STATE OF ALASK

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

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

INTERAGENCY NAVIGABILITY TEAM
DEPARTMENT OF NATURAL RESOURCES
DEPARTMENT OF FISH AND GAME

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 Cunning, 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).*

Federal Government Possesses Navigational Servitude

Although title to the beds of navigable waters are vested in the states, the Federal government has control over the navigable waters for the purpose of navigation. In *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-76 (1977), the Supreme Court said:

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the constitution.

Title to Riverbed Governed by State Law

In *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Supreme Court held, in overruling the *Banal* decision, that the equal-footing doctrine did not require that the effect of a movement of a river upon title to the riverbed must be resolved under Federal common law. Since the equal-footing doctrine vested title to a riverbed in a state as of the time of its admission into the union, such cases are properly determinable under state law. The rationale of *Corvallis* is that under the equal-footing doctrine, title to the beds of navigable bodies of water indefeasibly vested in the states at the time of their admission to the union. Thus a state may not be divested of title to the bed in favor of an upland owner by operation of Federal law, but may only divest itself of title through the operation of its own law. The *Corvallis* Court states at 376:

> ...[D]etermination of the initial boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands [is to be determined]....as a matter of federal law rather than state law. But that determination is solely for the purpose of fixing the boundaries of the riverbed acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State...

Federal Minerals within Meander Lines of water Body

Lands within the meander lines of a water body may be leased for oil and gas even though such lands are surveyed. The applicable regulations (43 CFR 3101.1-3) and 3101.1-4) require that the lands be described by metes and bounds connected to an official corner of the public land surveys.

In *David A Province*, 85 ID 154 (1978), the Board considered the question of whether the oil and gas deposits within the meander lines of the Yellowstone River are covered by an existing lease that covers the lot bounded by the meander line. The Board determined that the issue is the same regardless of whether the leased lands contiguous to the meander line are public domain or patented surface with Federally-owned oil and gas deposits. In several earlier decisions it was established that where the United States has patented lands subject to an oil and gas reservation, lands accreting to the patented lands are also subject to the reservation. *David W. Harper*, 74 ID 141 (1967); *David A. Province, supra.*

In *Province, supra* at 15, the Board held that the "lease extends only to the meander line and not the waterline." This conclusion was primarily based on an

MINERAL LAW 6th Ed Terry S. MAXEY 1966

examination of the Mineral Leasing Act which indicates that a lessee should receive only a specific acreage.

The Gulkana River Case

On May 16, 1979, the BLM issued an administrative decision finding the 30 miles of the Gulkana river to be non-navigable and then the following month conveyed the same lands to Ahtna, Inc., an ANCSA regional corporation. On November 25, 1980, the State of Alaska filed suit to quiet title to the bed of the river. After the United States district Court for the district of Alaska entered summary judgment in favor of the State of Alaska, 622 F.Supp. 455, the native regional corporation appealed to the Ninth Circuit Court. *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1949.

This case is significant because it contains a good description of the physical characteristics of the channel and the criteria by which it was held to be navigable. There was general agreement that the physical characteristics of the segment of the Gulkana River at issue, the lower 30 miles, had not changed since Alaska had become a State in 1959. This 30-mile segment of the Gulkana River has the following physical characteristics:

1. The shallowest part of the river is normally a foot and a half deep, diminishing to a foot during low-flow season.
2. On average the river along the lower 30 miles is 125-150 feet wide and 3 feet deep.

The Gulkana River is customarily used, or is susceptible to use, by the following types of watercraft:

1. Flat or round-bottom aluminum or fiberglass powerboats 16 to 24 feet long by 4 to 10 feet wide, capable of carrying loads between 900 and 2,000 pounds;
2. Inflatable rafts between 12 and 15.5 feet long by 4 to 7 feet wide, with a load capacity of 1,250 to 2,000 pounds; and
3. Square-sterned motorized freight canoes and double-ended paddle canoes 15 to 19 feet long, capable of carrying loads of 500 to 900 pounds.

