

MEMORANDUM

State of Alaska

DEPARTMENT OF FISH & GAME

TO: Frank Rue
Commissioner
Department of Fish and Game

DATE: September 14, 1995

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SUBJECT: Briefing on Navigability
and Related Issues

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*Review of attachment
per attached distribution.*

You recently received a memo from Commissioner Shively announcing that the Alaska Department of Natural Resources (DNR) is suspending all work on navigability and that DNR is placing "responsibility" for determination of submerged ownership with the appropriate state official having jurisdiction over a pending action where state approval or a permit is dependant upon state ownership (Attachment 1). Responsibility for defending state ownership of tide and submerged lands and presumably the public's right to navigate state waters would be assigned through an amendment to Department Order 125 (Attachment 2). This amendment has not been distributed and may not be prepared. The memo states that DNR will make their expertise on navigability standards available where ownership of submerged lands involves very important public policy and the issues in dispute have regional or statewide

implications. DNR has not provided examples of threshold projects which would re-involve DNR in the navigability issue. Department staff have contacted DNR but have not been able to find out more about DNR's decision to re-assign navigability and how this would work.

Department staff who work on navigation, public access, instream flow, and state and federal issues, are concerned that DNR's action may jeopardize not only the public's right to use navigable waters, but many other things as well. These concerns include:

1. Delegation of responsibility by permits - Under DNR's proposal, the responsibility for asserting state ownership and navigability would be assigned to the agency who issues a permit for that activity. For example, the Alaska Department of Transportation and Public Facilities (DOT&PF) might exert state ownership when DOT&PF wants to build a state road across a navigable stream. The Alaska Department of Fish and Game (ADF&G) is interested in maintaining public access to and use of navigable waters by watercraft and aircraft for hunting, fishing, and access to hunting and fishing areas. These activities do not require any type of permit from a state agency. ADF&G permits only apply to fish habitat and special areas. DNR's memo does not indicate that any responsibility for determining navigability would be assigned to ADF&G. Under the permit concept, no state agency would have the responsibility for asserting navigability for access to or use of fish and wildlife. It is not clear how permitting relates to navigability or state ownership, or how the public's broad interest in navigability as it applies to access for hunting, fishing, subsistence, or other recreational activities will receive much consideration under this system. Failure to assert navigability for fish and wildlife access and harvest may result in the loss of access to and ownership of literally hundreds of miles of streams and lakes. Habitat protection and management of water allocation for fish and wildlife resources and recreational needs may also be jeopardized. Whatever process the state adopts for asserting navigability has to be comprehensive and protect all navigability interests.
2. Dispersal of responsibility - The delegation of DNR's responsibility to other agencies with no staff, no experience, little interest, and no established process makes it unlikely that navigability will be asserted consistently, if it is asserted at all. DOT&PF, DNR/Division of Mining, DNR/Division of Oil and Gas, etc., may assert ownership where there is mineral potential, oil and gas potential or where state highways cross

streams; however, these criteria apply to relatively few areas of the state. Because these agencies have no statutory responsibility to assert navigability for access to hunting and fishing, and no expertise, it seems unlikely that they will do this. There is even a possibility that there may be navigability disputes between agencies as there has been over the Russian River and over the ownership of avulsed lands in Prince William Sound.

