Title Navigability: A Surveyor's Perspective

Frank A. Hardt
Bureau of Land Management
Anchorage, Alaska

This is a basic synopsis of title navigability. This is by no means an exhaustive study of the topic but rather an overview from the perspective of a Federal boundary surveyor in Alaska. I am not an attorney and the following is not intended as a substitute for legal advice. The reader should confer with counsel when necessary to determine proper response or course of action relative to the subject matter contained herein. Furthermore, the reader is encouraged to study the case law cited to gain a finer appreciation of the topics discussed.

I. Introduction

No discussion of navigability is complete without first examining the history of the Equal Footing Doctrine and the opening pages focus on this aspect of title navigability. These pages are used with permission of the author[1] G. Thomas Koester. The perspective then changes to focus primarily on title navigability issues in Alaska. The Alaskan focus summarizes the current laws, regulations, and policies governing the Bureau of Land Management's (BLM) navigability determinations in Alaska. Credit for the research and preparation of the majority of this segment of this paper goes to C. Michael Brown, Historian and Navigable Waters Specialist in the BLM's Alaska State Office. Mr. Brown is a leading authority on navigability issues for the BLM in Alaska and his efforts are greatly appreciated. I have taken the liberty to update, edit and supplement both of these documents.

For more than one hundred sixty years, the United States Supreme Court has viewed title to lands underlying navigable waters as an incident of state sovereignty vested in the original thirteen states as direct successors to the English crown[2] and in the states subsequently admitted to the Union on an "equal footing" with respect to sovereignty.[3] Because of the importance of such lands for purposes of trade and travel, the underlying rationale was that states hold such lands as a "public trust" to ensure that the public's rights to the use of the lands for trade, travel, and fishing are not impaired.[4]

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[1] Juris Doctor, California Western, 1975. As an Assistant Attorney General in Juneau, he represented Alaska in the state and federal courts (including the U.S. Supreme Court) and before Congress and federal administrative agencies. Mr. Koester has also represented the State of Alaska as a private attorney. He has lectured at the University of Alaska Southeast and authored or co-authored many published Opinions and other works. The majority of this paper is from his presentation during the conference on "*Who Owns Our Waterways*?" sponsored by the Northwestern School of Law, Lewis and Clark College, in Anchorage, Alaska, 1993.

[2] Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

[3] Pollard's Lessee v. Haqan, 44 U.S. (3 How.) 212 (1845).

[4] Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892).

II. Evolution of the equal footing doctrine in the title navigability cases

The equal footing doctrine in American jurisprudence has its roots in the common law of England.[5] The United States Supreme Court's first application of the English common law to determine title to submerged lands was Martin v. Waddell.[6] In that case, Waddell's lessee sued to eject Martin from oyster beds in Raritan River and Bay in New Jersey. Waddell's title traced to 1664 and 1674 grants from King Charles II to his brother, the Duke of York, for the purpose of establishing a colony. The duke transferred a part of the territory, including the 100 acres at issue, to "the proprietors of East New Jersey." The proprietors were invested with all of the rights of both property and government originally conferred on the duke by the king, but in 1702 surrendered back to the crown all the powers of government while retaining the property rights.

Waddell claimed title to the disputed submerged lands under an 1834 survey authorized by the proprietors. Martin claimed under two 1824 laws of the State of New Jersey, one of the thirteen states that initially formed the Union. Despite the fact that from 1702 on the crown and colonial officials, as well as the State of New Jersey officials who succeeded them, exercised proprietary rights over the submerged lands and a judgment by the New Jersey Supreme Court that the proprietors' title claim was without foundation,[7] a federal court found in favor of Waddell's lessee. The Supreme Court first noted that the land granted to the duke "was held by the king in his public and regal character as the representative of the nation and in trust for them."[8] The Court then disavowed any intent to determine whether the king had the power to grant to a private party lands covered by navigable waters,[9] and stated that it was unnecessary to address the rule that sovereign grants are strictly construed because the grant to the duke clearly included submerged lands and there accordingly was "no room" for application of the rule.[10]

The Court was required, however, to go beyond merely giving a technical construction to the language of the grant because the question before it went to the very nature of the title conveyed to the duke:

> The questions upon this charter are very different ones. They are: Whether the

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[5] Shively v. Bowlby, 152 U.S. 1, 14 (1894). Although the equal footing doctrine has its roots in English common law, the law relating to the ownership of lands covered by water traces back at least to the time of early Rome. For a scholarly discussion of Roman law on the subject, see MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water, 3 Fla. St. L. Rev. 511 (1975) at 517-34.

[6] Supra note 2. To ensure a full understanding of the equal footing doctrine in the title navigability context, both this case and Pollard's Lessee, supra note 3, are examined in some detail.

[7] See id. at 416-17. The New Jersey Supreme Court case was cited as Arnold v. Mundy, 1 Halstead 1.

[8] Id. at 409.

[9] Id. at 411. The Court then answered the question in dicta, however: "But from the opinions expressed by the justices of the Court of King's Bench in [two cases cited], the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant."

[10] Id.

> dominion and propriety in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the duke. Whether in his hands they were intended to be a trust for the common use of the new community about to be established; or private property to be parceled out and sold to individuals, for his own benefit. And in deciding a question like this, we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed.
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> Taking this rule for our guide, we can entertain no doubt as to the true construction of these letters patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke York to establish a colony upon the newly discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution.[11]

The Court then quoted Lord Hale for the proposition that, despite the king's ownership of the submerged lands, "the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary," a principle "not questioned by any English writer upon that subject."[12] What had been questioned, according to the Court, was whether, after Magna Charta, the king or any of his subjects could obtain a private property right to fish, and the mere existence of that question showed "how fixed had been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public."[13]

Nothing in the charter from the king to the duke indicated that a different result was intended in the colony; on the contrary,

> [t]he estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. Whatever was held by the king as a prerogative right passed to the duke in the same character. And if the word "soils" be an appropriate word to pass lands covered with navigable water, as contended for on the part of the defendant in error, it is associated in the letters patent with "other royalties," and conveyed as such. No words are used for the purpose of separating them from the jura regalia, and

[11] Id. at 411-412.

[12] Id. at 412.

[13] Id. at 412-13.

> converting them into private property, to be held and enjoyed by the duke, apart from and independent of the political character with which he was clothed by the same instrument. Upon a different construction, it would have been impossible for him to have complied with the conditions of the grant. For it was expressly enjoined upon him, as a duty in the government he was about to establish, to make it as near as might be agreeable in their new circumstances to the laws and statutes of England; and how could this be done if in the charter itself this high prerogative trust was severed from the regal authority? If the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parceled out and sold by the duke for his own emolument? There is nothing, we think, in the terms of the letters patent, or in the purposes for which it was granted, that would justify this construction. And in the judgment of the court, the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the crown.[14]

This construction of the charter from the king to the duke, the Court stated, "is confirmed" by referring to grants for other tracts of country for the purpose of colonization since

> in no one of these [other] colonies has the soil under its navigable waters, and the rights of fishery for shell fish or floating fish, been severed by the letters patent from the powers of government. In all of them, from the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy, in common, the benefits and advantages of the navigable waters for the same purposes, and to the same extent that they have been used and enjoyed for centuries in England. Indeed, it could not well have been otherwise; for the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell fish from its bottom, or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another. The usage in New Jersey has, in this respect, from its original settlement conformed to the practice of the other chartered colonies. And it would require very plain language in these letters patent to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every colony founded upon the Atlantic borders, was intended, in this one instance, to be taken away. But we see nothing in the charter to require this conclusion.[15]

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[14] Id. at 413-414.

[15] Id. at 414.

Having reached that conclusion as to the original charters from the king to the duke, the Court quickly reached the same conclusion as to the subsequent transfers from the duke to the proprietors and from the proprietors back to the crown. As a result, the crown at the time of the Revolution was in precisely the position it was in prior to the king's grants to the duke.[16]

The Court concluded: "And when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament, became immediately and rightfully vested in the state."[17] As a result, the lower court decision was reversed and Martin prevailed. Martin v. Waddell was followed three years later by the first true equal footing doctrine case, Pollard's Lessee v. Hagan.[18] At issue was title to reclaimed lands which, at the time Alabama was admitted to the Union in 1819, had not been filled and were subject to the ebb and flow of the tide.

