

Facilitated Discussion – Participant Topics/Issues
Friday, October 28, 2016

- **Copper River Delta – ANILCA language for fish & wildlife – acquisition of water rights – is the state reservation large enough to protect all value on the delta?**
 - ANILCA language for the Chugach NF (501B) specifies that the river will be managed for fish and wildlife conservation and habitat.
 - There is a 1999 Instream Reservation on the Copper River filed by AFGD for fish and wildlife.
 - The NF wants to insure that the instream flow protection results in sufficient sediment transport to maintain water-dependent values on the Delta.
 - Potential solution: Working collaboratively, it may be possible to increase the reservation to ensure the needed sediment flows.
 - Potential solution: Work with legal counsel to see if the additional ANILCA purposes created a federal reserved water right that goes above and beyond the reserved rights for Chugach National Forest. Knowing whether or not a reserved water right exists would be important for any collaborative processes or for protesting any proposed water development.
- **Land disposal to a Native Corporation – USFS retained ROWs for trails and fish passage – should we have addressed water rights? And what about future exchanges?**
 - Yes, water rights and water availability should be addressed with all exchanges. The overall disposal was legislatively required, but the specific provisions of the exchange were negotiated with the native corporation. If there is a desire to include provisions for protection of and access to water-dependent values, then this is a negotiable point.
 - The disposal was a final selection of federal land to a private entity (a Native Corporation). Any federal reserved water rights on the disposed lands terminate once the land is transferred out of federal ownership. The native corporation should be notified of this fact, and that protection of water-dependent values may be at risk.
- **Are there Federal Reserved Water Rights on native lands within federal management units?**
 - There is only one Native reservation in AK – Metlakatla Island Indian Reservation.
 - Lands conveyed to the Native Corporations (considered private entities) are fee title but not reserved lands; there are no federal reserved water rights associated with them.
- **Hot springs and recreational usage – is there Federal permitting of this and do we need water rights?**
 - There is recreational development around hot springs; the feds may also want to claim domestic use for heating.
 - There is no USFS reserved right for recreation use, but does Public Land Order 399 (blanket executive order withdrawing hot springs from homestead and mineral apply? If so, then the hot springs could have federal reserved water rights. We don't know if PLO 399 applies in Alaska.
 - If there is no reserved right, could the feds file for water rights under the State system?

- Recommendation: Check with BLM – was the spring noted on the Master Title Plats as a hot or medicinal spring subject to PLO 399?
- Check with Mike Walton from ADNR to identify the water rights status of the spring. There is a temperature threshold: if the temperature of the spring is less than or equal to 120°C, check with ADNR for water rights; if it is above 120°C or will be used for commercial purposes, the AK Oil & Gas Commission has jurisdiction or concurrent jurisdiction.
- **How do we use water rights to protect karst systems?**
 - Karst systems – are they considered ground water or surface water?
 - NPS claims federal reserved water rights on karst systems in other states – Devil’s Hole in Death Valley NP (NV), Lehman Caves in Great Basin National Park (NV) and Wind River (MT)
 - For BLM: if you can’t assert a reserved right, place the system in a special management area, such as BLM’s ACEC designation and also submit for an instream flow reservation.
 - Write a letter to ADNR – make them aware of the public interest aspect of a karst system.
- **Are water rights needed for snow fences?**
 - Do we need water rights for snow fences? Yes.
 - ADNR manages both frozen water and fresh water. A snow fence impounds snow (water content) so file for a water storage right.
- **Navigable vs. non-navigable waters**
 - Alaska’s title to its submerged lands and navigable waters vested at statehood and Alaska became a state on January 3, 1959. Therefore, unless a pre-statehood withdrawal clearly included the submerged lands and intended to defeat Alaska’s statehood title, Alaska retains ownership and management authority of its submerged lands beneath its navigable waters. This authority falls under the Equal Footing Doctrine, the Alaska Right-of-Way Act of May 14, 1898, the Submerged Lands Act of 1953 and the Alaska Statehood Act.
 - “Navigable Waters” are defined (in simple terms) as 1) Subject to the ebb and flow of the tide or 2) Navigable in Fact. A water body is “navigable in fact” if it is used, or susceptible of being used, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.
 - Therefore, any withdrawals of federal lands after January 3, 1959 could not have included the submerged lands beneath navigable waters, since they were no longer in federal ownership.
 - BLM – Division of Lands and Cadastral, Navigability Unit has the delegated authority to make title navigability determinations on behalf of Federal Agencies.