space rental (\$6,000 per person/year), phones, photo-copying (we intend to xerox any navigability information in BLM's files), postage, etc. Supplies include basic office supplies and computer/software purchases.