The Court first noted that the lands at issue were in a part of Alabama that had been ceded to the United States by the State of Georgia under a deed similar to the State of Virginia's cession to the United States of lands northwest of the Ohio River.[19] Both of those deeds stipulated that the lands within the territory ceded which had not previously been reserved or appropriated to other purposes should be considered a common fund for the use and benefit of all the United States.[20] Virginia's cession was on condition that "the territory so ceded shall be laid out and formed into states . . . Having the same rights of sovereignty, freedom, and independence, as the other states.[21] Georgia's cession was made subject to the Northwest Ordinance of July 13, 1787, under which new states would be admitted to the union "on an equal footing with the original states in all respects."[22]

From this, the Court concluded that the United States' title to the ceded lands was a limited proprietary one and not in the nature of sovereign title, sovereign title being reserved to the new states to be created out of the ceded territories:

> The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt [incurred by the United States in the war for independence], and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

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[16] Id. at 415-416.

[17] Id. at 416.

[18] Supra note 3.

[19] Id. at 221.

[20] Id.

[21] Id.

[22] Id. at 222.

> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose. The provision of the Constitution above referred to[23] shows that no such power can be exercised by the United States within a state. Such a power is not only repugnant to the constitution, but it is inconsistent with the spirit and intention of the deeds of cession.[24]

The Court then noted that the result was not changed by a provision in the Act admitting Alabama to the Union under which Alabama's people "disclaim all right and title to the waste or unappropriated lands lying within the said territory" and providing that such lands would be subject to disposition by the United States. That provision was simply an exercise by Congress of its constitutionally granted power "to make all needful rules and regulations respecting the territory or other property of the United States"[25] which "amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands" and "conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy" once Alabama had attained statehood.[26]

The necessary consequence was that Alabama, and not the United States, took title to the beds of navigable waters at statehood:

> Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. * * * Then to Alabama belong the navigable waters, and soils under them, in controversy in this case subject to the rights surrendered by the Constitution to the United States[27]

Leaving absolutely no doubt as to the fundamental nature of the rule established, the Court clearly distinguished the interests of the individual states from those of the nation:

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[23] U.S. Const. art. I, §8, cl. 16, which gives Congress the power to exercise exclusive legislation over the District of Columbia and "all places purchased, by the consent of the Legislature of the State in which the same may be, for the erection of forts, magazines, arsenals, dock yard, and other needful buildings."

[24] 44 U.S. (3 How.) at 224.

[25] U.S. Const. art. IV, §3, cl. 2.

[26] 44 U.S. (3 How.) at 224-225.

[27] Id. at 229.

> This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprived [sic] the States of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extend all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."
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> By the preceding course of reasoning we have arrived at these general conclusions: First. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Second. The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Third. The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case.[28]

The principle that new states unqualifiedly take title to lands underlying navigable water bodies as an incident of statehood under the equal footing doctrine has been consistently repeated and elaborated upon by the Supreme Court. For example, "the states since admitted have the same rights, sovereignty and jurisdiction... as the original states possess within their respective borders."[29] To implement the equal footing doctrine, the United States holds lands underlying navigable waters in a territory "in trust for the several States to be ultimately created out of the territory."[30] "[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce."[31] A new state's sovereign ownership of lands underlying navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it on admission."[32] The transfer of title from the United States, as trustee *for* new states, is automatic,[33] and is a matter of federal constitutional law and not congressional grace:

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[28] Id. at 230.

[29] Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867).

[30] Shively v. Bowlby, supra note 5, at 57.

[31] United States v. Oregon, 295 U.S. 1, 14 (1935).

[32] United States v. Louisiana, 363 U.S. 1, 16 (1960).

[33] Arizona v. California, 373 U.S. 546, 597 (1963).

> Thus under Pollard's Lessee the state's title to lands underlying navigable waters within it boundaries is confirmed not by Congress but by the Constitution itself. The rule laid down in Pollard's Lessee has been followed in an unbroken line of cases which make it clear that the title thus acquired by the state is absolute so *far* as any federal principle of land titles is concerned.[34]

As a consequence, "[t]he title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights, granted to the United States by the Constitution."[35]

This overview has considered the equal footing doctrine only in the context of determining title to lands covered by water. We next address its development in the context of state sovereign rights generally, a principle at the very heart of our federal system.

III. Expansion of the Equal Footing Doctrine to the Question of State Sovereign Rights Generally

While the principle that new states must join the Union on an equal footing with all other states in terms of sovereignty had been around since the Northwest Ordinance of 1787, its true import did not become clear until the Supreme Court was called on to determine the extent of Congress' power to admit new states in Coyle v. Smith,[36] a case having nothing to do with title to lands underlying navigable waters.

In the act admitting Oklahoma to the Union,[37] Congress provided that the capital of that state was temporarily to be at Guthrie, that it could not be moved there from until at least 1913, and that, except as necessary to transact State business at the temporary Guthrie capital site, the Oklahoma legislature "shall not appropriate any public moneys of the state for the erection of buildings for capital purposes during said period." The Oklahoma Constitution contained no provision regarding the location of the capital, but the convention which framed the Oklahoma Constitution adopted a separate "ordinance irrevocable" consenting to all the terms of the act of admission, an ordinance which was separately ratified by the people of Oklahoma when they ratified the Constitution.

In 1910, however, after it had been admitted to the Union "on an equal footing" with all other states, the Oklahoma Legislature passed an act providing for the removal of its capital from Guthrie to Oklahoma City and making an appropriation of state funds to construct the necessary buildings. The act was challenged in the Oklahoma Supreme Court as violating both the Oklahoma Constitution and the condition in the act of admission. That court held that it violated neither.[38]

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[34] Oregon ex rel. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).

[35] Shively v. Bowlby, supra, note 5, at 57-58.

[36] 221 U.S. 559 (1911).

[37] Act of June 16, 1906, 34 Stat. 267 (1906).

[38] Coyle v. Oklahoma, 113 P. 944 (Oklahoma 1910).

The case then went to the United States Supreme Court for determination whether it violated the act of admission (the question under the state constitution not being appropriate for resolution in a federal court). The Court summarized the question before it in these words:

> The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress would not for a moment be entertained. The question, then, comes to this: Can a state be placed upon a plane of inequality with its sister states in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission?[39]

In emphatically holding that Congress cannot impose conditions on the admission of a new state that would result in it being less than equal to its sister states, the Court placed primary reliance on Pollard's Lessee[40]:

> The case of Pollard v. Hagan, 3 How. 212, 11 L. ed. 565, is a most instructing and controlling case. It involved the title to the submerged lands between the shores of navigable waters within the state of Alabama. The plaintiff claimed under a patent from the United States, and the defendant under a grant from the state. The plaintiff relied upon two propositions which are relevant to the question here. One was that, in the Act under which Alabama was admitted to the union, there was a stipulation that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying within the state, and that they should remain at the sole disposal of the United States; and a second, that all of the navigable waters within the state should forever remain public highways and free to the citizens of that state and of the United States, without any tax, duty, or impost imposed by the state. These provisions were relied upon as a "compact" by which the United States became possessed of all such submerged lands between the shores of navigable rivers within the state.
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> The points decided were:
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> First, following Martin v. Waddell, 16 Pet. 410, 10 L. ed. 1012, that prior to the adoption of the Constitution, the people of each of the original states "hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution."
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> Second. That Alabama had succeeded to all the sovereignty and jurisdiction of all the territory within her limits, to the same extent that Georgia possessed it before she ceded that territory to the United States.
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> Third. That to Alabama belong the navigable waters, and soils under them.

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[39] 221 U.S. at 565.

[40] Supra, note 3.

The court held that the stipulation in the act under which Alabama was admitted to the Union, that the people of the proposed states "forever disclaim all rights and title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as law.

Fourth. As to the stipulation in the same admission act that all navigable waters within the state should forever remain open and free, the court, after deciding that to the original states belonged the absolute right to the navigable waters within the states and the soil under them for the public use, "subject only to the rights since surrendered by the Constitution," said:

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the Constitution, laws, and compact to the contrary notwithstanding."

The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.[41]

The Court concluded:

[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.[42]

IV. Conditions Affecting State Title Under the Equal Footing Doctrine

One caution must be sounded with respect to earlier statements (pages 7 and 8, above) of an apparently unqualified equal footing doctrine rule of state title to submerged lands underlying navigable waters, however, and that relates to Congress' power to dispose of this classification of lands during the territorial period prior to the admission of a new state. While dicta in some of the earlier cases suggested that Congress had absolutely no power to grant land below the high water mark of navigable waters in a territory, "it is evident that this is not strictly true"[43]

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[41] Id. at 570-73; also see id. at 574-76.

[42] Id. at 580.

