

ALASKA LEGISLATURE COMMITTEE FILES

1997-1998 8672

9650 SENATE RESOURCES

The buffers for small non-fish streams appear to be minimal or inadequate for sediment control. The recommended buffer width for sediment filtering ranges from about 26 to 150 ft (8–46 m), depending on hillslope (Johnson and Ryba 1992), whereas the average buffer width on private lands is 40 ft (12 m) for perennial non-fish streams and usually 0 ft for intermittent non-fish streams (Table 8.2). California is closest to the recommended width by requiring 50–100-ft buffers on perennial non-fish streams. A high level of timber harvest within the buffers, however, probably compromises their effectiveness as sediment filters. Because of the narrow buffers and high level of harvest allowed along small non-fish streams, preventing sediment pollution relies heavily on BMPs that restrict felling and yarding practices along streambanks.

BEST MANAGEMENT PRACTICES

The BMPs used in the five states are generally similar in that their principal objective is to prevent sediment pollution. Each state has a suite of BMPs for felling, yarding, slash disposal, site preparation, road construction and maintenance, and other activities designed to prevent disturbances to stream channels, riparian areas, and unstable soils, and minimize sediment runoff from roads and skid trails. Each state monitors effectiveness of its BMPs, but monitoring programs are only recently being developed, and current BMPs have not yet been fully evaluated.

Three BMPs pertaining to buffer zones are particularly important in protecting streams from disturbance and preventing downstream sediment impacts from timber harvest along small non-fish streams. These BMPs determine 1) whether trees can be felled into and limbed within stream channels, 2) whether cable yarding can cross streams with full or partial log suspension, and 3) whether tractors and other ground-based yarders can operate within streams or their buffer zones.

The states' BMPs for these activities carefully protect fish-bearing streams, but small non-fish streams are not as carefully protected. All states require that trees be felled away from and not bucked and limbed in fish-bearing streams; however, several states allow felling, bucking, and limbing in small non-fish streams. Washington and Idaho, for example, allow felling, bucking, and limbing in perennial non-fish streams as long as care is taken to minimize accumulation of slash. Cable yarding across fish-bearing streams must have full suspension and prior approval in Oregon and Washington, except for small non-fish streams. Tractor yarding is generally not allowed across fish-bearing streams and not allowed in most perennial non-fish streams except at constructed temporary crossings; however, all the states allow some log skidding across intermittent non-fish channels. For example, Oregon allows log skidding across dry streambeds where the disturbance is less than it would be to construct temporary crossings. Washington and California allow log skidding across intermittent non-fish stream channels unless a buffer zone is deemed necessary by on-site inspection.

Because small non-fish streams are particularly important for controlling sediment delivery and because buffer zones along them are usually narrow and heavily harvested, BMPs for felling and yarding must be closely monitored to ensure that they are effective. Effective BMPs are

Chapter 10

Conclusions and Recommendations

A comprehensive watershed-level approach is essential for maintaining and restoring salmonid habitat because the watershed is a fundamental unit for both ecological processes and land management. The failure of past piecemeal forest management to prevent habitat degradation or to accomplish restoration of stream reaches shows the need for an ecosystem-based, watershed-level management strategy.

The main technical elements of the watershed approach are buffer zones, BMPs, watershed analysis, and restoration. Because any conservation strategy will probably fail without community support, watershed management also includes outreach programs to recruit support from local citizens and enlist cooperation from private landowners.

BUFFER ZONES

Buffer zones are probably the most important tool for protecting critical riparian and aquatic processes. Buffer zones along streams, however, can not maintain fish habitat unless sensitive watershed areas and hydrologic processes are also protected by effective watershed management.

Buffer zones do not need to be "lock-out" zones if management activities within them maintain or restore critical riparian processes. The appropriate design for buffer zones depends on management objectives. The widest buffers with greatest restrictions on activities are used along fish-bearing streams to meet the full range of objectives for fish habitat, as well as for other wildlife (e.g., owls and amphibians). Narrower buffers with fewer restrictions can be used along non-fish streams to protect water quality and downstream fish habitat.

To fully protect fish-bearing streams, buffers need to provide all processes that create and maintain fish habitat, particularly shade, streambank integrity, and recruitment of large woody debris. Buffer zones need to be wide enough to fully protect the stream and floodplain and to ensure the long-term viability of the buffer itself. Buffers wider than one site-potential tree height (average maximum height given site conditions) may be needed to protect the floodplain and riparian vegetation where exposure to light and wind could cause succession to shrub communities. Blowdown in buffer zones, however, is usually not a problem for fish habitat, and where it does cause a problem, such as a stream blockage, it can be minimally altered to restore fish passage while leaving most fallen trees in place.

Current requirements for buffer width and leave trees on private lands do not fully protect LWD sources for fish-bearing streams. Four of the five states require leaving only an estimated 23% to 58% of potential LWD sources compared to the sources present in mature conifer forest. More and larger leave trees are needed to provide optimal fish habitat over the long term.

Many areas in the Pacific Northwest, however, have degraded riparian vegetation dominated by hardwood and shrubs, and lack additional large conifers for leave trees. In these degraded areas, buffer zones can be actively managed to improve degraded riparian functions. Reestablishing conifers offers potential long-term benefits for both fisheries and timber managers. In riparian areas restored to mature conifers, buffers could be selectively harvested if monitoring shows it would not harm fish habitat.

Buffer zones are also needed along non-fish streams to protect water quality and provide LWD for downstream fish habitat. Except for federal lands under NFP and PACFISH, buffers on small non-fish streams (both perennial and intermittent) are often inadequate or lacking. Reliance on BMPs alone may be inadequate to protect these headwater areas, and monitoring studies have not yet shown that BMPs are effective in preventing downstream impacts. The width and harvest activities within these buffers can be designed specifically to protect headwater sources of temperature control, sediment, and woody debris.

Management regimes are needed that will put timber harvest in the context of natural disturbance regimes. Disturbance to streams and flood plains is not necessarily negative, and may be needed for productive fish habitat over the long term. Unnatural disturbances, however, should be minimized, and patterns of land use should mimic the natural disturbance process and leave the necessary legacy for the long-term development of required habitat. Specifically, more large wood is needed in buffers along headwater channels with the greatest potential for delivery to fish-bearing streams.

BEST MANAGEMENT PRACTICES

Generally, BMPs can be effective at controlling nonpoint source pollution but need to be closely monitored for implementation and effectiveness to identify needed improvements. All the Pacific Northwest states and Alaska have a regulatory BMP program and monitor for implementation and effectiveness. Monitoring programs are mostly new, however, and BMPs have not been fully evaluated.

Many current forestry-related problems with water quality result from inadequate BMP implementation, which is generally worse on small private parcels than on public or large industrial holdings. On-site inspections are needed to identify sensitive areas and to design harvest and transportation plans to suit local conditions. Having well-qualified field personnel available to provide site-specific BMP recommendations, particularly for small private landowners, is probably the best way to improve BMP implementation.

Because small non-fish streams are particularly important for preventing sediment pollution and because buffer zones along them are usually narrow and heavily harvested, BMPs for activities

near them need to be closely monitored to ensure that they are effective. State BMPs do not fully protect small non-fish streams, intermittent channels, and unstable slopes from logging disturbance. The BMPs pertaining to felling and yarding that apply to fish-bearing streams generally do not apply to small non-fish streams (particularly intermittent channels) and unstable slopes. Monitoring with feedback for adaptive management is needed to develop, evaluate, and improve BMPs for these areas.

WATERSHED ANALYSIS

A watershed program must have some process for analysis and planning at the watershed level. Watershed analysis is the most thorough method for understanding potential effects of land uses at the watershed scale. Watershed analysis can be used to describe current conditions, identify sensitive areas and risks, determine factors limiting salmonid production, and develop prescriptions to prevent cumulative effects.

Watershed analysis should be instituted wherever possible to provide information for watershed planning. State agencies can organize and lead working groups of concerned landowners in cooperative watershed analysis in watersheds with mixed ownerships. The watershed analysis efforts in Washington and Idaho provide good prototype models for developing prescriptive watershed analysis for private lands.

RESTORATION

Restoration is an integral part of comprehensive watershed management and is used to stabilize deteriorating conditions and speed recovery in key watersheds. Effective restoration has a watershed-level approach and includes upland, riparian, and instream components. The upland component is used to control erosion, stabilize roads, upgrade culverts for fish passage, and manage watershed uses. The riparian component restores functions of riparian vegetation by reestablishing mature conifers or other appropriate vegetation. The instream component, using woody debris and other structures to retain spawning gravel and create pools or other features, should be conducted only after watershed problems have been addressed and limiting factors identified.

Effectiveness evaluations are a critical part of restoration because they help improve technology and demonstrate the benefits of restoration. A representative sample of projects needs to be evaluated over a range of watershed and stream classes for each type of restoration technique.

Although restoration projects should undergo rigorous planning and evaluation, a streamlined process is needed to take advantage of opportunities arising during timber harvest on private lands when equipment, materials, and labor are on site. Trained agency personnel are needed to advise willing companies on obtaining permits and designing projects so that the work can be done without delay. Monitoring can be used to develop and evaluate standard techniques for such cases, and incentives can be incorporated in forest practices rules to encourage such

projects. Prototype models for this are the Oregon incentives for riparian and instream restoration.

Priorities for restoration are key watersheds with the best remaining habitat, rather than the most degraded areas. The goal is to secure, expand, and link key watersheds in a system of refugia connected by intact migration corridors. Restoration activities for the best watersheds should focus on reducing risks to these habitats by obliterating unneeded roads and revegetating upland and riparian areas. The expectation is that all watersheds, not just key watersheds, will improve over time, but key watersheds will recover fastest because of their high level of habitat protection and priority for restoration. Other watersheds are expected to recover as a result of improved land management.

The best form of restoration is habitat protection. There is no guarantee that restoration efforts will succeed, and the cost of restoration is much greater than the cost of habitat protection. The most prudent approach is to minimize the risk to habitat by ensuring adequate habitat protection.

COMMUNITY OUTREACH

Comprehensive watershed management involves more than improved scientific understanding; it also encompasses economic, social, and political concerns. In the ideal situation, all stakeholders, including landowners, industries, and citizen groups, are partners in planning and implementing watershed management. Working groups of government agencies, industry, and citizen groups can provide the necessary consensus on forest practices and watershed management issues.

Habitat protection and restoration on a watershed basis will require integrating federal land management with other regulatory programs that affect aquatic habitats, particularly the Clean Water Act and Endangered Species Act. Habitat Conservation Plans developed under the ESA have an important role in watershed planning on private lands. Ultimately, basin-wide planning efforts are needed that include all public and private land managers.

Economic incentives can be provided for local communities and landowners to support habitat protection and restoration. On public lands, contracts awarded by competitive bidding can provide effective habitat protection and restoration while providing local employment. Tax credits and cost-sharing programs can be expanded to compensate private landowners for measures taken to protect public aquatic resources, such as expanded buffer zones or retention of additional leave trees along streams.

Although scientific information will always be incomplete and possibly wrong, current knowledge is adequate to design comprehensive watershed management to reduce risks to salmonid habitat and to restore degraded habitat. Scientific information can provide the basis for evaluating trade-offs between timber harvest and habitat protection, but whether society should take actions needed to recover anadromous salmonids is a political decision.



Alaska Timber Times

October 1996

Forestry Experts call Beetle Kill "Environmental Emergency"

Two Canadian forestry experts told a joint meeting of the House and Senate Resources Committees last month that the state should be prepared to spend more than \$15 million per year, and as much as \$100 million total, to properly restore state forested land devastated by spruce bark beetles. Calling the situation an "environmental emergency," the Canadians advised state lawmakers to launch an aggressive reforestation effort. They said that state timber sales should be an important part of the effort to restore the badly damaged forests.

"The forest industry did not cause this problem; therefore they shouldn't be required to foot the entire bill of restoring the forest," said Canadian consultant Les Reed, who

was brought to the state by the Society of American Foresters, along with Patrick Moore, a director of the Forest Alliance of British Columbia and a one time director of Greenpeace Canada. They were backed by Ed Holsten, an Alaska based entomologist with the U.S. Forest Service, who said tall grass will prevent regeneration of spruce on the Kenai Peninsula if no replanting is done.

