

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 0072

10987 HOUSE RESOURCES

# ALEUTIANS EAST BOROUGH

SERVING THE COMMUNITIES OF

■ KING COVE ■ SAND POINT ■ AKUTAN ■ COLD BAY ■ FALSE PASS ■ NELSON LAGOON

October 14, 2003

James Hansen,  
Leasing Manager  
Division of Oil & Gas  
Department of Natural Resources  
550 West 7<sup>th</sup> Avenue, Suite 800  
Anchorage, AK 99501

Ref.: Proposed Alaska Peninsula & Bristol Bay  
Oil & Gas Leasing Program

Dear Mr. Hansen,

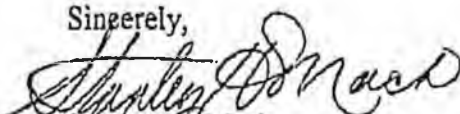
The Assembly of the Aleutians East Borough wants to thank you and your team for the presentation on October 7, 2003. Even though the weather did not allow everyone to get to Cold Bay, the Assembly's comments after the meeting included their appreciation of your efforts to brief the Assembly and the residents of the Aleutians East Borough.

First, it is the Borough's understanding that if there is Best Interest Finding, all development will take place within the State's jurisdiction and that there will be no development off shore. Furthermore, the Borough understands that the majority of the development will likely be on State owned land. Second, the concerns voiced by the people of Nelson Lagoon are symptomatic of the concerns of the majority of the Aleutians East Borough's residents. They were:

1. We need to protect our fish and game resources.
2. We need local jobs and employment at all stages of development. This must be at all levels, management, technical and labor, union and non union, should oil or gas be produced within the Aleutians East Borough.
3. We need any and all exploration sites returned to their original nature.

To this end, the Assembly passed a motion supporting the State of Alaska's efforts to conduct a Best Interest Finding process for the proposed oil & gas leasing program on the Alaska Peninsula.

Sincerely,

  
Stanley J. Mack  
Mayor

**RECEIVED**

OCT 16 2003

DIVISION OF  
OIL AND GAS

CLERK/PLANNER  
P.O. BOX 349  
SAND POINT, AK 99661  
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(907) 383-3496 FAX  
e-mail: AEBCLERK@aol.com

BOROUGH ADMINISTRATOR  
3380 C STREET, SUITE 205  
ANCHORAGE, AK 99503-3952  
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e-mail: aebanc@aol.com

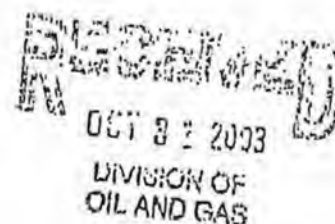
FINANCE DIRECTOR  
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KING COVE, AK 99612  
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e-mail: aebfinance@aol.com



*Lake and Peninsula Borough*

*P.O. Box 495  
King Salmon, Alaska 99613*

*Telephone: (907) 246-3421  
Fax: (907) 246-6602*



October 27, 2003

Patrick Galvin, Petroleum Land Manager  
Division of Oil & Gas  
550 W 7<sup>th</sup> Ave, Suite 800  
Anchorage, Alaska 99501-3560

RE: Call for Comments, AK Peninsula Arcawide 2005 Oil & Gas Lease Sale

Dear Mr. Galvin:

First, we would like to thank the Governor, the Governors staff and those within DNR's Oil & Gas Division for the recognition of the extra attention required "to get the word out" to those who live on the Alaska Peninsula concerning the upcoming oil and gas lease sales. There are many communication gaps in bush Alaska making your task that much more difficult.

The regional meetings in Dillingham, Bristol Bay Borough (Naknek) and in the Lake & Peninsula Borough offices (King Salmon) were instrumental in ensuring accurate information is "passed along" to others. However, due to the size of the Lake and Peninsula Borough and the steep transportation costs to travel between villages, some over 1 hour away from King Salmon by plane, I would encourage you consider additional informational meetings to be held in Port Heiden, Iliamna, and the Chigniks, ASAP. We will be glad to provide you with local contacts for those communities.

Lake & Peninsula Borough responded earlier to Mr. James Hansen's request for information providing copies of the borough's latest Community Economic Development Strategies document. Additionally, community profile maps will soon be available (expected by June 2004) on-line at DCED's website of all the villages within the Borough. These maps will contain several layers of information readily accessible by the user. Local information pertaining to sensitive cultural areas, traditional hunting or gathering areas and local historic sites are included on most community maps (local preference so not every village map contains this information). These maps will no doubt prove to be invaluable relating to potential exploration that might be considered in close proximity to a village.

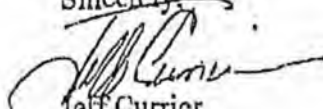
Finally, the Lake and Peninsula Borough supports onshore exploration and development but are concerned that the Best Interest Findings developed from this "call for comment period" also apparently apply to the 1.5 million acres of offshore acreage included in the lease sale, and further, that those findings are valid 10 years out.

We want to make it perfectly clear that while we are in support of onshore exploration and leasing, "the jury is still out" in most Borough villages when it comes to offshore exploration. I suspect much more information and discussion with the village leaders around the Bay will be required before offshore activities receive a majority of local support.

By supporting the current lease sale proposal, the resulting exploration and possible development of onshore sites within the next 5 years, we want to ensure we do not lose the ability to consider through separate actions, any potential exploration and development of offshore acreage in the future.

Thank you for the opportunity to provide this input. Please feel free to contact me as may be necessary.

Sincerely,



Jeff Currier  
Borough Manager

P.O. BOX 189  
NAKNEK, ALASKA 99633

[www.thebcrough.com](http://www.thebcrough.com)



TELEPHONE  
(907) 246-4224  
FAX  
(907) 246-6633

## *Bristol Bay Borough*

### **BRISTOL BAY BOROUGH RESOLUTION 2002-02**

#### **A RESOLUTION SUPPORTING OIL & GAS EXPLORATION ON NATIVE CORPORTATION LANDS NEAR BRISTOL BAY BOROUGH**

WHEREAS, Bristol Bay Borough and Communities throughout Western Alaska face difficult economic conditions due in part to high costs of living, high costs of energy and depressed fish prices and;

WHEREAS, all refined petroleum products required to operate home heating furnaces, electrical generators, cannery retorts and fish harvesting vessels are imported into the region and stored, both at very high costs and;

WHEREAS, the oil & gas industry has in the past expressed interest in exploring for reserves on the Alaska Peninsula on or near lands currently owned by the Alaska Peninsula Corporation and Bristol Bay Native Corporation as well as other lands in the region and;

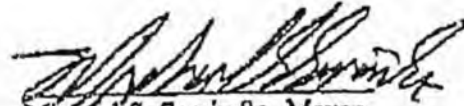
WHEREAS, the interest was significant enough for the private sector to invest considerable capital in seismic and actual drilling exploration and;

WHEREAS, Senator Stevens in recent conversations with Bristol Bay Borough officials and before the Alaska State Legislature indicated a willingness to petition Congress to add funding to the United State Geologic Survey in order to enable regional oil & gas assessments throughout rural Alaska and;

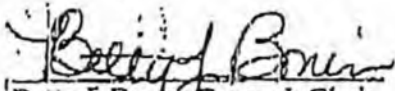
WHEREAS, potential development of oil & gas reserves on the Alaska Peninsula would likely yield direct benefits to the Bristol Bay Borough, borough residents and businesses and economic development efforts to revive our ailing economy and,

NOW THEREFORE BE IT RESOLVED, that the Bristol Bay Borough Assembly strongly encourages the local & regional Bristol Bay ANCSA corporations to work closely with the Borough, private sector oil & gas firms and the Congressional delegation in the wise development of our natural oil & gas resources in an effort to optimize benefits to the overall Bristol Bay region and State of Alaska.