[43] Shively v. Bowlby, supra, note 5, at 47

and "Congress has the power to make [such] grants. . . whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory."[44]

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered" in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."[45]

The presumption against a pre-statehood conveyance and in favor of state ownership is so strong that Choctaw Nation v. Oklahoma,[46] which held that the bed of the navigable Arkansas River had been conveyed to three Indian tribes prior to Oklahoma's admission to the Union and therefore could not have vested in Oklahoma upon its admission, is "a singular exception" to the otherwise "established line of cases" confirming state title under the equal footing doctrine.[47]

In recent years, the equal footing doctrine rule of state ownership of lands underlying navigable waters has come under question and litigation. The trust responsibility of the Federal government with regard to pre-statehood disposal of submerged lands is well established as espoused in Shively,[48] Holt State Bank,[49] and others. State sovereignty as an absolute right in regard to navigable waters has not always been upheld in the courts. Criteria necessary to defeat a State's title to submerged lands is reiterated and refined in the 1987 Utah Lake case in the Supreme Court.[50] The Supreme Court accepted the premise that the United States "has the power [under the Property Clause[51]] to prevent ownership of land underlying a navigable water from passing to a new state by reserving the land to itself for an appropriate public purpose. Utah poses a two prong test to determine the effect of prior withdrawal on the future state's entitlement: 1) intent to reserve submerged land and 2) intent to defeat state title.

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[44] Id. at 48.

[45] Montana v. United States, 450 U.S. 544, 552 (1981) (citations omitted).

[46] 397 U.S. 620 (1970).

[47] Montana, supra note 38, at 555 n.5.

[48] Supra, note 5.

[49] United States v. Holt State Bank, 270 U.S. 49 (1926)

[50] Utah Division of State Lands v. United States, 482 U.S. 193 (1987)(Utah Lake)

[51] Supra, note 25.

Intent to reserve submerged land can be proved by clear language, boundary descriptions which include submerged land or absent specific language by "necessary implication." "Necessary implication" relates to purpose and public exigency. The court ruled in the case of the Crow Reservation[52] that although the Big Horn River was within the lands reserved, the Crow Tribe did not traditionally use the river or its resources for subsistence and therefore the bed should not be reserved but rather title passed to the State of Montana under the Equal Footing Doctrine.

The test of the second rule, the intent to defeat state title, is problematic in that is was not applied in Utah. The Utah Court concluded Congress did not intend to include submerged lands within the withdrawal at issue[53] and therefore did not need to rule on the intent to defeat title. Another problem is that even with clearly worded withdrawals reserving submerged lands Congressional intent relative to future statehood would not necessarily be addressed in specific terms.

V. What are Navigable Waters?

To this point, we have only explored the general principles underlying the equal footing doctrine. We have not looked at perhaps the most important inquiry to determine whether the doctrine applies -- i.e., do the lands underlie "navigable waters?"

In Barney v. Keokuk,[54] the United States Supreme Court made clear that, despite the general understanding that navigable waters in England were only those subject to the ebb and flow of the tide and that the English rule of sovereign ownership accordingly extended only to lands covered by tidal waters, Martin v. Waddell and Pollard's Lessee" enunciate principles which are equally applicable to all navigable waters," tidal and non-tidal.[55] Those and other cases establish that it applies to bays,[56] tidal rivers,[57] nontidal rivers,[58] lakes,[59] and tidelands.[60] The

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[52] Supra, note 45

[53] The majority did not reach the issue because, "even if a reservation . . . could defeat [a state's] claim, it was not accomplished on these facts." Id. at 201

[54] 94 U.S. 324 (1876).

[55] Id. at 338.

[56] E.g., Martin v. Waddell, supra note 2.

[57] E.g., Pollard's Lessee, supra note 3

[58] E.g., Barney v. Keokuk, supra note 41.

[59] E.g., United States v. Holt State Bank, 270 U.S. 49 (1926).

[60] E.g., Borax. Ltd. v. Los Angeles, 296 U.S. 101 (1935). It does not apply offshore, however, despite the Supreme Court's candid acknowledgement that the language in its earlier equal footing doctrine cases strongly suggested that it would. United States v. California, 332 U.S. 19, 38-39 (1947). For a possible explanation of this seemingly aberrant result, see J. Briscoe, Federal-State Offshore Boundary Disputes: The State Perspective, Law of the Sea Institute Eighteenth Annual Conference (1984), reprinted in Developing Order of the Oceans 380, 382-84 (R. Krueger and S. Riesenfeld eds. 1985). Congress reversed

earliest judicial statement concerning title to the beds of non-tidal navigable rivers was issued in 1807 by Chief Justice Tilghman in a case involving the claim of a riparian proprietor to an exclusive fishery in the Susquehanna River. After observing that the English rule of the common law had not been adopted in Pennsylvania, the Chief Justice opined: "The common law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches."[61] Justice Yeates in the same proceeding opines: "The qualities of *fresh* or *salt* water cannot amongst us, determine whether a river shall be deemed navigable or not. Neither can the flux or reflux of the tides ascertain its character. Pursuing such rule would, in the first case, render the river *Delaware* an innavigable stream throughout the confines of the state; and in the second, would confine its navigable quality to its several courses south from *Trenton.*"

As to what precisely constitute navigable waters, exclusive of tidal waters, the answer is not as clear. The general test is easily stated:

> "[T]he settled rule in this country [is] that navigability in fact is the test of navigability in law [for title purposes under the equal footing doctrine], and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[62]

Determining the navigability of a particular water body in light of the general test can be difficult in practice. Indeed, "[i]t has been suggested that the contemporary test may be whether a stream is navigable enough to float a Supreme Court opinion, a highly esoteric inquiry at best."[63] Once a water body has been determined to be navigable, however, the entire bed up to ordinary high water mark is subject to the equal footing doctrine.[64]

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the result of the California decision in the Submerged Lands Act of 1953, 43 U.S.C. 1301 et seq., which granted to the coastal states the offshore submerged lands within their boundaries.

[61] Carson v. Blazer, 2 Binn. 475, 1810 WL 1292 (Pa.), 4 Am.Dec. 463 (1810)

[62] Oklahoma v. Texas, 258 U.S. 574, 586 (1922) (footnote omitted). This is the same test initially announced in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), for determining the federal courts' admiralty jurisdiction. In the title navigability context, an additional factor is that the factual determination of navigability must be made as of the time of statehood. Utah v. United States, 403 U.S. 9 (1971).

[63] C.E. Corker, Water Rights and Federalism -- the Western Water Rights Settlement Bill of 1957, 45 Cal. L. Rev. 604. 617 (1957).

[64] The Mississippi Supreme Court explained the rule this way:

> Yet so long as by unbroken water course -- when the level of the waters is at mean high water mark - one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust.

VI. The Alaskan Perspective

We have examined how title to submerged lands beneath navigable waters has developed since the formation of the original thirteen colonies and how the courts have since held that, under the "Equal Footing Doctrine," title to the beds of navigable waters passed to subsequent states at the time of statehood. In 1953, Congress passed the Submerged Lands Act, which in effect codified the "Equal Footing Doctrine" as applied to lands underlying navigable waters as well as tidelands.[65] By Section 6(m) of the Alaska Statehood Act of 1958, Congress expressly applied the Submerged Lands Act to Alaska.[66] Thus, on January 3, 1959, title to the beds of navigable rivers, streams, and lakes passed to the new state of Alaska (the State).

As a general rule, title to the beds of navigable waters passed to the state at statehood and these lands are not available for conveyance to Native corporations, the State, or Native individuals. The principal statutory law addressing navigable waters and land conveyances in Alaska is Section 901 of the Alaska National Interest Lands Conservation Act (as amended).[67]

The Bureau of Land Management's Navigability Section is responsible for the issuance of legally defensible administrative navigability determinations for water bodies on BLM-administered lands. To put it somewhat differently, the section identifies those cases where title to the submerged lands are believed to have passed to the State of Alaska at the time of statehood. At the present time, BLM-Alaska generally limits these determinations to unreserved lands selected under the Statehood Act,[68] Alaska Native Claims Settlement Act,[69] and Native Allotment Act.

In the late 1950s and early 1960s, the new State of Alaska aggressively asserted claims to the

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Cinque Bambini Partnership v. State, 491 So.2d 508, 515(Mississippi 1986), aff'd sub nom. Phillips Petroleum Corp. v. Mississippi, 484 U.S. 469 (1988).

[65] Section 3(a) of the Submerged Lands Act provides that it is "in the public interest that title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States..... " Under Section 3(b) the United States "releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources."

