

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DNR
550 W. 7th Avenue
Anchorage, AK 99501, Suite 1050-A
(907) 269-8525
www.dnr.state.ak.us/land/nav.htm

INTERAGENCY NAVIGABILITY TEAM


DEPARTMENT OF NATURAL RESOURCES
DEPARTMENT OF FISH AND GAME

ADF&G
333 Raspberry Rd
Anchorage, AK 99518
(907) 267-2242
kamie_simmons@fishgame.state.ak.us

TO: Department of Transportation & Public Facilities
John F. Bennett, Chief
Right of Way
Northern Region

RECEIVED R/W

APR 09 2001

FROM:  Dick Mylius, DNR, Co-Chair
Tina Cuning, ADF&G, Co-Chair

DATE: March 21, 2001

SUBJECT: Kotsina River Floodplain

The Interagency Navigability Team received your January 30, 2001 memorandum requesting further assistance in clarifying the jurisdictional boundaries of the navigable waters of the Kotsina River. Thank you for the detailed chronology; it was very helpful in reviewing the history of your agency's issues.

Your letter specifically asked three questions:

- 1) Does the Department of Natural Resources (DNR) still support the 2/4/94 navigability determination?
- 2) Over what geographic boundaries will DNR assert its ownership? To the main channel of the Kotsina River or to the ordinary high water line as defined by the tree line on each side of the floodplain?
- 3) Would the State actively pursue legal action to defend its navigability claims?

We carefully reviewed agency files, including past correspondence between DNR, DOT, Ahtna Inc., and the National Park Service, Master Title Plats, State Status Plats, the 1951 USGS quadrangle map (Valdez (C-2)), Interim Conveyance 442 to Ahtna Inc., and prior navigability assessments and determinations. The Interagency Team offers the following responses to your three questions.

- 1) The State of Alaska still supports the 1994 DNR navigability determination for the Kotsina River. The state asserts that the Kotsina River is navigable in fact, in its natural and ordinary condition, from its mouth at the confluence with the Copper River upstream through T. 4 S, R. 6 E, CRM.
- 2) In Alaska, the boundary of state ownership of nontidal inland navigable waterbodies is defined by the ordinary high water (OHW) mark. In cases of braided channels, OHW would be assessed considering the outermost banks, not just the limits of the active channel. The state claims ownership

of the riverbed (shoreland) as well as any gravel or sand bars that were determined to be part of the riverbed. While determining OHW in the field is not easy, the state agrees that the sand and gravel would denote shoreland, and the upland begins where there is a change in soil and vegetation. The state's definition stated in 11 AAC 53.900 (23) describes OHW as:

"...the mark along the bank or shore up to which the presence and action of the nontidal water are so common and usual, and so long continued in ordinary years, as to leave a natural line impressed upon the bank or shore as indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics..."

3) The state assumed ownership of navigable rivers at statehood under the Equal Footing Doctrine. If a waterbody was navigable in fact at the time of statehood, title to the shorelands passed to the state. Bureau of Land Management (BLM) navigability determinations are mandated by ANCSA for acreage entitlement purposes and are made based on existing law. In 1980, the BLM found the Kotsina River to be non-navigable in its initial navigability review. The state contends that the initial determination by the BLM was erroneous. Since that determination, the Ninth Circuit Court of Appeals in 1989 decided the Gulkana River case.¹ That decision confirmed an expansive interpretation of the criteria for determining title to lands beneath navigable waters. Under the current interpretation of the criteria, the Kotsina River is properly considered navigable for title purposes.

In summary, it is the state's position that the Kotsina River was navigable at statehood and, therefore, title to the riverbed passed to the State of Alaska in 1959 pursuant to the Equal Footing Doctrine, the Alaska Statehood Act, and the 1953 Submerged Land Act. Accordingly, BLM did not possess and could not legally convey title to the lands under the Kotsina River to Ahtna, Inc.

We hope this letter answers your questions. If you have additional questions, contact Kamie Simmons at Fish and Game (267-2242) and our team will do what we can to assist you. We look forward to coordinating with your agency regarding similar issues.

¹ *Alaska v. Ahtna, Inc.* 891 F.2d 1401 (9th Cir. 1989).

MEMORANDUM

State of Alaska

Department of Transportation & Public Facilities
Northern Region Design & Engineering Services

TO: Dick Mylius
DNR, Division of Mining, Land & Water
Resource Assessment & Dev. Section

DATE: January 30, 2001

FILE NO:

TELEPHONE NO: 451-5423

FAX NO: 451-5411

FROM: John F. Bennett
Chief, Right of Way
Northern Region

SUBJECT: Kotsina River Floodplain
Jurisdictional Boundaries of
Navigable Waters

Dick, as I was preparing this package to send to DNR, I had an opportunity to talk to Tina Cunning about the Interagency Navigability Team that includes you and Tina as members. Tina recommended that I forward this package to you for consideration by the Team.

