Audit Report

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

WATERWAY MANAGEMENT ISSUES

March 28, 1997

Audit Control Number:

10-4540-97

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

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March 28, 1997

Members of the Legislative Budget
and Audit Committee:

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

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

WATERWAY MANAGEMENT ISSUES

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

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

Randy S. Welker, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

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

Objectives

The objectives of the audit were as follows:

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

Scope and Methodology

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

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

- Review of testimony at legislative committee hearings and legislative staff research conducted in support of those hearings.

- Review of the State's response to navigability reports issued by BLM during FY 95 and FY 96.

- Review of the State's response to representative notices of proposed easements issued by BLM during FY 96.

- Review of materials published by the following organizations:

  Legislative Research Agency

  University of Alaska, Institute for Social and Economic Research

  University of Alaska, Justice Center

  Alaska Natives Commission

  Alaska Bar Association

  Alaska Law Review

  Land and Water Law Review

- Observation of interdepartmental navigability team meetings.

ORGANIZATION AND FUNCTION

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

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

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

Ownership of submerged land

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

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

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

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

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

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

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

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

Fishery management

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

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

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

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

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

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

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

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

Allocation of water rights among competing users

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

The United States Geological Survey (USGS) has divided Alaska into six hydrologic subregions, each of which focuses upon the area's main river systems.[2] The State has a statutory system[3] which would allow it to simultaneously determine all users' water rights for each of these subregions in a single "basin-wide" adjudication. Though such a proceeding is conducted in the state court system, the rights subject to adjudication explicitly include federal reserved water rights.[4]

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[2] *See* AS 46.15.035(e)(2).
[3] AS 46.15.165-168; 11 AAC 93.400-440.
[4] *See* AS 46.15.165(b); AS 46.15.166(a); 11 AAC 93.430.

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

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

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

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

Waterway obstruction

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

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

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[5] 43 USC § 666(a).

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

[7] *See* AS 34.65.020.

REPORT CONCLUSIONS

BLM navigability decisions virtually ignored in FY 95 and FY 96

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Public access easements involve little public input

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

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

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

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

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

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

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

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[10] See 43 CFR § 2650.4-7(a)(9). [Emphasis added.]
[11] See 43 CFR § 2650.4-7(a)(11). [Emphasis added.]

We note that some 17(b) easements are subject to termination by BLM if there is no evidence of public use by the year 2001.[12] Public resources spent in procuring an easement would be wasted in the event of such termination.

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

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

The unmarked state of most easements negates meaningful public access

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

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

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

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

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[12] *See* 43 CFR § 2650.4-7(a)(13).

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

[14] *See* 43 CFR § 2650.4-7(b)(2).

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

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

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

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

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

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

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

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

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

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

EXHIBIT 1
DNR EASEMENT ATLASES

Atlas Area	*Year Published*	*Number Published*	*Total Publishing Cost*	*Publishing Cost Per Atlas*	*Retail Price*
Kodiak	*	2,500	$24,925	$9.97	$10.00
Prince William Sound	*	1,450	25,000	17.24	10.00
Kenai	1993	690	23,336	33.82	15.00
Bristol Bay	1990	500	11,759	23.52	10.00
Nome	1989	500	2,592	5.18	8.00
Kotzebue	1988	500	4,893	9.79	8.00
Copper River	1987	1,000	2,485	2.49	8.00

** Atlas not yet released for sale*

DNR's computerized statewide map and database are noteworthy projects

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

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

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

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

DNR has produced a noteworthy public information booklet

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

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

Statutes of limitation have minimal impact on waterway litigation decisions

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

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

- If a state brings a suit against the federal government after more than 12 years, title quieted in submerged land is taken subject to any existing leasehold, easement, or right of way involving "*substantial improvements*" or *"substantial investments."*[16]

- If a state brings a suit against the federal government involving land *"used or required by the United States for national defense purposes,"* the suit must be brought within 12 years.[17]

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

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

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

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

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[15] 28 USC 2409a.
[16] 28 USC 2409a(j).
[17] 28 USC 2409a(h).
[18] *Lee v. United States*, 629 F.Supp. 721, 727-728 (D. Alaska 1985).
[19] *See* P.L. 100-395, Aug. 16, 1988, 102 Stat. 979.