3. Document flow - There is a long-established process between the Bureau of Land Management (BLM) and DNR and from DNR to other state agencies for distributing and receiving comments on land transfers which affect navigation, Alaska Native Claims Settlement Act (ANCSA) Section 17(b) easements, etc. It is not clear how this will work under the new DNR paradigm. If the responsible agency does not receive the document or does not respond within deadlines, not only public access will be lost, but some bad precedents may be set. There is good reason for concern. There may be as many as 2,500 land transfers from federal to private ownership this year, many involving Alaska's estimated 14,000,000 acres of navigable water bodies. Further, we understand that due to budget cuts, BLM is being asked to determine which of their duties could be contracted to private entities. Under the Indian Reorganization Act, several of the Native Corporations have submitted proposals to perform a number of BLM's current duties, including Native Allotment field verification surveys and surveys of lands to be transferred to ANCSA corporations. Although there is currently no move to have these same corporations identify ANCSA 17(b) easements and navigable waters, the potential does exist. The state and federal task force that has been working to establish mutually acceptable criteria for quiet title action on navigable waters has stalled, so no relief can be expected from that process. It seems more likely with both state and federal downsizing, and jettisoning of statutory responsibilities, that there is a much greater chance that very important land use decisions relating to navigability will fall through the cracks. To be successful in this environment, the state will have to assert navigability clearly, consistently, and unequivocally. BLM has already created numerous navigability problems which we thought DNR would rectify. BLM has designated some portions of streams non-navigable and sections above and below navigable. Failure to be businesslike and consistent in handling navigability assertions will invite more of the same.
4. Statutory responsibility - Although it is not clear what DNR intends to do, it seems that DNR has a statutory and perhaps a constitutional

mandate to assert the state's interest in navigable waters and the ownership of submerged lands. It is not clear that DNR can legally assign its responsibilities to other agencies, even if they agreed to accept them. This is akin to ADF&G assigning the subsistence issue to DNR to manage. There also is a question of what legal standing other state agencies such as DOT&PF would have in asserting navigability. Failure to do a credible job in protecting state interests in navigability might also invite litigation from users who feel that they may suffer substantial losses if the state fails to protect navigability. More detailed discussions of these issues are attached for your reference (Attachment 3).

5. Navigability is tied to other state interests - There is a great deal more at stake than the public's right to use navigable water bodies to harvest fish and wildlife or to access other public lands and waters. For example, navigability includes state ownership of submerged lands, and oil and gas and mineral rights. In regions such as the coastal plain, the ownership of mineral rights under rivers and lakes could mean billions of dollars in rents and royalties. State ownership of stream beds allows the ADF&G more freedom to construct weirs and conduct other fish and wildlife management activities without paying rent. The public also has a right to stand on the bed of navigable waters below ordinary high water and harvest fish even if the adjacent uplands are privately owned or in a restrictive federal ownership category. ANCSA 17(b) easements were created to allow public access to state lands and navigable waters. The state constitution provides for public access to navigable waters, even across private property. The department's legal and physical ability to protect fish and wildlife habitat in anadromous streams, prevent blockages in fish streams, and protect aquatic habitat in critical habitat areas and refuges is stronger in navigable streams than non-navigable streams. Failure to assert navigability consistently will consequently affect many other state interests.

ADF&G staff from the divisions of Habitat and Restoration, Sport Fish, Commercial Fisheries Management and Development, and Wildlife Conservation and the Commissioner's Office feel there is so much at stake that you need to discuss this issue with Commissioner Shively at the earliest possible date. Because DNR's actions affect other state agencies, and a wide variety of constituents including sportsmen, subsistence users, miners, oil and gas lease holders, this is an issue which should be discussed at the cabinet level if DNR can't satisfy this vital function. The most desirable outcome would be for DNR to continue to be the state's lead on navigability, and to rigorously defend all of

the state's interests in navigability and ownership of submerged lands. The department is ready and willing to provide substantial assistance to DNR and the Attorney General's Office where fish and wildlife interests are related to navigability, as we have in the past.

If DNR can not meet their statutory responsibilities, an alternate process needs to be established whereby the department can be confident that ADF&G can do a credible job protecting navigability-related fish and wildlife interests. This will require at a minimum: 1) establishing whether DNR will continue to receive and distribute BLM documents or if ADF&G will have to establish its own relationship with BLM and other state agencies such as the Department of Law; 2) if there is a dispute with BLM over navigability, will DNR become involved or will ADF&G and the Attorney General's office have to be prepared to perform all of DNR functions; and 3) if disputes over navigability arise between state agencies, who resolves them? DNR will also have to train staff from other agencies to handle navigability issues. There will also have to be a clear division of responsibilities for asserting navigability between state agencies, and central oversight, otherwise this will not work. Other questions will probably become evident as we get further into this function.

Please let us know how you wish to proceed.

Attachments

cc: Janet Kowalski
Kevin Delaney
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