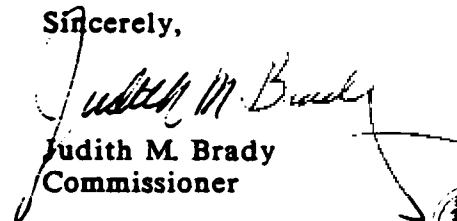


"Navigability" may not be a household word, but it is important to all Alaskans. The state owns the land under waterbodies that are "capable of transporting people or goods." If a river, lake, or stream is determined to be navigable, then public access and use for travel or recreation are assured. Furthermore, these submerged lands may hold valuable deposits of oil and gas, placer deposits, other minerals, and materials such as sand and gravel, all of which would belong to the state and its residents.

The state's navigability project started in 1980. The project has a staff of 4, including attorneys. The project has produced physical and historical reports for each of the 11 hydrologic regions in Alaska, reviewed hundreds of federal navigability determinations, successfully litigated test cases which established ground rules for determining navigability. We have also mapped waterbodies that the state feels are navigable and public easements and rights-of-way. In cooperation with Native corporations, we plan to publish these maps in the form of regional atlases. The first atlas will be for the Copper River Basin and will be available this summer.

I encourage you to read this paper. It's short, readable, and important.

Sincerely,



Judith M. Brady  
Commissioner



# Policies and procedures on OWNERSHIP AND MANAGEMENT OF NAVIGABLE AND PUBLIC WATERS

MAY 1987

State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution. Montana v. United States, 450 U.S. 544 (1981). Consistent with that principle, ownership of the beds of navigable waters in Alaska vested in the newly formed State of Alaska in 1959. Under the Alaska Constitution, the state also has power and control over all waters in the state regardless of navigability. The waters are held and managed by the state in trust for the use of the people. The primary 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 management of the state's submerged lands and public waters.



## 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. Unfortunately, there are differences of opinion regarding the navigability of many of Alaska's lakes, rivers, and streams. Perhaps the greatest reason for this disagreement is the lack of any hard and fast rules for determining navigability. Navigability is a question of fact, not a simple legal formula. Factual variations in waterbody use that result from different physical characteristics and transportation methods and needs must be taken into account in determining navigability. Although there are many legal precedents for determining navigability in other states, the courts are just beginning to provide the necessary legal guidance for accurate navigability determinations in Alaska.

In 1980, after passage of the federal Alaska National Interest Lands Conservation Act (ANILCA), the state established a

comprehensive navigability program in response to federal land conveyances and land management activities under the Alaska Native Claims Settlement Act (ANCSA) and the Alaska Statehood Act. Navigability determinations are required to determine whether the state or the federal government owns the submerged lands. Navigability determinations are also required prior to state land disposals to insure that adequate public use easements are reserved.

The purpose of the state's program is to protect the state's sovereign ownership of the beds of navigable waters. Because state and ANCSA land selections and federal conservation units blanket the state, navigability questions have arisen for rivers, lakes and streams throughout Alaska. The navigability or nonnavigability of many of those waterbodies has been agreed upon. There are hundreds of others, however, where navigability remains at issue. The princi-



pal goal of the 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 now and in the future as disputes arise. Other important aspects of the program include monitoring federal land conveyances and management programs to identify particular navigability disputes, seeking cooperative resolution of navigability problems through negotiations and legislation, and preparing for statewide navigability litigation.

## Navigability Criteria

The physical characteristics and uses of a waterbody -- or criteria -- which are used by the state for asserting navigability are based upon the legal principles established by the federal courts. Those criteria are applied taking into account Alaska's geography, economy, water-based transportation methods and the physical characteristics of Alaska's rivers, lakes, and streams. The State of Alaska bases its navigability program upon the following interpretations of the federal test of title navigability.

■ *The Waterbody Must Be Usable As A Highway For The Transportation of People or Goods.* 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 matter. Transportation associated with recognized commercial activities in Alaska, such as mining, timber harvesting, and trapping, is evidence of navigability. The use of a waterbody 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. Likewise, 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 is true for recreational transportation, including personal travel as well as 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 (*i.e.*, physically capable) of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable. The susceptibility element of title navigability is very important for the identification of navigable waterbodies in Alaska. Because of sparse population and lack of development, there is often little or no evidence of actual use for transportation purposes, although many remote waterbodies are physically capable of such use.