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

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

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

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

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

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

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

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

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

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

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

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

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

Public trust doctrine does not mandate pursuit of all potential claims

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

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

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

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

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

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

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

Criminal prosecution not efficient for removing obstructions

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

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

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

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

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

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

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

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

[26] AS 38.05.128(c).

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

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

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

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

Lack of decisive top-level direction impairs program implementation

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

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

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

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

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

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

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

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

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

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

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

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

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

Recommendation No. 2

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

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

Recommendation No. 3

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

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

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

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

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

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

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

Recommendation No. 4

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

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

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

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

In evaluating easement proposals, DNR and DFG should also contact local resources who are personally familiar with the site in question. Examples of such resources are shown in Exhibit 2.[30] Phone calls should be an adequate means to accomplish these contacts. The calls should be briefly documented in the written rationale included in the easement file (see Recommendation No. 1).[31]

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

EXHIBIT 2

POTENTIAL LOCAL RESOURCES REGARDING ROUTING FOR PUBLIC ACCESS EASEMENTS

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

Recommendation No. 5

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

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

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

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

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

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

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

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

Recommendation No. 6

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

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

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

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

[32] *See* 1 Zeigler, *Rathkopf's The Law of Planning and Zoning* § 6.10[6]; 5 Zeigler, *Rathkopf's The Law of Planning and Zoning* § 65.04.

Recommendation No. 7

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

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

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

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

Recommendation No. 8

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

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

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

We believe Alaska's basin-wide adjudication statute[33] has untried potential for long-term resolution of most water-related issues. Each of the six USGS hydrologic subregions for Alaska could provide an appropriate foundation for such an adjudication.

[33] AS 46.15.165-168.

Basin-wide adjudications resolve *"all water rights in a drainage basin, river system, ground water aquifer system, or other identifiable and distinct hydrologic regime."*[34] Traditional water appropriation rights are included[35] as are rights reserving an instream flow.[36] We believe that federal reserved water rights[37] and a waterway's navigability status can also be resolved within such a state court adjudication.

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

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

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

More specifically, if the State sues the federal government in a suit to directly determine the ownership of land underlying a waterway, that suit must be filed under the federal Quiet Title Act[39] and litigated in the federal district court.[40] However, since *Babbitt,* the factual issue of a waterway's navigability is an essential element of "administration" and should now be subject to determination in the State court as part of an adjudication of water-related issues for an entire system of rivers. Once navigability has been decided in the State's favor, it can treat the underlying land as State-owned. If any party contests the State's ownership, the State court's factual determination should have collateral estoppel effect in later proceedings to directly quiet title.[41]

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[34] AS 46.15.166(a).
[35] *See* AS 46.15.040.
[36] *See* AS 46.15.145.
[37] AS 46.15.166 explicitly cites 43 USC § 666 and provides for an adjudication of federal reserved water rights in superior court. In fact, AS 46.15.165 and 11 AAC 93.410-430 allow for adjudication of federal reserved water rights in a DNR administrative proceeding if the federal government consents. Despite federal resistance to the quiet title actions, there has been some cooperation in administratively determining federal reserved water rights through the DNR water rights permitting system.
[38] *See United States v. District Court for Eagle County,* 401 U.S. 520, 524 (1971).
[39] 28 USC § 2409a. *See McIntyre v. United States,* 789 F.2d 1408, 1411 (9th Cir. 1986); *Block v. N.D. ex rel. Bd. of University & Sch. Lands,* 461 U.S. 273, 286 (1983).
[40] 28 USC § 1346(f).
[41] *Cf. Jeffries v. Glacier State Telephone Co.,* 604 P.2d 4, 8 (Ak. 1979).

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

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

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

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

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

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

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

[43] AS 46.15.166(d).

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

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

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

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

Recommendation No. 9

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

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

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

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

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

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

Recommendation No. 10

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

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

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

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

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

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

Recommendation No. 11

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

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

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

[45] AS 09.45.240.