PASSED AND APPROVED, by a duly constituted quorum of the Bristol Bay Borough Assembly on this 4<sup>th</sup> day of February, 2002.

  
Michael S. Swain Sr., Mayor

ATTEST:

  
Betty J. Borman, Borough Clerk

FEB-02-04 MON 04:28 PM DIRECTORS OFFICE

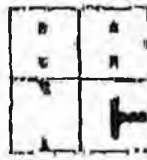
FAX NO. 907 2698938

P. 09/11

JUL-02-03 WED 01:37 PM

FAX NO. 2698904

P. 08/27



# Bristol Bay Native Corporation

Enriching Our Native Way of Life

1100 Cordova Street, Suite 200 / Anchorage, Alaska 99501-6299 / (907) 278-3602 / fax (907) 276-3924

4184  
JP  
TS

VIA FEDEX & FAX: (907) 465-3532

June 26, 2003

Honorable Frank Murkowski, Governor  
P.O. Box 110001  
Juneau, Alaska 99811

Fax Received  
JUN 26 2003  
Office of the Governor

Subject: Support for Leasing Program in the Bristol Bay Region

Dear Governor Murkowski:

Residents of the Bristol Bay region sorely need your help in order for them to help themselves. We need you to institute an oil and gas leasing program in Bristol Bay. We've compared and contrasted the pros and cons of exploration licensing and leasing, and we believe that, for several reasons, the State's best option is to put its uplands on the leasing schedule.

First, the "leasing notice" is announced to a wider audience than the exploration licensing notice is. Second, leasing, since it includes rental, bonus, and minimum work commitment terms, generally generates more revenue and more information for the State. Lastly, the land leased can be more than the 500,000-acre "cap" imposed by the exploration-licensing program, and this may be more desirable from the industry's standpoint.

BBNC has embarked on a mission to reinvigorate the environmentally responsible exploration for, and development of, oil and gas resources in Bristol Bay. We've also received the blessing, by resolution, of several Bay-area organizations that recognize the need for more jobs and cheaper energy. I've attached copies of the fourteen resolutions I've received so far, which include both regional and village-level organizations.

If you have any questions, please call me at 1-800-478-3602.

Sincerely,

Paul C. Roehl  
V.P., Land & Resources

Cc: Tom Irwin, DNR Commissioner  
Randy Rulderich, AOGCC Commissioner  
Mark Myers, DOG Director  
BBNC Board of Directors

Post-It® Fax Note	7671	Date	6/26/03	Page #	2
To	Gov. Murkowski	From	Paul Roehl		
CO/DEPT	State of Alaska	Co.	BBNC		
Phone #		Phone #			
Fax #	(907) 465-3532	Fax #			



## King Salmon Tribe

People of the Volcano

P.O. BOX 68 KING SALMON, AK 99613  
TEL: 907/246-3553 FAX: 907/246-3649  
E-MAIL: [ksnv@bristolbay.com](mailto:ksnv@bristolbay.com)

September 15, 2003

Bristol Bay Native Corporation  
800 Cordova Street  
Suite 200  
Anchorage, AK 99501-6299

VIA FACSIMILE: 907/276-3924

Dear Mr. President:

As you know, Bristol Bay has been faced with economic failure year after year, due to the low return of salmon and the low prices paid to the fisherman. Because of the failure in our fishery, our people are faced with having to live in poverty. We can no longer pretend that our fishery will be, as we knew it. Other than fishing, most of our people in our villages have very few economic opportunities. As a result, we have friends and family fighting amongst themselves for these limited jobs. Until there are economic changes in place, we will forever be faced with economic despair because there are no other means to provide for ourselves other than what we have today. We need economic diversity.

The village of King Salmon is in support of developing our oil and gas reserves both onshore and offshore and developing our mineral deposits here in Bristol Bay. We also support ground transportation from King Salmon to Anchorage so that we can reduce transportation costs to promote economic opportunities. This would also reduce the cost of living in our villages and region. Whether any of these development issues take place remains to be seen. However, we cannot continue to impoverish our people because of differences of opinions in regards to economic development.

It is unfair of people and organizations who criticize development in our region when in fact they offer no solutions to address our current short and long-term needs. In addition, many people who are opposed to economic development have good paying jobs, or work and live outside our region. Yet, many try to dictate what is best for us and our villages.

In closing, the village of King Salmon asks that we all put aside any differences that we may have of economic development in Bristol Bay. Our people deserve more than having to live in poverty and the consideration of going on welfare.

Sincerely,

Ralph Angasan, Sr.  
President

2832  
JP

**CITY OF ALEKNAGIK**

P.O. BOX 33, MAIN STREET  
ALEKNAGIK, ALASKA 99555-0033  
PHONE: 907-842-5953 OR 842-2528  
FAX: 907-842-2107  
EMAIL: [cityalek@nushtel.com](mailto:cityalek@nushtel.com)

April 11, 2003

Governor Frank H. Murkowski  
Office of the Governor  
3<sup>rd</sup> Floor State Capital, Mail Stop 0001  
P.O. Box 110001  
Juneau, Alaska 99811-0001

RECEIVED

APR 16 2003

GOVERNOR'S OFFICE

RE: Oil and Gas Development in Bristol Bay

Dear Governor Murkowski:

The City Council of the City of Aleknagik passed Resolution 03-11 supporting OCS 92 lease sales for oil and gas development in Bristol Bay at their regularly meeting on April 8, 2003. The City of Aleknagik supports economic development, local jobs, lower energy costs, less dependence on foreign oil, and protection of the fisheries and environment.

Please support oil and gas development in Bristol Bay and help to move up the OCS sales from 2011 to the earliest possible date. Thank you for your time and favorable consideration.

Sincerely,



Chris Chuckwuk  
Mayor

Enclosure: Resolution 03-11

cc: Senator Ted Stevens  
Senator Laura Murkowski  
Congressman Don Young  
Alaska State Legislature  
Paul Roehl, Bristol Bay Native Corporation

CITY OF ALEKNAGIK  
RESOLUTION 03-11A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ALEKNAGIK  
SUPPORTING OCS 92 LEASE SALES FOR OIL AND GAS DEVELOPMENT IN  
BRISTOL BAY.

WHEREAS, Outer Continental Shelf (OCS) Sale 92, which occurred in October 1988, garnered nearly \$96 million in oil and gas bids for 122,000 acres contained in 23 leases; and

WHEREAS, the lease sale happened at a time when the price for sockeye salmon was high (up to \$2.60/lb.) and the price for oil was relatively low (\$17.30/bbl.); and

WHEREAS, the high commercial value of salmon in the late 1980's, coupled with the threat posed by the oil industry to salmon and wildlife habitat (particularly after the March 1989 Exxon Valdez oil spill), resulted in widespread opposition to the OCS 92 lease sales, and eventually lead to the cancellation of those lease sales and the return of the bid proceeds to the respective oil companies; and

WHEREAS, lease sale area OCS 92 is not scheduled to be revisited by the U.S. Minerals Management Service until 2011; and

WHEREAS, the environmentally responsible exploration for, and development of, Bristol Bay oil and gas resources could create needed high-paying, rewarding jobs for the people of the region, especially given the recent, disastrous Bristol Bay commercial salmon seasons; and

WHEREAS development of these oil and gas resources could also result in substantially reduced heating and energy costs for residents in the Bristol Bay region, and could enhance the competitiveness of the Bristol Bay commercial salmon and other industries, such as mining; and

WHEREAS, given the rising tensions in the Middle East, it is becoming increasingly clear that America's dependence on foreign oil imports is highly undesirable, both from a strategic and domestic standpoint.