As a part of developing right of way acquisition drawings, we have had several opportunities in the past to work with Jim Culbertson or Dan Allison in reaching solutions to our navigability questions. Typically the issue is whether a particular body of water is determined to be navigable by the State or not. These determinations allow us to quantify the compensation due an upland property owner or whether we need to secure a right of way permit from DNR. For the most part, the rivers we have dealt with have had a readily defined ordinary high water line so the jurisdictional boundaries have not been much of an issue. The Kotsina River has been determined navigable by DNR but as it has a broad flood plain and a relatively small meandering water channel, we expect that the limits of State jurisdiction may be subject to debate.

We are looking at this boundary issue in order to solve a materials problem for our Maintenance forces. We have 3 federally granted material sites that lie east of the Copper River, north of the McCarthy road and within the Kotsina River floodplain. At the time of grant application, it was presumed that the Kotsina River was not navigable and that the State had no claim to the floodplain. The area in question includes Sections 7 and 8 of Township 4 South, Range 6 East, CRM. The fee estate for these lands has since been conveyed by BLM to Ahtna, Inc. In the past 20 years since the IC to Ahtna, the criteria by which navigability is determined has become better established in the law. If the State in fact has a legitimate claim to the lands upon which the material sites reside, then it is time to correct our records and obtain a material sales agreement from DNR.

The following chronology provides a guide to the documents related to this case. (* notes attachment):

- 12/9/68: * BLM Grant AA-2868 (MS 850-004-5) and Grant AA-2858 (MS 850-007-5) provided material sites for Project S-0850(3), Copper River Bridge.
- 1951: * Patch print of USGS Valdez (C-2) 1951 with Kotsina floodplain highlighted.
- 8/21/71: Project S-0850(3) Copper River Bridge near Chitina – project completed.
- 5/3/72: * BLM Grant AA-6088 (MS 850-005-5) provided a material site for Project S-0850(7), Copper River to Kuskulana River.

- 3/6/72: BLM Grant AA-6050 for Project S-0850(7), Copper River East to Kuskulana River (Sections). This project included a realignment of the McCarthy Road adjoining the Kotsina floodplain. The project was never constructed and a relinquishment of the grant was issued on 7/3/84. The project also included a dike to train the Kotsina River channel away from the realigned McCarthy road.
- Early 70's: DOT Maintenance constructs two dikes in the Kotsina floodplain to protect the McCarthy road from high water events.
- 8/15/80: BLM determined that the Kotsina River is non-navigable in T.4S., R.6E., CRM. (This item is based on a reference in the 2/4/94 DNR Navigability determination for the Kotsina River.)
- 10/23/81: * IC to Ahtna, Inc. – The IC is subject to the 3 material site grants noted above. The Copper and Chitina Rivers are excluded from the conveyance, but not the Kotsina River.
- 4/21/86: * Letter from NPS to DOT – ANILCA transfers jurisdiction of lands and management of the 3 material sites to the National Park Service.
- 6/87: * DNR - Copper River Basin Easement Atlas, Page 60, Valdez C-2. The linetype for “State determined navigable” is used along the Kotsina main channel on the north side of the floodplain.
- 3/8/88: * Letter from NPS to Ahtna – waiver and transfer of administration for the 3 material sites to Ahtna, Inc.
- 1989: Alaska v. Ahtna, Inc. - 9th Circuit Court upholds Gulkana decision clarifying standards for navigability determinations.
- 2/12/93: * DOT memo – Levasseur to Tinker – Discussion of history and need for Kotsina dike with reference to high water events that require continuing maintenance and repair.
- 12/7/93: * DOT memo – Bennett to Gerke – Land status research for Kotsina Dike repair project.
- 12/27/93: * Letter from Ahtna to COE: This letter provides comments to the Corps of Engineers regarding a proposal by DOT to reconstruct a dike in the Kotsina River originally constructed in the early 1970's. Ahtna argues that the original construction was likely in trespass due to land withdrawals, that the Kotsina is not navigable and if it was, the proposed construction area is well beyond the limits of the ordinary high water line. Ahtna also argues that any gravel used should be purchased from private landowners.
- 1/14/94: * DNR memo – Dan Allison to Kotsina R. file – summary of navigability testimony and evidence.
- 2/4/94: * DNR memo – Dan Allison to Ric Davidge – Kotsina River navigability determination signed by Rick Davidge, Director of Water. “The Division of Land has requested that a

navigability determination be prepared to identify who owns the gravel resources at the mouth of the river. AHTNA claims ownership to the river bed ...”.