- The conveyance would proceed on schedule as though the easements were not in dispute.

- Any easement found invalid by the court would be vacated.

- In the event that a reserved easement was found invalid, the landowner committed itself in advance to substitute an unspecified replacement easement for the one found invalid.

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

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

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

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

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

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

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[46] *See Alaska Public Easement Defense Fund v. Andrus*, 435 F.Supp. 664 (D. Alaska 1977).
[47] *See State of Alaska (Koniag, Inc.)*, IBLA 94-130 (Dec. 2, 1996).
[48] *See Municipality of Anchorage v. Schneider*, 685 P.2d 94 (Ak. 1984).
[49] *Cf. Vick v. Board of Electrical Examiners*, 626 P.2d 90, 95 (Ak. 1981).

Neither BLM nor the State have kept statistics as to the proportion of promised replacement easements that still remain to be fulfilled. In assessing the need to seek enforcement, the affected State departments should establish this number without delay. Federal regulations reflect an overall theme that 17(b) easement issues be finalized by the year 2001.[50] Easements not used by then could be lost.

Recommendation No. 12

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

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

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

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

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[50] *See* 43 CFR § 2650.4-7(a)(13).

[51] AS 34.65.020(e).

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

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

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APPENDIX A

WATERWAY MANAGEMENT

Excerpt From DNR's Kenai Easement Atlas (1993)

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

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

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

■ RESERVED EASEMENTS

ADL 67551
An easement 5 feet in width for an existing trail from FAS 4040 in T 8 S, R 13 W, Sec 34, SM eastward to Kachemak Bay State Park and Tutka Bay.

EIN 1
An easement for that portion of the existing road from Seldovia to Windy Bay beginning at FAS 4040 in Sec 10, T 9 S, R 13 W, SM and ending at Windy Bay. (60-foot road)

EIN 15
A one-acre site easement (approx. 200 feet x 200 feet) for camping and float plane tie-up at the outlet of Scurvy Lake in Sec 29, T 10 S, R 13 W, SM. (one-acre site)

EIN 16
An easement for an existing trail from FAS 4040 in the vicinity of the Kenai Chrome Mine southeastward to public land in Sec 27, T 9 S, R 13 W, SM. (25-foot trail)

EIN 16
A one-acre site easement located at the junction of road EIN 1 and trail EIN 23. (one-acre site)

EIN 16
A one-acre site easement located at the head of Picnic Harbor. (one-acre site)

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

EIN 17
An easement for a proposed road from road EIN 1 to site EIN 15 on Scurvy Lake in Sec 29, T 10 S, R 13 W, SM. (60-foot road)

EIN 23
An easement for a proposed trail from road EIN 1 eastward through the Port Dick drainage on the south side of Port Dick Creek to public land. (25-foot trail)

EIN 26a
A one-acre site easement on the north shore of Rocky Lake with an additional 25-foot wide easement on the bed of Rocky Lake along the entire waterfront of the site. (one-acre site)