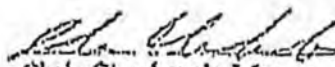
NOW THEREFORE BE IT RESOLVED that the City Council of the City of Aleknagik that the City of Aleknagik strongly supports oil and gas exploration and development in the Bristol Bay region provided maximum protection be given to the fishery resources and that exploration and development be done in an environmental manner; and

BE IT FURTHER RESOLVED that the City of Aleknagik supports immediate exploration and development of the OCS 92 area and request the assistance of Senator Stovena, Senator Murkowski, Congressman Young, Governor Murkowski, and the

Alaska State Legislature to assist in moving the OCS sales schedule up from 2011 to 2004 or as earliest as possible.

PASSED AND APPROVED this 7<sup>th</sup> day of April, 2003 at Aleknagik, Alaska.

SIGNED:

  
Chris Chuckwuk, Mayor

ATTEST:

  
Pauline Kohler, City Clerk

SB

266

**HB 383/SB 266**  
**Limited Mineral Order for Bristol Bay Area**  
**February 19, 2004**

**Summary:**

- HB 383/SB 266 ensure that land remains available for a proposed competitive oil and gas sale in the Bristol Bay area by precluding oil and gas exploration licensing and shallow natural gas leasing in the competitive lease sale area.
- HB 383/SB 266 will:
  - Avoid potential conflicts in land use for these areas later, if the proposed competitive oil and gas lease sale occurs.
  - Ensure that the state receives the maximum economic benefit from its higher potential oil and gas areas through bonus bids, royalties, and lease terms.
  - Help facilitate needed economic development and job creation in Alaska's Bristol Bay region as well as produce property tax revenue for municipalities.

**Background:**

- Upon the request of local governments and Native organizations, the Governor has requested that the Department of Natural Resources consider a competitive areawide oil and gas lease sale in the Bristol Bay (Alaska Peninsula) region. Geologists believe that outside of the North Slope and Cook Inlet, the Alaska Peninsula offers the greatest potential in the state for commercial oil and gas development.
- In order to avoid conflicts between the proposed competitive sale and either exploration licensing under AS 38.05.131-AS 38.05.134 or shallow natural gas leasing under AS 38.05.177, the Commissioner of Natural Resources signed a mineral closing order on July 11, 2003. The mineral order only precludes exploration licensing and shallow natural gas leasing in the competitive lease sale area. This order does not affect locatable minerals or leaseable minerals other than shallow natural gas leasing or oil and gas exploration licensing.
- Under AS 38.05.300(c), a mineral closing order is an interim classification which does not become permanent unless approved by the legislature by the 90<sup>th</sup> day of the next regular session, or adjournment.
- HB 383/SB 266 would:
  - Prevent speculators from top filing shallow natural gas applications (\$5,000 application fee) in an area of richer oil and gas potential which should be competitively leased.
  - Avoid potential land use and program conflicts if an oil and gas exploration license or shallow natural gas lease is top filed in the proposed competitive sale area.
  - Help maximize economic benefit from the State's higher potential oil and gas areas through royalties, lease terms, and competitive bonus bids.

State of Alaska  
 Department of Natural Resources  
 Division of Oil and Gas

Mineral Order No. 791

Closing land to oil and gas licensing and leasing under AS 38.05.131-134 and AS 38.05.177

I. Name: Proposed Bristol Bay Competitive Oil and Gas Areawide Lease Sale Area

II. Finding: I consider it necessary and proper to issue an interim classification order to preclude shallow natural gas leasing and oil and gas exploration licensing due to the State of Alaska's announced intent to plan, schedule and hold a competitive oil and gas areawide lease sale in the area described in Section III. This order has no effect on locatable minerals or leaseable minerals other than shallow natural gas leasing or oil and gas exploration licensing. I will transmit this interim classification order to the legislature for their consideration within 10 days of the convening of the next regular legislative session.

III. Legal Description:

Seward Meridian, Alaska

<u>Township</u>	<u>Range(s)</u>	<u>Township</u>	<u>Range(s)</u>
17 S	44 - 58 W	36 S	51 - 52 & 55 - 60 W
18 S	44 - 58 W	37 S	57 - 62 W
19 S	44 - 58 W	38 S	58 - 63 W
20 S	45 - 61 W	39 S	59 - 64 W
21 S	46 - 54 & 57 - 61W	40 S	59 - 65 W
22 S	47 - 53 & 58 - 61W	41 S	63 - 68 W
23 S	47 - 52 W	42 S	63 - 69 W
24 S	47 - 52 W	43 S	65 - 70 W
25 S	47 - 52 W	44 S	65 - 71 W
26 S	47 - 53 W	45 S	67 - 72 W
27 S	47 - 53 W	46 S	68 - 73 W
28 S	48 - 53 W	47 S	69 - 78 W
29 S	48 - 54 W	48 S	70 - 81 W
30 S	48 - 55 W	49 S	70 - 83 W
31 S	49 - 56 W	50 S	71 - 84 W
32 S	51 - 57 W	51 S	71 - 85 W
33 S	52 - 58 W	52 S	74 - 75 & 79 - 86 W
34 S	53 - 59 W	53 S	85 - 87 W
35 S	51 - 59 W	54 S	85 - 87 W

IV. Decision: This order, issued pursuant to AS 38.05.300(c), is subject to valid existing rights. The above-described lands are hereby closed to Oil and Gas Exploration Licensing under AS 38.05.131-134 and Shallow Natural Gas Leasing under AS 38.05.177.

Ordered and Effective this 11 day of July, 2003.

*Original signed by Thomas E. Irwin*  
Thomas E. Irwin, Commissioner  
Department of Natural Resources



# STATE OF ALASKA

FRANK H. MURKOWSKI, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

400 WILLOUGHBY AVENUE  
JUNEAU, ALASKA 99801-1796  
PHONE: (907) 465-2400  
FAX: (907) 465-3886

550 WEST 7<sup>TH</sup> AVENUE, SUITE 1400  
ANCHORAGE, ALASKA 99501-3650  
PHONE: (907) 269-8431  
FAX: (907) 269-8918

March 4, 2004

The Honorable Beth Kerttula  
Alaska State Legislature  
State Capital, Room 430  
Juneau, Alaska 99801-1182

Dear Representative Kerttula:

You asked for clarification regarding the administration's intent relative to onshore or offshore drilling in Bristol Bay on state lands. If the State deems that an Alaska Peninsula Oil and Gas Lease Sale is in the State's best interest and a sale occurs, it is this Administration's intent that companies only be allowed to access offshore prospects from onshore drill sites, utilizing directional drilling technology.

The Department of Natural Resources (DNR) has expressed the Administration's intent related to onshore drilling to each of the three boroughs (Bristol Bay, Lake and Peninsula, and Aleutians East), the Bristol Bay Native Association, and local residents.