- 5/13/94: * Kotsina River Trip Report by Dan Allison and Steve Weems – “The river has historically flopped back and forth across this mile wide flood plain....There have been past disputes with the Chitina Village Corporation, AHTNA, and the State about the ownership of the gravel resources on the Kotsina flood plain.”
- 2/26/97: * E-mail from Jim Culbertson to Shari Howard – “The state’s position on ownership is we own everything below the ordinary high water mark. In layman’s terms this is generally defined as the vegetation line. BLM takes the position that we only own to the limits of the active channel. The AG’s office has concluded that taking any trespass action against AHTNA at this time is a low priority. Let’s go with the state authorizations and see what develops.”
- 5/23/97: * Letters – BLM to Chitina Native Corp and Ahtna, Inc. – Notice that Ahtna and Chitina Native Corp. do not want a navigability redetermination performed on the Kotsina River.
- 1/17/01: * DNR Status plat and LAS printout of trespass action against Copper River Forest Products. “Copper River Forest Products have been removing gravel from the confluence of the Copper, Chitina and Kotsina Rivers. There is a question on navigability because the lands are surveyed – (BLM)”

At this point DOT has not submitted applications to DNR for materials contracts within the Kotsina River floodplain. There are additional documents and verbal communications with Ahtna and Chitina Native Corp. that speak to a continuing difference of opinion regarding the ownership of land and materials within the floodplain. There have been claims and counter claims of trespass and theft of materials by the parties involved. There are several questions we are posing to the Interagency Navigability Team:

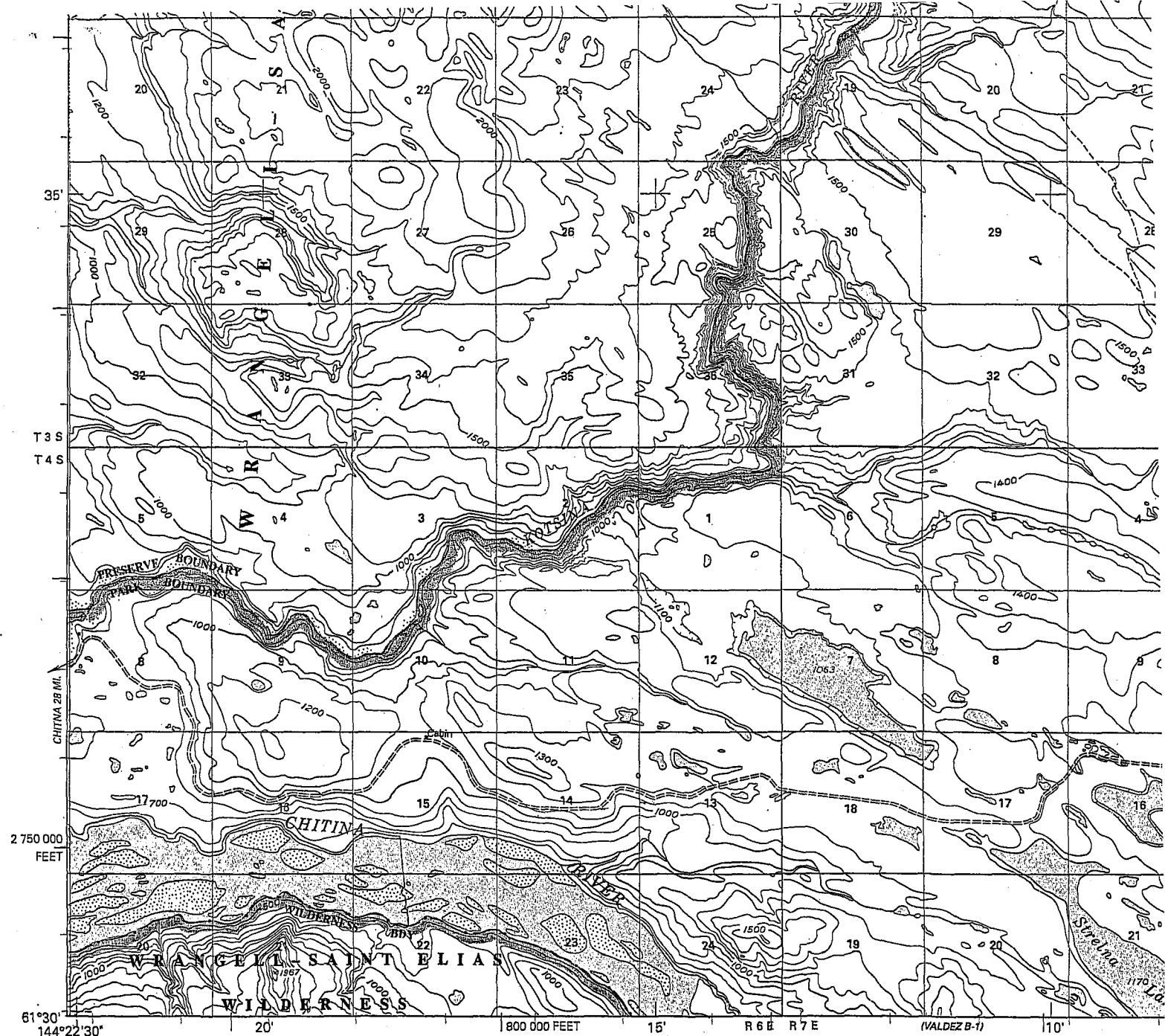
1. Does DNR still support the 2/4/94 Navigability determination issued by Ric Davidge?
2. If the answer to the first question is yes, to what geographic boundaries will DNR assert its ownership? To the main channel of the Kotsina River or to the ordinary high water line as defined by the tree line on each side of the floodplain?
3. If the answer to the above two questions is yes, would the State’s assertion be passive or will the State actively pursue legal action to defend its navigability claims?