■ *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 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-bottomed boats, poling boats, riverboats, 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. However, 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.

Preliminary court decisions have indicated that the use of a river or a lake as a highway in its frozen condition, travelling on the ice, may not be evidence of navigability.

bility. If upheld, the practical significance of those rulings is unclear. It appears that most waterbodies in Alaska that are used as highways in winter can also be travelled by small boats in the summer and are navigable on the basis of the summer use.

■ *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 is not navigable for title purposes. However, if transportation does or may occur on the waterbody and the improvements would only make transportation easier or faster (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 nonnavigable if the obstruction can be navigated despite the difficulties or if it can be circumvented by other means, such as portaging, lining, or poling past the obstruction. A waterbody is also navigable even though, due to seasonal fluctuations in the water level, it is not navigable at all times. However, a waterbody which is only navigable at infrequent and unpredictable periods of high water is not normally considered navigable.

■ *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. Because only a short amount of time has passed since Alaska became a state, most waterbodies have not changed enough since statehood to alter their navigability. A waterbody which is navigable today was probably navigable in 1959. Exceptions might include the creation, by natural or man-made causes after statehood, of a totally new lake now used for navigation; such a lake 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, would

still be considered navigable for title purposes.

## Navigability Criteria Disputes

Because of differing legal interpretations of court navigability decisions, some aspects of the state's navigability criteria position are disputed by the federal government. The result has often been that waterbodies considered navigable by the state were determined nonnavigable by the federal government.

The primary criteria dispute has centered on the type or purpose of the transportation. For many years the federal government has asserted that a waterway must be used or capable of use for transporting commerce to be considered navigable; "noncommercial" transportation uses were considered insufficient to establish navigability. In this context, the federal government 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. With respect to professionally guided transportation services provided by Alaska's tourism industry, the federal government has admitted that these services constitute commerce. However, the federal government 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 therefore claimed that waters used only for commercial recreation are legally nonnavigable, even though they may be navigable in fact.

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 nonnavigable by the federal government. The federal government's argument 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 criteria dispute involves remote, isolated lakes. The federal government has found many of these lakes legally nonnavigable even though they are physically capable of being navigated. The federal government's theory is that a navigable connection to another area is required 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 nonnavigability by the federal government. With the exception of floatplane use, the courts have agreed with the navigability criteria presented by the State of Alaska and have rejected the limitations suggested by the federal government. A review of these cases follows:

Gulkana River. This recent federal court decision rejected the federal government's requirement of commercial transportation and its restrictive definition of commerce. Ruling for the state, the 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." The court also rejected the federal government's restrictive interpretation of the "customary mode of transportation" element of the title navigability test. The decision stated that the test of navigability is not limited to the types of watercraft customarily used at the time of statehood. It determined that contemporary watercraft use must be considered along with past use, and observed that on the Gulkana River, modern power boats, including jet unit craft and aluminum riverboats, "are the craft most commonly used, followed by inflatable rafts and canoes." Because the Gulkana River can be used for the transportation of people or goods using these customary craft, the Gulkana River was found navigable. That decision is now on appeal. Alaska v. United States, No. A80-358 Civil (D. Alaska Dec. 16, 1986),

appeal docketed, No. 87-3555 (9th Cir. Jan 26, 1987).

Kandik and Nation Rivers. In this administrative appeal, the State of Alaska and Doyon Limited, a Native 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. These rivers and lakes 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 navigability. 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 has recommended that the Matanuska River, in Southcentral Alaska, be found navigable. The Secretary of Interior, over the state's objections, stayed implementation of the recommended decision. 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).

## 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 of the maps are poor and out-of-date. It is an immense and complex task simply to locate and identify all of the thousands of named and unnamed lakes, rivers and streams in the state which might be considered navigable. Furthermore, once a potentially navigable lake, river or stream has been identified, detailed information about the size and uses of that waterbody is necessary to make an accurate navigability determination. Because of Alaska's undeveloped and remote character, gathering that information is both time-consuming and expensive. Finally, administrative navigability determinations made by the state or the federal government are subject to legal challenge, since only the courts can authoritatively determine title to submerged lands.