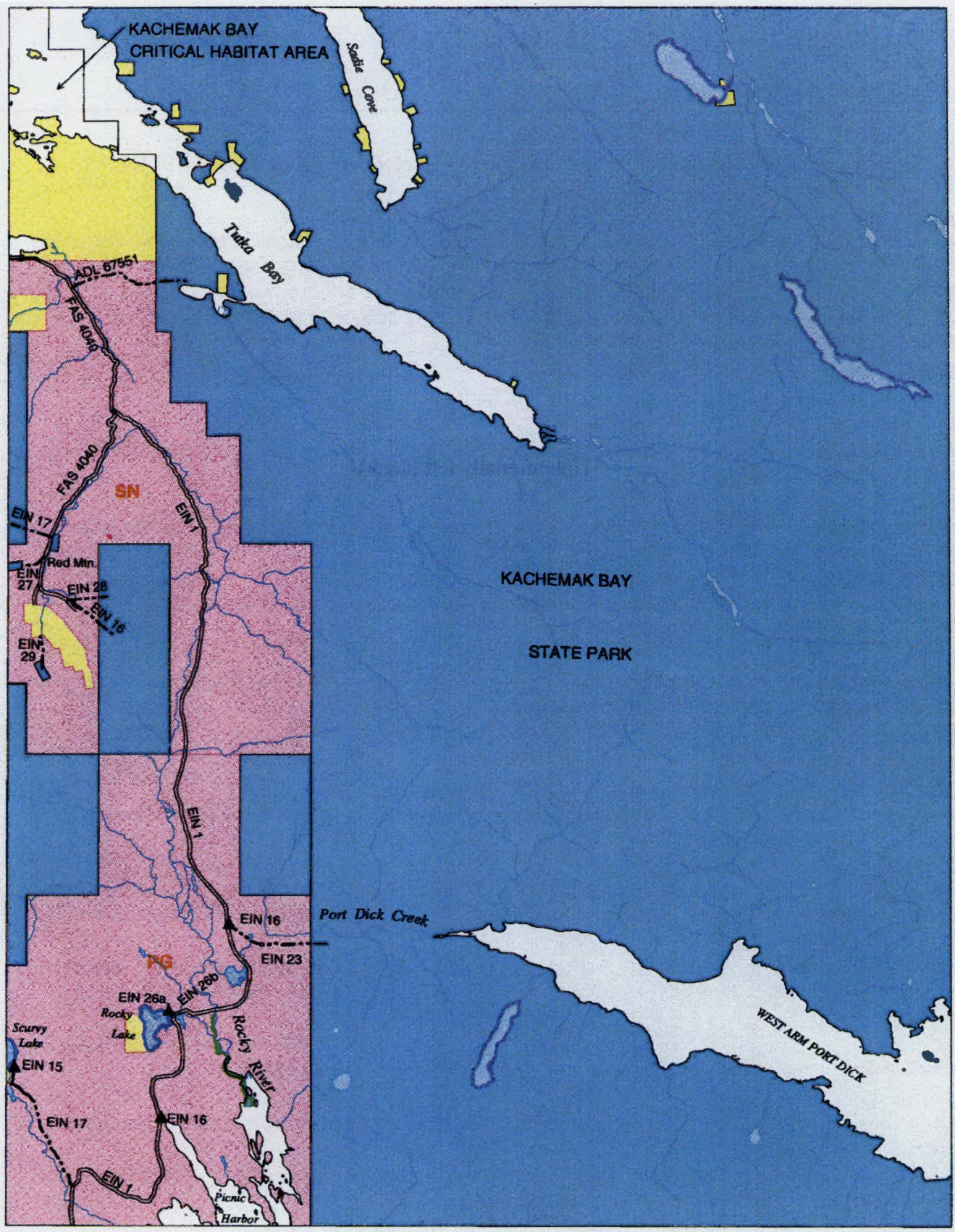
EIN 26b
An easement for an existing trail from road EIN 1 to site EIN 26a at Rocky Lake. (25-foot trail)

EIN 27
An easement for a proposed trail from FAS 4040 westward about 0.25 mile to public land and US Mineral Survey 2156. (25-foot trail)

EIN 28
An easement for a proposed trail from FAS 4040 near the Kenai Chrome Mine eastward about 0.25 mile to public land. (25-foot trail)

EIN 29
An easement for a proposed trail from FAS 4040 near the Kenai Chrome Mine southward to public land and US Mineral Survey 2158. (25-foot trail)

FAS 4040
An easement 100 feet in width for the existing road between Jakolof Bay and the Kenai Chrome Mine on Red Mountain. Locally known as Red Mountain Road. (Omnibus Road)



0 1 2 3 MILES

1 inch equals 2 miles

N

KENAI EASEMENT ATLAS

1993

LAND OWNERSHIP

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

ROADS & TRAILS

- State-Maintained Roads
- Improved Roads
- 4WD Trails
- ATV Trails
- Snowmachine Trails
- Horse Trails
- Foot Trails
- Alaska Railroad

MISC

- Atlas Boundary

SITES

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

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APPENDIX B

WATERWAY MANAGEMENT

Potential Publishers Of Information Regarding Public Access Easements

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

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STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

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June 25, 1997

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

Dear Mr. Welker:

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

Response To Report's Conclusions

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

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

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

Response : See response to recommendation 1 on page 4.