[66] Section 6(m) of the Alaska Statehood Act applies the Submerged Lands Act of 1953 to Alaska; the section also states that Alaska "shall have the same rights as do existing States thereunder."

[67] Pub. L. 96-487 and Pub. L. 100-395.

[68] "The Act of July 7, 1958 (72 Stat. 339-343) . . . grants to the State of Alaska the right to select . . . not to exceed 102,550,000 acres from the public lands in Alaska which are vacant, unappropriated and unreserved at the time of selection." 43 CFR 2627.3.

[69] "In carrying out its responsibilities under the Alaskan Native Claims Settlement Act (Pub. L. 92-203; 85 Stat. 688; 43 U.S.C. 1601 et seq.) the Bureau of Land Management must determine whether lands within native selections are considered to be federally owned. Such determinations by the Bureau are solely to permit it to perform its administrative functions under the Act." Hugh C. Garner to Director, Bureau of Land Management, March 16, 1976.

title of lands underlying navigable waters as the Federal government undertook to offer numerous oil and gas lease sales. In 1960, the Department requested the Solicitor's opinion on the subject of navigable waters in the new state. Evidently, some in the Department had doubts as to its authority to make administrative navigability determinations. Reminding the Secretary that title to the beds of navigable waters vested in the State, the Solicitor replied: "I am informed that many oil and gas lease offers are currently being received which embrace or include the beds of bodies of water, principally lakes, which raises the question of ownership as between the State and the United States. There seems to be an impression that this question can only be decided in a judicial proceeding, that it differs, so far as the jurisdiction of the Department is concerned from other questions of title to, and the right to dispose of, public lands. This, I think is not so. In fact it has been the consistent policy of the Department to issue mineral leases for the beds of waters solely upon its own determination of their navigability." He went on to observe that the fact that these determinations were not frequently made in the older states, probably accounted "for the confused thinking on the subject."[70]

During the 1960s, the Department and the State attempted to resolve the navigability issue with respect to oil and gas lease sales and State land selections.[71] This included, in 1965, the introduction of a bill in Congress creating a Navigable Waters Commission. The commission's purpose was to make administrative determinations of navigability for State selections. Both the State and the Department supported passage of the bill.[72] However, Congress failed to act on the bill before the Alaska Native land claims and the development of the Prudhoe Bay oil field demanded its attention.

VII. Navigable Waters and ANCSA

The passage of the Alaska Native Claims Settlement Act in 1971 focused attention on the issue of navigability as never before. Given the large acreage entitlements granted to the Native corporations, and the large number of potentially navigable waters in Native-selected areas, the Department and the State recognized that it was impossible for the courts to decide the navigability of these water bodies if land title was to be conveyed expeditiously. Nor was it necessary to do so in every case. Many rivers, streams, and lakes were clearly used for travel, trade, and commerce. Reasonable people would not dispute this fact. On the other hand, the Department was not prepared to accept the State's definition of navigable waters, which included braided glacial rivers, small lakes suitable for floatplane landings, streams used in winter travel, and so forth. In April 1973, the State presented the BLM with some 275 "water

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[70] C.R. Bradshaw to Director, Bureau of Land Management (M-36596), March 15, 1960. After reading the solicitor's opinion, a state's attorney wrote: "Determination of fact in issues concerning public lands are clearly in the Department of the Interior in the first instance, and the courts ordinarily will not overturn them except on a showing of abusive discretion. The Department of the Interior does not have the final say as to what lands are within its jurisdiction anymore than the Division of Lands has similar authority. Obviously any administrative agency may make any decision on any matter so long as it is not questioned in the courts." Joseph Rudd to Phil R. Holdsworth, December 23, 1960.

[71] On July 3, 1958, the President signed Public Law 85-505, "An Act to provide for the leasing of oil and gas deposits in lands beneath nontidal navigable waters in the Territory of Alaska, and for other purposes." The BLM experienced much confusion in attempting to implement this law in the new state.

[72] "Creating Navigable Waters Commission" (89th Cong., 1st sess., S. Rept. No. 529, Calendar No. 512), August 2, 1965.

delineation maps" or protraction diagrams showing purportedly navigable waters in ANCSA selection areas.[73] In February 1974, the BLM rejected the State's assertions of navigability for many water bodies. Instead, the agency identified forty-six rivers and lakes which it considered navigable.[74] According to an attorney for the State the BLM's "list stands in clear conflict to the state position and sets the mood."[75]

By December 1974, the Department had decided that administrative navigability determinations were a necessary step in the implementation of ANCSA. Assistant Secretary Royston C. Hughes testified in Congress: "The legal concept of navigability of any water body cannot be a universal formula, but always depends upon the facts in a particular case. Determination of navigability is handled on a case by case basis. Since the Department is charged with the administration of the public lands, the Secretary has the responsibility to determine what is public land. In decisions concerning the navigability of water, and which lands below waters are public lands, the Department works closely with the States, but the final determination rests with the Secretary. If there is disagreement, the matter can always be taken to the courts."[76]

The BLM was assigned the task of making administrative navigability determinations for the purpose of maintaining control over acreage charges against the State's and Native corporations' entitlements. In 1973, the Department issued regulations for the implementation of ANCSA. These provided, among other things, that "[s]urveys shall take into account the navigability or nonnavigability of bodies of water. The beds of bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act."[77] In 1976, the Solicitor advised BLM

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[73] Charles F. Herbert to Curtis V. McVee, April 16, 1973. Herbert was then commissioner of the state department of natural resources. McVee was BLM's state director in Alaska.

[74] George C. Turcott to State Director, Alaska, February 6, 1974; and Curtis V. McVee to Joe Upicksoun, May 13, 1974. Turcott was the director of BLM. Upicksoun was president of the Arctic Slope Regional Corporation.

[75] Robert M. Johnson to Norman C. Gorsuch, October 21, 1974.

[76] Excerpt from statement of Royston C. Hughes, Assistant Secretary, Department of the Interior, to the Interior and Insular Affairs Committee, December 10, 1974.

[77] 43 CFR 2650.5-1. "Surveys shall take into account the navigability or nonnavigability of bodies of water. The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act. Prior to making his determination as to the navigability of a body of water, the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made. The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the act. The beds of all nonnavigable bodies of water comprising one half or more of a section shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlement under the act, unless the section containing the body of water is expressly selected or unless all the riparian land surrounding the body of water is selected. No ground survey or monumentation will be required to be done by the Bureau of Land Management of bodies of water." 43 CFR 2650.0-5(g) defined "public lands" as all Federal lands and interests in lands located in Alaska (including the beds of all non-navigable bodies of water). . . .

that the agency "will be required to make these determinations on all lands within the native selections" so that it may perform its administrative functions under ANCSA. The Solicitor summarized the law of title navigability and recommended a list of facts that the agency should collect.[78] In addition, the BLM was allotted nearly $1 million with which to compile a database of facts relating to Alaska water bodies. The database would enable BLM to make reliable administrative navigability determinations.

In 1977, the BLM began to systematically identify navigable waters on lands selected under ANCSA and the Alaska Statehood Act. The State Office reviewed lands selected under ANCSA; the district offices reviewed lands selected under the Statehood Act. (Selections made under the Native Allotment Act were not addressed until 1987.) Navigability determinations were made for all rivers, streams, and lakes, regardless of size and the status of submerged lands at the time of statehood.[79]

VIII. Legal Test Cases and Navigability Determination Criteria

The BLM's navigability determinations are based upon criteria derived from U.S. Supreme Court cases, which were analyzed in the Solicitor's memorandum of 1976.[80] The State of Alaska strenuously objected to BLM's decisions that found large rivers and lakes non-navigable, arguing that they failed to take Alaska's uniqueness into account. Yet, other than in cases involving the Niukluk River and Tustumena Lake,[81] the courts had not provided much guidance in applying title navigability law in Alaska. Many points in the State's definition of navigable waters clearly needed to be tested in the courts.

In the late 1970s and early 1980s, the period in which the BLM succeeded in satisfying nearly 80 percent of the acreage entitlements granted under the Statehood Act and ANCSA, the State and certain Native corporations challenged numerous navigability determinations before administrative boards or the Federal court. The outcome of three cases significantly affected BLM's navigability determination criteria. In 1979, the Alaska Native Claims Appeal Board provided an Alaskan context to title navigability law when it found the Nation and Kandik rivers navigable. The Regional Solicitor advised that, while a variety of other facts must also be analyzed, the BLM should consider, on the basis of ANCAB's decision, "flat bottomed boats capable of carrying 1,000 lbs. of freight" as "the lower limit of commercial river crafts." The use of such craft, which included poling boats, tunnel boats, and outboard river boats, was evidence to support a susceptibility determination of navigability.[82] (Analyzing the historic record, the BLM discovered that the smallest outboard river boat in Alaska at the time of statehood was commonly eighteen feet long and constructed of wood. Nearly all had motors

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[78] Hugh C. Garner to Director, Bureau of Land Management, March 16, 1976.