Despite these difficulties, the state and federal governments issue navigability decisions for nearly every federal land conveyance under ANCSA or the Alaska Statehood Act. The purpose of the navigability decision is to determine the extent of state-owned submerged lands within the area intended to be conveyed. Similarly, nearly every federal Conservation System Unit (CSU) management plan addresses the navigability issue. These federal navigability decisions are reviewed by the state (average 30-45 per month) to insure that the available information sources were used and interpreted correctly. Where the federal government determines nonnavigable a waterbody which is considered navigable by the state, the state provides supplemental information about the uses and charac-

teristics of the waterbody to obtain a redetermination of navigability. In addition, the state makes its own navigability determinations if there is a need to, such as for an oil and gas lease, material sale, mining claim, or other resource use requiring an ownership determination.

In the 1960s and 1970s, the federal government generally made navigability determinations on a township by township or parcel by parcel basis in connection with individual land conveyances. This often required several looks at a single waterbody which extended across a township or parcel boundary. The result was a duplication of efforts and, occasionally, inconsistent navigability determinations. For example, there were instances in which the upper reaches of a stream were determined navigable while the lower reaches were not. In 1979, in order to achieve more uniform results, an agreement was signed between the state and the federal government to cooperate in performing navigability research on a regional hydrologic basis. Today, navigability reports are done by hydrographic region or drainage and include historic, hydrologic, and other physical characteristics information. Altogether there are 11 different hydrological regions in Alaska. Examples include the Arctic, Bristol Bay and Copper River regions.

In compiling these regional reports, the state and federal governments research published and unpublished materials concerning the past and present uses and physical characteristics of all waterbodies within the particular region. A report is then prepared that summarizes the information on the basis of individual waterbodies and by the nature of the transportation use. These reports are prepared independent of the legal disagreements on the proper criteria for determining navigability. All types of waterbody use are reported. The regional reports provide information which can be used to make navigability and other land management decisions.

In addition to preparing the regional reports containing waterbody use data, the state is graphically depicting navigable waters in Alaska on U.S.G.S. maps (1:63,360



# LEGAL AND POLICY GUIDELINES GOVERNING MANAGEMENT OF SUBMERGED LANDS AND PUBLIC WATERS

## Public Trust Doctrine

The state has special duties and management constraints with respect to state owned land underlying navigable waters. These special duties and management constraints arise from the Alaska Constitution. The Alaska Constitution contains numerous provisions embracing the principles commonly known as the public trust doctrine. That doctrine, as it has evolved in court decisions over hundreds of years, requires the state to exercise authority to insure that the paramount rights of the public to use navigable waters for navigation, commerce, recreation and related purposes is not substantially impaired.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892), involved a grant by the State of Illinois of one thousand acres of the bed of Lake Michigan, constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The U.S. Supreme Court held that the grant was revokable, that the state held the land in trust for the public, and that it was powerless to relinquish its rights as trustee.

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

[I]t is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust devolving upon the state for the

public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

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

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

The Alaska Supreme Court has never had occasion to directly address the application of the common law public trust doctrine in Alaska. However, several provisions in Art. VIII of the Alaska Constitution provide similar protections - protections which cannot be disregarded by the legislature or overruled by the courts. For example, Art. VIII, Sec. 3 provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

The 1985 Alaska legislature recognized the constitutional application of public trust doctrine principles in Alaska. In an Act

scale). When completed, the maps will include those waters determined navigable by the state, the federal government, or by any court. The maps are based on a review of existing navigability determinations. If no formal determination has been made previously, the state may make a new determination based upon the physical characteristics of the waterbodies, the regional hydrologic reports, the transportation use information taken from the regional historical reports, and application of the state's navigability criteria. Time and resources permitting, the state may also contact individuals with specific knowledge of the mapped area and its waterbodies for additional information.