State foresters estimate as much as 3 million acres statewide have been infested by bark beetles since 1989, including much of the Kenai Peninsula and Copper River Valley, and say the epidemic has progressed far beyond the point where it could be stopped by logging. Bark beetles incubate for one or two years in dying trees before going on to new trees.

Forestry division director Tom Boutin, testified that the state has sold 8,800 acres of timber on the Kenai Peninsula in the past three years and plans to sell another 19,000 in the next five years. Most of the recent logging of beetle-infested woods on the Kenai Peninsula has been on Native corporation lands.

Boutin said it was hard to justify more aggressive salvage logging when state foresters could find no state or federal wildlife biologists to say that the extensive beetle-kill would be a detriment to moose, bear or salmon, as the Canadians claimed.

"They are reluctant to say logging, even if done well, will have less impact than if the beetle epidemic is allowed to take its course," Boutin said.

Patrick Moore, the Canadian expert, responded to Boutin's comments by saying he was "flabbergasted" to hear that the Department of Fish and Game expressed concern about moose but not about species

that depend on tall spruce trees, such as songbirds and the marbled murrelet.

Alaska Forest Association director, Jack Phelps said, "The problem on Federal lands is complicated by the fact that much of the spruce beetle infestation on federal land occurs on lands which are not managed for timber resources at all (park lands, wildlife refuges, and other BLM lands). One action I think Alaska should take is for the Legislature to work with Governor Knowles to press the federal government to take action on its lands that will aid in restoration of forest health while creating some economic opportunities for Alaskans. It is time for Alaskans to speak up with a loud and consolidated voice. My association stands ready to assist you, even as we are working with the governor to get a better recognition by the national administration of the needs of Alaska's forests and her people. Recent actions by the White House have been less than encouraging, but we are not yet ready to give up."

House and Senate leaders listened sympathetically to testimony during the special hearing. House Speaker Gail Phillips, R-Homer said "We must declare a state of emergency and take action." She called the state's failure to check the advance of spruce bark beetles "shameful".

Reed and Moore spoke at several meetings throughout the state aside from the House Resources meeting.

Reed, in deposition for a pending lawsuit against the state's logging policy, has blamed the spread of beetles for last summer's Miller's Reach fire near Big Lake. State fire officials say beetle-killed timber was not a factor in that fire.

Moore is scheduled to speak at Alaska Forest Association's upcoming annual convention.

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Statewide News

October 1996

Southeast Conference - Strength Through Unity

Jack Phelps and Elizabeth West represented the Alaska Forest Association at the Southeast Conference held in Juneau September 24 - 26. Governor Knowles addressed the assembly and spoke of his desire to "Alaskanize the Tongass." He also announced the formation of the Tongass Regional Timber Business Plan Task Force. The Task Force consists of mayors, industry representatives and representatives of the environmental community. The purpose is to recommend a plan for the future of Southeast Alaska's timber industry.

Two timber related resolutions were unanimously passed: 1) support for the Governor's task force, and 2) support for the development of public and private partnerships that further the forest products industry. Jack got important amendments put into each resolution. To the resolution on the governor's task

force, he added a provision urging the governor to have the task force address the need for a statewide timber strategy. To the development of partnerships he added that special consideration should be given to those communities that have suffered job loss since 1990 (thinking of Sitka, Wrangell and possibly Ketchikan).

Other work completed at the session were four committee meetings: local government, transportation, environment, and regional development. These committees passed resolutions on to the Board for approval and recommendations to the membership. AFA presented four repeat resolutions in support of the timber industry, reestablishment of industry in Sitka and Wrangell, KPC's contract extension, and the concept of the transfer of the Tongass. The first two were put into SE Conference's new "Regional

Development Strategy and Area Plan." They are part of their overall Economic Resource Development Plan. Regarding support for KPC's contract, they felt that current events made this issue mute. They still struggle with the "concept" part of transferring the Tongass, getting caught up in the discussion that Alaska is not equipped to take on that responsibility. To that point, the amendment to the Governor's task force resolution was an important step.

James Calvin of the McDowell Group made a presentation on economic impacts felt throughout Southeast in all resource industries. He made an important point that most researchers look at Southeast as a region. But when you separate Juneau, the rest of the region has not fared so well, being much more resource dependent.

From the State Forester's Office...

Haines Timber Sale Negotiated: The Haines Area negotiated a 45,000 board foot timber sale with Alaska Timber and Mining Company (ATM) of Haines. This spruce beetle killed salvage sale in the Haines State Forest will provide needed road maintenance on the Kelsall logging road prior to freeze-up. ATM, a relatively new operator in Haines, has hired four local small sawmill operators to cut the logs into lumber, which is then shipped to the Lower 48 for further manufacture and sale.

Wrangell Timber Sales: Forestry has completed negotiations with Frank Age for the first two Wrangell timber sales. The U.S. Forest Service may make available small amounts of federal timber adjacent to these first two state timber sales.

PLT Training: The Project Learning Tree coordinator and state fire training manager facilitated a workshop for 28 individuals at the recently opened Campbell Creek Science Center at BLM district headquarters in Anchorage. Volunteer facilitator Rena MacFarlane lead the group in a tree macarena to learn the names of tree parts and then in "building a tree." The surrounding forest contributed spectacular fall colors. Although most of the group members were undergraduate teachers-in-training, several were natural resource interpreters, public information officers, or scout leaders. The center was built on a former smoke jumpers' pad to minimize clearing additional forest.

Ketchikan Chamber named 1996 Outstanding Chamber

The Greater Ketchikan Chamber of Commerce was named the 1996 Outstanding Chamber of Commerce at an annual awards presentation held in Sitka on October 3, 1996.

The Ketchikan chamber was cited for their work on the Yellow Ribbon Campaign and for demonstrating community support for the area's natural resource based industries.

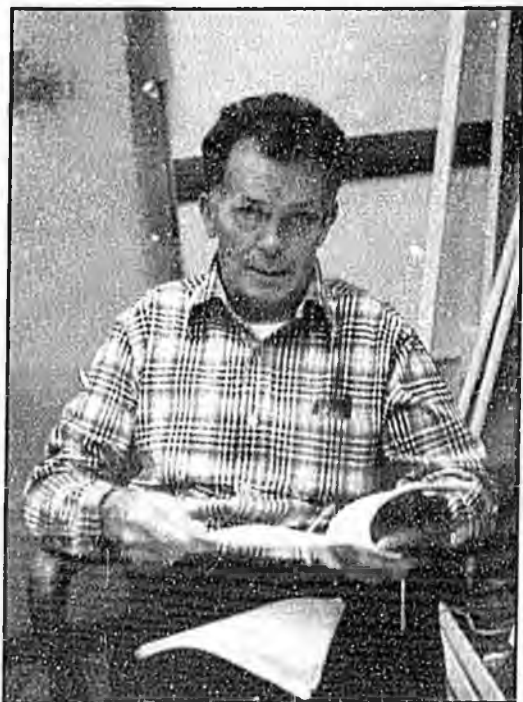
The award is presented to a local Alaskan Chamber of Commerce that is notable for consistent community involvement and excellence of programs, according to the state Chamber.

Association News

October 1996

The Alaska Forest Association Bids Farewell

The Alaska Forest Association mourns the loss of three longtime friends who recently passed away; Alex Reid, Newt Cutler and Letha Campbell. We send our deepest sympathy to their families and dedicate this page in their memory.



Alex Reid

Alexander Reid, one of the charter members of the Alaska Loggers Association, died Sept. 18, 1996.

Alex was born on Oct. 2, 1923, and grew up in Montana. He moved to Petersburg in 1940 and married Mary Hungerford in 1944. Together they raised five sons and two daughters.

Alex and his brother, Glenn, owned and oper-

ated a family business, Reid Brothers Logging. In the early 50's the brothers formed an association for Southeast loggers called the Timber Operators Association.

In 1956, a group of loggers met in Ketchikan, among those present were Alex and Glenn Reid. At this meeting it was voted to establish an association for Alaska loggers and affiliate with the Timber Operators Association. The group withdrew from the Timber Operators Association on July 21, 1957 and formed their own association: Alaska Loggers Association.

In 1968, the Reid family business was divided and Alex and Mary moved to Ketchikan where they continued logging under the name Reid Timber, Inc. In 1988, Alex turned the business over to his sons and they formed a corporation, Reid Bros. Logging & Construction and merged with Reid Timber.

Alex is survived by his wife, Mary and numerous relatives. He will be missed by many friends and associates.

Newton Cutler died September 27, 1996 in Juneau.

Newt was born Jan. 5, 1926, in Montana.

He married Thelma Wetherbee in 1949.

In 1963, the Cutlers moved to Juneau. Newt first worked for the insurance firm D.K. McDonald then opened his own company, Newt Cutler Insurance. He served

on the Alaska State Chamber of Commerce board of directors and executive board and was president of Citizens for Management of Alaskan Lands, lobbying Congress on the Alaska National Interest Lands Conservation Act.

Newt was an active industry supporter and was instrumental in forming the Alaska Loggers Workman's Compensation Program, that was put into effect during ALA's first year of operation. Many remember Newt from the association's early days.



Newt Cutler



Letha Campbell

Letha Campbell died August 13, 1996, after a brief illness.

She was born on October 5, 1916 to John and Carrie Slattery in Beloit, WI. She grew up and attended school in Sedro Woolley, WA.

On June 26, 1937 she married Jim Campbell. Jim was the first Alaska Loggers Association president. He served as president in the years; 1957, 1964, 1965, 1974 and 1975. They lived in Ketchikan for 30 years where together they owned and operated a logging and road building business, Campbell Logging and Construction. They set up camp in different areas on Prince of Wales Is' and at; Twelve Mile Arm, Hollis and Uukati.

Letha is survived by her husband, Jim and numerous other relatives.

Member Spotlight

Samson Tug and Barge

by Judy Auger

George Baggen of Samson Tug & Barge Company is an employer that believes employees are a valuable component in building a successful business. George is like many employers in Alaska that have employees working anywhere from the northern part of the State to the Seattle area. So, having an employee that understands the logistics of a widespread operation and the coordination needed between each site is an asset that can be costly if they have to be replaced.

In May of 1995, George was faced with this prospect when employee Justin Scott was in a serious motorcycle accident that fractured his back and left him paralyzed from the waist down. Justin had been a welder and maintenance person at Samson's Seattle location working alongside his brother Eric.

Because the company did not want to lose the knowledge that Justin had gained during his time with them, an analysis of how to utilize his talents was done. Even before Justin's accident the company had grown to the extent that it needed to track when it was time for overhauls on trailers and containers. What was needed was a maintenance record keeper. With the hands on experience Justin already had in this area, it seemed only natural for him to take over these duties. Justin's brother Eric and the yard crew built a ramp to the yard office so Justin is able to be close to the maintenance area and keep track of the equipment as it is repaired. Once the maintenance is completed Justin enters the required data into the computer for future reference. Keeping track of the crew and the equipment is not a matter of looking out the window

of the office, so Justin is often seen on the four wheeler, cruising from the docks to the yard making sure all is kept in order.

Justin is not one to stay still for long. When I visited with him last spring he told me he was thinking of taking up wheelchair racing.

*Judy Auger,
is the Benefits
Administrator
for Tongass
Timber Trust.*

Samson Tug & Barge was founded in 1937, by owner George Baggen's grandfather, also named George. It started as a small family operation with one tug. The tug was an old fish packer named Samson that the company was later named for. In the early days they hauled logging camp supplies and towed log rafts.

Slowly the company grew. In the late 1970's they enlarged to include container cargo. Expanding their service from Seattle to the the Aleutian chain. A decade later they added freezer containers to their inventory.

Today, Samson has approximately 100 employees, with their corporate office located in Sitka with branches in Seattle, Kodiak, Cordova, Valdez and Adak. They offer barge service all along the Alaskan coast, with connections to interior Alaska, the Lower 48, Europe and the Orient.