I have signed memorandums of understanding with the Bristol Bay Native Corporation and the Aleut Corporation, in which we pledged to work cooperatively to ensure all development projects are pursued in an environmentally responsible manner to minimize impacts to fishery resources. Additionally, the northern portion of the sale area lies within the Bristol Bay Fisheries Reserve. In accordance with AS 38.05.140(f), the State cannot permit any offshore facilities within the Reserve until the Legislature specifically finds that the entry will not constitute a danger to the fishery. Please feel free to call me with any questions.

Sincerely,



Thomas E. Irwin  
Commissioner

**SB**

**295**

# Alaska State Legislature

SENATOR  
GENE THERRIAULT

Mailing Address:  
119 N. Cushman, Suite 101  
Fairbanks, Alaska 99701  
(907) 488-0857  
Fax: (907) 488-4271



Senate

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

## Sponsor Statement SB295

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

Sponsor: Senator Gene Therriault

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

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

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

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

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

02

## AN ACT

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

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

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

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

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

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

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

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

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

manner in which the original appointment was made.

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

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

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

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

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

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

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

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

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

- (1) establish a process for researching navigability determinations that affect land title;
- (2) develop procedures for involving private landowners and the general public in the navigability determination process of the commission;
- (3) undertake a process of navigable and non-navigable waters identification under criteria established in law;
- (4) make recommendations to improve coordination and consultation between the state and federal governments in making navigability determinations and decisions concerning title to submerged lands.

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

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

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

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

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

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

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

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

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

# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

Fiscal Note Number: \_\_\_\_\_  
Bill Version: SB295-DNR-MLW-02-18  
( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Natural Resources  
Title Extend Navigable Waters Commission RDU Resource Development  
Component RS 2477/Navigability  
Sponsor Senator Therriault  
Requester Senate Resources Component No. 2226

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

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

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

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

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

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

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

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

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

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

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

# ALASKA STATE LEGISLATURE

## CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

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

Updated: 02/11/04

### Statehood Entitlement – Submerged Lands

Alaska became a state in 1959 and under the Equal Footing Doctrine and the Submerged Lands Act inherited title to almost 60+ million acres of submerged lands. Unfortunately, since statehood, less than 20 rivers have been determined to be navigable by the federal courts. Although BLM has made numerous navigability determinations and the Department of the Interior is presently working positively with the state to identify and issue a "Recordable Disclaimer of Interest" for navigable waterways, the process is still painfully slow. Considering the fact that Alaska contains 20,000+ potentially navigable rivers and well over 1,000,000 lakes that could qualify as navigable, it could take several life-times and billions of litigation dollars before Alaska realizes its entitlement, if at all. In addition, the passage of time weakens the state's ability to provide the factual determinations necessary to prove in a federal court that a waterbody was navigable at the time of statehood.

### Issues of State Ownership of Submerged Lands

Alaska faces two types of legal hurdles in establishing its entitlement to submerged lands. Its most critical problem is to establish, in an efficient and timely manner, which of the state's rivers and lakes are navigable. Alaska's second hurdle is to determine which submerged lands the United States legally withdrew prior to statehood. The state's attempts to resolve these issues are thwarted by the extremely narrow interpretation the United States gives to the federal Quiet Title Act and by the lack of a non-judicial process to determine title.

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

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

For purposes of title to submerged lands, waters are navigable when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted. Unfortunately, only a handful of waterways have been adjudged navigable since Alaska's statehood, because of the unwillingness of the United States to settle navigability issues outside litigation, and because of the jurisdictional difficulties of litigating navigability against the United States.

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

#### Navigable Waters Jurisdictional Issues

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

#### Navigability Criteria Conflicts

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

The greatest hurdle to overcome in the State's efforts to identify and manage navigable waters has been the long-standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability. Navigability is a question of fact, not a simple legal formula. Variations in waterbody use that result from different physical

characteristics and transportation methods and needs must be taken into account. There are many legal precedents for determining navigability in other states based upon the particular facts presented in those cases.

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

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

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

**Kandik, Nation and Black Rivers.** In this case, the State and Doyon Limited successfully established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by trappers, as well as extensive historic and contemporary canoe use, the federal courts found the Kandik and Nation rivers navigable and, due to a technical interpretation of the federal Quiet Title Act, failed to rule on the Black River. The Department of the Interior issued a "Recordable Disclaimer of Interest" for the Black River, however, in 2003.

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

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

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

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

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

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

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

#### Clouded Titles Due to Erroneous Navigability Determinations

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

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

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

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

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

### Difficulties Quieting Title to Submerged Lands

The State must file a Quiet Title Action in federal court to definitively resolve a dispute with the federal government regarding ownership of a navigable water body. The federal government has made it very difficult to quiet title. The Quiet Title Act provides that the United States may be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S. C. § 2409a(a). The United States has adopted a very narrow view of the term "claims and interest," asserting that the federal court has no jurisdiction to hear quiet title actions against it unless the federal government actively and expressly asserts an interest in the lands. In the context of the submerged lands, this will occur only in rare circumstances.

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

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

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

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

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

#### Solutions Through Administrative Action – Recordable Disclaimer of Interest

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

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

#### Solutions Through Federal Legislation

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

B. **Joint State/Federal Navigable Waters Commission.** In 1971, Congress and the State of Alaska respectively created a Joint Federal/State Land Use Planning Commission for Alaska to assist in the massive land-use planning process following passage of the Alaska Native Claims Settlement Act. The State Legislature passed a bill in 2002 to create a similar State/Federal Commission for the purpose of expediting navigability determinations and providing recommendations for ways to improve the process of making water use and navigability decisions in Alaska. Similar legislation was introduced in Congress by the Alaska delegation to create the federal portion of the Commission. Unfortunately, this legislation did not pass as the federal and state administrations looked for other ways to accelerate title dispute resolutions.

#### Examples of Navigability Complexities & Additional Information

Appendix A is a copy of the State of Alaska's August 27, 1992 notice to Secretary of the Interior, Manuel Lujan, Jr. of its intent to quiet title to submerged lands described under 194 specific water-bodies in Alaska. Similarly, Appendix B contains a copy of the official notice to Secretary of the Interior Bruce Babbitt of the State's intent to quiet title to submerged lands described under an additional 9 water-bodies. Most of the water-bodies listed in Appendix A and Appendix B have been recognized by the Bureau of Land Management as being navigable for land conveyance purposes but have maintained that this assertion is not for title purposes.

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

# STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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P.O. BOX 110300 - STATE CAPITOL  
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PHONE: (907) 465-3600  
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August 27, 1992

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

Dear Mr. Lujan:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. 52409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§1301 et seq., and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339, 48 U.S.C. note preceding §21.

Sincerely,

CHARLES E. COLE  
ATTORNEY GENERAL

By:

*Joanne M. Grace*  
Joanne M. Grace  
Assistant Attorney General

JMG/sh  
Attachment

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

8/27 mailed cert return receipt

Appendix A to letter of August 27, 1992.