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

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

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

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

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

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

Response : See response to recommendation 7 on page 7.

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

Response : We agree.

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

Response : DNR is currently updating the booklet.

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

Response : No comment.

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

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

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

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

Response : We agree.

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

Response : See response to recommendation 9 on page 11.

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

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

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

B) When necessary assert through quiet title actions or other litigation state ownership of waterways. Focus on litigation that can establish precedents with broad regional or statewide implications.
C) Review Federal plans, regulations, and other actions to ensure that state ownership and public uses are protected.

2. Assert the public's right to use navigable waters and inform the public of these rights.
A) Provide the public with information about it's right to use waters that constitute "public or navigable waters" as provided in the Alaska Constitution regardless of who owns the underlying lands.
B) Make information on navigable waters more easily understood and better accessible to the public.

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

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

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

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

Response to report recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

John T. Shively, Commissioner
Department of Natural Resources

Frank Rue, Commissioner
Department of Fish and Game

Bruce M. Botelho
Attorney General

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

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

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July 8, 1997

Members of the Legislative Budget
and Audit Committee:

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

Recommendation No. 5

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

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

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

and Audit Committee

Recommendation No. 8

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

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

- Both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to use the basin-wide adjudication process if it chooses to do so.

- Both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to join the federal government as a party to a basin-wide adjudication.

- Both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to determine federal reserved water rights in the context of a basin-wide adjudication.

- Except in the context of an action to directly quiet title against the federal government, state courts have the authority to routinely make factual findings of navigability to resolve property disputes.

- State statutes and regulations make factual findings of navigability pertinent to some of the water rights issues subject to a basin-wide adjudication.[1]

- In the event that a state court makes findings of navigability during a basin-wide adjudication, those findings may have binding effect against the federal government in any later litigation to directly quiet title in the federal court.[2]

- State statutes and regulations provide broad, though untested, authority for state courts to require private entities to fund the means for measuring the impact of their water use (e.g., gauging stations).[3]

Nevertheless, the agencies voice two types of concerns about the potential for basin-wide adjudications. First, they assert that federal law (specifically the McCarran Amendment[4])

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

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

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

bars joining the federal government as a party to any basin-wide adjudication in which the state court will look at factual issues of navigability. Second, the agencies argue that federal reserved water rights and navigability are irrelevant to the allocation of fishery management authority between the state and federal governments.

However, these objections are framed in the rhetoric of advocacy (e.g., "legally impossible," "fundamental misunderstanding") rather than meaningful references to the actual state of the law today. Despite our repeated requests for citations to specific legal precedents, the rhetoric remains unsupported. We conclude that the potential limits on a basin-wide adjudication simply remain an open, unsettled area of the law at this time.

In regards to the agencies' first argument concerning the McCarran Amendment, they cite only the case of *South Delta Water Agency v. U.S., Dept. of Int.* We note that this case did not even involve a basin-wide adjudication. The court explicitly observed:

> *The parties agree that the instant suit does not meet the requirements of subsection (1) of the McCarran Amendment because the suit does not involve a general stream adjudication.*[5]

The agencies have correctly noted that a suit under the federal Quiet Title Act is generally the sole means to directly challenge federal title to real estate. However, the agencies have ignored the explicit exception which the Quiet Title Act contains for suits brought under the McCarran Amendment:

> *[N]or does it [the Quiet Title Act] apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666) [the McCarran Amendment].*[6]

The agencies also seem to implicitly argue that the basin-wide adjudication must decide all parties' rights in an initial case and then require them to return with a second case for "administration" of those rights. If this is in fact the agencies' argument, it disregards guidance from the U.S. Supreme Court that "administration" under the McCarran Amendment *"obviously includes water rights previously acquired by the United States through appropriation or presently in the process of being so acquired."*[7] No precedent

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[4] 43 U.S.C. 666.