Samson Tug & Barge has been a member of the Alaska Forest Association since 1970.



from left: Judy Auger and Justin Scott

From the Director

October 1996



Extremist Views of Logging Threaten the Environment

By Jack E. Phelps

Extremism, which Webster defines as "advocacy of extreme political measures" frightens most reasonable people today. Webster connects it with the state of being radical which is a sharp departure "from the usual or traditional." While every sane person recognizes the inevitability, even the importance, of change, most people understand the need for balancing competing interests as society moves forward.

Not so the extremist. He demands change immediately regardless of the consequences to those who don't share his vision of the past or the future. It's "damn the torpedoes, full speed to the left." This drove Maximilian Robes Pierre and his Committee of Public Safety to take control of the French Revolution and institute the Reign of Terror, in which thousands of ordinary and innocent French peasants literally lost their heads.

Extremists today, at least in this country, do not haul people off to the guillotine. But, like their political cousins the Jacobins, they act without

regard to facts and without regard to the human cost of their policies. An article in the July, 1996, issue of *Outdoor Life* illustrates this perfectly. The headline reads: "Two Visions of the Tongass, Game-rich habitat, or a stricken moonscape? Those are the choices."

Granted, headlines are meant to grab the reader's attention, and are often sensational even if the content of the article is not. Unfortunately, this does not hold in the current example. The article trots out all the myths associated with the extremist environmental agenda so familiar to those of us trying to make an honest living from the forest while maintaining the rich fish and wildlife values we share with other Alaskans.

The litany includes the notion that logging is destroying fisheries and deer habitat, and that logging companies gobble up trees and ravage the landscape with no regard for the natural environment. The writer describes the result of timber harvesting as "sterile, fishless rivers and ...fragmented, lifeless forest habitat." This would be tragic if accurate, but it bears no resemblance to the truth.

In fact, the fish and wildlife protections on the Tongass and on state and private land in Alaska are among the strictest in the nation. Fish producing streams and beach fronts are protected by mandatory buffer zones where no timber harvest is allowed to occur. A recent study produced by a top expert on fish habitat, and published by the National Oceanic and Atmospheric Administration indicates that Alaska's stream buffers are working very well to protect fish habitat. Yet the

extremists, if they mention them at all, give buffers only passing mention, as if they are unimportant.

Another fact rarely mentioned by environmental extremists is that 4 million of the 5 million acres of productive of old growth on the Tongass are protected by non-harvest designations such as parks, monuments and wilderness. Only 1.7 million acres are open for any forest development. The industry is content to harvest within this relatively small area over a 100 year cycle, provided timber sales are consistently available.

Contrary to the extremists' rhetoric, the choice really is between responsible development and poverty. It is between responsible timber harvest here and ecologically damaging harvest in places like Russia and third world countries where environmental consciousness is not at the level enjoyed by Alaska's forests. The demand for wood in this country and around the world is not going to decline soon. We can maintain the economic health of our own timber industry while protecting the environment, or we can force more harvest overseas at the cost of our jobs and at the expense of the environment. That is the real choice.

This article was written by Jack Phelps for the *Alaska Business Monthly*.

Member Highlights

October 1996



AFA's Woodsman Coat of Arms

This Woodsman Coat of Arms (*at left*) hangs in the stairwell leading up to the Alaska Forest Association office.

The Coat of Arms was designed by Bill Bailey of Bailey's in an effort to give the logger, (landowner, lumberman, forester, etc.) a unifying symbol, while enhancing the credibility of the logging profession in the eyes of the general public. "If our industry is going to continue to prosper in the near and distant futures, we must communicate to the citizenry of our great country that through harvesting and reforestation via professionalism, we loggers truly become people in unison with nature." said Skip Newell of Baileys, when he presented the work of art to the Alaska Loggers Association during the 1989 safety conference.

The two crossed axes, an historic symbol of the woodsman, is the focal point

of the Coat of Arms. The axes were special made by Eddie Fawcett of New Zealand. Fawcett's famous racing axes, and throwing axes have been used to dominate the competition at logging shows in numerous countries for years. The ax heads in our Coat of Arms are plated in 24 carat gold.

A frequently asked question is, "Where can I buy one of those Coat of Arms?" Smaller versions are available through Bailey's mail order catalog. For more information call Bailey's at: 1-800-322-4539.

Shuham receives Award

Long time AFA associate member, Walt Shuham of Shuham, Milner, Schafer & Howard PC, was presented with the William A. Egan Outstanding Alaskan award by the Alaska State Chamber of Commerce.

Walt has been an accountant in Ketchikan since 1947 and has taught accounting at the University of Alaska Southeast, since 1954.

In a letter of nomination, according to the state Chamber, "Quietly, behind the scenes, with few words, Shuham has supported, encouraged and simply been kind to hundreds of students, employees, colleagues and neighbors.

Those whom he has encouraged describe his support as a stepping stone in their own lives. In honoring him, we extol loyalty, persistence, generosity and patience."

The William A. Egan award, presented annually since 1964, has been the state Chamber's most prestigious, given to individuals who have made substantial and continuing contributions of statewide significance.

Chamber President, Ernesta Ballard said before presenting the award "He's given so much and expected so little in return. We should study this man's life admirably."



Walt Shuham

New Members

AFA welcomes new regular member: Evergreen Timber, LIC

The Alaska Forest Association welcomes Evergreen Timber, LIC. Evergreen Timber, is under the management of Rick Ludwigsen, Glen Snow and Mike Meske. The new company employes about 20 people. They are currently logging at Long Island for Alaska Pacific Trading. For more information contact Rick Ludwigsen at: 907-247-4900.

AFA welcomes new associate member: Alaska Diving Service, Inc.

Welcome back, long time industry supporter, Del Hansen owner and operator of Alaska Diving Service, Inc. They specializes in marine services ranging from diving, salvage to install logging stage areas, and anchor work. For more information call: 907-225-3667.

Calendar of Events

Pacific Logging Conference

November 13 -16

Maui, HI

Western States Coalition Summit VII

November 14-16

Salt Lake City, UT

Resource Development Council Annual Meeting

November 21-23

Anchorage, AK

Alaska Miners Association Convention & Trade Show

November 4-8

Sheraton Hotel

Anchorage, AK

Russian Forest Product Export Conference

Vladivostok, Russia

May 13 & 14, 1997

Point of View

October 1996

Forest Health Problem Exists, Depends on Management Objectives

by Logan A. Norris

Forest health is a popular term, but a slippery one because it lacks precise meaning. Actually, it has many meanings and as with beauty, the health of the forest is in the eyes of the beholder. A healthy forest to one individual is a highly decadent one to another.

The public readily makes the analogy between forest health and human health. Being a healthy person means our body functions well, producing a desirable outcome. It is a good analogy when we use it to reflect how well a forest ecosystem works. But the analogy has limitations. I am not aware of anything good that comes from having tuberculosis.

But heart rot in a tree might or might not reflect a desirable ecological condition in a forest.

What constitutes good forest health depends on the management objective. Across the landscape, these vary widely, and not all are achievable on every acre every minute. Thus, there is no one forest condition or set of ecological processes that we can logically call "healthy" for all forests.

In my view, a healthy forest is one in which the operation of ecological processes is consistent with policy and the objectives of management. Because there

are forest conditions that are reducing our ability to reach these objectives, I feel we have forest health problems. They are not restricted to insects and disease, but include other aspects of forest condition, such as stand vigor.

Foresters know how to solve problems for individual trees or stands. Forest health problems (such as spruce budworm, oak wilt, or white pine blister) that occur at the landscape level can have far greater

impact and are enormously more difficult to deal with, especially when multiple ownerships are involved. Organizations differ widely in their internal policies and management objectives and in their ability

to contribute resources to a common effort. Coordination is hard to achieve.

What is described by some as a forest health crisis in parts of the Interior West is a case in point. Nearly a century of fire exclusion and preferential harvest have left large areas where stand vigor is poor, fuel density is high, and the potential for catastrophic fire is great. The problem is complicated by an ownership pattern that includes public, industrial, and nonindustrial private lands, and is confounded by the dramatic changes occurring in the thrust of federal forest management. Although progress is being



made in some areas, most "owners" proceed independently, as if their part of the landscape was in isolation from the rest of the system in which this forest health problem exists. This isolationism is counter to the interests of the individual organizations, and to the public. It flies in the face of the very tenets or the ecosystem management advocated by some of these organizations.

Unfortunately, the current policy framework provides no incentives and it inhibits the coordinated effort required among owners to solve landscape-level forest health problems. Making it more attractive for forest owners to voluntarily coordinate their efforts will go a long way to helping solve the forest health problem, but it will test our professional leadership.

This article was reprinted from the July issue of *The Forestry Source*.

Logan A. Norris is professor and head of the Department of Forest Science, Oregon State University, Corvallis, OR 97331

Let The Chips Fall...

October 1996

Look who stopped by the office this month: **Emmett McKillop** (Ben's Truck Parts Inc.), **Wes Davidson** (Texas Refinery Corp.), **Ron Baldwin** (North Star Explosives), **Pete Amundson** (C.A.R.E.), **Rick Ludwigsen** (Evergreen Timber), **Keaton Gildersleeve** (Gildersleeve Logging), **J.C. Conley** (Service Auto Parts), **Jeanne Fleenor** (Herring Bay Lumber), **Kathy Miller** (AWIT), **Ralph Bache** (Cape Fox Corp.), **Georgia Brown** (Gildersleeve Logging), **Mike Gates** (North Star Explosives), **Nancy Watt** (Diversified Investments), **Ron Wolfe** (Klukwan Forest Products), **Tom Winter** (Six Robbles), **Don Thornlow** (Communications Unlimited), **Phyllis Yetka** and **Ernesta Ballard** (Ballard & Associates).



From left: Barb Milner, Debbie Phelps, Otto Phelps and Jennifer Painter.

Young Otto kept the ladies entertained while they were busy designing arrangements for the convention banquet tables.

The arrangements were created with wood shavings donated by **The Great Alaskan Bowl Company** and cedar boughs from the Phelps' backyard.

Terms of the Trade: Bald-headed; Buttrigging sent back to the woods without chokers.

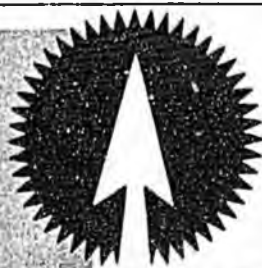
Ron Strunk (Service Auto Parts Inc.) We appreciate all your help with the Red Suspender Party.

(I apologize for missing the "R"!)

The rumor is true! Our friend, **Troy Reinhart** (who was once pictured in *Alaska Men Magazine*), will not be single for long. Congratulations, Troy and Adrienne, on your engagement!

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Recent Events in the Alaska Timber Industry

by George Woodbury

information on minimum volumes to operate value added facilities and how much they could pay for raw material. The next step in the process will be to develop this information so that the feasibility of these ideas can be evaluated.

In the meantime, the revision of the Tongass Land Management Plan was being influenced by the U.S. Fish and Wildlife Service (FWS). The FWS

agenda could reduce the harvest to levels below 100 mmbf. Given this information, it was apparent to industry leaders that the Task Force needed information offered supporting the minimum volume necessary to sustain a viable, integrated industry. Various resolutions were showing the minimum volume necessary to support a viable, integrated industry. The resolutions were floated and debated in a series of subcommittee and Task Force meetings held by telephone conference during the closing weeks of 1996. Finally, Mayor Jack Shay of Ketchikan put forward a resolution stating the need for a minimum timber harvest of 300 mmbf to allow an integrated industry that can economically utilize the low end and high end wood from the Tongass. Shay's resolution passed on a 10-4 vote.

Now AFA and others should go back to work on the visions paper to determine what is feasible for SE Alaska. No matter what comes out of the process, however, SE Alaska needs a transition period that allows the remaining saw

Over the past few weeks, AFA has been working with the Governor's "Southeast Regional Timber Task Force." The result of this effort is an AFA paper presenting four visions of the industry based on several different projected harvest levels. The report (available from the AFA office) includes charts and graphs showing projected employment at harvest levels of 100, 200, 300, and 420 million board feet (mmbf). These charts and graphs were presented to a subcommittee of the Task Force on December 12. The purpose of the presentation was to provide the material for the Task Force to complete a report for Governor Knowles to use in establishing the state's position on the future of the timber industry. At the same meeting, environmental interests submitted their vision of the industry. Their presentation focused on "value added" jobs and a small harvest of 50 to 150 mmbf.