In order to support a claim that the boundaries of State’s ownership should be from tree line to tree line as opposed to the active channel, I have also attached copies of aerial photos dated 7/20/66, 5/23/71, 8/16/73, 9/12/85 and 7/14/94. The dikes constructed by DOT Maintenance first show up on the 1985 photography. Diversion of the main channel could result in the increase of vegetation in the protected area and a suggestion that the “ordinary high water line” has moved toward the center of the floodplain. My understanding of the law on this issue is that changes in the OHW line that are not the result of the natural imperceptible changes made by accretion or erosion would not serve to change the boundary between the submerged lands and the uplands. Therefore, changes resulting from construction activities would also not serve to change the legal boundaries.

If the Navigability Team supports the existing DNR navigability determination and that the boundaries of State ownership extend to the tree line along the bluff adjoining the existing McCarthy road, then our next step will be to apply for materials contracts within the flood plain. We expect that this action will provide results similar to whacking a hornet's nest and could result in political intervention. However, at my level, if the technical and legal analysis suggests that the public has a right to these lands and materials, then we have an obligation to pursue them.

If there is additional documentation that would assist you in your analysis or if you recommend that DOT pursue another course of action, please feel free to contact me directly at 451-5423 or by e-mail at johnf_bennett@dot.state.ak.us.

Cc: George Levasseur, SouthCentral Manager (w/o attachments)



Mapped by the Defense Mapping Agency

Produced by the United States Geological Survey

Control by USGS and NOS/NOAA

Compiled from aerial photographs taken 1950, field annotated 1951

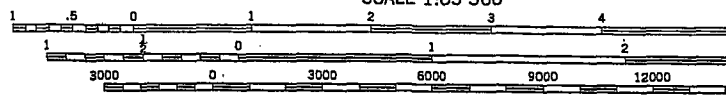
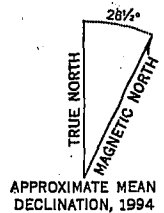
1927 North American Datum (NAD 27). Projection and 10 000-foot ticks: Alaska Coordinata System, zone 3 (Transverse Mercator) Blue 1000-meter Universal Transverse Mercator ticks, zone 6

North American Datum of 1983 (NAD 83) is shown by dashed corner ticks The values of the shift between NAD 27 and NAD 83 for 7.5-minute intersections are obtainable from National Geodetic Survey NADCON software

There may be private inholdings within the boundaries of the National or State reservations shown on this map

Federal reservation boundaries established by the Alaska National Interest Lands Conservation Act, PL-96-487, Dec. 2, 1980, are shown as compiled by the administering agencies

Gray land lines represent unsurveyed and unmarked locations predetermined by the Bureau of Land Management Folio CR-6, Copper River Meridian



SCALE 1:63 360
CONTOUR INTERVAL 100 FEET
NATIONAL GEODETIC VERTICAL DATUM OF 1929

FOR SALE BY U. S. GEOLOGICAL SURVEY
FAIRBANKS, ALASKA 99701, DENVER, COLORADO 80225, OR RESTON, VIRG
A FOLDER DESCRIBING TOPOGRAPHIC MAPS AND SYMBOLS IS AVAILABLE ON



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Alaska State Office

222 W. 7th Avenue, #13

Anchorage, Alaska 99513-7599

AA-6653-A (2651)
(962AH)MB/JL

RECEIVED
MARCH 3 1997
MAY 27 1997
TITLE ADMINISTRATION

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ahtna, Inc.
P.O. Box 649
Glennallen, Alaska 99566

Gentlemen:

MAY 23 1997

RECEIVED
MAY 27 1997
TITLE ADMINISTRATION

In a telephone conversation on May 8, 1997, Sue Sherman, of your staff, informed us that your corporation does not wish a navigability redetermination done on the Kotsina River. This is to advise you that the village of Chitina will be notified of your decision and our files so notated.