*to what  
water bodies*

Colville Region

Mouth of Colville River to Nuka River  
Mouth of Kuna River to Chefarnak

Northwest Region

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

Koyukuk River Region

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

Upper Yukon Region

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

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

40 Mile Area

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

South Central Region

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

Tanana Region

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

Middle Yukon River

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

Lower Yukon Region

Anvik River  
Bonasila River  
Kotlik River  
Nulato River  
Pastolik River

Kuskokwim River Region

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

Bristol Bay Region

Alec River *chignik*  
Aniakchak River *chignik*

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

Mouth of Wood River to Lake Aleknagik

Copper River Region

Mouth of Bering River to near Bering Lake

Mouth of Chitna River to Tana River

Mouth of Copper River to Batzulnetas (above Slana)

Crosswind Lake

Mouth of Eyak River and Eyak Lake

Mouth of Klutina River to Klutina Lake

Low River

Miles Lake and outlet

Nelchina River

- Tasmuna River

- Mouth of Tazlina River to Tazlina Lake

Southeast Region

Chilkat River

Chilkoot River

Stikine River

Kodiak Island and Shelikof Straight Region

Afognak Lake

Mouth of Afognak River to the remains of the Bridge

Akalura and Red Lakes

Mouth of Aniakchak River to Albert Johnson Creek

Karluk Lake

Mouth of Karluk River to Karluk Lake

Statewide Region

Yukon River

# STATE OF ALASKA

## DEPARTMENT OF LAW

### OFFICE OF THE ATTORNEY GENERAL

December 17, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Dear Mr. Babbitt:

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

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:

*Joanne M. Grace*  
Joanne M. Grace  
Assistant Attorney General

Attachment

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

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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

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

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

**APPENDIX A**

Copper River Region  
Copper River

Northern Region  
Kuk River  
Meade River  
Kukpowruk River

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

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

**Before the**

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

**on  
July 30, 2002**

**Concerning**

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

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before you today. I am Abigail Kimbell, Associate Deputy Chief for National Forest System, Forest Service. I am here today to provide the Administration's comments on four bills and a concurrent resolution:

S. 2565—to enhance ecosystem protection and the range of outdoor opportunities protected by statute in the Skykomish River Valley of the State of Washington by designating certain Federal lands as wilderness, and for other purposes.

S. 2587—to establish the Joint Federal and State Navigable Waters Commission for Alaska.

S. 2612—to establish wilderness areas, promote conservation, improve public land, and provide for high quality development in Clark County, Nevada, and for other purposes.

S. 2652—to authorize the Secretary of Agriculture to sell or exchange certain land in the State of Florida, and for other purposes.

S. Con. Res. 107—expressing the sense of Congress that Federal land management agencies should fully support the Western Governors Association "Collaborative 10-year Strategy for Reducing Wildland Fire Risks to Communities and the Environment", as signed August 2001, to reduce the overabundance of forest fuels that place national resources at high risk of catastrophic wildfire, and prepare a National Prescribed Fire Strategy that minimizes risks of escape.

The Department supports S. 2652 and S. Con. Res. 107 and does not object to S. 2565, S. 2587 or S. 2612. The Department would like to work with the Committee to recommend improvements to S. 2565, S. 2587 and S. 2612.

#### S. 2565—The Wild Sky Wilderness Act of 2002

The Department does not oppose S. 2565 designating the Wild Sky Wilderness on the Mount Baker-Snoqualmie National Forest in the State of Washington as a component of the National Wilderness Preservation System. However, the Department would like to work with the Committee to improve S. 2565.

This legislation would create approximately 106,000 acres of additional wilderness on the Skykomish Ranger District of the Mt. Baker-Snoqualmie National Forest. It directs the Secretary to assure adequate access to private in-holdings within the Wild Sky Wilderness and establish a hiking trail plan. The bill authorizes the use of helicopter access to construct and maintain a Forest Service communication repeater site to provide improved communication for safety and health purposes.

S. 2565 also requires the Secretary to exchange specified lands with the Chelan County Public Utility District if the District offers to the Secretary approximately 371.8 acres within the Snoqualmie National Forest, in exchange for a permanent easement, including helicopter access, consistent with such levels of use as of the date of this Act's enactment, to maintain an existing Snotel site on 1.82 acres on the Wenatchee National Forest.

If Chelan County notifies the Secretary that they no longer need to maintain the Snotel site, the easement will be extinguished and all rights conveyed by this exchange would revert to the United States.

The Department has significant concerns with approximately 36,000 acres of the 106,000 acres proposed for wilderness designation. These acres would not be considered suitable for wilderness designation under the provisions of the 1964 Wilderness Act or under existing Forest Service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

releases and retains certain Nevada lands as wilderness study areas.

Title II proposes a number of areas in Clark County as additions to the National Wilderness Preservation System, and several related administrative and management requirements and limitations. Although the Department does not oppose Title II and is supportive of the proposed additions to the National Wilderness Preservation System, we have significant concerns with some of the administrative and management provisions as they are currently drafted. We look forward to working with the Committee to resolve these concerns.

The Nevada Wilderness Protection Act of 1989 provided for low-level over-flights in designated wilderness for military purposes only. The language of the section 205 in the current bill allows for low-level flights by anyone. We would like to work with the Committee to resolve this difference.

As a general matter applicable to three of the proposed additions to the National Wilderness Preservation System, the Forest Service is concerned with our ability to administer wilderness boundaries that follow private property lines and un-surveyed cadastral (i.e., township) lines. The resulting wilderness would be more effectively managed if, where possible, recognizable landscape features and elevation contour lines defined the boundaries.

In most cases, private property boundaries and cadastral lines were defined in the last century and have not been surveyed. For example, the western boundary of the proposed La Madre Wilderness appears to follow the section lines.

Revising that boundary to follow topographic features would make it easier to both establish and administer on the ground. The Forest Service also recommends assuring that this portion of the boundary is sufficiently offset from FSR 576 and the private inholding to guard against any potential conflict with those features. Also, where boundaries use offsets from man-made structures, such as roads or power lines, these offsets should be adequate to allow for road and fuel break maintenance, as well as dispersed parking where appropriate. We would like to discuss our specific boundary concerns with the Committee and staff before the bill moves forward.

Additionally, we have a number of substantive and technical concerns regarding sections 208-210 and would like to work with the Committee to modify these sections.

Title IV of the bill contains amendments to the Southern Nevada Public Land Management Act (SNPLMA), specifying that a maximum of 25 percent of the amounts be used for capital improvements and a minimum of 25 percent be used for parks, trails, and natural areas. These legislated restrictions are problematic. We recommend maintaining flexibility in the proportions allocated to land acquisitions, capital improvements and parks, trails, and natural areas to allow those three program areas to adjust to the variations in needs and priorities that naturally occur from year to year. The process currently described in the SNPLMA Implementation Agreement permits important flexibility. The Implementation Agreement process allows public participation throughout the nomination process to help set the priorities for distribution of funds. The latest round of project submittals exemplified how the current flexibility was used to distribute funds to the mutual advantage of all participating agencies and, ultimately, to the public. Therefore, we recommend that the Implementation Agreement process be used to develop the annual recommendations for SNPLMA project funding.

#### **S. 2652—Florida National Forest Land Management Act of 2002**

S. 2652 would authorize the Secretary of Agriculture to solicit offers for the sale or exchange of 18 parcels of land within the National Forests in Florida.

S. 2652 authorizes the Secretary to use a real estate broker and pay the real estate broker a commission in an amount that is comparable to the amounts of commission generally paid for real estate transactions in the area.

The bill allows the Secretary to accept a cash equalization payment in excess of 25 percent of the value

of the Federal land exchanged for non-Federal land of a lesser value.