The ideas presented by representatives of the environmentalist community were all worthy of consideration and study, but the presentation did not include

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A "New National Forest Management Act"

Idaho Senator Larry Craig has released a draft bill that would comprehensively rewrite national forest policy. This may be the single-most refreshing step forward in the "forest wars" of the '90's. Senator Craig's bill, titled '**Public Land Management Responsibility and Accountability Restoration Act**,' is the product of two years of exhaustive congressional committee hearings and preparation. As the title suggests, its purpose is to provide greater responsibility and accountability to the Forest Service and BLM for both planning and active management of federal lands. The wholesale breakdown in national forest timber and other programs has had a devastating impact on western communities dependent on federal land outputs. This bill is critical to the future existence of the Forest Service and BLM, and the forest industry will aggressively pursue its passage over the coming months - and years if necessary.

This bill intends to "right the sinking ship", so that the Forest Service is empowered to professionally manage federal forests without the paralyzing barriers of legal gridlock, endless planning, authority usurped by other agencies, lacking expectation for results, contradictory hierarchy of laws, and administrative interference. The bill was released last month to allow for public comment, prior to workshops scheduled for January in Washington, D.C. Input will be gathered and incorporated into the draft prior to introducing the bill in February. Senator Craig expects the bill to evolve through a public process which allows both sides of the aisle to negotiate their desired language. Craig's aides began discussing content of the bill a year ago, making repeated requests to Agriculture Secretary Glickman for his participation. The Secretary stonewalled all attempts for involvement, offering only a terse letter last August, suggesting that no legislation was necessary because the Forest Service was

taking administrative actions to resolve the problems Craig raised. The White House and extreme environmentalists will oppose any forest reform bill.

Key elements of Senator Craig's draft land law reform bill are: providing additional guidance to streamline plan development and implementation; make the appeals process more rigorous; harmonizing the relationship between other laws including NFMA, FLMPA, NEPA, ESA, Clean Water Act, Clean Air Act, and FACA; eliminate ESA consultation by FWS and NMFS; providing oversight of eco-region plans like Option 9; eleven innovative administrative changes important to effective agency function; repeal the RPA; an evolutionary approach to consider transferring management only of some federal lands to the states; and miscellaneous measures, including a 10 year sunset for all Forest Service and BLM authorizations.

reprinted from "The AOL Mainline"

Knowles Administration Fires State Forester

The Knowles Administration has fired State Forester Tom Boutin, citing an Alaska State Employees Association (the government workers labor union) survey which showed low employee morale at the Division of Forestry. As the only nonunion employee at the division, Tom brought a work ethic to the job that is seldom seen in government. While his commitment to long hours and hard work more closely mirrored a private sector manager, it contrasted sharply with the state's 37 1/2 hour standard week.

During his 4 years as State Forester, Tom has been responsible for increasing state timber offerings to record levels even as division staffing has been reduced. Tom has been a champion of private property rights and an effective lobbyist for the Department of Natural Resources. He was the last remaining Hickel Administration appointee at the division director level or higher in the Knowles Administration.

The Administration must choose a new State Forester from candidates selected by the Board of Forestry. The board is scheduled to meet in Juneau on January 21 and 22.



From the State Forester's Office...

Delta Area Timber Sale: The Delta Area timber sale on December 11 resulted in three of the five sales being sold. The three sales had 1,362 thousand board feet (MBF) of white spruce saw logs, 23,000 cubic feet of spruce pulp logs, and 75,200 cubic feet of birch, selling for a total of \$37,991.26. The sales require \$25,901.92 in improvements, primarily road construction and scarification.

The two remaining sales have also attracted interest. The division has received minimum bid deposits and expects the sales to be sold on December 18. The two sales have a minimum purchase price of \$75,405 for 1,980 MBF of spruce saw logs.

Kuskokwim Corp. and Koncor Plan Timber Harvest: The Southwest Area Forester met with the CEO of MTNT, Ltd. and Craig Savidge, a consultant working for Koncor Forest Products, Inc., to discuss their plans for timber harvest along the Kuskokwim River next summer. There was also an evening meeting in McGrath with the local loggers

and mill operators. Koncor, MTNT, and the Kuskokwim Corp. plan to begin harvest from their lands along the Kuskokwim next summer. According to information provided at the two meetings, they intend to produce lumber for use in HUD, and other construction projects in the Kuskokwim Basin. Eventually, they would like to expand their market to the western Alaska coastal villages as far north as Nome. They intend to use local loggers and mill owners to produce this material under contract. This is likely to impact the demand for timber from state lands, since the Native-owned timber is much closer to most villages than the state timber.

Copper River Forest Products Increases Production: Copper River Forest Products (CRFP) currently has eight subcontractors harvesting timber near Chitina. There are also 46 truck drivers hauling as many as 70 loads of timber per day to Valdez. Productivity is at its highest during the winter when road building costs are minimal and access to "winter ground" is possible. CRFP hopes to increase its production to 90 loads per day. The subcontractors are responsible for harvesting, yarding, and loading the

timber, and CRFP is responsible for road building. There are about 130 people employed in the logging operations occurring on Chitina Native Corporation and Ahtna, Inc. lands.

Ketchikan Forest Practices: The Ketchikan area forestry office gave 50 copies of the Forest Resources and Practices Act regulations to Sealaska Timber Corporation (STC) for distribution to its contractors and their foremen. STC will meet with the contractors later this winter to review aspects of forest practices regulations pertinent to Region I private landowners.

State Bills BLM for 1995 Fire Season: Forestry has completed the billing process for the 1995 fire season with the BLM Alaska Fire Service. The preliminary 1995 billing, completed in February 1996, recovered \$330,607.19 in reimbursable suppression costs to the state. The final billing, which resulted from the technical field audit, will recover an additional \$20,935.18 for the state. The final billing documents are ready to be signed.

New Forest Service Chief Named

Agriculture Secretary Dan Glickman announced the appointment of Mike Dombeck as Chief of the Forest Service at a news conference late last month. Dombeck is currently acting director of the Bureau of Land Management. His academic background is in fisheries biology and zoology. His career included a stint as a biologist for the Forest Service.

"Once again, the Clinton Administration has appointed a biologist to run the Forest Service," said AFA executive director Jack Phelps. "This makes as much sense as appointing a forester to head the Fish and Wildlife Service. Would the Clinton Corps ever consider doing that? No, because in the eastern

fairytale land that these people live in, killing fish to eat is in vogue, but cutting trees to build homes is not."

One of the new chief's first actions was to appoint a chief of staff to help him with the controversial and complex issues facing the agency. His choice for that slot was former Times Mirror head, Francis Pandolfi. Another decision announced by Dombeck was to appoint a Forest Service liaison officer with the White House. "That was unprecedented," Phelps said. "The Secretary stands in the chain of command between the Forest Service Chief and the White House. What does this action really mean in terms of the Secretary's authority? Is the White House intending to make the Forest Service a defacto department?"

Is the Chief going to be a quasi cabinet member? This will be interesting to watch."

Dombeck, like his successor Jack Ward Thomas, was involved in formulating Clinton's forest strategy in the Pacific Northwest. "That strategy has been a disaster for the forest products industry in Washington and Oregon," Phelps said. "So that piece of his resume doesn't really excite us." On the other hand, Phelps said, "we need to work with the Regional Forester's office to get Dombeck and Pandolfi to Alaska to talk with us and see the Tongass for themselves." He recently sent a letter to the Forest Service proposing such a visit, Phelps said.

26th Annual Alaska Forest Products Industry Safety Conference

The Alaska Timber Insurance Exchange and Alaska Forest Association will host the 26th Annual Alaska Forest Products Industry Safety Conference on Friday, March 7, 1997 at the Westmark Cape Fox Lodge. The theme for this year's conference is *Back to Basics*.

As in prior years, a seminar conducted by the Helicopter Safety Committee of the Helicopter Association International and sponsored by NIOSH will be held at the

Westmark Cape Fox Lodge Thursday, March 6th.

The safety conference is an excellent opportunity for you and your employees to join with other companies to learn about the latest in safety regulations, technologies and how others look at safety. Door prizes will be given away throughout the day.

Registration for the safety conference will be 8:00-8:30 Friday morning. If you haven't received a preregistration form please notify the AFA office.

Timber Tidbits

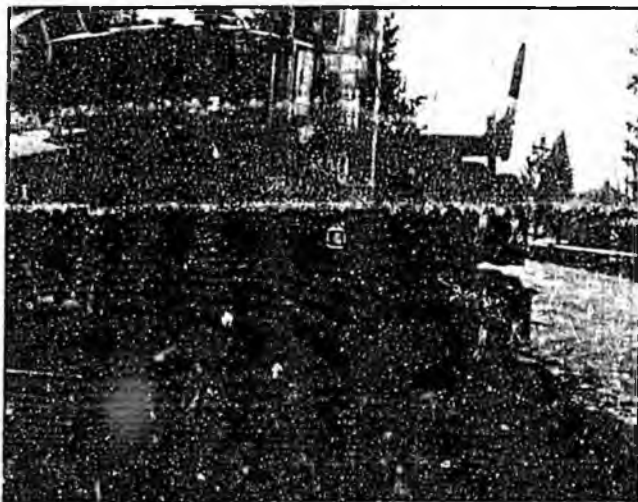
Four Visions

Four Visions of the Timber Industry on the Tongass National Forest, is a report (cover story) prepared by the Alaska Forest Association's Timber Issues Committee for the Governor's Southeast Regional Timber Task Force. To receive a copy fax your request to the AFA office at 907-225-5920 or call 907-225-6114.



Eielson Tree City Award

The Division of Forestry presented the Tree City USA award for 1995 to Eielson Air Force Base at a small ceremony on December 17. This is the third year that Eielson has received this recognition. In 1995, the base planted 693 trees at a cost of just over \$59,000. They also performed maintenance activities on 142 trees. The base has increased the number of trees in the community forest by seven fold in the past 21 years.



Ryno Trucking

Frank Ryno of Ryno Trucking (pictured at left) stepping into his Kenworth 1-800.

Frank has been hauling for Mel Masterson from Delta Junction to Valdez.

Ryno Trucking has been a member of the Alaska Forest Association since 1992.

(Events - Continued from pg 1)

mills to continue operations. Further harvest reductions will severely limit Alaska's ability to retain skilled people and the support facilities so necessary to maintain healthy economies in the timber dependent communities of the region. The value added manufacturing facilities, identified in the vision paper, must be given time to develop. Primary manufacturing facilities will still be necessary to break down logs for use in secondary processing plants, dry kilns, finger joint plants, etc. If there

are loggers supplying logs to mills that are producing material for secondary and tertiary manufacturing, the chances are good that such facilities will be built. Without a steady supply of raw material, viable harvest operations and stable primary manufacturing facilities, the chances are not good.

Another basic premise in the industry vision statement was the need for a facility to manufacture products from pulp logs and residual chips. Without the ability to process chips in Alaska, the industry will be at the mercy of the international chip market. This market is very volatile and

is likely to remain depressed for some time into the future. With an uncertain chip market, the viability of a SE Alaska regional industry will be threatened.

The Forest Service is expected to release the final Record of Decision on TLMP in February. We can only hope at this point that it will allow a harvest sufficient to maintain the currently operating mills and get some closed sawmills back on line.

George Woodbury is Vice President of Timber Operations for Alaska Pulp Corporation

Southeast Loggers Receive Special Commendations

Each year at the annual State Emergency Medical Services Symposium in Anchorage, awards are given to outstanding EMS providers. EMS administrators and citizens who have performed above and beyond the call of duty.

This past November at the annual EMS Symposium, three Southeast loggers were recognized with awards for their outstanding efforts in a life threatening situation. The three, Travis Hedges, Gary Soderberg and the late Mike Lockman, were nominated in a letter written by Phil McElroy, Safety Supervisor for Ketchikan Pulp Company.