[79] See page 26 for a discussion of navigability determinations for water bodies on reserved lands.

[80] Hugh C. Garner to Director, Bureau of Land Management, March 16, 1976.

[81] United States of America v. Joseph E. Lucas, et al. (District Court, Alaska Civil No. 3473) (1941); United States of America v. State of Alaska, March 20, 1979. 423 F.2d 764 (1970).

[82] Appeal of Doyon, Ltd., ANCAB RLS 76-2; John M. Allen to State Director, Bureau of Land Management, February 25, 1980.

equipped with propellers.) As a result of the ANCAB decision, the number of water bodies found navigable by BLM increased significantly.

The Gulkana River case[83] was initiated by the State of Alaska in 1980. The impetus for the suit was a decision by the BLM to issue interim conveyance to the lower thirty miles of the riverbed to Ahtna, Inc., a Native corporation. In 1987, the District Court found the river susceptible to navigation and ruled for the first time that rivers and streams used or susceptible to use for commercial recreation meet the Federal test of navigability. Unfortunately, in making this finding the court relied upon a misinterpretation of title navigability law, that is, that evidence of travel alone is sufficient to find a river or stream navigable[84]. However, for a short period of time immediately following this ruling the Bureau employed the "Gulkana" standard in making administrative navigability determinations. This interim standard was short lived and considered river travel alone as the basis for an affirmative navigability determination.

In 1989, the Ninth Circuit Court corrected the lower court's mistake.[85] It also found the river navigable, but held that the amount of guided fishing and sightseeing occurring on the river was commercial in nature and that power boats at the time of statehood with a load capacity of 1,000 pounds "could have at least supported" such commercial activity that now occurs on the river. The court clearly considered the use of inflatable rafts, freight canoes, air boats, jet boats, and river boats with motors equipped with jet units, as appropriate evidence to support susceptibility determinations of navigability. The Bureau had modified the criteria for administrative navigability determinations accordingly. Furthermore, the Bureau's posture is that the Gulkana decision applies only to the Gulkana River.

What the Gulkana River case did for Alaska's rivers and streams, the Slopbucket Lake case did for lakes. The State of Alaska had argued for many years that lakes used or suitable for use by floatplanes should be considered navigable. The widespread use of floatplanes in various commercial ventures is well known. However, the court deemed floatplane use as virtually irrelevant in navigability determinations for title purposes (as opposed to admiralty purposes).[86] In 1985, the Ninth Circuit Court upheld the lower court's finding that "use of Slopbucket Lake by floatplanes and related incidental water craft is insufficient as a matter of law to render the lake navigable for purposes of title."[87]

IX. DOI's Submerged Land Policy

By the time the courts had decided the Gulkana River case, the Department, the State, and

[83] State of Alaska v. United States of America, 622 F.Supp. 455 (1987), No. A80-359 Civil (Gulkana River)

[84] The Daniel Ball v. U.S., 77 U.S. (10 Wall.) 557 (1870) "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. They are navigable when they are used, or susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

[85] State of Alaska v. Ahtna, Inc. and United States of America, 891 F.2d 1401 (1989), No. 87-3555

[86] State of Alaska v. United States of America, A81-265 Civil, May 12, 1983

[87] State of Alaska v. United States of America, 754 F.2d 851, February 28, 1985.(Slop Bucket lake)

Native corporations had found a political solution to the navigability issue as it related to land conveyances under ANCSA and the Statehood Act. This was Section 901 of ANILCA. Enacted in 1980, ANILCA established a statute of limitations with respect to navigability lawsuits; provided that only the BLM had authority in the Department to make navigability determinations in connection with ANCSA conveyances; and set up an elaborate and cumbersome system by which Native corporations could reconvey title to submerged lands to the State and have the acreage deducted from charges against their entitlements. However, almost immediately after passage of ANILCA, the State announced that it found the statute of limitations obnoxious and would seek to have that part of Section 901 amended.

In late 1983, the Department, the State, and Native leaders reached another agreement, one intended to lessen the impact of the navigability issue on the land conveyance process. Under the new agreement, effective December 5, 1983, the BLM would meander water bodies in accordance with Sections 3-115 to 3-123 of the Manual of Instructions for the Survey of the Public Lands of the United States (1973 edition).[88] The submerged land acreage of meanderable water bodies would no longer be charged against the entitlements of the Native corporations and the State.[89] In practical terms, this meant that, besides navigable waters, the beds of nonnavigable rivers and streams three chains wide or more and nonnavigable lakes fifty acres or more in size would be excluded from conveyances to the Native corporations and the State.[90]

In the spring of 1984, the Department and the State concluded a formal agreement on implementation of the policy with respect to land conveyances to the State.[91] The MOA describes BLM's responsibilities with respect to the survey of "meanderable waters."

1. For plats of survey approved after December 5, 1983, segregate meanderable waters from the public lands.[92]

2. For approved plats of survey, on which patent had not issued before December 5,

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[88] In the survey of the public lands, government surveyors meandered all water bodies that met a certain size, regardless of navigability, as well as all navigable water bodies. The purpose of meander lines is to define the sinuosities of the banks of a river, stream, or lake and to ascertain the quantity of uplands after segregating the water area. The government then issued patents to the uplands. Smaller, nonnavigable water bodies were not meandered.

[89] "Interim Waiver of Regulations and Establishment of Policy," 48 Federal Register, 54483, December 5, 1983. According to the policy, BLM would not readjust acreage charges against corporations' entitlements in the case of patents. Furthermore, BLM would not make any "adjustments, additions, or deletions of water bodies" for the "expressed purpose of submerged lands chargeability" in those cases where the survey plats were approved.

[90] If the water body was navigable, the state would own the submerged lands. If non-navigable, the Native corporations would own the submerged lands through operation of riparian law.

[91] The agreement was incorporated into Public Law 100-395.

[92] Section 3 of the MOA states in part: "For any plat of survey approved after December 5, 1983, water bodies shall be meandered and segregated from the survey, in accordance with the principles contained in the Manual, as modified by this agreement, as the basis for determining acreage chargeability." Pub. L. 100-395.

1983, and meanderable waters were not segregated from the survey, calculate and deduct the acreage of meanderable waters shown on the plat from charges against the State's entitlement. [In other words, redetermine the navigability of water bodies shown only on these plats.] "Except in cases of gross error, no adjustments, additions, or deletions of water bodies shall be made on the plat for the express purpose of recalculating the acreage to be charged against the State's land entitlement."[93]

3. For approved plats of survey, on which patent had issued before December 5, 1983, and where the acreage of meanderable waters was charged against the State's entitlement, the BLM may at State's expense calculate and deduct the acreage of meanderable waters from charges against the State's entitlements. [The Navigability Section has, in fact, determined the navigability of such water bodies on State-patented land. The State reimbursed BLM for the cost of these determinations.][94]

A year later, the Department adopted regulations implementing the new policy in ANCSA land conveyances.[95] The pertinent regulations provide the following:

1. For any plat of survey approved before or on December 5, 1983, where meanderable waters were not segregated, deduct the acreage of meanderable waters from charges against the corporations' entitlements.[96]

2. For any plat of survey approved after December 5, 1983, segregate the beds of meanderable waters from uplands.[97]

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[93] Section 2(a) of the MOA states in part: "For any approved plat of survey on which patent was not issued prior to December 5, 1983, and meanderable water bodies were not segregated from the survey, the acreage of meanderable water bodies appearing on the plat shall be calculated by the Secretary, at no cost to the State, and shall not be charged against the State's land entitlement. Except in the case of gross error, as identified or concurred in by the Secretary, no adjustments, additions, or deletions of water bodies shall be made on the plat for the express purpose of recalculating the acreage to be charged against the State's land entitlement." Pub. L. 100-395.