The appellant contended that most of the uses of the Gulkana River have been recreational and that recreational uses do not support a finding of navigability. However, the Court said "we think the present use of the lower Gulkana is commercial and provides conclusive evidence of the lower Gulkana's susceptibility for commercial use at statehood." Moreover, "[t]o deny that this use of the River is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity." The Court affirmed the District Court decision and concluded that the lower Gulkana was susceptible for use as a highway for commerce at statehood. *Id.* at 1405.

Conveyances Made Before Statehood Do Not Preclude State from Acquiring Navigable Waters

Two Supreme Court decisions hold that conveyances made by the United States prior to statehood do not convey navigable waters unless such intention was clearly and specifically declared to convey navigable waters. *United States v. Hot*

State Bank, 270 U.S. 49, 55 (1926); *Montana v. United States*, 45 U.S. 544, 552 (1981).

Reservations Made Prior to Statehood Do Not Preclude State from Acquiring Navigable Waters

In *Utah Division of State Lands v. United States*, 107 S.Ct. 2318 (1987), the Court held that title to the bed of Utah Lake passed to Utah upon that State's admission to the Union in 1896, despite the reservation of the lake as a reservoir site before statehood. As the Court said, "the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land" to demonstrate that the reservoir did not pass to the State.

Basart Exception

The "Basart Exception" to boundary rules did not originate in *Madison v. Basart*, 59 I.D. 415 (1947), but rather reiterated the holdings in a long line of Federal court decisions. In *Madison v. Basart*, the secretary said:

> It is a general rule that a meander line is not a line of boundary but one designed to point out the sinuosity of the bank or shore and as a means of ascertaining the quantity of the land in the fractional lot, the boundary line being the water line itself. But there are a number of exceptions to this general rule. Thus, if the meander line was run where no lake or stream calling for it exists, or where it is established so far from the actual shore as to indicate fraud or mistake, the meander line is held to be the true boundary line. Another well-established exception is that if, at the time of a homestead entry is made, a large body of land previously formed by accretion existed between the meander line and the waters of the stream, then the meander line will be treated as the boundary line of the grant, and the patent will be construed to convey only the lands within the meander line.

In *Eldon L.R. Johnson*, 82 IBLA 135, 138-39 (1984), the Board concisely stated the criteria for applying the Basart exception:

1. The accretion must have formed prior to homestead entry or other private acquisition.
2. The amount of the accreted land must be perceived to be "large" or "substantial," or "an acreage largely in excess of what the patent calls for."
3. Whether the equities of the situation favored or disfavored the entryman, including whether he knew at the time that he was occupying a considerably larger acreage than he had contracted to enter and pay for, and whether he was unjustly enriched thereby.

In *Eldon L.R. Johnson, supra*, the Board considered a case where approximately 79 acres were purchased and at least another 37 acres between the meander line and the water line were occupied. The Board held that the 37-acre excess was a "substantial" acreage and the criteria for the "Basart exception" are met. Therefore, the accreted land is owned by the United States.

Island Must Exist at Statehood

An island, in existence in a navigable stream which is public land at the time a state is admitted to the Union, remains the property of the United States. *Texas*

MINERAL LAW 6th Ed Terry S. MALEY 1996

v. Louisiana, 410 U.S. 702, 713, *rehearing denied*, 411 U.S. 988 (1973); *Scott v. Latig*, 227 U.S. 229, 242-44 (1913). Conversely, if an island in a navigable stream, which is public land, washes away totally before statehood and then forms again in the same place after statehood, title to the island is in the state. *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191 (5th Cir.) *rehearing denied*, 191 F.2d 705 (5th Cir. 1951), *cert denied*, 342 U.S. 920 (1952).