In the letter, McElroy brought to light the events that took place July 10, 1996 at Shelter Cove, a remote logging camp located about 15 air miles south of Ketchikan.

On that July day Larry Mott, a logger working as a rigging slinger for Ketchikan Pulp Company, was seriously injured when he was struck by a log that tobogganed down a steep hillside. First on the scene was Travis Hedges, a choker setter on Mott's side. Hedges who witnessed the accident called for help and immediately ran to Mott's side. Mott was laying face down unconscious. Travis quickly dug debris away from and around his mouth to help him breathe. The crew brought down the stretcher and they carefully lifted Mott on to it. Mott stopped breathing a couple times and Gary Soderberg, the crews side rod, began encouraging Mott to keep breathing.

Soderberg knew that Silver Bay Logging was doing some helicopter logging in the area and called to see

if they would lift Mott from the site.

With the help of Travis Hedges to guide them through the heavy fog, Silver Bay Pilot, Gary Pilgrim and his Co-Pilot Mike Lockman flew into the site. Hedges had had previous experience in helicopter logging so his help was critical.

Gary Soderberg and the rest of the crew got Mott prepped for the long line lift out of the woods. Silver Bay's helicopter crew lifted Mott out of the woods and flew him to camp where they set down. Mike Lockman asked KPC's Robert Rowland to fly with them and assist him in first aid treatment during the flight to Ketchikan. Lockman and Rowland worked to keep Mott's airways clear for breathing.

In Ketchikan, Pond Reef Ambulance Mediflight team stood by for transport. Mott's condition was critical and doctors at Ketchikan General Hospital, who stabilized Mott for mediflight to Harborview Medical Center in Seattle, stated that if Mott had not been brought in as soon as he had, and had he not received the first aid administered by all

involved, he would not have survived.

Mott is still recovering in a hospital in Oregon but is making positive progress. The sad thing about this story, wrote McElroy, is that one of the key players in the rescue was killed just three days later. Mike Lockman was killed in a helicopter crash near Shelter Cove.

Hedges and Soderberg both flew to Anchorage to receive Special Commendation for their selfless efforts in saving a life. The same award was later sent to Mike Lockman's widow who now resides out of state.



Travis Hedges (left) and Gary Soderberg at the presentation of their Special Commendations.



Wild-eyed Claims Go Wanting, Forest Practices Act is Working

Jack E. Phelps

examined by the Cooperative Working Group on Fisheries/Forestry Research. ADF&G staff have regularly participated in the Working Group.

The Board of Forestry took the ADF&G allegations quite seriously. If they were true and could be substantiated, the state and the industry would have to carefully examine

It was also costly for the state. It demanded huge blocks of time from Division of Forestry personnel, taking staff time away from field work. The process had a similar effect on the other agencies, especially ADF&G. Herein lies great irony; the Habitat Division has consistently complained that it lacks sufficient funding and personnel to adequately cover forest practices field inspections.

During the work of the committee, not one instance of specific harm was identified, so field work never became part of the process. Due to the complete lack of evidence, the discussions were strictly theoretical and hypothetical.

The Habitat Division of ADF&G has now taken its best shot at discrediting the state's forest practices act and Alaska's timber industry. After careful review in a credible process, only very minor problems have been identified. No evidence for the significant and irreparable harm alleged in the 1995 report was found. The concerns were not supported by the facts.

Now it is time for the state to close the books on this false alarm. The public expects the regulatory agencies to protect the environment and to monitor the effects of industrial activity, and pays them very well to do so. For their part, the agencies should be diligent to stick to the facts. Raising "the sky is falling" alarms with no evidence is not in the public's best interest. Let's hope the Board of Forestry acts expeditiously and finalizes this investigation promptly. And let's hope the Department of Fish and Game exercises better judgment in the future.

The Alaska State Board of Forestry is meeting in Juneau on January 21 and 22. During 1996, the board spent much of its time examining allegations made by the Department of Fish and Game in its 1995 annual report on the Forest Resources and Practices Act (FPA). The report included accusations that logging was destroying important wildlife and fish habitat, and that the state's FPA was deficient in protecting non-timber resources. The ADF&G report impugned previous documents submitted by the board to the governor and the legislature which concluded the FPA was working as intended.

Timber industry leaders were bewildered by the ADF&G action. Until the time the report was presented to the board, field resolution of disagreements over specific forest practices problems was commonplace. The number of times an interagency disagreement had to be elevated to the commissioner level for resolution had declined to very few. Also, industry has been paying for scientific monitoring of salmon streams in logging areas to analyze any potential effects of harvest on fish habitat, and the studies have been routinely

the effect of timber operations throughout Alaska. A science and technical committee was formed to scrutinize the concerns raised by ADF&G. The committee was jointly chaired by deputy directors from the Division of Forestry and ADF&G's Habitat Division. Industry committed to working with the state to evaluate the charges and arrive at any warranted solutions.

After many days spent in meetings involving staff from ADF&G, the Department of Natural Resources, the Department of Environmental Conservation, representatives from industry and consulting scientists, no serious implementation or effectiveness problems could be identified. ADF&G was simply unable to provide any substantiation for the allegations of harm made in the report.

The process used to examine the ADF&G complaints was a good one. The committee conducted its business professionally and scientifically. Leadership of the committee, particularly that provided by the Division of Forestry, was fair and diligent. But the process was expensive. Industry invested more than \$100,000 over the past year to have professional and research staff attend the meetings and investigate the allegations.

A Tribute to Don Bell



Even though I'm retired now I worry about the timber industry in the Tongass. I've seen it go through so much.

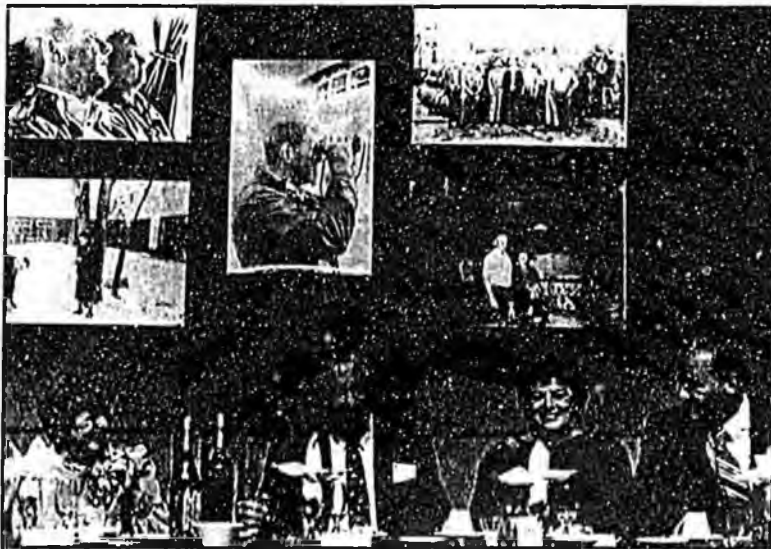
Seen loggers and their families come and go. Seen the human side of the

industry year after year. I wonder if we're going to survive the environmentalists. We have to. I don't know how, but we have to.

--- Don Bell from *People of the Tongass*, 1989

It is hard not to associate the name Don Bell with the Alaska Loggers Association (now Alaska Forest Association), they have been almost one and the same. Don has been associated with Alaska's timber industry since 1952, when he moved to Ketchikan from Bellingham to work at Ketchikan Pulp Co. as assistant personnel manager and safety supervisor, a position he held for 8 years. In 1965, Don became General Manager of Alaska Loggers Association (formed in 1957), and retired from the Association in 1986, after 21 years of service.

On a brilliant sunny afternoon on January 21, 1997 in Ketchikan, Don Bell, 79, quietly passed away, joining many friends who preceded him. Legends like Charlie McDonald, Art Brooks, Bill Boardman, J.R. Gildersleeve, New Cutler, Doug Ross, Clarence Kramer, Memorie Hunter, and Dave Murdy, to name a few. With his passing from this life, we remain with memories of life with Don. We dedicate these pages to the Memory of Don Bell. For you who knew him, and those of you who missed him, the following pages are filled with memories of Don...



the past thirty years. It is now hanging in the Alaska Timber Insurance Exchange office.

That was the start, and the program put on for me at the ALA Annual Meeting was super. It started when they opened the doors, I still didn't know what was happening. K.A. Gregg/Swiger and Judy Auger took me by the hands and led me into the banquet room. The walls were decorated with 2' x 4' posters, photos of me and friends taken over the years. They certainly brought back a flood of memories.

Don Dickey, my friend for the past 20 years was the Emcee. The program went along nicely until after desert when a beautiful young lady grabbed me by the arm and led me to the other end of the banquet hall where there was a real rowdy group seated. I looked around and realized they were all my very good friends: John Schnabel, Cliff Taro, Rich Rasmussen, Porky Bickar, Don Dickey, Jim Hickey, Senator Frank Murkowski, Bill Boardman, and Pat Soderberg. I knew I was in for trouble. --- Reflections by Don Bell on his retirement.

October, 1986, was a real special month for me, and I would like to share some of its highlights with you. It started on October 2nd, my 69th birthday, Carolyn and I went to Seattle for a football weekend. We saw the University of Washington beat California and on Monday night the Seattle Seahawks beat San Diego.

Tuesday it was foggy and the flight to Ketchikan was late, at least I thought it was to be a flight to Ketchikan. We boarded Alaska Airlines about 1:30 p.m. and headed north. About the time we should have let down for Ketchikan the pilot announced he had just turned to the direct heading for Anchorage. I turned to Carolyn and said, "we are on the wrong airplane." She advised me we were going to Anchorage to attend the banquet at the Governor's Annual Safety Conference.

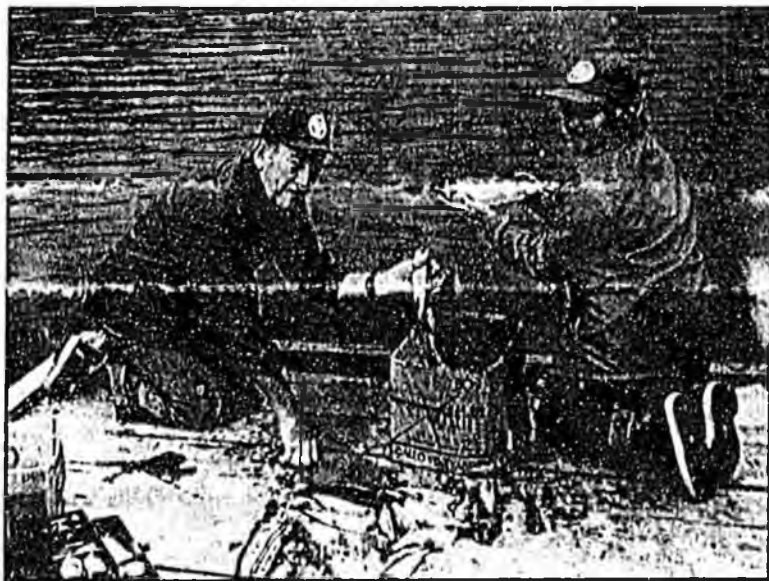
We did and I was presented with the Governor's trophy for my contribution to safety during



Ⓐ Don took great pride in telling me stories about his days as a football player with Western Washington in Bellingham. His coach "Lappy" Lappenbush was my Uncle Charlie.

Don often mentioned that the success of their undefeated season was due to the Coach Lappenbush implementation of the Straight Line Defense system. "Lappy" developed this method of play which many coaches tried to duplicate but never really understood.

Don said that none of his teammates could understand the straight line system either, but were reluctant to admit it to the coach. They figured the best way to please Lappenbush was to tuck their heads down and push for the goal line--not a bad philosophy of life. Don's zest for life showed us he followed this play all through his life, even when it came to weaving his spruce root baskets. I will always treasure the one he gave me and when I look at it I will always see Don with his head tucked in, racing for the goal line. --- **Senator Frank Murkowski**



Ⓐ I can hear Don and Memorie now laughing over one of their many inside jokes, only for the first time, she has "job seniority" over him.