[5] *South Delta Water Agency v. U.S., Dept. of Int.*, 767 F.2d 531, 540 (9th Cir. 1985).

[6] 28 U.S.C. § 2409a (a).

[7] *United States v. District Ct., County of Eagle, Colo.*, 401 U.S. 520, 524 (1971).

brought to our attention indicates that a basin-wide adjudication cannot address both rights and administration for a hydrologic unit in a single efficient proceeding.

Also, contrary to the agencies' assertion, the U.S. Supreme Court has construed the McCarran Amendment broadly, not narrowly, to allow state courts to decide a considerable spectrum of federal water-related rights during a basin-wide adjudication:

> *[W]e deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights.*[8]

The agencies further assert that federal reserved water rights and a waterway's navigability are irrelevant to which level of government prescribes the rules for fishery allocation between subsistence and other users. Indeed, in the recent *Totemoff* case, the agencies were successful in convincing the Alaska Supreme Court that federal reserved water rights should not be a factor.[9] However, the court's decision still hinged upon a factual finding that a waterway was navigable and thus subject to state authority.

Nevertheless, in *Babbitt*, the agencies were quite unsuccessful in persuading the U.S. Court of Appeals to disregard federal reserved water rights and navigability. The plain language of that court's decision makes them key factors in which level of government gets to write the rules:

> *By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.*
>
> *For these reasons, we hold to be reasonable the federal agencies' conclusion that the definition of public lands include those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters.*[10]

This ruling from the *Babbitt* case is unique, unprecedented, unpopular with the State's attorneys, and at variance with the Alaska Supreme Court. However, all of this does not

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[8] *United States v. District Ct., County of Eagle, Colo.*, 401 U.S. 520, 524 (1971) [Emphasis added].

[9] *See Totemoff v. State*, 905 P.2d 954, 961-968 (Alaska 1995).

[10] *State of Alaska v. Babbitt*, 72 F.2d 698, 703-704 (9th Cir. 1995).

change the case's status as a mandate to federal agencies, who we doubt will defer to the conflicting guidance of the Alaska Supreme Court.

To put it bluntly, unless the extent of federal reserved water rights gets established in the State court system, federal regulators will do it themselves. The State's current approach, which denies the significance of federal reserved water rights, leaves the State by default in a posture of waiting to react to whatever those regulators might decide is best for Alaska. In fact, those regulators may ultimately decide that federal authority exists in entire waterways from their source to the sea, even if only a portion of the waterway passes by federal land.

The agencies' current posturing of "irrelevance" appears to be a recent adaptation. During a House Resources Committee hearing on April 28, 1995, the Department of Law expressed considerable concern on how federal agencies would attempt to regulate fishing in waterways that are navigable and have federal reserved water rights. The minutes from that hearing describe that concern as follows:

> *MR. WHITE [Assistant Attorney General] said during the break he was able to talk with the attorney who is representing the state in all of the federal/state fish and wildlife cases. He stated the question he struggled with earlier is how far away from the federal reservations does the federal reserve water rights extend in regard to allowing federal management. He noted unfortunately the answer is not clear since the Ninth Circuit did not say anything about it other than the federal reserve water rights allow the federal government to manage navigable waters which are necessary to serve the purposes of the federal reserves. . . .*
>
> *MR. WHITE told committee members the federal government, before the Ninth Circuit, also advocated the position that the court held--that is, the federal reserve water rights allow some management over navigable waters but they did not clarify what that meant. He said the plaintiffs in the case argued, under various theories and will argue under the federal reserve water rights, that the federal government should manage all the way out to the ocean. [Emphasis added.]*

Similarly, in a House Resources Committee hearing on February 21, 1996, the commissioner of the Department of Fish and Game noted his concern with the role of navigability in allocating state-federal management authority. The minutes from that hearing state:

> *FRANK RUE, Commissioner, Department of Fish and Game (ADF&G) said the department is in a support role to the Department of Law and the Department of Natural Resources and share the concern that we want to be aggressive in asserting navigability for a number of reasons. Recently with*