Sincerely,

/s/ Mary J. Bonin

Mary J. Bonin
Land Law Examiner
ANSCA Team
Branch of 962 Adjudication

Copy furnished to:

State of Alaska
Dept of Natural Resources
Division of Land
Realty Services Section
Attn: Jim Culbertson
3601 C Street, Suite 960
Anchorage, Alaska 99503-5936

Jack Frost
-Navigability Section (961)

Cadastral Survey (920)

Author: jimc@dnr.state.ak.us at dotpfwan

Date: 2/26/97 9:11 AM

Priority: Normal

TO: Shari Howard at FAIBWR-CCMAIL, mikeb@dnr.state.ak.us at DOTPFWAN

Subject: RE: Kotsina River (and Pits)

The state's position on ownership is we own everything below the ordinary high water mark. In layman's terms this is generally defined as the vegetation line. BLM takes the position that we only own to the limits of the active channel. The AG's office has concluded that taking any trespass action against AHTNA at this time is a low priority. Let go with the state authorizations and see what develops.

-----Original Message-----

Well, it doesn't rain, it pours! I just received a call from another project manager asking about the Kotsina River pits. Back in 1994, the State determined that the "submerged lands and gravel resources associated with the submerged lands beneath the Kotsina River belong to the State of Alaska." Does that mean that just the active channel is the State's or the whole floodplain (which Ahtna has been running up and down for I don't know how long and done bridge construction across the active channel). Do I need to get DNR contracts for my pits?

Mike, if I need contracts, can you get them to me quick? We have existing BLM grants on them, so they are the easy ones.

Shari

-----End of Original Message-----

Jim Culbertson

Phone: 907-269-8525

E-mail: jimc@dnr.state.ak.us

Date: 02/26/97

Time: 09:11:15

Trip Report

Kotsina River

May 13, 1994

Dan Allison & Steve Weems

The lower two miles of the Kotsina River upstream of the Copper River is a gravel out wash plain. The river has historically flipped back and forth across this mile wide flood plain. The current channel is on the north bank of the river and in the past the Department of Transportation has built dikes to keep the river on the north bank away from the McCarthy Road. These dikes were made by using material from the inactive river bed south of the dikes. No rip-rap or other material was used. One proposal for the McCarthy Road upgrade is to move the road to the south side of the Kotsina River flood plain. The road currently runs cross slope of a very steep hill and requires a lot of maintenance as the unstable hill sloughs above and below the road.

There is a gravel pit on the flood plain and material is extracted by local individuals. There have been past disputes with the Chitina Village Corporation, AHTNA, and the State about the ownership of the gravel resources on the Kotsina flood plain. We observed an individual extracting gravel on May 12 & 13. Gravel was being used to build an access road at approximately mile 7 of the McCarthy Road.

On February 4, 1994 the Department of Natural Resources, Division of Water reaffirms a June 1987 Division of Land and Water determination that the Kotsina River is navigable in fact for title purposes through Section 2, T. 4 S., R. 6 E., Copper River Meridian. The submerged lands and gravel resources associated with submerged lands beneath the Kotsina River belong to the State of Alaska.

Summary

Placing the road on the flood plain will require that the Department of Transportation do periodic channel work and dike repair to ensure that the river stays in the north channel. The material for the dike and a road upgrade should come from the active channel area north of the dikes. Also, the gravel pits should be placed in areas that will not accelerate erosion near the existing road or proposed upgrade. Extraction of gravel south of the dikes will likely accelerate channel changes during extreme high water periods.

FEB 11 1994

Northern Region DOT & PF

MEMORANDUM

Dept. of Natural Resources

State of Alaska


Division of Water

TO: Ric Davidge
Director of Water

DATE: February 4, 1994

TELEPHONE NO: 762-2573

FAX NO: 562-1384

FROM: Dan Allison 
Chief, Navigability

SUBJECT: Kotsina River
Nav Determination

The Kotsina River drains 460 square miles and flows west into the Copper River north of Chitna Village. The river is 42 miles long and has a gradient of 74 feet per mile. There are many references to mineral discovery in the Kotsina River Valley area, however there are not any references of use for transporting goods up and down river.