S. 2652 also prohibits the Secretary of Agriculture from selling or exchanging the parcel of land described in paragraphs (1) through (7) of subsection (b) without the concurrence of the Secretary of the Air Force. The Department has concerns with this provision and believes it could significantly delay disposing of the specified parcels. We would like to work with the Committee to revise the concurrence language.

Further, we would recommend that parcel 17 (tract C-2212) be removed from the bill. The 5 acres does not belong to the Forest Service.

The Department supports S. 2652. The parcels contained in the bill are also identified for exchange or sale in the National Forests in Florida's Land Management Plan. This legislation will expedite the sale of these parcels, which are separated and isolated lands that no longer contain national forest characteristics and are no longer manageable as National Forest land. Several of these parcels are encumbered with urban structures, such as baseball fields and the Okaloosa County fairgrounds.

S. 2652 will allow us to acquire the remainder of a 2,560-acre inholding within Florida's Apalachicola National Forest. We recently completed a land exchange for 1,180 acres of this property.

**S. Con. Res. 107—Sense of Congress on the "Collaborative 10-year Strategy for Reducing Wildland Fire Risks to Communities and the Environment."**

Senate Concurrent Resolution 107 expresses the sense of Congress that Federal land management agencies should fully support the 10-Year Comprehensive Strategy for Reducing Wildfire Risks to Communities and the Environment. This strategy was developed by the Secretaries of Agriculture and the Interior in collaboration with the Western Governors Association. The Secretaries and the Governors endorsed this document in August 2001.

Subsequently, in May of this year, the Secretaries and Governors signed the implementation plan for the 10-Year strategy. This plan is a consensus document agreed to by the Secretaries, the Western and Southern Governors Associations, the National Association of Counties, the National Association of State Foresters, industry, environmental groups, and other parties. The goals of the implementation plan are to improve fire suppression, reduce hazardous fuels, restore fire adapted ecosystems, and promote community assistance through performance based collaboration. The implementation plan establishes the need for active forest management, including thinning that produces commercial or pre-commercial products, biomass removal and utilization of prescribed fire and other tools to reduce wildland fire risks to communities and the environment.

The newly formed Wildland Leadership Council is important to the leadership, accountability, and coordination in carrying out these goals. The Council has developed action plans for each task described in the 10-Year Implementation Plan. We appreciate the continued bipartisan support from Congress, and we are committed to meeting the goals of this federal-state partnership.

**Conclusion:**

This concludes my statement. We look forward to working with the Committee on making the suggested modifications as noted above, and I would be happy to answer your questions.

For more information contact: Tony Dixon

SB

297



# ALASKA STATE SENATE



Session:  
State Capitol  
Juneau, Alaska 99801-1182  
(907) 465-2327  
(907) 465-5241 Fax

Interim:  
119 N. Cushman, Suite 201  
Fairbanks, Alaska 99701  
(907) 456-8161

Senator\_Ralph\_Seekins@legis.state.ak.us

Senator Ralph Seekins  
District D

## Senate Bill 297 Sponsor Statement

**“An Act relating to bear predation management and the donation and sale of bear hides and skulls.”**

There is no shortage of black or grizzly/brown bears in Alaska. Here, they are neither threatened nor endangered. In some Game Management Units the bear populations are many multiples of the established population objectives. The Alaska Department of Fish and Game estimates statewide black bear populations as high as 200,000 and the grizzly/brown bear population as high as 35,000.

In certain Game Management Units, estimates range from 70–90% of all the moose calves are dead before they reach two months of age due, in large part, to bear predation. As a result, fall recruitment is virtually zero and the reproductive base populations are crashing. The well publicized 2003 McGrath bear relocation experiment clearly demonstrated that a reduction in bear populations has a direct positive effect on increasing calf survivability and thus the long-term health of the resource. But relocation efforts do not solve the underlying problem.

Senate Bill 297 addresses Alaska’s bear over-population problem in those places — called Intensive Management Areas — where the Board of Game has: (1) first determined that consumptive use of the big game population is a preferred use; (2) depletion of the big game population has occurred and may result in a significant reduction in the allowable human harvest of the population; and (3) enhancement of abundance or productivity of the big game prey population is feasibly achievable utilizing recognized and prudent active management techniques.

*It is important to understand that the provisions in SB 297 only come into play if the Board of Game, advised by the Department of Fish and Game biologists, finds that bears are a cause of the depletion or reduction of big game productivity.*

Once the above findings have been made, SB 297 allows for remediation efforts through the issuance of bear predation management permits. These special-purpose permits relax certain restrictions relative to the taking of bears in those areas where bear predation is identified as a problem. The Bill also provides guidance with respect to bear sealing as well as disposition of hides and skulls taken under this Act.

A strong point of emphasis is that this program in all reality is, and should be viewed as, a predator control program. The provisions of this Act *do not apply* to Game Management Units in which intensive management is not necessary. Furthermore, proactive measures end as soon as the bear populations are once again within the population objectives that have been set by the Board of Game.

# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1  
Bill Version: CSSB 297(RES)  
(S) Publish Date: 4/19/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Fish and Game  
Title Taking Black, Brown, and Grizzly Bear RDU Wildlife Conservation  
Component Wildlife Conservation  
Sponsor Senator Seekins  
Requester Senate Resources Component No. 473

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

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

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

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

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

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

Passage of this legislation would have no fiscal impact.

Prepared by: Sarah Gilbertson, Legislative Liaison  
Division: Alaska Department of Fish & Game  
Approved by: Commissioner Kevin Duffy  
Agency: Alaska Department of Fish & Game

Phone 465-6137  
Date/Time 3/12/04 11:37 AM  
Date 3/12/2004

# FISCAL NOTE

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

Fiscal Note Number: 2  
 Bill Version: CSSB 297(RES)  
 (S) Publish Date: 4/27/04

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
 Title Act relating to bear predation management RDU Alaska State Troopers  
 Component Bureau of Wildlife Enforcement  
 Sponsor Sen. Seekins  
 Requester (S) Rules Component No. 2746

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

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

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

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

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

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

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

This act will establish policies related to the Department of Fish and Game (ADF&G) being able to issue permits to allow hunters, both resident and non-resident, to harvest black, brown, and grizzly bears within "intensive management" areas. ADF&G will issue bear predation management permits to those hunters who qualify. Nonresident or nonresident aliens will be accompanied by a registered guide or master guide, or by a hunter who is over 21 years of age and who meets other qualifications outlined in the legislation. The taking of bear under authority of a bear predation management permit is subject to all other provisions applicable to the taking of bear such as the regulations governing the method, manner, means, bag limit, or other matters adopted by the board that do not conflict with this legislation.

This legislation is not expected to have a fiscal impact on the Alaska State Troopers.

Prepared by: Lt. Al Storey  
 Division: Alaska State Troopers  
 Approved by: Commissioner William Tandeske  
 Agency: Department of Public Safety

Phone 907-269-4532  
 Date/Time 4/22/04 10:19 AM  
 Date 4/22/2004

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# Alaska

## Professional Hunters Association, Inc.

P.O. Box 91932 • Anchorage, Alaska 99509  
(907) 522-3221

May 3, 2004

Honorable Bruce Weyrauch, Chairman  
State Affairs Committee  
Alaska House of Representatives  
State Capitol  
Juneau, AK 99801

RE: SB 297

Dear Chairman Weyrauch:

We have reviewed the revised version of SB 297 relating to bear predation management and conclude that it continues to represent a threat to the guide requirement in State law for non-resident hunting of bears and other big game species. This conclusion arises from analysis of the bill and review of applicable case law.