> *dual management in subsistence, it may be important for the state's management of fish and wildlife that we assert navigability. Also, primarily, for public use, public access to fish and wildlife, the navigability issue can become significant. So, we have supported the Department of Law and the Department of Natural Resources in various litigations and/or assertions and that has been our role. We give information and point out areas where we think the federal agencies are overreaching and trying to restrict public uses on what believe are navigable waters. [Emphasis added.]*

It is important to remember that our Recommendation No. 8 advised the legislature to establish a joint committee to review the potential for basin-wide adjudications to resolve some long-term issues. It is disturbing that the agencies apparently do not wish the legislature to even consider the possibility. Short-term posturing is no substitute for long-term planning.

The full potential for basin-wide adjudications under Alaska's unique circumstances remains an open and untested legal frontier. However, we suspect that the agencies' true concern with a basin-wide adjudication lies more with internal administrative preferences than the state of the law. Such adjudications have historically required states to make a serious, long-term allocation of their legal resources. We are not unsympathetic with this concern and would not expect such a refocus in the State's litigation to be undertaken lightly. However, we still feel basin-wide adjudications should be one of a spectrum of alternatives that the legislature considers in devising a strategy for resolving the State's waterway issues.

Though the outer limits for use of basin-wide adjudications are unsettled, both a state statute and the U.S. Supreme Court provide clear legal authority for Alaska to use the basic process to decide water rights. Thus, in a February 7, 1997 letter to the attorney general, we requested his projection of the annual personnel funding required from the legislature to support basin-wide adjudications. Unfortunately, the attorney general did not respond to our request for this estimate.

The agencies propose that their current litigation approach can be rehabilitated with a public information campaign which disseminates agency opinions concerning navigability ("public use determinations"). Such a sharing of technical information with the public is, of course, a commendable governmental function.

However, a good portion of land within the State's borders will ultimately be owned by corporate entities that wish to fully exercise their rights to control entry. Disputes in such situations concerning the use of waterways, shorelines, portages, gravel bars, and islands frequently involve conflicting values rather than a mere lack of information.[11] Resolution of

[11] *Cf.* Debra Stein, *Overcoming Community Opposition,* Land Development (Winter 1997), pp. 10-12; Thomas Morehouse & Marybeth Holleman, *When Values Conflict: Accommodating Alaska Native Subsistence,* (Inst. of Social and Economic Research, University of Alaska, June 1994), pp. 1-10, 44-46.

those disputes will require legally-binding determinations. The agencies need to develop a broader vision of a systematic means for settling waterway status disputes in a mandatory, permanent fashion.

Some binding, systematic effort beyond information brokerage was no doubt envisioned by the electorate when they adopted AS 38.05.500-38.05.505 in a 1982 initiative. Alaska Statute 38.05.502 provides that the State holds the title to unappropriated land *"in trust for the people of the state."* Alaska Statute 38.05.505(b) provides that *"[a]n individual may institute a civil action to recover damages for injury or loss sustained . . . for the failure of the state to enforce its trust responsibilities to the people of the state."* Though the decision to pursue an individual case lies within executive discretion, these sections may impose a duty upon the State to adopt some form of binding program to pursue public access.

Report Conclusions

Lack of decisive top-level direction impairs program implementation

The agencies are understandably disturbed by our finding that deficiencies in teamwork have resulted from a lack of decisive top-level executive direction. The agencies' audit response insists that the administration's navigability program is now being decisively implemented through a coordinated team.

Though not widespread, we did encounter instances in which too much energy was diverted into turf wars and employees' record-building concerning their perceptions of co-worker deficiencies. Based on the audit response, responsible executives have hopefully rectified this divisive behavior.

For a program of this magnitude, we believe that a team approach should be designed within definite guidelines formulated by executives directly accountable to the governor. We remind the administration of the important distinction between the roles which the State Personnel Act assigns to classified technical staff and nonclassified executives:

> *The personnel board, upon written recommendation of the commissioner of administration, may extend the partially exempt service to include any position in the classified service that, in the judgment of the board,*
>
> *(1) involves principal responsibility for the determination of policy; [or]*
>
> *(2) involves principal responsibility for the way in which policies are carried out; . . .*[12]

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[12] AS 39.25.130(a).