[94] Section 1 of the MOA states in part: "For any approved plat of survey on which patent was issued to the State prior to December 5, 1983, and meanderable water bodies were not segregated but were included in the calculation of acreage to be charged against the State's land entitlement, the chargeable acreage may be recalculated, at the State's expense, to conform to the principles contained in the Manual, as modified by this agreement. Pursuant to such principles, the acreage of meanderable water bodies shall not be included in the acreage charged against the State's land entitlement. Acreage recalculations under this paragraph shall be based upon the meanders shown on the approved plat of survey, except that in the case of identified gross error or approved protracted plats, acreage recalculations may be based upon enlarged township diagrams showing the meanders prepared using the most recent rectified photography, U.S.G.S. mapping, or any other method mutually agreed upon by the parties." Pub. L. 100-395.

[95] 50 Federal Register 15547, April 19, 1985.

[96] "For any approved plat of survey where meanderable water bodies were not segregated from the survey but were included in the calculation of acreage to be charged against the Native corporation's land entitlement, the chargeable acreage shall, at no cost to the Native corporation, be recalculated to conform to the principles contained in the Bureau of Land Management's *Manual of Surveying Instructions*, 1973, except as modified by this part. Pursuant to such principles, the acreage shall not be included in the acreage charged against the Native corporation's land entitlement." 43 CFR 2650.5-1 (b) (1).

[97] "For any plat of survey approved after December 5, 1983, water bodies shall be meandered and

In the case of pre-1983 plats, the regulators clearly hoped that no changes to approved plats of survey would be necessary for the purpose of adjusting submerged land acreages. The BLM simply calculated the acreage of meanderable water bodies shown on the plat and reported acreage adjustments in the margin of the plat. However, supplemental plats are now prepared to meander water bodies and segregate the submerged lands.

In 1988, the Department's submerged lands policy was enacted into law as an amendment to Section 901 of ANILCA (Public Law 100-395, August 16, 1988). It is the principal law upon which BLM now relies in making navigability determinations. The law requires BLM, among other things, to meander rivers, streams, and lakes in accordance with the principles of the Manual of Instructions for the Survey of the Public Lands of the United States (1973 edition) whenever surveying lands selected under ANCSA and the Statehood Act.[98] The Manual in turn requires BLM to meander three categories of water bodies:

1. navigable rivers, streams, and lakes,
2. rivers and streams three chains or more in width, and
3. lakes fifty acres or more in size.

Second, the Act provides that the Secretary is not required to determine the navigability of a river or stream that is three chains or more in width or a lake fifty acres or more in size.[99] Third, the law abolished the statute of limitations imposed on quiet title actions involving submerged lands. Fourth, the Act specifically identified the BLM as the sole agency in the executive branch responsible for making administrative navigability determinations for land conveyances under the ANCSA and the Statehood Act.[100] Fifth, the law codified the

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segregated from the survey in accordance with the principles contained in the Bureau of Land Management's *Manual of Surveying Instructions*, 1973, as modified by this part, as the basis for determining acreage chargeability." 43 CFR 2650.5-1(b) (2).

[98] ". . . whenever the Secretary surveys land selected by a Native, a Native Corporation, or the State pursuant to the Alaska Native Claims Settlement Act [43 U.S.C.A. º1601 et seq.], the Alaska Statehood Act, or this Act, lakes, rivers, and streams shall be meandered in accordance with the principles in the Bureau of Land Management, 'Manual of Survey Instructions' (1973)."

"Navigable rivers and bayous, as well as all rivers not navigable, the right-angle width of which is 3 chains and upwards, are meandered on both banks, at the ordinary mean high-water mark, by taking the general courses and distances of their sinuosities. Rivers not classed as navigable are not meandered above the point where the average right-angle width is less than 3 chains, except where duly authorized. Shallow streams and intermittent streams without well defined channel or banks are not meandered, even when more than 3 chains wide." Manual 1973, 3-120. "All lakes of the area of 50 acres and upwards, are meandered." Manual 1973, 3-121.

People frequently mistake a meandered water body as navigable. Historically, this was not the case. The facts relating to the water body as a route of travel, trade, and commerce are most important. In Oklahoma v. Texas the Supreme Court held that a legal inference of navigability cannot result from a meander line. Manual 1973, 7-49.

[99] Section 901(a) (3), Pub. L. 100-395.

[100] "No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of a lake, river, or stream within an area selected by a Native or Native Corporation pursuant to the Alaska Native Claims Settlement Act or this Act unless a

memorandum of agreement between the Department and the State regarding submerged land acreage charges against the State's entitlement. Finally, the law codified a longstanding fundamental principle of riparian law: once the riparian lands are conveyed to a Native, a Native corporation, or the State of Alaska, the United States no longer has any right, title, or interest in the submerged lands.[101]

X. Navigability Redeterminations and Conveyed Lands

The Department's submerged land policy of 1983 required that the submerged land acreage of meanderable rivers, streams, and lake, regardless of ownership questions, would not be charged against the entitlements of the corporations and the State. BLM was still confronted with the problem of determining the navigability status of smaller water bodies, not only in areas selected by the State or corporations, but also those on lands conveyed to these entities. And, in view of the 1987 Gulkana River decision, they were more numerous than believed when the submerged land policy was developed. By law, in the survey of the public lands, the BLM is required to meander navigable water bodies and segregate the uplands from the submerged lands. The corporations and the State could not be charged for the submerged land acreage. From the point of view of equity, it appeared that the Native corporations should not be charged for the acreage of submerged lands that had not been excluded from conveyances in the belief that they were nonnavigable but which, under the Gulkana River standard, clearly were navigable.

In February 1987, on the basis of the District Court's decision in the Gulkana River case, the BLM adopted a more liberal standard in its administrative navigability determinations. The revised standard included the commercial recreation test. The Navigability Section applied this standard not only to Native- and State-selected lands but also to interim-conveyed and tentatively approved lands. In view of the Gulkana River decision, managers realized that some rivers and streams declared nonnavigable at the time of interim conveyance or tentative approval probably were navigable under the Court's standard. The beds of these waters had been erroneously conveyed to Native corporations, and the submerged land acreage charged against the corporations' entitlements. Thus, on the theory that issuance of an interim conveyance or tentative approval did not defeat State's title to the beds of navigable waters, the BLM was prepared to revisit interim conveyed and, in certain situations, tentatively approved lands for the purpose of meandering navigable waters and segregating the submerged lands from conveyed lands.

At the request of the Justice Department and the Regional Solicitor's Office, the BLM reversed the navigability redetermination policy by the end of 1987. Federal attorneys were then

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determination by the Bureau of Land Management that such lake, river, or stream, is or is not navigable, was validly appealed to such agency or board on or before December 2, 1980." Section 901(c) (2), Pub. L. 100-395. The law in effect excludes the Interior Board of Land Appeals from the adjudicative process. Where there is a legal controversy involving an administrative navigability determination made after December 2, 1980, one that requires adjudication by the courts, the disgruntled party must file an action in federal court. This provision of the law effectively shortens the appeal process, thereby making it easier to achieve finality in navigability disputes.

[101] Section 901(b) (1), Pub. L. 100-395.

arguing a case involving submerged lands in the Pt. Lay area.[102] The government attorneys took the position that the United States did not have the authority to redetermine the navigability of water bodies on lands conveyed to the Native corporations. In fact, ANILCA specifically prohibited such changes to property boundaries which were established at the time of interim conveyance.

The District Court agreed. Reviewing ANILCA and the legislative history, the Court held that BLM could not be required, as the State demanded, to redetermine the navigability of water bodies on interim conveyed or patented lands. Intended to avoid administrative delays, Section 901(b) of ANILCA provides that the issuance of an interim conveyance is "the final agency action with respect to a decision by the Secretary of the Interior that the water covering such parcel is not navigable . . . ." Moreover, Section 1410 provides that "the boundaries of the lands as defined and conveyed by the interim conveyance shall not be altered but may then be redescribed, if need be, in reference to the plat of survey."[103] If BLM were to determine a water body on conveyed lands navigable, land would necessarily be deleted from the patent. This would result in a change in boundaries, a clear violation of Section 1410.

The Court's opinion did not close all doors to an administrative solution to the problem of navigable waters on conveyed lands. The Justice Department and the Regional Solicitor's Office advised BLM that it could make navigability redeterminations under the authority of Sec. 316 of FLPMA and 43 CFR 1865.3 applying to correction of conveyance documents. However, all landowners must first agree to the redeterminations.[104] Both the Native corporation holding title to the surface estate and the corporation holding title to the subsurface estate must agree to these determinations. If either corporation declines, a determination cannot be made.[105]

Seven regional corporations and most village corporations in the regions took advantage of the BLM's offer to redetermine the navigability of water bodies on conveyed lands. They are: Bristol Bay Native Corporation, Cook Inlet Region, Inc., Doyon, Ltd., Ahtna, Inc., NANA Corporation, Aleut Corporation, and Chugach Native Corporation. The Calista Corporation specifically requested that redeterminations not be made for any lands interim conveyed to it. The Bering Straits Regional Corporation failed to submit a timely request for a redetermination. So BLM did not redetermine the navigability of water bodies in that region. The remaining corporations (ASRC and Sealaska) were not consulted. Lands in their regions were reserved at the time of statehood, thus navigability is not an issue.