Alaska's guide requirement is predicated on considerations of hunter welfare and safety, resource management, and enforcement of hunting regulations. AS 16.05.407-408. Federal and state courts have upheld as legitimate and rational similar restrictions concerning nonresident hunters. See *O'Brien v. State*, 711 P.2d 1144, 1151 (Wyoming 1986) (upholding guide requirement for hunting big or trophy game as rational means of ensuring "proper game management, protection of hunter welfare and safety, or better enforcement of the game [and] fish laws"); *Clajon Production Corp. v. Petera*, 854 F.Supp 843 (D. Wyoming 1994) (upholding a resident license preference regulation that reserved a certain percentage of big game hunting licenses for state residents); *DeMasters v. State*, 656 F.Supp. 21 (D. Montana 1986) (upholding Montana statute limiting the number of yearly nonresident elk hunting licenses as an effective management tool for the purpose of wildlife conservation).

Any action that says, in essence, that these considerations are legitimate and compelling with respect to one area (where the guide requirement is in effect) but are not compelling (and are waived) in another, weakens the rational basis of the requirement. As a result, differential treatment of non-residents in different areas within the state is likely to expose Alaska's guide requirement to federal constitutional equal protection challenge.

B. Weyrauch

-2-

5/3/04

SB 297 would establish such differential treatment. The measure would amend AS 16.05.781 to eliminate the guide requirement for non-residents hunting bears in designated bear predation management area. The revised version of the bill attempts to address the differential treatment issue by requiring non-residents to be accompanied by residents that satisfy certain criteria and receive special training. Although the purposes and objectives behind criteria are not specified, the emphasis on "experience" seems to be an effort to facilitate safety and in that sense, mirror or replicate one of the purposes underlying the guide requirement. Put another way, the bill seeks to establish these special residents as de facto guides operating in a non-commercial or quasi-commercial manner. <sup>1</sup> We presume that the thinking is that the differences between commercial and non-commercial "guides" would be considered minimal and not arbitrary or irrational.

This raises two issues. First, certifying a specific set of residents as stand-ins for guides raises questions about the basis for retaining guide requirements in other areas or for different big game species. If the State determines that the objectives of public safety resource management, and enforcement related to bear hunting can be secured via non-commercial means (i.e., using specially qualified non-compensated individuals as de facto guides), it indicates that commercial or economic purposes are the remaining rationale for guide requirements in other venues. Once guide requirements are rendered fundamentally commercial, these requirements become subject to attack under a commerce clause analysis. *See Conservation Force v. Manning*, 301 F.3d 985 (9<sup>th</sup> Cir. 2002). Application of the commerce clause/commercial analysis case law standards usually results in striking down guide requirements. *Id.*; *O'Brien* at 1152.

Second, requiring non-residents to hunt with specially qualified residents (i.e., de facto guides) appears to thwart the purpose of the bill—to facilitate killing bears. If the existing guide requirement is considered an obstacle to bear management, the special resident requirement constitutes a comparable obstacle. It raises this question: how many additional bears are likely to be taken by switching to a de facto guide requirement as compared to a certified professional guide requirement? It is likely that the benefits (in terms of facilitating the take of problem bears) of the de facto guide arrangement will be extremely minimal. Only a handful of residents are likely to qualify and go through the testing process to be able to "guide" non-resident hunters. On balance, such minimal benefits do not appear to outweigh the risks the revised scheme poses to the existing guide requirement.

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<sup>1</sup> The bill allows these resident "guides" to recover costs and expenses.

B. Weyrauch

-3-

5/3/04

To preserve the constitutionality of Alaska's guide requirement for non-resident hunters, we would strongly counsel against authorizing any exception to the guide requirement or a scheme in which special residents act as de facto guides in a non-commercial or quasi-commercial manner.

Sincerely,



Joe Klutsch, President  
Alaska Professional Hunter's Association

SB

305

# ALASKA STATE LEGISLATURE

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



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

Senate  
Senate District F

Senate Bill 305

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

SPONSOR: Senator Gene Therriault

## SPONSOR STATEMENT:

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

In some cases, the federal government has used every possible legal tactic under the Federal Quiet Title Act to impede the state's assertion of ownership. The Black, Kandig and Nation Rivers in northeast Alaska are examples. These three Rivers clearly meet the criteria established by the federal courts for determining navigability in Alaska. Although no one contested the state's claim that these streams met the federal criteria, this case took nine years and millions of state and federal dollars to litigate. Eventually the state won two of the three cases. The third was resolved by a Federal Recordable Disclaimer of Interest in 2003.

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

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

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

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

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

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

# FISCAL NOTE

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

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

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Natural Resources  
Title ASSERTING STATE TITLE TO RDU Resource Development  
SUBMERGED LAND Component RS2477 and Navigability  
Sponsor Sen. Therriault  
Requester Sen. Resources Component No. 2226

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

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

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	141.5	111.5	74.5			
Travel	5.0	3.0	3.0			
Contractual	25.0	25.0	10.0			
Supplies	5.0	5.0	5.0			
Equipment	10.0	3.0	2.0			
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>186.5</b>	<b>147.5</b>	<b>94.5</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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

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

Estimate of any current year (FY2004) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

**POSITIONS**

Full-time	2	2	1			
Part-time						
Temporary						

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

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

This project will require the following positions:

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

CONTINUED

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

FISCAL NOTE #1

STATE OF ALASKA  
2004 LEGISLATIVE SESSION

BILL NO. SB 305

ANALYSIS CONTINUATION

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

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

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

# ALASKA STATE LEGISLATURE

## CONFLICTS CONCERNING TITLE TO SUBMERGED LANDS IN ALASKA

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

Updated: 02/11/04

### Statehood Entitlement – Submerged Lands

Alaska became a state in 1959 and under the Equal Footing Doctrine and the Submerged Lands Act inherited title to almost 60+ million acres of submerged lands. Unfortunately, since statehood, less than 20 rivers have been determined to be navigable by the federal courts. Although BLM has made numerous navigability determinations and the Department of the Interior is presently working positively with the state to identify and issue a "Recordable Disclaimer of Interest" for navigable waterways, the process is still painfully slow. Considering the fact that Alaska contains 20,000+ potentially navigable rivers and well over 1,000,000 lakes that could qualify as navigable, it could take several life-times and billions of litigation dollars before Alaska realizes its entitlement, if at all. In addition, the passage of time weakens the state's ability to provide the factual determinations necessary to prove in a federal court that a waterbody was navigable at the time of statehood.

### Issues of State Ownership of Submerged Lands

Alaska faces two types of legal hurdles in establishing its entitlement to submerged lands. Its most critical problem is to establish, in an efficient and timely manner, which of the state's rivers and lakes are navigable. Alaska's second hurdle is to determine which submerged lands the United States legally withdrew prior to statehood. The state's attempts to resolve these issues are thwarted by the extremely narrow interpretation the United States gives to the federal Quiet Title Act and by the lack of a non-judicial process to determine title.

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

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

For purposes of title to submerged lands, waters are navigable when they are used or susceptible of being used in their natural and ordinary condition as highways for commerce over which trade and travel may be conducted. Unfortunately, only a handful of waterways have been adjudged navigable since Alaska's statehood, because of the unwillingness of the United States to settle navigability issues outside litigation, and because of the jurisdictional difficulties of litigating navigability against the United States.