The Alaska Department of Transportation has asked DNR for an ILMA for an area near the mouth of the Kotsina River and the McCarthy Road. The Division of Land has requested that a navigability determination be prepared to identify who owns the gravel resources at the mouth of the river. AHTNA claims ownership to the river bed and Roy Alley a local resident has made an earlier complaint to the ombudsman about not receiving a permit to take gravel.

We have identified two previous navigability determinations.

On August 15, 1980 the Bureau of Land Management determined that the Kotsina River is non-navigable in T. 4 S., R. 6 E. Copper River Meridian and transferred the title to AHTNA.

In June 1987 the State of Alaska, Division of Land and Water Management claimed that the Kotsina River is navigable in the Copper River Basin Easement Atlas.

There is not a lot of use of the river for boating activities because the upper portions are dangerous white water and there are few reasons to travel the lower section. The Kotsina has been used by kayakers since 1981. Dr. Andy Embick has participated in 5 of the 6 known trips down the lower canyon. Dr. Embick believes that only the lower six miles is navigable with a raft carrying 1,000 pounds. He states that the river is 50-60 yards across, 2 feet deep, and is Class I + II white water in this section. The river between mile 6 and Long Glacier contains three canyons that are Class V and VI white water depending on flow and should only be used by experienced kayakers. The river above Long Glacier is in a wide valley and could be canoed.

Paul Berry Sr. a miner who constructed the road to the upper end of the Kotsina River states that only the lower eight miles is suitable for rafting and that he has not observed any one using the river.

John Brievagle a local river boat operator has been up the river for one mile with his 22-foot river boat. He has not gone further up stream as he has no reason to go there. He believes that the section of river below the canyon could easily be rafted.

Navigability Criteria:

The Ninth Circuit Court's decision of December 13, 1989, on the navigability of the Gulkana River states that water customary at statehood included boats with a load capacity of about 1000 pounds. The Court further held that contemporary guided fishing and sightseeing activity on the Gulkana was commerce and the watercraft customary at statehood "could have supported" this commercial activity.

Determination:

Based on the physical characteristics of the Kotsina River, testimony from several people familiar with the river, and the standards set forth in the Gulkana Decision, I find that the Kotsina River through Section 2, T. 4 S., R. 6 E. Copper River Meridian, navigable in fact.



Ric Dayidge, Director

MEMORANDUM

Dept. of Natural Resources

State of Alaska


Division of Water

TO: Kotsina River File

DATE: January 14, 1994

TELEPHONE NO: 762-2573

FAX NO: 562-1384

FROM: Dan Allison 
Chief, Navigability

SUBJECT: Kotsina River
Phone interviews

1/4/94 I called John Rego, Geologist, BLM Area Office in Glennallen. (822-3217)

John states that the Kotsina River contains Class IV and V white water in the canyon areas. He stated that the lower reaches could be navigated easier than the upper areas. He believes that experienced rafters could navigate even the canyons if they used caution and portages. He suggested that I call Chuck Drummond with the Park Service and the Barry Brothers long time miners on the Kotsina.

1/4/94 I called Nikki Szarzi with ADF&G in Glennallen. She is going to contact some local citizens and call back. (822-3309)

Nikki states that there is a sockeye run that uses the lower reaches of the river. She also states that Dr. Andy Embick (835-4200) from Valdez has floated the river and written an article about the Kotsina and Jim Breivagle (822-5870) a local guide states that he can use his inboard on the lower mile of the river.

1/5/94 I called Paul Barry Sr. a miner in the Kotsina area for over ten years. (376-4569) Paul was working to develop a silver mine until the Park Service shut his operation down.

Paul states that he has never rafted on the river or observed others using the river for transportation. He states that some have used the river during the winter as an ice road and that over flow made this treacherous. Paul believes that the lower eight miles could easily be floated using a rubber raft. The canyon areas would be very dangerous and he does not believe that they could be safely floated. Paul has seen salmon below the canyons.

Paul Barry Sr.
HC 32 Box 6665-AS
Wasilla, Alaska 99687

1/7/94 Dr. Andy Embick (835-4811 & 835-4200) called me to discuss the Kotsina River. Dr. Embick is a kayaker and author on river

trips in Alaska. The Kotsina is a chapter in his book that will be out in April 1994. He states that the Kotsina River is not widely used and should only be traveled by experienced kayakers. He sent me an advanced copy of the Kotsina chapter. (attached)

Dr. Embick states that the Kotsina from Long Glacier up stream can be canoed and rafted. This reach would be considered Class II white water.