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[102] Public Law 100-395. See also the Court's order of February 24, 1988, in State of Alaska v. United States of America and Arctic Slope Regional Corporation, A87-450 Civil (Point Lay).

[103] Section 1410, Public Law 96-487 (ANILCA).

[104] The regulation states, "The authorized officer may initiate and make corrections in patents or other documents of conveyance on his/her own motion, if all existing owners agree." See also Robert W. Arndorfer memo, c. November 1987; Harold E. Wolverton to Chief, Navigability Section, January 27, 1988.

[105] IM AK 88-268, August 29, 1988.

XI. Alaska Native Claims Settlement Act Selections (ANCSA)

Before the adoption of the Patent Plan Process, the Navigability Section issued administrative navigability determinations at the time of DIC (decision to issue interim conveyance) or IC (interim conveyance). Navigable waters were not only identified in the SD Memo (State Director's memo on easements and navigable waters) but also in the DIC and IC. Where the hydrography was too complex to describe in a narrative form, navigability maps or "water plates" (reproductions of USGS ITMs with navigable waters shaded) were incorporated in the DIC or IC.

In 1987, BLM-Alaska adopted the present method of identifying navigable waters at the time of survey and excluding navigable waters from DICs and ICs in general terms.[106] Thus, the Navigability Section identifies navigable waters on all unreserved lands selected under ANCSA and navigable waters excluded from interim conveyances. Navigable waters in a survey window are described on a township-by-township basis or delineated on copies of USGS ITMs. The township list and maps are sent to Cadastral Survey for inclusion in special instructions for surveys.

In two respects, the Navigability Section's (the Section) reports may be incomplete. First, the reports usually do not address all Section 14(h) (1) selections. As a policy matter, we examine water bodies in such selections only if BIA has approved the application as eligible. Otherwise, we do not determine the navigability of water bodies in these selections. The effect of this policy is to eliminate unnecessary research of water bodies in selections that are not approved. If such a selection is approved after completion of the navigability report, the Division of Conveyance Management must request the Section to review the selected lands for navigable waters prior to survey.

Second, the reports usually do not identify navigable rivers and streams three chains or more in width or lakes fifty acres or more in size. In or about 1983, the Section stopped issuance of determinations for these larger water bodies. This step was taken in order to reduce a heavy workload and in the belief that an administrative navigability determination had no practical effect. Regardless of the determination, the water body will be meandered and segregated from the uplands.

As a point of interest, it should be noted that, for a short time in 1993, the section departed from this practice. There were good reasons. First, the Section intended to make its reports a complete record of navigability determinations inasmuch as BLM officials, attorneys, corporation officers, State officials, and many others frequently call the section for information about these water bodies. To obtain the information requires researching numerous scattered reports. Second, the Branch of Mapping Sciences employs different meandering criteria for navigable and non-navigable waters. If photo interpreters are unaware that a stream is navigable, they may very well overlook a slough that should have been meandered. Third, the Section frequently determines third- or fourth-order tributaries navigable in these reports. It is absurd to ignore the fact that the trunk, first-order and second-order tributaries must be navigable, too. Finally, the BLM incurs little cost in documenting the navigability of these water bodies. In any case, the vast majority of the rivers and streams of meanderable size were

[106] Robert W. Arndorfer to Branch Chiefs (960), November 20, 1987.

determined navigable at the time of interim conveyance.

It is well to remember too that, if the landowners so request, the BLM may be required to determine the navigability of water bodies not only on interim-conveyed lands but also on lands patented under ANCSA. Under the terms of ANCSA, the corporations are entitled to a specified amount of acreage. If a corporation believes that the bed of a navigable water body was charged against its acreage entitlement, it may demand a navigability redetermination. The Secretary has discretionary authority to approve the request. If the water body is found navigable, the BLM would deduct the submerged land acreage from charges against the corporation's acreage entitlement account.

XII. Alaska Statehood Act Selections

The Act of August 16, 1988 and the MOA of 1984 are the primary, but not the sole, guidance for navigability determinations for water bodies within State selections. The Navigability Section is required to identify navigable waters excluded from tentative approvals as well as navigable waters within State selections. In addition, the Section is required to identify navigable waters on tentatively approved lands if those waters are shown (but not segregated) on plats approved before December 5, 1983. If they are not shown on the survey plats, the Section is not required to redetermine their navigability.[107] Finally, the Section is not required to identify navigable waters on State-patented lands.

XIII. Native Allotment Act Selections

The history of public land law and survey practices shows that navigable waters were meandered and, in the instance of a conveyance, segregated from the uplands. With few exceptions, title to lands underlying navigable waters was not intentionally conveyed to riparian owners. The Manual of Surveying Instructions (1973), based upon a long history of survey practices, provides that navigable waters will be meandered. In public land disposals throughout the American West, navigable waters were meandered and the submerged lands segregated from the public lands.

In December 1988, the Division of Conveyance Management requested adjudicators to ensure that the beds of navigable waters are not conveyed to Native allottees. They were to obtain a navigability determination for water bodies on lands claimed under the Native Allotment Act. Obviously, navigability determinations are not required for allotments simply fronting on rivers, streams, and lakes. Nor are they required for rivers, streams, and lakes of meanderable size.[108]

Navigability determinations are also needed for allotments that are reinstated and allotments

[107] The BLM has held the position that it would make acreage adjustments in the confirming patent in those cases where the beds of navigable waters had not been excluded from conveyances (TA) to the state. These acreage adjustments necessitated an administrative navigability determination. Dennis J. Hopewell to M. Francis Neville, August 5, 1982. In accordance with the MOA of 1984, the adjustments can only be made in those cases where the water body is shown on the plat approved before December 5, 1983.

[108] Arvilla McAllister to Branch Chiefs (960), September 1, 1988; BLM-AK IM No. AK 89-72, December 6, 1988.

that fall upon interim conveyed or tentatively approved lands. In these cases, the Division of Conveyance Management must request the Navigability Section to review the selected lands for navigable waters. This must be done prior to survey of the allotment.

XIV. Submerged Lands Reserved or Withdrawn at the Time of Alaska Statehood

The BLM is not required to determine the navigability of water bodies on lands in certain reserves or withdrawals extant at statehood.[109] Section 5 of the Submerged Land Act provides for exceptions from operation of the law. Section 5(a) includes "all lands expressly retained by or ceded to the United States when the State entered the Union." Section 5(b) specifically identifies "lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians."[110]

Ironically, during the early 1980s, the BLM was required to make navigability determinations for water bodies in reserves and withdrawals. In 1979, the Alaska Native Claims Appeal Board ruled in a case involving the Colville River that, regardless of the legal status of submerged lands on the North Slope, the BLM is required by regulation to exclude the federally-owned beds of factually navigable water bodies from the acreage charged against Native corporations' entitlements.[111] On the basis of this ruling, the BLM investigated the navigability of water bodies in ANCSA selections on the North Slope and in the national forests solely for the purpose of acreage chargeability. The same policy applied to Statehood Act conveyances as a matter of equity.

With the adoption of the Department's submerged land policy in 1983 and the suspension of the regulations in 43 CFR 1650.5-1, BLM no longer had a need to make these determinations and immediately stopped issuing them. Five years later, Congress enacted an amendment to ANILCA, providing among other things that rivers, streams and lakes less than the meanderable size in such areas are not to be meandered and that the United States no longer has any right, title or interest in the submerged lands once title to the riparian lands is conveyed.[112] As a result, BLM is no longer required to determine the navigability of water bodies in reserves and withdrawals extant at statehood. Administrative navigability determinations issued between 1979 and 1983 for reserved or withdrawn lands are in effect null and void.

Not all reserves and withdrawals existing at statehood included the beds of navigable waters. Whether or not a reserve or withdrawal defeated the State's title to lands underlying navigable waters depends upon the specific order or legislation creating the reserve or withdrawal. The language, legislative or executive history, and other facts must be seriously considered. Clearly, the mere existence of a reserve or a withdrawal does not automatically lead to the conclusion that the submerged lands were included in the reserve or withdrawal. [This issue was discussed previously on pages 10 - 12.]