Don will be missed by all who knew him, even those who agreed to disagree with his decisions. He was a force to be reckoned with when convinced of the right or wrong of any situation. He had a passion for moving forward yet understood the necessity of keeping his goals attainable.

Don Bell was a very unique individual, who had a very positive impact on my life, both personally and professionally. A deep sense of sorrow will forever exist in the hearts of all us who were privileged to know him, a sorrow softened by the knowledge he is no longer suffering and he is now in the house of our lord. God Bless. --- **Jim Hunter**

Memorie Hunter, office manager at the ALA office passed away in 1986.



Ⓐ Mr. Bell was my boss, my mentor and most of all my friend. Along with my husband, Jim, we have spent many wonderful hours with Carolyn and Mr. Bell at their cabin in George Inlet. Each day we arise to eat breakfast together and pay strict attention to Mr. Bell while the chores to be accomplished are outlined, before the sun sets and it's toddy time.

In April of 1973, I was hired by Don Bell to be the ALA radio operator.

On my first day of work Mr. Bell informed me "The ALA radio is for business use only!!" The camp radio operators, and in many cases the bookkeeper and spouse co-owner of the camp, were to limit calls to ordering supplies, new hires and emergencies. I took this order very seriously until the fall of the year when the football season started. One day a call came in from Ralphie Slattery, the bookkeeper for Campbell Log. He advised me to announce to Mr. Bell that he was placing a \$1.00 bet, with some kind of odds, on football team-A and Bell could have football team-B (You can tell I know a lot about football). Although this did not fit any of the categories listed as business, the message was delivered. And continued to be delivered each Friday during the football season for the many years Ralphie worked at Naukat.

The telephone intercom was never used during Don Bell's tenure as general manager. His very substantial voice carried to every corner of the office and on one occasion across the street to the offices of the Forest Service when they placed a sign in the parking lot advising the citizens of Ketchikan they could no longer use the lot as a turnaround! The next day the sign was gone.

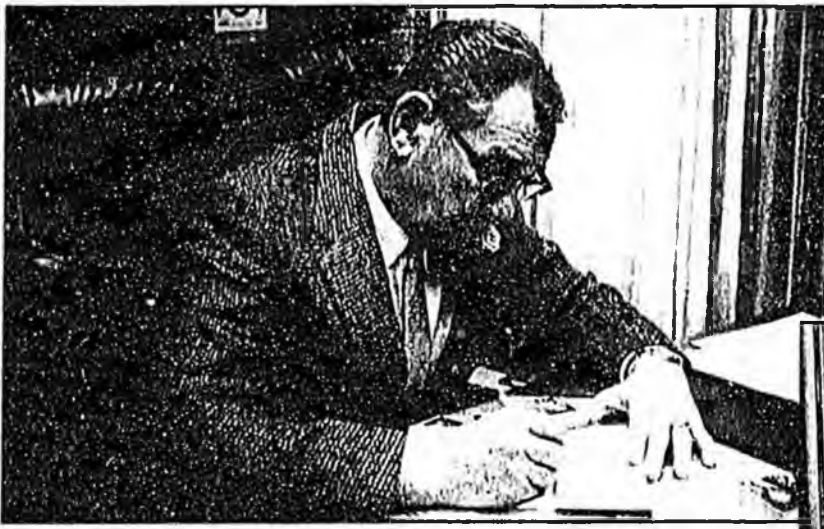
Mr. Bell took great pride in being the editor of the Logger Letter. It was written entirely by hand each month on recycled stationery and old paper in his large scribbled hand. He then allowed Memorie to type and lay it out in final form before taking it to Lind Printing. The Logger Letter, the People Map and ALA Coloring Book were just a few of the tools Mr. Bell used to keep us in touch with people outside the logging industry. Thousands of coloring books were mailed each year to school children in the lower 48. Any-

one walking in off the street could get a copy of our People Map showing the name and location of the logging companies and each month our members grabbed the Logger Letter to scan the back page containing "Let the chips fall" to find out what private joke Mr. Bell was revealing this month.

As the leader of the Alaska Loggers Association Mr. Bell's concern for the loggers, both big and small was always foremost in the decisions he made.

--- **Judy Auger**





Ⓐ He was one of the hardest working and dedicated individuals I have known. Don was committed to ALA, the industry and very loyal to his friends. I always appreciated and respected his straight forward and honest manner. We have lost a true friend. --- Les Spickler



Ⓐ From my viewpoint, it isn't surprising that Don Bell goes down in memory books as the one that opened the way for ladies to take a more visibly active role in the timber industry through the formation of Alaska Women in Timber.

The idea of a support group representing the families of the forest had been lurking around in the back rows for some time when Sandra Nutting, the leader of California Women in Timber, crossed Don's path at an industry meeting.

You didn't have to hit Don with a sledgehammer to get his attention; there was no doubt that the women could add a dimension on the public front that might be helpful, indeed, needed.

So Don returned to Ketchikan with an idea that the time had come, Alaska Women in Timber was formed soon after. I was pretty involved in those days, and I will never forget how supportive Don was to the fledgling group, and how appreciative of our successes.

Working with Don, always made me feel like an important part of the team, and for all the joking around, we had a mutual respect.

This meant all the more because, let's face it, Don came from the *Good Old Boy School of Fine Thought* which was more apt to joke about a women's place as being barefoot, pregnant and chained to the kitchen stove.

Besides the memories of all the high jinks and good times, I treasure especially the beautiful little covered basket that Don wove for me as a memento of my time as leader of AWIT, an opportunity that was possible because Don Bell, for all the hooting and hollering, respected the power of women and helped give us our chance to be involved. --- Helen Finney

Ⓐ Don was always concerned about photos. He preferred photos to text in the *Logger Letter* (so he'd have less to write). One day, when I was new to the Public Relations Department of ALA, Don took me on a "woods tour". He found a huge tree, and said he wanted to take my picture emphasizing how big it was, so I should put my arms around it, but face the camera. I did as I was told, not thinking how it would look. Don laughed and laughed over that picture, and called me "Chesty". -- K.A. Gregg/Swiger



Ⓐ Bill Boardman had a boat named the BIOYA (Blow It Out Your A---). He and Don went fishing, so many times that Boardman used to say, "I know Bell thinks he owns this boat".

Back in 1977, O.J. Williams, my Regional Vice President, and I visited Ketchikan and took part in a fishing excursion with Bell and Boardman on the BIOYA. O.J. was recovering from a hernia operation he had had four weeks earlier. It was his first trip to Alaska, and being from California, he had on sporty attire complete with brand new white tennis shoes. The fish were biting and O.J. had one on. Bell, who wasn't fishing, just giving advice, kept yelling at O.J. to keep the --- rod tip up!

Weak from surgery, O.J. would try to rest the butt of the rod in his groin, but doing so would make him grimace with pain and the rod would go down. Bell would yell at him again, "Keep the tip up, goddammit, where're you from California?" This went on until O.J. finally landed the fish. Bell grabbed a gaff hook, giving the fish a mighty whack, resulting in blood from the poor fish flying all over the slacks and white tennis shoes of O.J. Bell was ever the gracious host, but for some strange reason whenever I mentioned joining me for a fishing trip in Alaska O.J. always declined.

Don Bell and Bill Boardman influenced me more than anyone on my Alaska success. They taught me about people and respect. However, I still remember telling Bell if he wanted to talk to me, don't use the phone, just open the window. --- Jim Hickey





Over the years, I had many memorable experiences with Don, but probably the most memorable I can safely relate was a return trip Don and I made from Juneau to Ketchikan on Alaska Airlines.

Don and I were staying at the Baranof Hotel, and the station manager of Alaska Airlines offered us a ride to the airport, which we were glad to accept because Art Brooks had asked us to take a statue of

Michelangelo's David to Dave Murdey in Ketchikan.

This was a plaster statue about three feet high, anatomically correct and...other than a sling over its shoulder,...totally nude.

Obviously we couldn't check the statue, so Don conned the station manager into convincing the flight attendants to put it in one of their compartments. Then, all set to check in, Don realized he had left his ticket in his hotel room. The station agent said that was a real problem, because there was a rule that NO one, not even the President of Alaska Airlines, could board a plane without a ticket.

Somehow Don convinced the agent to go to the hotel and get Don's ticket and turn it in, so we thankfully boarded the plane and headed for Ketchikan.

At this point, our luck ran out. The plane overheaded Ketchikan and we ended up in Seattle.

This was in the days when the airline would put you up if you didn't get to your assigned destination, so we all had to stop at the ticket counter and get a chit to cover expenses. Of course, they wanted to see your ticket receipt.

Not wanting to get our agent friend in trouble for getting him on the plane without a ticket in hand, Don said, "I seem to have lost my receipt somewhere along the way."...and the counterperson said, "Well, I'll give you the chit for your hotel, but you are going to have trouble getting on the plane in the morning unless you find your receipt."

We tried to convince the lady at the counter to let us leave David there for us to pick up in the morning, but she would not allow it as there was no way she was even going to look at it, let alone touch it.

So, off we went to the hotel with David under Don's arm partly covered by a newspaper.

The next morning, Don did an admirable job of talking his way back on the flight to Ketchikan by insisting that they call the agent in Juneau to verify that he did have a ticket for that flight when he left Juneau.

So the counter agent gave Don a boarding pass, but said, "About that statue, you'll have to check it. If they'll let you." Don then convinced the agent that he would convince the flight attendants to put the statue someplace on the plane.

It turned out that they weren't very cooperative, so Don asked some first class passengers if they minded having David under their seat. They reluctantly agreed, and off we went to Ketchikan, and in due time, David was delivered to Dave.

As I remember, Dave eventually gave the statue to ALA where the ladies made him more socially acceptable with the addition of a black velvet jock strap.

Having shared this experience about Don, I am convinced he can con himself any where anytime. I'm sure he's already conned St. Peter into opening the pearly gates. --- Don Finney



What does one say about Don Bell? He was a friend, and he was mentor. He was also one of the most blatant and effective con-men known to man. Man of course meaning a species, not a gender specific term. Who but Don Bell could assign you a task advise you of the assignment by mail say you had three days to decline and if no response was received he assumed you were in agreement. The letter was always received after the response date. We all know he was one of a kind. Trite but true words. We will miss him. --- Pat & Les Hook



Don Bell had presence. When he entered a room, you knew he was there. I often watch Disney's "The Lion King" movie, with my son who is nearly three. Dear to me is the part when the Lion King explains to his young son that the stars in the heavens are Kings of the past watching over you. I will now put Don Bell up there as a King of the past, watching over us. -- K.A. Gregg/Swiger

Don Bell was instrumental in starting a memorial scholarship fund through the Association. Many students have been recipients of the ALA scholarships over the years, and in recent years the fund was renamed the Don Bell Alaska Loggers Scholarship Fund, in his honor. The family requests memorial donations be made to this fund which was so dear to Don.