Unsurveyed Island in Navigable Water

In *Scott v. Latig*, 227 U.S. 229 (1913), the Supreme Court held that an error in omitting to survey an island in a navigable stream does not divest the United States of title or preclude surveying it at a later date. An island within the public domain in a navigable stream and actually in existence both at the time of the survey of the banks of the stream and also upon admission to the union of the state within which is situated remains the property of the United States. Even though omitted from the survey, such land does not become part of the fractional subdivision on the opposite banks of the stream. Title to an island also remains in the United States and the island remains subject to survey despite the disappearance of the channel separating the island from the lots which were formerly riparian. *U.S. v. Severnson*, 447 F.2d 631 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972); *R.A. Mikelson*, 26 IBLA 1,9 (1976).

Island Must Exist at Statehood to Be Public Lands

An island must exist as an island on the date of admission of a state to the union; otherwise it would be state land. *Lee E. McDonald*, 68 IBLA 272 (1982). If sufficient evidence is available to raise a question of fact when such land was formed, the Interior Board of Land Appeals may order a hearing to resolve questions of fact to determine if title to a tract of land vests in the United States. *Eldin L.R. Johnson*, 47 IBLA 366 (1980). However, there is no right to a formal hearing on a protest against a survey of omitted lands. Again however, the Board may, in its discretion, order a hearing if questions of fact are not fully answered in the record.

Accretion to Islands

Although as a general rule the island owner owns accretion to the island, there are limitations on the rule depending on how far the accretions run and whether the accretions are deposited on a stream bed owned by one other than the island owner. *Houston v. United States Gypsum Co.*, 569 F.2d 880, 883 (5th Cir.), *rehearing denied*, 580 F.2d 815, 818 (5th Cir. 1978).

Navigability of Lakes

Navigability of lakes comes under the same rules as the navigability of streams. A lake must, at the time of statehood, have been used or been susceptible to commercial use in its natural condition without modification of the lakebed. *United States v. Utah*, 183 U.S. 64 (1931).

In *State of Montana*, 80 I.D. 312 (1973), the Board ruled that a meandered lake in Montana is nonnavigable where it is located in a remote region and there is no evidence to show it has been used or is susceptible to being used as a highway for commerce. In *U.S. v. Oregon*, 295 U.S. 1 (1935), the Supreme Court held five

JACK T. KELLY

IBLA 87-771 Decided March 12, 1990

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring placer mining claims null and void ab initio in part. M MC 108915 through M MC 108917.

Affirmed.

1. Mining Claims: Lands Subject To--Navigable Waters--State Lands

   Title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. A placer mining claim is properly declared null and void to the extent that it includes the bed of a navigable river.

2. Mining Claims: Lands Subject To

   A placer mining claim is properly declared null and void to the extent that it includes land patented without a reservation of minerals to the United States.

3. Mining Claims: Lands Subject To--Mining Claims: Relocation--Mining Claims: Withdrawn Land--Withdrawals and Reservations: Generally

   To establish that a location of a mining claim made after withdrawal is actually an amendment of a prior location made before the withdrawal, a claimant must show the earlier location included the portion of this claim subject to the withdrawal, that the person making the amended location had an unbroken chain of title with the original locators, and that the location predating the withdrawal was properly made.

4. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Mining Claims: Recordation of Certificate or Notice of Location

   Under 43 U.S.C. § 1744 (1982), the owner of an unpatented mining claim located on or before Oct. 21, 1976,

was required to file with the proper office of BLM a copy of the official record of the notice or certificate of location and a copy of the evidence of assessment work on or before Oct. 22, 1979. Failure to make the required filings constitutes an abandonment of the claim by the owner.

5. Federal Land Policy and Management Act of 1976: Assessment Work--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

   Under 43 U.S.C. § 1744 (1982), an owner of an unpa-tented mining claim is required to file evidence of annual assessment work or a notice of intention to hold the claim with the proper BLM office before Dec. 31 of each year. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the claim.