The reach from Long Glacier to Elliot Creek is constant Class V white water during low flow periods. Dr. Embick kayaked this river beginning on October 19 during a low flow period prior to freeze up. The river flows at 20 mph in this stretch and has a flow of 10,000 cubic feet per second during the summer. In places the channel is restricted to 10 feet across.

The Kotsina River has been floated 6 times from Elliot Creek at river mile 17 to the mouth. Dr. Embick has been involved in five of these trips. Class V white water limits the use of this river from mile 6 to mile 17 to experienced kayakers. Below the canyons the lower six miles flows at six mph and would be considered Class II white water and easily navigated with a rubber raft carrying 1,000 pounds.

Dr. Andrew Embick
P.O. Box 1889
Valdez, Alaska

1/11/94 I called Chris Roach (255-8179) a Civil Engineer with Alyeska and kayaker. Chris kayaked down the Kotsina River in 1985 from Elliot Creek at mile 17. Chris believes that most of the Kotsina River is not suited to rafting and that a rafter would have to do more portaging than floating. The lower canyon is 5+ miles long and not suitable for rafts and the other two canyons would be more difficult. He agrees with Embick's assessment that the lower few miles are navigable with a raft.

1/14/94 I called John Breivagle (822-5870). John is an experienced boater who has taken his boats to Mc Carthy, to the base of the Chitna Glacier and down the Copper River to the Million Dollar Bridge. John has used a river boat on the lower mile of the Kotsina River on four occasions. Two of these trips involved rescues of people stranded in the stream with four wheel drive vehicles. John believes that the lower portion of the river can be run with his 22 foot Almar jet boat weighing 1 1/2 tons empty. He also feels that the lower 6 miles below the canyon could be easily rafted.

MEMORANDUM

State of Alaska

Department of Transportation and Public Facilities

TO: Mike Tinker
Environmental Coordinator
Northern Region

DATE: February 12, 1993

FILE NO:

TELEPHONE NO: 835-4322

THRU:

SUBJECT: Kotsina River Dike Repair

FROM: George Levasseur *GL*
District M&O Manager
Southcentral

RECEIVED R/W
DEC 02 1993

Northern Region DOT & PF

The Kotsina River confluences with the Copper River on east side near the town of Chitina. About 30 years ago, the Kotsina River meandered toward the south, eroding the bluffs where the McCarthy Road alignment is. Maintenance forces built two parallel dikes each about 1000 feet long to divert and keep the river over on the north side of the floodplain. River gravel was pushed up to build the dikes and since no riprap was used, annual maintenance has been required. About 12 years ago, the river breached the dikes during a high water event with one or more of the glacial lakes dumping. M&O worked for about 3 weeks with two dozers to restore the dikes to their original condition. Since then we have performed maintenance, however not to that scale. Last year another high water event washed out or damaged about 750 feet of the dikes and two channels of the river are carrying a low volume of water against the bluffs.

This breaching of the dikes will be a problem for the bluffs and possibly the Copper River bridge at high water. M&O plans to move two D-8 type dozers and one loader into this area in early summer to rebuild the dikes before further damage occurs. All material will come from the floodplain and any inwater type work will be kept to a minimum. A typical section of the dike will be a 12' top, with a 2:1 slope and 18' bottom. Height of the dike is 10'. Length of work required is 250'. Work duration is expected to be two to three weeks. ⁷

I've enclosed a photo of the area prior to the recent high water event that clearly shows the dike placement. Please pursue acquiring the necessary permits for the work. Thanks again for your help.

cc: John Horn, P.E. Regional Director
George Herrman, Tazlina Area Manager

CHIEF RW AGENT	
PRE AUDIT	
ENGINEERING	
APPRAISALS	
NEGOTIATIONS	
CONSTRUCTION Mgmt.	
DUPLES	
REPORTING	
FILE	

Ahtna, Inc.

Kotsina River 1

GLENNALLEN OFFICE
P.O. BOX 649
GLENNALLEN, AK 99588
PHONE: (907) 822-3476
FAX: (907) 822-3495

ANCHORAGE OFFICE
406 W. FIREWEED LANE, NO. 101
ANCHORAGE, AK 99503
PHONE: (907) 274-7662
FAX: (907) 274-6614

December 27, 1993

U.S. Army Corps of Engineers
Alaska District
Regulatory Branch (1145b)
Attn: District Engineer
Post Office Box 898
Anchorage, Alaska 99506-0898

RECEIVED

DEC 29 1993 *shh*

REGULATORY FUNCTIONS BRANCH
Alaska District, Corps of Engineers

Re: Comment Solicitation for Permit #4-930418

Dear Sir,

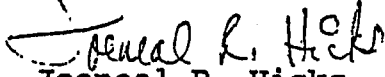
In review of Public Notice Application for Permit #4-930418, as received from the State of Alaska, DOT&PF, Ahtna, Inc. offers the following comments.