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Oral Auction and
Sealed Bid
Sold Volume in
Net + Utility**

costs are the appraised
delivered log cost

prepared
January 13, 1997

1994 FISCAL YEAR				
AREA	SALE	MBF	\$/MBF	TOT AMT
STIKINE	MIDPOINT	5,328	\$345.00	\$1,838,160.
	RYNDA	4,546	\$311.00	\$1,413,806.
	ZAREMBO SLV	371	\$263.00	\$97,573.
	DEEP BAY NO	14,860	\$308.00	\$4,576,880.
		<u>25,105</u>		<u>\$7,926,419.</u>
CHATHAM	WUKUKLOOK	419	\$260.00	\$108,940.
	CORNER SLV	379		0
	CORNER HELO	7,984	\$268.00	\$2,139,712.
	APPLETON	27,665	\$267.00	\$7,386,555.
	SAOOK	29,833	\$300.00	\$8,949,900.
	<u>66,280</u>		<u>\$18,585,107.</u>	
KETCHIKAN	DERUMBA	585	\$251.00	\$146,835.
	BEAVER CK	4,550	\$287.00	\$1,305,850.
	KITKUM BAY	4,408	\$152.00	\$670,016.
	SHOAL COVE	733	\$224.00	\$164,192.
	<u>10,276</u>		<u>\$2,286,893.</u>	
TONGASS		<u>101,661</u>		<u>\$28,798,419.</u>
CHUGACH	TWENTY-THREE	993	\$128.00	\$127,104.
	LV RAY SLV	469	\$135.00	\$63,315.
	JOHNS CK	1,015	\$202.00	\$205,030.
		<u>2,477</u>		<u>\$395,449.</u>

1995 FISCAL YEAR				
AREA	SALE	MBF	\$/MBF	TOT AMT
STIKINE	SAGINAW	20,575	\$248.00	\$5,102,600.
	BUSHY SLV	778	\$249.00	\$94,122.
		<u>20,953</u>		<u>\$5,196,722.</u>
KETCHIKAN	SWING	2,119	\$216.00	\$457,704.
	N. RIDGE	924	\$335.00	\$309,540.
	TOP OF WORLD	592	\$245.00	\$145,040.
		<u>3,635</u>		<u>\$912,284.</u>
		<u>24,588</u>		<u>\$6,109,006.</u>
CHUGACH	FRENCHY CK	2,044	\$158.00	\$322,952.
	GRANITE	568	\$150.00	\$85,200.
	W. GRANITE	965	\$148.00	\$142,820.
	GRAVEL PIT SLV	1,146	\$143.00	\$163,878.
	<u>4,723</u>		<u>\$714,850.</u>	



1996 FISCAL YEAR				
AREA	SALE	MBF	\$/MBF	TOT AMT
STIKINE	BOHEMIA	33,313	\$339.00	\$11,293,107.
	SHAMROCK	24,280	\$403.00	\$9,784,840.
	KINDERGARTEN	262	\$253.00	\$66,286.
	LITTLE HAMILTON	331	\$245.00	\$81,095.
	CEDAR	500	\$423.00	\$211,500.
	<u>58,686</u>		<u>\$21,436,828.</u>	
KETCHIKAN	S.MACKENIE	12,317	\$406.00	\$5,000,702.
	WHISTLE	579	\$337.00	\$195,123.
	WARREN CHAN	824	\$263.00	\$216,712.
	CAPE POLE	1,263		0
	TRIANGLE SLV	348	\$248.00	\$86,304.
	LIMES PT	2,200	\$220.00	\$484,000.
	<u>17,531</u>		<u>\$5,982,841.</u>	
CHATHAM	SPARE	187	\$304.00	\$56,848.
	LUCY	382	\$259.00	\$98,938.
	HANUSATC	15,546	\$290.00	\$4,508,340.
		<u>16,115</u>		<u>\$4,664,126.</u>
		<u>92,332</u>		<u>\$32,083,795.</u>
CHUGACH	PARLEY VOO	373		

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RETREADING

Alaska Needs an Integrated Forest Industry

by Eric Muench

To maximize economic benefits by fully utilizing the resource, and to minimize impacts on wildlife and other resource uses, Southeast Alaska needs facilities to process all available species and grades of wood.

Much of the recent emphasis on "value added" has focused on producing higher value end products, such as music wood or instruments, furniture, and so on. Such products, however, require the highest grades of wood. Even dimension lumber requires at least #3 grade sawlogs.

Lower quality logs such as #4 and utility grades cannot be made into high value logs or converted into high value products simply by sending them to a sawmill or furniture plant. Defects such as closely spaced knots or large volume losses from frost cracks, wind shake or decay make it impossible to saw a reasonable percentage of the log into usable stock at competitive efficiency. Sawing such logs produces huge quantities of waste.

In order to use them at all, these low value logs must be ground into chips or broken down into pulp and then reconstituted into products such as chipboard, fiberboard, paper, rayon, etc. Historically, 20 percent to 40 percent or more of the logs from commercial timber stands in Southeast have been of this type, commonly known as pulp logs. The pulp mills at Sitka and Ketchikan provided an outlet for most of these pulp logs. These mills contributed significantly to local economies while converting pulp logs into high grade dissolving pulp. In addition to pulp logs, the pulp mills used chips from the waste portions of higher grade logs utilized in local sawmills, thereby improving sawmill economics.

The loss of the two Alaska pulp mills and the shutdown of others in the Puget

Sound area has resulted in an oversupply and drastic price drop of chips and pulp quality logs on the West Coast. Even when the amortization of development, engineering and overhead costs of timber harvest operations are shifted to higher quality wood, the unavoidable handling costs of pulp grade logs are 2 to 3 times present market values.

None of the potential logging responses to the situation is attractive. Leaving pulp grade logs unyarded in the woods lowers the yield of the sale while doing nothing to reduce development costs. It is also an ugly waste of resources, sure to raise objections against all logging. Clean clearcuts produce increased deer feed, both in easily digestible succulent green forbs and in huckleberry shoots and buds. This feed, especially the huckleberry, remains available even when snow covers the ground, so long as deer can navigate through the clearcuts. But when many logs are left on the ground, they form obstacles that hinder deer movement and increase the energy deer must expend to feed. Therefore, cluttered clearcuts become a net habitat loss for deer, even during moderate winters.

Selective logging to avoid the poor quality trees will be ineffective since pulp quality is always found in the tops and sometimes in the butts of even very good trees. This would also result in poor residual, "high-graded" timber stands, and would require more expensive helicopter logging.

Forcing timber purchasers to produce pulp quality logs at a heavy financial loss will raise the cost that sawmills have to pay for the better grade logs. This will have a negative effect on sawmill economics and probably prevent the desired higher value added facilities from operating. The net effect of these alternatives, therefore, would be harm to both wildlife and industry economics. Stumpage prices

would experience downward pressure, with the possible result of more deficit sales.

The greatest need for forest product industry integration at this time is manufacturing plants that can handle lower quality logs, the very kinds of facilities we are losing in Southeast Alaska. The region also needs a plant able to use the lower grades of cedar. These plants, whatever their product, must deal with low recovery rates, large waste volumes and more complex manufacturing processes. They are likely to require the handling of chemicals, and they should be able to use a high percentage of waste volume to supply some of their own energy needs.

All this indicates the need for heavy investment and economies of scale that are unlikely to be possible for small operators standing alone. Alaska should promote conditions for small, local independent operators to use available timber resources to turn out finished products of the highest possible value. The opportunity for small mills to divert low grade volume to higher value uses, other than "chemical wood," is likewise very important. But to make these processes possible, and for the benefit of the overall economy of the region's industry the need for an economic local use of the lowest quality logs cannot be ignored. Forest health and wildlife will also be beneficiaries.

Eric Muench owns and operates Alaska Woods Service Company, a forestry consulting business.

The opinion presented on this page is the writer's point of view and not necessarily that of the Alaska Forest Association.

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Newkirk in Washington D.C.



The Alaska Forest Association helped sponsor a trip to Washington D.C. for Mt. Edgecumbe High School Student, Tiffany Newkirk. Tiffany needed sponsors to help with travel expenses to enable her to participate in the Washington D.C. Close Up Program, Nov. 8-16, 1996.

The Close Up Program is a close up experience in our nation's capital. Tiffany was able to attend interactive workshops and seminars, work with peers and educators on a national level, and participate in discussions that bring to life the democratic ideals that our society represents. The trip took place during an exciting time in our country, the presidential elections.

While Tiffany was in D.C., she kept us up to date on her experiences with cards and letters.

Tiffany is the daughter of Frank and Sue Newkirk. Frank is an employee of Whitestone Logging. He has worked in the logging industry 27 years.



Calendar of Events

Alaska Forest Products Industry Safety Conference

March 7, 1997

Westmark Cape Fox
Ketchikan, AK

AFA Board of Director's Meeting

March 13 & 14

Westmark Baronof Hotel
Juneau, AK

Russian Forest Products Export Conference

May 13 & 14, 1997

Vladivostok, Russia
206-851-3883

AFA's 40th Annual Convention

October 22, 23 & 24, 1997

Sitka, AK

Don Bell Alaska Loggers Scholarship Program

Applications for the annual Don Bell Alaska Loggers Scholarship Awards were mailed out early this month.

The scholarship program started by Don Bell in 1971, has awarded over \$50,000 in academic scholarships. Assisting more than 50 Alaska students in pursuit of post-secondary educations.

The Alaska Forest Association will award three scholarships in 1997 in the amount of \$3,000 each, in memory of deceased AFA members. This is double the dollar amount of the 1996 award.

Previous scholarship recipients who

are still attending college are eligible to apply. One of the three scholarships can also go to a graduating senior who is entering a vocational or technical school. At least one of the scholarships will be given to a qualified student from an Alaska high school of fewer than 160 students. The candidate must have a parent who is an employee of an Alaska Forest Association regular member company.

If you have not received an application or a list of program requirements, please call the AFA office.

New Members

AFA welcomes regular member:

Alpine Helicopters

C & I Helicopters, formerly owned by Leo Gellings, was recently purchased by Butch and Jackie DuRette. It is now operating under the new name, Alpine Helicopters, Inc.

Alpine offers helicopter support and resource development services.

Alpine Helicopters is located at 5569 North Tongass Highway in Ketchikan. They can be contacted at: 907-247-6601 or fax: 907-247-6602.

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Sea Coast Towing, Inc., is a tug and barge company that specializes in log towing. It

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We have someone new
at the AFA office!



Kathy and Brad Miller (Miller, Inc.) are new (and first time) grandparents! Kathy called to let us know that their daughter Wanda and her husband, Paul Axelson, have a daughter, Kendall Kathrine Axelson. She was born December 12, at 11:30 p.m. weighing 10 lbs. 12 oz. Grandma says she is cute, cute, cute. Congratulations to all of you!

Forest Wars is a video that documents an American dilemma: can we have our wood products and our forests too? *Forest Wars* takes you to the battlegrounds and introduces you to the warriors on both sides of the issues. This video is available at the AFA office for \$25. 907-225-6114.

Juanita Cannon will be taking Jo Carol MacMillan's place as Tongass Timber Trust, Claims Processor. (Jo Carol plans to retire this spring.)

Juanita has lived in Ketchikan since 1974, she has 3 children and a 2 month old granddaughter. Her husband Craig works for Petro Alaska.

Thank you to all who brought by or sent Christmas goodies: Laurie Bender (Phoenix Logging), Butch Olmstead (First Bank), K.A. Swiger (D.C. Cuisine), Rolf Trautmann & Dennis Maher (Trautmann, Maher & Assoc. Inc.), Dick Buhler (Silver Bay Logging), Helen & Don Finney, Bill Moran & John Clifton (First Bank), Gail Hammer (Ethix Northwest), Bill Wurts (Wurts, Johnson & Co.), Licha Kelley-King (Westmark Cape Fox Lodge), our friends at Eldorado Computing and Bob Jernberg.

Terms of the Trade: Farmer's eye; An eye splice formed by stranding a cable and twisting it to form an eye; a fast temporary splice.

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Audit Report

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

WATERWAY MANAGEMENT ISSUES

March 28, 1997



Audit Control Number:

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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 each legislative chamber. 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 \$5 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 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 either Anchorage or Juneau.

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Members of the Legislative Budget
and Audit Committee:

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

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

WATERWAY MANAGEMENT ISSUES

March 28, 1997

Audit Control Number
10-4540-97

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

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

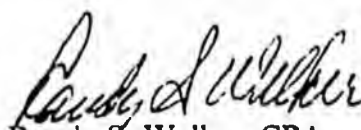

Randy S. Welker, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

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

Objectives

The objectives of the audit were as follows:

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

Scope and Methodology

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

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

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

Legislative Research Agency

University of Alaska, Institute for Social and Economic Research

University of Alaska, Justice Center

Alaska Natives Commission

Alaska Bar Association

Alaska Law Review

Land and Water Law Review

- Observation of interdepartmental navigability team meetings.

ORGANIZATION AND FUNCTION

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

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

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

Ownership of submerged land

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

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

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

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

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

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

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

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

Fishery management

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

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

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

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

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

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

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

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

Allocation of water rights among competing users

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

The United States Geological Survey (USGS) has divided Alaska into six hydrologic subregions, each of which focuses upon the area's main river systems.² The State has a statutory system³ which would allow it to simultaneously determine all users' water rights for each of these subregions in a single "basin-wide" adjudication. Though such a proceeding is conducted in the state court system, the rights subject to adjudication explicitly include federal reserved water rights.⁴

² See AS 46.15.035(e)(2).