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

#### Navigable Waters Jurisdictional Issues

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

#### Navigability Criteria Conflicts

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

The greatest hurdle to overcome in the State's efforts to identify and manage navigable waters has been the long-standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability. Navigability is a question of fact, not a simple legal formula. Variations in waterbody use that result from different physical

characteristics and transportation methods and needs must be taken into account. There are many legal precedents for determining navigability in other states based upon the particular facts presented in those cases.

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

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

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

**Kandik, Nation and Black Rivers.** In this case, the State and Doyon Limited successfully established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by trappers, as well as extensive historic and contemporary canoe use, the federal courts found the Kandik and Nation rivers navigable and, due to a technical interpretation of the federal Quiet Title Act, failed to rule on the Black River. The Department of the Interior issued a "Recordable Disclaimer of Interest" for the Black River, however, in 2003.

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

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

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

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

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

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

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

#### Clouded Titles Due to Erroneous Navigability Determinations

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

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

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

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

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

### Difficulties Quieting Title to Submerged Lands

The State must file a Quiet Title Action in federal court to definitively resolve a dispute with the federal government regarding ownership of a navigable water body. The federal government has made it very difficult to quiet title. The Quiet Title Act provides that the United States may be named as a party defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S. C. § 2409a(a). The United States has adopted a very narrow view of the term "claims and interest," asserting that the federal court has no jurisdiction to hear quiet title actions against it unless the federal government actively and expressly asserts an interest in the lands. In the context of the submerged lands, this will occur only in rare circumstances.

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

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

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

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

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

#### Solutions Through Administrative Action – Recordable Disclaimer of Interest

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

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

#### Solutions Through Federal Legislation

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

B. **Joint State/Federal Navigable Waters Commission.** In 1971, Congress and the State of Alaska respectively created a Joint Federal/State Land Use Planning Commission for Alaska to assist in the massive land-use planning process following passage of the Alaska Native Claims Settlement Act. The State Legislature passed a bill in 2002 to create a similar State/Federal Commission for the purpose of expediting navigability determinations and providing recommendations for ways to improve the process of making water use and navigability decisions in Alaska. Similar legislation was introduced in Congress by the Alaska delegation to create the federal portion of the Commission. Unfortunately, this legislation did not pass as the federal and state administrations looked for other ways to accelerate title dispute resolutions.

#### Examples of Navigability Complexities & Additional Information

Appendix A is a copy of the State of Alaska's August 27, 1992 notice to Secretary of the Interior, Manuel Lujan, Jr. of its intent to quiet title to submerged lands described under 194 specific water-bodies in Alaska. Similarly, Appendix B contains a copy of the official notice to Secretary of the Interior Bruce Babbitt of the State's intent to quiet title to submerged lands described under an additional 9 water-bodies. Most of the water-bodies listed in Appendix A and Appendix B have been recognized by the Bureau of Land Management as being navigable for land conveyance purposes but have maintained that this assertion is not for title purposes.

THE  
FOLLOWING  
DOCUMENT(S)  
ARE  
POOR  
ORIGINAL  
COPIES

# STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 263-5100  
FAX: (907) 276-3697

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

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

August 27, 1992

*APPENDIX A*

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

Dear Mr. Lujan:

The State of Alaska intends to file real property quiet title actions as to the submerged lands described on the list attached as appendix A, and is providing you this notice pursuant to 28 U.S.C. §2409a(m). Title to these lands passed to Alaska at statehood based on the equal footing doctrine, the Submerged Land Act of May 22, 1953, P.L. 83-31, 67 Stat. 29, 43 U.S.C. §§1301 et seq., and the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 329, 48 U.S.C. note preceding §21.

Sincerely,

CHARLES E. COLE  
ATTORNEY GENERAL

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

JMG/sh  
Attachment

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

*8/27 mailed cert return receipt*

Appendix A to letter of August 27, 1992.

Colville Region

Mouth of Colville River to Muka River  
Mouth of Kuna River to Chefarnak

Northwest Region

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

Koyukuk River Region

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

Upper Yukon Region

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

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

40 Mile Area

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

South Central Region

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

Tanana Region

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

Middle Yukon River

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

Lower Yukon Region

Anvik River  
 Bonasila River  
 Kotlik River  
 Nulato River  
 Pastolik River

Kuskokwim River Region

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

Bristol Bay Region

Alec River *chignik*  
 Aniakchak River *chignik*

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

Mouth of Wood River to Lake Aleknagik

Copper River Region

Mouth of Bering River to near Bering Lake

Mouth of Chitna River to Tana River

Mouth of Copper River to Batzulnetas (above Slana)

Crosswind Lake

Mouth of Eyak River and Eyak Lake

Mouth of Klutina River to Klutina Lake

Lowe River

Miles Lake and outlet

Nelchina River

- Tasmuna River

- Mouth of Tazlina River to Tazlina Lake

Southeast Region

Chilkat River

Chilkoot River

Stikine River

Kodiak Island and Shelikof Strait Region

Afognak Lake

Mouth of Afognak River to the remains of the Bridge

Akalura and Red Lakes

Mouth of Aniaktchak River to Albert Johnson Creek

Karluk Lake

Mouth of Karluk River to Karluk Lake

Statewide Region

Yukon River

# STATE OF ALASKA

## DEPARTMENT OF LAW

### OFFICE OF THE ATTORNEY GENERAL

December 17, 1996

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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

Dear Mr. Babbitt:

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

Sincerely,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:

*Joanne M. Grace*  
Joanne M. Grace  
Assistant Attorney General

Attachment

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

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5100  
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KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
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P.O. BOX 110300-DIMOND COURT HOI  
JUNEAU, ALASKA 99811-0300  
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FAX: (907) 465-6735

APPENIDIX A

Copper River Region  
Copper River

Northern Region  
Kuk River  
Meade River  
Kukpowruk River

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



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## State Policy on Navigability

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    - Navigability Criteria Disputes
    - Identification of Navigable Waters
    - Navigable Waters within Pre-Statehood Federal Withdrawals
    - Navigable Waters within ANILCA Conservation System Units
  
  - II. Legal and Policy Guidelines Governing Management of Submerged Lands and Public Waters
    - Public Trust Doctrine
    - Public Waters
    - Boundaries of Navigable Waters
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- 

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

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

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

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

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

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

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

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

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### RIPARIAN RIGHTS AND STATUTE OF LIMITATIONS

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

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

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

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

In 1983, following years of negotiations, lawsuits and legislative attempts to solve the navigability problems created by the unusual survey and conveyance procedures in Alaska, the State of Alaska, the United States Department of the Interior and the Alaska Federation of Natives (AFN) agreed that the standard rules of survey should be followed for land conveyances in Alaska. The effect of that decision was to treat Alaska surveys and land conveyances like federal land surveys and conveyances in other states. The recipients of conveyances from the federal government are charged only for the amount of public land that is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams.

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

lease, mining claim, or a gravel sale.

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

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

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## NAVIGABILITY CRITERIA

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

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

consideration.

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

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

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

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

Waters Which Are Capable of Being Used For Transporting Persons and Goods, Although Not Actually Used, Are Navigable. It is not necessary that a waterbody be actually used for transportation to be found navigable. It is enough that it is susceptible, or physically capable, of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth, and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable. 5

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

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

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

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

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

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

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

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

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

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## NAVIGABILITY CRITERIA DISPUTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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## IDENTIFICATION OF NAVIGABLE WATERS

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