In many of the large, undeveloped regions of Alaska there may be little or no accurate waterbody use or physical characteristics information available for making these navigability determinations. When no other information is available and the state nevertheless must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on the U.S.G.S. maps. In those cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 100 feet wide) and having an average gradient over the length of the stream of no more than 25 feet per mile. With rare exceptions, the state's experience has been that streams of this type are deep enough and wide enough to be navigable by boats carrying persons or goods and must therefore be considered legally navigable. Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 25 feet per mile and are at least 10 miles long without excessive meanderings.

With respect to lakes, if there is no public use or physical characteristics information readily available, those lakes which are shown on the U.S.G.S. maps as having a navigable water connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size of the lake. These lakes are part of a system of interconnected navigable waters. If a lake is shown on the U.S.G.S. map to

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

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

## Riparian Rights and Statute of Limitations

Disputes over ownership of submerged lands in Alaska arise under a variety of circumstances. However, the most common in Alaska is the product of the survey and acreage accounting system used by the federal government for conveying land to the state and ANCSA corporations.

Accurate determinations of the amount of land selected by and conveyed to the State of Alaska or Alaska Native Corporations require that the selected areas be surveyed; acreage figures used prior to survey are simply estimates. Under traditional land survey and conveyance procedures, only uplands are surveyed and conveyed, not submerged lands. Bodies of water are



excluded from the surveys and the water acreage is not included in computing the amount of land involved in the conveyance. In Alaska, however, the federal government has not consistently followed these survey rules. Instead, the federal government has often treated bodies of water like uplands, surveying and charging submerged lands against the total acreage entitlements. Since the state owns the beds of navigable waters, the federal government issued navigability decisions for many bodies of water within selected areas. If a waterbody was believed to be nonnavigable, however, the submerged lands were conveyed and the acreage was charged against the state or ANCSA corporations' acreage entitlement.

Because of these conveyance procedures, the navigability of waterbodies in Alaska have been issues 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 aggravated by the narrow definition of navigability used by the federal government. These narrow definitions have been rejected by the courts, including the recent decision in the Gulkana River case. Alaska v. United States, No. A80-359 Civil (D. Alaska Dec. 16, 1986). Thus, many of the submerged lands that the federal government attempted to convey to Native corporations should have been recognized as belonging to the state. The state appealed many conveyances to protect its title. Native corporations also found it necessary to challenge erroneous federal navigability decisions to insure they would not be deprived of any portion of their entitlements by being charged for submerged land owned by the state.

In an effort to resolve these inequities, the state, United States Department of Interior and the Alaska Federation of Natives agreed that the standard rules of survey, as found in the 1973 edition of the Manual of Instructions for the Survey of the Public Lands of the United States, should be followed for land conveyances in Alaska. The standard rules of survey require that navigable lakes, rivers, and streams regardless of size, and all lakes

50 acres or larger and rivers and streams three chains (198) feet in width or wider, regardless of navigability, must be meandered and segregated or excluded from the public lands. The recipients of conveyances from the federal government are charged only for the amount of public land, or uplands, identified by the survey. These procedures have been consistently followed in Alaska since 1983.

The use of these survey procedures has eliminated many of the problems associated with land conveyances in Alaska. Submerged lands are no longer being conveyed to fulfill acreage entitlements. Thus, with the exception of lakes smaller than 50 acres and streams narrower than 198 feet, navigability determinations are not required prior to land conveyances. Determinations of ownership of submerged lands, where this survey procedure is used, can be put off until a natural resource use requires resolution, such as an oil and gas lease or a gravel sale.

The decision to use the standard survey procedures for land conveyances in Alaska has been challenged by two environmental groups in the court case of The Wilderness Society v. Carruthers, No. 84-1823 Civil (D.D.C., June 30, 1986), appeal docketed, No. 86-5205 (D.C. Cir. Feb. 28, 1986). Their lawsuit was dismissed by the federal district court in Washington, D.C. for lack of standing, since the environmental organizations could not demonstrate that they were personally affected or injured by the use of these standard survey procedures. The State of Alaska is actively defending the case, along with the federal government, the Alaska Federation of Natives, and several ANCSA corporations.