We trust that the administration will assign policymaking responsibilities and classify personnel as necessary to assure strong leadership with sufficient accountability to the governor. For example, a governor, commissioner, or director may decide to substantially delegate that position's policymaking in a specialized area to an individual with particular talents, skills, or experience.[13] The State Personnel Act envisions that such delegation will occur in the context of reclassification or reassignment to a position as an assistant under the exempt or partially-exempt service.[14] This status provides the control necessary to ensure that the assistant will faithfully promote the administration's programs and work most cohesively with the administration's other appointees.

The success of this program is very much dependent on it receiving top-level direction. Given the number of agencies involved, this direction must be focused through a team effort. This was one of the reasons we requested a single response from the agencies as a team. The audit response demonstrated the top-level attention and teamwork essential to a program of this complexity and importance. We hope the focus of this attention and teamwork can now be transferred toward the program itself.

Randy Welker, CPA
Legislative Auditor

[13] *See* AS 44.17.010; AS 44.17.040; AS 44.17.070.

[14] *See* AS 39.25.120(c)(8) (special assistants); AS 39.25.120(c)(1) (assistant commissioners); AS 39.25.110(20) (governor's office).

The following digest version of the audit report was added by ARLIS as a supplement. The digest version was cached by Google. The Legislative Budget and Audit website no longer lists the 1997 audit reports or the digests.

The digest version is entitled: *Summary of: A Special Report on the Departments of Natural Resources, Fish and Game, and Law, Waterway Management Issues, March 28, 1997.*

The section headers and wording of the printed audit report differ from the online digest version.

Alaska Division of Legislative Audit

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SUMMARY OF: A Special Report on the Departments of Natural Resources, Fish and Game, and Law, Waterway Management Issues, March 28, 1997.

PURPOSE OF THE REPORT

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

The objective of this audit was to evaluate the effectiveness of the State's programs regarding its ownership of submerged land, rights to management of fisheries within navigable waterways, protection of public access, and allocation of water among competing users.

REPORT CONCLUSIONS

The State made virtually no effort to review, correct, or appeal the federal Bureau of Land Management's (BLM) FY 95 and FY 96 findings on navigability.

On the other hand, we found that during FY 96 the State consistently reviewed and responded to BLM's notices concerning the reservation of public access easements. However, despite this consistent attention, the public easement process involves little public input and information concerning the existence and location of the easements is not readily available to the public. In fact, the unmarked state of most of these easements negates meaningful public access.

However, in regards to aspects of the State's waterways other than access easements, we did find some noteworthy projects designed to enhance the availability of information to the public. These include a computerized database a mapping system, and an information booklet.

The State's piecemeal approach to its waterway litigation has minimal long-term impact on statewide

resolution of important issues such as ownership of submerged land, division of State-federal authority for particular waterways, and allocation of water among competing users.

Nevertheless, state managers have discretion to set priorities in the use of their limited legal resources for enforcing public rights. The public trust doctrine does not impose a legal duty upon the State to pursue every potential claim for assertion of a waterway's navigability or for a public access easement.

We found that the administration has so far not articulated a unified, decisive strategy to its departments regarding waterway issues. The mixed messages and leadership void have contributed to a troubling level of friction among some classified personnel expected to coordinate waterway activities between departments and even between divisions.

The administration has also not responded with a decisive program to address the legislature's concerns. The tension between the two branches reflects their lack of consensus on broader policy issues that underlie waterway management choices.

FINDINGS AND RECOMMENDATIONS

1. Department of Natural Resources (DNR) personnel who review BLM easement notices and navigability reports should briefly document the rationale for their decisions.

2. DNR and Department of Fish and Game (DFG) should facilitate BLM's inclusion of citizen groups in the process for reserving public easements.

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

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

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

6. The legislature should amend statutes governing the administration of state aid to promote the marking and maintenance of public access easements.

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

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

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

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

11. DOLaw should aggressively pursue unfulfilled promises to substitute easements under the *Andrus* agreement.

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

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