1. The notice makes reference to repair and rehabilitate an existing dike, per the Kotsina River near Chitina, Alaska. Ahtna questions the authority and or permit application given the dike's construction in the early 70's? As we are aware, the lands were closed to entry by PLO 4582, effective January 23, 1969, pending Native selections.
2. Ahtna does not object to the repair and rehabilitation of the existing dike. We do however, object to the applicants proposal to excavate 8,800 cubic yards of gravel from beneath the ordinary high water line. Such a statement by DOT&PF asserts that the land is owned by the State of Alaska. We disagree to the effect that only navigable waters are owned by the State of Alaska. This ownership does not exceed lands beyond the mean high water mark. The Kotsina River is a non-navigable waterway and even if it were navigable, the proposed area considered for excavation is beyond the terminus of the mean high water mark. The area is vegetated and cannot be considered "beneath the ordinary high water line" in any definition of the term, and
3. Use of gravel by the State DOT&PF for public purposes is in direct conflict with private industry. Ahtna finds that the State DOT&PF should be purchasing gravel from private landowners as a prerequisite to any type of construction.

Ahtna, Inc. concedes it is landowner of the surface and subsurface estate. Use of gravel to repair and rehabilitate the existing dike constitutes "no acceptance by Ahtna, Inc." that the land and gravel is owned by the State DOT&PF, nor that the gravel is beneath the "ordinary high water line" of the Kotsina River. Ahtna, Inc. invites the State DOT&PF to make an acceptable offer for the gravel purchase.

Sincerely,

Ahtna Land and Resource Department



Joeneal R. Hicks
Special Projects Manager

cc: State of Alaska, DOT&PF
2301 Peger Road
Fairbanks, Alaska 99709-5316

Roy S. Ewan, President

MEMORANDUM

State of Alaska Department of Transportation & Public Facilities

TO: Eric Gerke
Environmental Analyst
Northern Region

DATE: December 7, 1993

FILE NO:

TELEPHONE NO: 474-2413

FROM: John F. Bennett, PLS
ROW Engineering Supervisor
Northern Region

SUBJECT: Kotsina River Dike Repair

I have reviewed the information that you forwarded regarding the Kotsina dike repair and have the following comments:

The dikes in question lie within section 7, T.4S., R.6E., C.R.M. Your Corps permits cites section 7, T.4S., R.5E., C.R.M.

George Levasseur's memo of 2/12/93 states that the dikes were built approximately 30 years ago. I was unable to find any permits of that vintage. I was able to find a right of way project (attached) S-0850(7) Copper River East to Kuskulana River (Sections). This project was approved on July 14, 1970. These plans note a parcel "1A" which is a right of way for a dike along the Kotsina approximately in the vicinity of the existing dikes. An application was made to BLM for this right of way and a Grant was issued on March 16, 1972. (AA-6050)

In a July 3, 1984 BLM Decision states that on May 9, 1984, the BLM was notified (by the State of Alaska) that the rights of way issued under AA-6050 were never constructed. Therefore the right of way grant was terminated. Therefore, it appears that even if a portion of the existing dike was within the BLM Grant, there now exists no right of way or permit for it.

Section 7 was IC'd to Ahtna on 10/23/81 as IC #442. The IC cites that the conveyance of section 7 excludes the Copper river and the Chitina river but not the Kotsina river. DNR's Copper River Easement Atlas indicates that BLM does not consider the Kotsina river navigable for title purposes. The DNR atlas notes that the state considers the Kotsina to be navigable.

The end result is the following:

1. There is an obvious title conflict. Ahtna will consider the area of the dike to be their land and DNR will consider the Kotsina to be navigable. What is unclear about DNR's position is whether they will only defend the primary channel or the whole floodplain.
2. It is clear with our experience on Copper River Highway bridge No. 282, if we are not willing to perform the surveying and mapping required for DNR, they will not issue a permit. At this time, even if DNR had clear title, we barely have enough information to begin the permitting process, and we would need a commitment from M&O to fund the mapping and surveying necessary to complete the process.

3. If we do not think that we can withstand a challenge by Ahtna that they own the land then we would have to approach this as a typical right of way acquisition project including preliminary surveying and mapping, appraisal and negotiations.

Either direction will require a commitment of M&O funds to complete the process. I will let you follow up on that issue and will not proceed further till I hear where we are headed.

attachments: DNR Easement Atlas - Valdez C2
BLM Grant and Termination documents
Right of Way Plans S-0850(7)