6. Federal Land Policy and Management Act of 1976: Recordation of Mining Claim Certificates or Notices of Location--Mining Claims: Recordation of Certificate or Notice of Location--Mining Claims: Relocation

   Rights acquired under a relocation of a mining claim abandoned pursuant to 43 U.S.C. § 1744 (1982) will not relate back to the date of location of the original claim but only to the date of the relocation.

7. Mining Claims: Lands Subject to--Mining Claims: Powersite Lands--Mining Claims: Withdrawn Land--Powersite Lands--Withdrawals and Reservations: Powersites

   The Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621 (1982), opened certain powersites to entry under the mining laws. Mining claims located after the enactment of that legislation are properly made subject to its restrictions.

APPEARANCES: Jack T. Kelly, pro se.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Jack T. Kelly has appealed from the July 24, 1987, decision of the Montana State Office, Bureau of Land Management (BLM), declaring the Gold Bar Amended Mining Claim (M MC 108915), the Gold Standard No. 1 Amended Mining Claim (M MC 108916), and the Nugget Bar Amended Mining Claim (M MC 108917) null and void ab initio in part because the

claims are located partially on lands not open to mineral entry. These claims were located on February 10, 1984, and recorded with BLM on February 23, 1984. BLM determined that the three claims lie partially on the streambed of the Missouri River which is navigable and that title to the streambed vested in the State of Montana upon its admission to the Union. BLM also determined that the Nugget Bar Amended claim lies in part on land patented without a reservation of minerals to the United States. The decision also found that the remaining portion of each claim was located under the Mining Claims Rights Restoration Act of 1955 (MCRRA), 30 U.S.C. § 621 (1982), and is subject to certain limitations under that statute because the remaining portions of all three claims lie within land withdrawn for power purposes by Powersite Reserve No. 9, issued effective July 2, 1910.

Although appellant appeals the decision to "void the mining claims," BLM declared the claims void only to the extent that they described patented land or land in the bed of the Missouri River. BLM did not declare those portions of the claims invalid which remain within the powersite withdrawal. Nevertheless, appellant states the subject claims were first located in the early 1900's, prior to the 1910 powersite withdrawal. We construe this contention as directed against that portion of BLM's decision which held appellant's claims to be subject to the MCRRA.

[1] BLM properly held that appellant's claims are null and void to the extent they describe land in the streambed of the Missouri River. Appellant does not contest BLM's assertion that the portion of the river in question is navigable, and it is well established that title to the bed of navigable rivers is held in trust for future states and passes to them upon admission to the Union. Utah Division of State Lands v. United States, 482 U.S. 193 (1987); Montana v. United States, 450 U.S. 544 (1981); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Leonard R. McSweyn, 28 IBLA 100, 83 I.D. 556 (1976). It necessarily follows that a placer mining claim is properly declared to be null and void to the extent that it embraces land underlying the navigable waters of a state.

[2] BLM also determined that the Nugget Bar Amended claim lies in part on land embraced by patent No. 358631 which issued on October 7, 1913, without a reservation of minerals to the United States. 1/ Placer mining claims partially located on lands patented without a reservation of mine-rals to the United States are properly declared null and void to the extent they include such lands. Seth M. Reilly, 112 IBLA 273, 275-76 (1990); Kenneth Russell, 109 IBLA 180, 183 (1989); Santa Fe Resources, 106 IBLA 374 (1989); Donald E. Stewart, 104 IBLA 48, 49 (1988); Merrill G. Memmott, 100 IBLA 44, 46 (1987); Leslie Corriea, 93 IBLA 346, 349 (1986); Lynn M. Sheppard, 90 IBLA 23, 25, 92 I.D. 612, 614 (1985). Thus, that portion of the Nugget Bar Amended claim situated in sec. 7, T. 4 N., R. 3 E., Principal Meridian, Montana, is properly declared null and void.

1/ The patent in this case was a railroad grant patent which excluded "all lands mineral in character." It has been held, however, that such a patent constitutes a conclusive determination of the nonmineral character of the land. Diane B. Katz 48 IBLA 118 (1980).