Even if the state and ANCSA corporations win that lawsuit, however, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are hundreds of erroneous nonnavigability decisions and the resulting submerged land conveyances made to Alaska Native Corporations in previous years. Those nonnavigability decisions and submerged land conveyances are subject to the statute of limitations in Section 901 of ANILCA, which requires

the state to file federal court litigation challenging every erroneous non-navigability finding or risk losing state title to the submerged lands.

Section 901 of ANILCA was an attempt to guarantee that ANCSA corporations would not lose a portion of their land entitlement under ANCSA as a result of judicial rulings of navigability. Specifically, that section provides that the ownership by a ANCSA corporation of a parcel of submerged land, or a decision by the Secretary of Interior that the water covering such a parcel is not navigable, shall not be subject to a judicial determination unless a civil action is filed in the United States District Court within five years after the date of the execution of the involved conveyance, if the conveyance was made after December 2, 1980. A seven year statute of limitations from date of the conveyance would apply if the conveyance occurred before December 2, 1980.

These original five and seven year periods have been twice extended by Congress to avoid the necessity for extensive navigability litigation while Congress searches for a better and more permanent solution to the submerged lands problems in Alaska. The statute of limitations periods now expire eight and nine years from December 2, 1980 respectively. However, it is inevitable that, if there is a limitation on the time within which the state must assert its title, the state will eventually be required to file a large number of navigability cases each year to preserve its claim of title to submerged lands.

This artificially induced litigation would be costly and time consuming, not just for the state but also for the federal government and ANCSA corporations. The judicial system would also be inundated by litigation that would often be unnecessary but for the statute of limitations. Moreover, extensive navigability litigation taking many years to resolve would perpetuate the conflicts and uncertainties regarding acreage chargeability and ownership of submerged lands in Alaska.

Under the survey procedures now being used in Alaska, submerged lands are no longer being conveyed and charged against the

state and ANCSA corporations acreage entitlements. Thus, the Section 901 statute of limitations is no longer necessary to insure that ANCSA corporations do not lose a portion of their entitlement because of navigability findings. Recognizing this, the state, the Alaska Federation of Natives and the Department of the Interior are working together in Washington, D.C. to legislatively repeal the Section 901 statute of limitations and to confirm the 1983 decision to use the standard survey procedures for acreage accounting purposes under the Alaska Statehood Act and ANCSA.

If Section 901 is not repealed, the magnitude of the task of identifying all the parcels of submerged land that might be subject to the limitations period in sufficient time to bring an action under Section 901 would put an immense burden on the state. There is also continuing uncertainty concerning the criteria for determining navigability in Alaska. In addition, much of the land being conveyed by the federal government in Alaska has yet to be surveyed. Prior to survey, many land transfers have been accomplished by interim conveyances or tentative approvals which may be inaccurate because of poorly prepared or outdated maps, aerial photography, or lack of mapping.

For these reasons, the State of Alaska filed suit in November 1981, challenging the constitutionality of Section 901(a) on equal footing and due process grounds. Alaska v. United States, No. A81-483 (D. Alaska filed Nov. 25, 1981). The case was stayed at the request of all of the parties in the spring of 1983 so that alternative remedies could be pursued in Congress. There has been no further activity on the case since that time, although it will be renewed if the legislative effort to repeal Section 901 is unsuccessful.

## **Navigable Waters Within Pre-Statehood Federal Withdrawals**

Although disputes over which waters in Alaska are navigable are the most frequent cause of submerged land ownership disputes, there is another major legal issue which

also threatens Alaska's sovereign claim to the beds of navigable waters. Even where navigability is conceded, the federal government often contends that title to submerged lands did not vest in the state if the submerged lands were withdrawn or reserved by the federal government on the date of statehood. The federal government has used this argument to attempt to convey the beds of navigable waters within prestatehood withdrawals or reservations to third parties. Within state selections, the federal government has often attempted to charge the acreage of "reserved" submerged lands against the state's entitlement.