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[109] Hugh C. Garner to Director, Bureau of Land Management, March 16, 1976.

[110] Public Law 31-65, May 22, 1953.

[111] ANCAB #VLS 78-32 (Kuugpik Corporation), July 31, 1979.

[112] Section 901(b) (1), Pub. L. 100-395.

The Department and the BLM have considered the question of submerged land ownership in specific reserves and withdrawals as the need arose. The Department's position has been that title to the beds of navigable waters in power site classifications,[113] power site reserves,[114] and federal town sites,[115] passed to the State upon achieving statehood. On the other hand, the Department's position with regard to title to beds of navigable waters in the Denali and Glacier Bay National Parks, the national forests,[116] certain wildlife refuges,[117] and Native reserves,[118] and on lands withdrawn by Public Land Order 82 (North Slope), was that title did not pass at statehood. The BLM has also maintained that title to the beds of navigable waters in military reserves, military reservations, and Indian Reorganization Act reserves,[119] did not vest in the State.

The State has challenged the Department's position on navigable waters within reserves and withdrawals on multiple fronts. In June of 1988, in a case involving the Katalla River, the Interior Board of Appeals ruled that the Chugach National Forest did not include the beds of navigable waters. Title to the beds of these waters passed to the State at statehood.[120] IBLA cited among others, Montana[121] and Utah.[122]

More recently, the State of Alaska brought action against the Federal Government to quiet title regarding title to lands under navigable waters located on the North Slope.[123] The United States District Court for the District of Alaska granted a partial summary judgment for State. The Federal Government appealed from the judgment of the District Court and their judgment reversed the lower court and remanded because the Federal Government expressly reserved title to the lands under the State's navigable waters located within PLO 82 at statehood.[124] The general result of this action is that the State's entitlement under the Equal Footing Doctrine was defeated and that there are no State owned beds under navigable waters on the North Slope

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[113] 90 IBLA 135 (Susitna River), November 24, 1987.

[114] Tazimina River.

[115] Catherine Bayer, interview with Neil Bassett, December 23, 1985.

[116] Robert W. Arndorfer to Chief, Branches of ANCSA Adjudication, Conveyance Services, Easement Identification, and State Adjudication, July 3, 1985.

[117] For example, the Kodiak National Wildlife Refuge.

[118] E.g., Elim, Tetlin, Karluk, St. Lawrence Island, and Venetie reserves.

[119] E.g., Kobuk.

[120] 102 IBLA 35, 1988 (Katalla River)

[121] Supra, note 45.

[122] Supra, note 50.

[123] Public Land Order 82, 8 Fed. Reg. 1599 (Feb 4, 1943) ("PLO 82").

[124] Alaska v. United States, 213 F.3d 1092 (2002) (Kukpowruk River)

of Alaska. This decision was a precursor to the Supreme Court's ruling in the "Dinkum Sands" case.[125] Inland tidal waters within PLO 82 were also excluded from the Statehood grant to Alaska as a result of prior withdrawal.[126] The Department of the Interior is still bound by law[127] to apply the ***Manual*** criteria for meandering water bodies to segregate chargeable acreage but is not required to make administrative navigability determinations on streams and rivers greater than 3 chains in width or lakes greater than 50 acres in surface area.

The most recent Alaska case was heard in the U.S. Supreme Court. [128]

> "Here, Alaska and the United States dispute title to two areas of submerged lands. The first consists of pockets and enclaves of submerged lands underlying waters in the Alexander Archipelago that are more than three nautical miles from the coast of the mainland or any individual island. Alaska can claim these pockets and enclaves only if the archipelago waters themselves qualify as inland waters. The second area consists of submerged lands beneath the inland waters of Glacier Bay. To claim them, the United States must rebut Alaska's presumption of title."
>
> "The Special Master in this case recommended that summary judgment be granted to the United States with respect to both areas, concluding that the Alexander Archipelago waters do not qualify as inland waters either under a historic inland waters theory or under a juridical bay theory, and concluding that the United States had rebutted the presumption that title to the disputed submerged lands beneath Glacier Bay passed to Alaska at statehood."

Alaska filed exception to both findings and the Supreme Court overruled both exceptions. This case is instructive regarding inland waters and juridical bay theory as well as the requirements necessary to defeat a future State's title to submerged lands.

XV. Recordable Disclaimers of Interest

The outcome of the Kandik and Nations River case had a secondary impact on BLM administrative navigability determinations and the ability of the State to pursue quiet title actions to the beds of potentially navigable waters. As to the Black River**,** the matter was remanded to the District Court with instructions to dismiss for lack of jurisdiction. In the appeal before the Ninth Circuit Court, Circuit Judge Kleinfeld opined:

> Our recent decision in *Leisnoi* [129] seems to us to be an insuperable barrier to jurisdiction regarding the Black River. *Leisnoi* holds that because subsection (a) of the Quiet Title Act requires that title be "disputed," there must be a dispute between the United States and the plaintiff in the Quiet Title Act suit. There has never been a dispute between the

[125] United States v. Alaska, 521 U.S. 1, 138 L. Ed. 2d 231, 117 S. Ct. 1888 (1997) ("Original 84").

[126] Id.

[127] Submerged Lands Act of 1988, PL 100-395 (102 Stat. 979) (1988)

[128] State of Alaska v. United States, 545 U.S. ___ (2005), No. 128 Original, June 6, 2005

[129] Leisnoi, Inc. v. United States, 170 F.3d 1188 (1999).

> United States and the State of Alaska over the Black River. The United States reserves the right to start a dispute, and has not disclaimed any interest. There may well be a dispute at some time, considering that the federal position on the Black simply followed the administrative determination on the Kandik and Nation, and it has taken conflicting positions on those rivers. But whatever dispute there may be, it has not yet occurred.
>
> This is not to say that the State of Alaska ought not to be able to sue to quiet title in the Black River. Arguably it should. Forty years after statehood, it ought to be able to manage its property knowing what is its property. And the litigation, if there is to be litigation, ought to take place while witnesses with personal knowledge are still alive to testify. The district court's concerns about the federal "dog in the manger" posture are well taken. But the statutory language as construed in *Leisnoi* nevertheless leaves the district court without jurisdiction to quiet title in the Black River. A title cannot be said to be "disputed" by the United States if it has never disputed it. The statute as it stands does not enable us to repair this practical problem. We are compelled to reverse the district court's judgment insofar as it spoke to the Black River, and remand the case so that the claim can be dismissed for lack of jurisdiction as to the Black River.

The direct result is that the State is left without the means to file quiet title actions through the courts for a large number of potentially navigable waters in federally managed areas. The next logical step is for the State to pursue an administrative remedy directly from the BLM. This has led to an increase of State applications for recordable disclaimers of interest to submerged lands beneath selected water bodies. This in turn has led to the formation and staffing of a Recordable Disclaimer of Interest team (RDI) within the BLM Division of Lands, Minerals and Resources.

The RDI team, in consultation with other Federal upland owners and DOI attorneys, reviews the State's evidence of navigability. After consultation and review, the BLM RDI team decides whether or not a water body meets the federal test of title navigability. A decision affirming title navigability results in issuance of a recordable disclaimer of interest. BLM is exercising their authority under Section 315 of the Federal Land Policy and Management Act[130] and guidelines set forth by the corresponding regulations[131] and policy[132] to process these claims. BLM Alaska is the only bureau office currently applying the RDI process on a systematic basis to navigable water bodies within a state and issued its first RDI document on October 24, 2003.

XVI. Conclusion

From the first days of European exploration and settlement of the Atlantic Coast of North America to modern day courts of law and governmental agency involvement, navigability and ownership of submerged lands has played a major role in settlement, governance and management of land. Trade, travel and commerce are all affected by title and jurisdictional

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[130] PL 94-579 (94 Stat. 2743), October 21, 1976

[131] 43 CFR 1864 (January 6, 2003)

[132] Instruction Memorandum No. AK 2004-042, Aug. 20, 2004

issues. Navigable waters issues continue to be of major importance to land managing agencies statewide and on a national level. It certainly is true that title navigability cases begin and end with questions of title to land. The decisions regarding title to the beds of navigable water bodies go well beyond their banks, and have been inextricably woven into the very fabric of our federal system. [133]

[133] Two additional cases were cited during the February 17, 2006 presentation. They are:
U.S v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899)
A river may not be navigable for its entire length
U.S. v. Utah, 283 U.S. 64 (1931)
A river may have non-navigable reaches