³ AS 46.15.165-168; 11 AAC 93.400-440.

⁴ See AS 46.15.165(b); AS 46.15.166(a); 11 AAC 93.430.

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

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

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

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

Waterway obstruction

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

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

⁵ 43 USC § 666(a).

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

⁷ See AS 34.65.020.

REPORT CONCLUSIONS

BLM navigability decisions virtually ignored in FY 95 and FY 96

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public access easements involve little public input

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

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

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

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

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

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

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

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

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

We note that some 17(b) easements are subject to termination by BLM if there is no evidence of public use by the year 2001.¹² Public resources spent in procuring an easement would be wasted in the event of such termination.

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

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

The unmarked state of most easements negates meaningful public access

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

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

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

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

¹² See 43 CFR § 2650.4-7(a)(13).

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

¹⁴ See 43 CFR § 2650.4-7(b)(2).

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

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

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

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

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

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

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

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

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

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

**EXHIBIT 1
DNR EASEMENT ATLASES**

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

DNR's computerized statewide map and database are noteworthy projects

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

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

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

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

DNR has produced a noteworthy public information booklet

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

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

Statutes of limitation have minimal impact on waterway litigation decisions

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

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

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

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

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

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

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

¹⁵ 28 USC 2409a.

¹⁶ 28 USC 2409a(j).

¹⁷ 28 USC 2409a(h).

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

¹⁹ See P.L. 100-395, Aug. 16, 1988, 102 Stat. 979.

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

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

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

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

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

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

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

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

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

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

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

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

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

Public trust doctrine does not mandate pursuit of all potential claims

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

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

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

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

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

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

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

Criminal prosecution not efficient for removing obstructions

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

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

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

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

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

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

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

²⁵ The statute provides exceptions for various types of legally-authorized obstructions.

²⁶ AS 38.05.128(c).

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

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

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

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

Lack of decisive top-level direction impairs program implementation

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

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

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

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

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

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

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

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

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

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

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

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

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

Recommendation No. 2

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

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

Recommendation No. 3

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

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

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

NAVIGABILITY:

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

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

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

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

Recommendation No. 4

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

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

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

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

In evaluating easement proposals, DNR and DFG should also contact local resources who are personally familiar with the site in question. Examples of such resources are shown in Exhibit 2.³⁰ Phone calls should be an adequate means to accomplish these contacts. The calls should be briefly documented in the written rationale included in the easement file (see Recommendation No. 1).³¹

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

Recommendation No. 5

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

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

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

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

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

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

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

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

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

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

Recommendation No. 6

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

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

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

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

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

Recommendation No. 7

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

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

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

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

Recommendation No. 8

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

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

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

We believe Alaska's basin-wide adjudication statute³³ has untried potential for long-term resolution of most water-related issues. Each of the six USGS hydrologic subregions for Alaska could provide an appropriate foundation for such an adjudication.

³³ AS 46.15.165-168.

Basin-wide adjudications resolve "all water rights in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime."³⁴ Traditional water appropriation rights are included³⁵ as are rights reserving an instream flow.³⁶ We believe that federal reserved water rights³⁷ and a waterway's navigability status can also be resolved within such a state court adjudication.

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

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

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

More specifically, if the State sues the federal government in a suit to directly determine the ownership of land underlying a waterway, that suit must be filed under the federal Quiet Title Act³⁹ and litigated in the federal district court.⁴⁰ However, since *Babbitt*, the factual issue of a waterway's navigability is an essential element of "administration" and should now be subject to determination in the State court as part of an adjudication of water-related issues for an entire system of rivers. Once navigability has been decided in the State's favor, it can treat the underlying land as State-owned. If any party contests the State's ownership, the State court's factual determination should have collateral estoppel effect in later proceedings to directly quiet title.⁴¹

³⁴ AS 46.15.166(a).

³⁵ See AS 46.15.040.

³⁶ See AS 46.15.145.

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

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

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

⁴⁰ 28 USC § 1346(f).

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

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

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

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

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

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

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

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

⁴³ AS 46.15.166(d).

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

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

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

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

Recommendation No. 9

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

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

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

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

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

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

Recommendation No. 10

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

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

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

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

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

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

Recommendation No. 11

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

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

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

⁴⁵ AS 09.45.240.

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

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

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

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

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

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

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

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

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

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

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

Neither BLM nor the State have kept statistics as to the proportion of promised replacement easements that still remain to be fulfilled. In assessing the need to seek enforcement, the affected State departments should establish this number without delay. Federal regulations reflect an overall theme that 17(b) easement issues be finalized by the year 2001.⁵⁰ Easements not used by then could be lost.

Recommendation No. 12

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

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

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

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

⁵⁰ See 43 CFR § 2650.4-7(a)(13).

⁵¹ AS 34.65.020(e).

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

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

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APPENDIX A

WATERWAY MANAGEMENT

Excerpt From DNR's Kenai Easement Atlas (1993)

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

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

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

SELDOVIA B-4

■ RESERVED EASEMENTS

ADL 67551

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

EIN 1

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

EIN 15

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

EIN 16

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

EIN 16

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

EIN 16

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

EIN 17

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

EIN 17

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

EIN 23

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

EIN 26a

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

EIN 26b

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

EIN 27

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

EIN 28

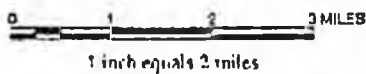
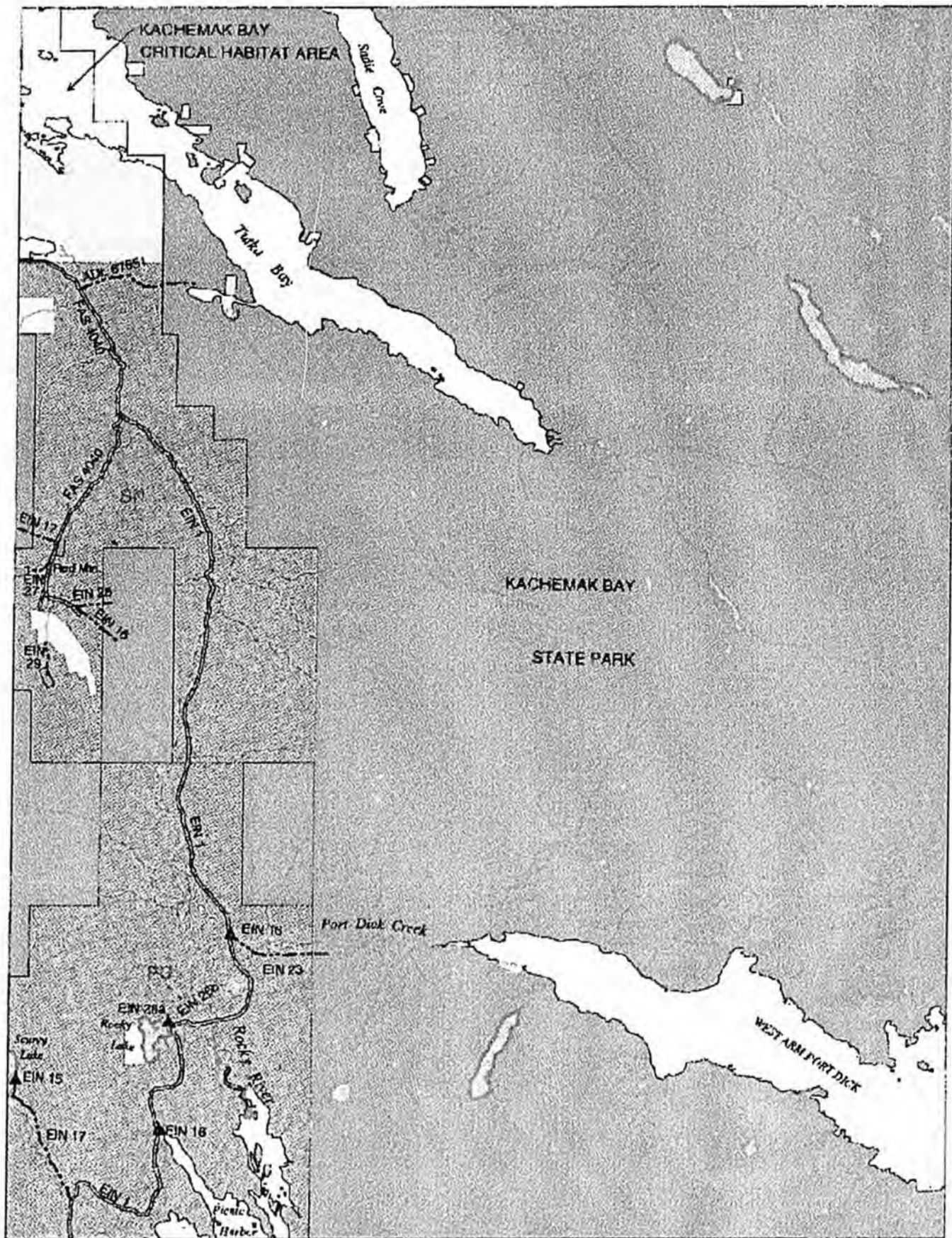
An easement for a proposed trail from FAS 4040 near the Kenai Chrome Mine eastward about 0.25 mile to public land. (25-foot trail)

EIN 29

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

FAS 4040

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



KENAI EASEMENT ATLAS

1993

LAND OWNERSHIP

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

ROADS & TRAILS

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

SITES

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

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APPENDIX B

WATERWAY MANAGEMENT

Potential Publishers Of Information Regarding Public Access Easements

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

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STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

June 25, 1997

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

Dear Mr. Welker:

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

Response To Report's Conclusions

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

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

TONY KNOWLES, GOVERNOR

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

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

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

Response : See response to recommendation 1 on page 4.

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

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

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

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

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

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

Response : See response to recommendation 7 on page 7.

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

Response : We agree.

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

Response : DNR is currently updating the booklet.

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

Response : No comment.

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

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

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

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

Response : We agree.

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

Response : See response to recommendation 9 on page 11.

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

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

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

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

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

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

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

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

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

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

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

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

Response to report recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"navigable waters" means any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes. AS 38.05.965(12).

Further clarification of the legislature's intent came in 1985, in an Act relating to the public or navigable waters of the state. The legislature found that "the people of the state have a constitutional right to free access to the navigable or public waters of the state" and that the state "holds and controls all navigable or public waters in trust for the use of the people of the state". 85 SLA Ch. 82. In the same act, the legislature stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

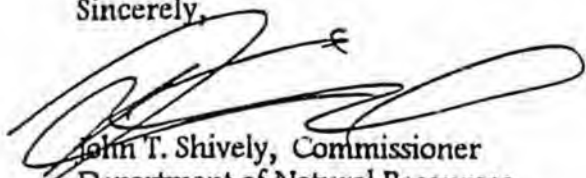
Recommendation No. 12: "The legislature should amend the surveyors' entry statute to include State employees whose duties require access to the State's waterways."

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

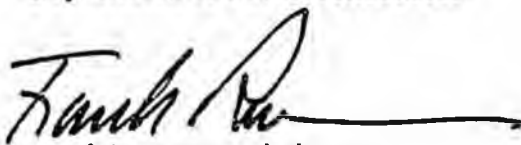
More analysis should be included in the report as to whether or not this is a significant problem and to explain why there is a need to change Alaska Statutes 34.65.020 as proposed.

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


Sincerely,



John T. Shively, Commissioner
Department of Natural Resources



Frank Rue, Commissioner
Department of Fish and Game



Bruce M. Botelho
Attorney General

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

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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

July 8, 1997

Members of the Legislative Budget
and Audit Committee:

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

Recommendation No. 5

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

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

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

Recommendation No. 8

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

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

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

Nevertheless, the agencies voice two types of concerns about the potential for basin-wide adjudications. First, they assert that federal law (specifically the McCarran Amendment⁴)

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

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

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