The state strongly disagrees with this federal claim and is actively pursuing a number of court challenges to resolve the issue. In addition to numerous appeals from federal decisions to convey or charge for the beds of navigable waters, the state

is involved in two cases before the United States Supreme Court which present this issue. The cases are United States v. Alaska, U.S. Supreme Court 84 Original (filed June, 1979) and Utah v. United States, 780 F.2d 1515 (10th Cir. 1985), cert. granted, No. 85-1772 (Oct. 14, 1986).

The State of Alaska expects that the pending cases will reject the federal government's "reserved" submerged lands theory and affirm that title to the beds of all navigable waters in Alaska vested in the state on the date of statehood. The issue is particularly significant here, since over 95 million acres - more than 25% of the total area of the state - was enclosed within various federal withdrawal and reservations at the time Alaska became a state.



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

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

## **Navigable Waters Within ANILCA Conservation System Units**

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

The U.S. Constitution gives Congress certain limited powers to control uses on state owned submerged land. These are known as the Property Clause, Navigational

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

In ANILCA, Congress did not take away the state's power to regulate state-owned submerged lands within federal CSU's in Alaska. Numerous provisions in ANILCA recognize and respect the state's authority over state-owned land. In some cases, however, Congress may have attempted to give the federal land managers some concurrent authority to regulate navigable waters within CSU's. The state has taken the position that, where possible, cooperation rather than confrontation will be used with the federal land managers. This cooperation usually takes the form of a memorandum of understanding that discusses management issues and how they will be resolved.

## **Public Waters**

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

Section 14. *Access to Navigable Waters.* Free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by

general law regulate and limit such access for other beneficial uses or public purposes.

Pursuant to this grant of authority, the Alaska State Legislature, in AS 38.05.365(12), defined "navigable waters" as follows:

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

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

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

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

(b) Subject to the federal navigational servitude, the state has full power and control

of all of the navigable or public waters of the state both meandered and unmeandered, and it holds and controls all navigable or public waters in trust for the use of the people of the state.

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

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

Thus, under the Alaska Constitution and this statute, any surface waters capable of use for the public purposes defined in AS 38.05.365(12) are available to the public, irrespective of streambed ownership. Further, such public use is not considered a taking and is not subject to inverse condemnation action. Private ownership is subject to the public rights that are protected by the public trust. In two recent Montana Supreme Court cases involving the nature of public rights where the submerged lands are privately owned, the court ruled that the public has the right to use the area between the high water marks for floating, wading, fishing, portaging, anchoring, and other uses incidental to the use of the water. The court also found that if travel on the water or streambed is obstructed, the public is allowed to use the adjacent private land to portage around the barrier in the least intrusive way possible, avoiding damage to the private property holder's rights. However, the public does not have the right to enter into or trespass across private property in order to enjoy the recreational use of state owned

waters. The State of Alaska agrees with this ruling and believes a similar ruling would be made by our state courts.

## Boundaries of Navigable Waters

The state is often asked where the public portion of a navigable lake or stream ends and private ownership rights begin. The boundary between public and private ownership is the ordinary high water mark. According to the Alaska Supreme Court, the ordinary high water mark is a natural physical characteristic placed upon the lands by the action of the water. It is not a highly technical boundary requiring a surveyor to locate. It has been defined as the mark along the bank or shore where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to leave a natural line impressed on the bank or shore. That line may be indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics. See State, Department of Nat. Resources v. Pankratz, 538 P.2d 984, 988-89 (Alaska 1975).

The same question often arises in the case of wide, braided streams. A braided stream is simply a river with numerous channels

that are constantly changing. See Oklahoma v. Texas, 260 U.S. 606, 634-36 (1923). Thus, the test for determining the boundary is the same. Is the area so regularly covered with water as to deprive it of terrestrial vegetation? If so, it is considered part of the bed of the stream and is subject to the public rights of use. On the other hand, if upland vegetation has taken hold, the area should be considered part of the adjacent uplands or, if isolated, an island. Islands are not part of the riverbed and, if privately owned, are not subject to the same public rights. However, newly formed islands belong to the owner of the river bed. Thus, islands which have risen since the date of statehood from the beds of state-owned navigable rivers belong to the state and may be used by the public. If the river is non-navigable and the bed is privately owned, a newly formed island belongs to the private owner.

## Conclusion

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

