# MEMORANDUM State of Alaska

TO: Tom Hawkins, Director
Div. of Land & Water Management
Dept. of Natural Resources

DATE: July 3, 1984

FILE NO: 366-579-84

TELEPHONE NO: 465-3600

FROM: By: Douglas K. Mertz
Assistant Attorney General
Department of Law

SUBJECT: Quiet title actions concerning accreted lands

On April 30, 1984, you requested this office's opinion concerning two questions having to do with ownership of accreted lands. First, you asked whether, when the state is faced with claims to former state lands which may have accreted to an upland owner, the state is obligated to defend the original survey line at mean or ordinary high water. 1/ Second, you ask whether, if the state determines that such lands are in fact accreted lands, there is any mechanism other than a quiet title action whereby the state can convey record title to the upland owner.

1. In our opinion the state is obligated to defend its title to land whenever the state has an arguable good faith basis for its claim of ownership. We reach this conclusion after considering both the constitutional basis for state stewardship over public lands and the common law status of the state as trustee for the public over state lands. The Alaska Constitution in Article VIII provides significant safeguards for state lands and restricts the ability of the state to alienate lands without public notice "and other safeguards of the public interest." Likewise the Alaska Land Act, AS 38.05, restricts the authority of the Department of Natural Resources to alienate state land without public notice and a variety of other safeguards, including, in almost all instances, the requirement of disposal only at fair market value. Although there is no statutory provision speaking directly to the accretion situation, we believe the policy permeating the Alaska Land Act as well as the relevant constitutional provisions should be read as setting out a standard of caution for use in resolving adverse land claims against the state. This conclusion is buttressed by the common law doctrine of the public trust, whereby the government holds title to public lands as trustee for the public and can take no steps regarding those

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1/ Accretion is the gradual and imperceptible increase in land area beside a body of water; title to accreted lands ordinarily vests in the shoreline owner. See Honsinger v. State, 642 P.2d 1352 (Alaska 1982).

lands except in fulfillment of the trust obligation. This doctrine may be particularly relevant in the case of a wildlife refuge or other state lands specifically set aside for public purposes.

Against this general background we find an absence of statutory authority for the state to simply accede to adverse claims of ownership of state lands. We thus conclude that it is the duty of the state to defend state claims of ownership whenever the state has a good faith arguable position in its assertion of title. Thus, in cases where transfer of title by accretion is alleged, the state should not simply accede to such claims by upland owners unless it is convinced after careful examination of the facts that the state could not advance any good faith argument that title remains in the state.

2. You have also asked how, in those situations where the state does not have any basis for disputing a claim of transfer of title by accretion, the state can accomplish an actual conveyance of the lands such that the upland owner could in the future demonstrate recorded evidence of title. This is a considerably more difficult problem than might at first appear. This office has given the opinion in the past that there is no statutory authority to simply quitclaim or disclaim ownership of state lands when we believe a claimant has a valid right to title (see 1983 Inf. Op. Att'y Gen. (Aug. 4; 166-683-83) by Assistant Attorney General Barbara Malchick). It is clear, however, that in the context of good faith litigation the state may settle quiet title claims by means of a conveyance by deed to the lands in dispute in the litigation (see 1981 Op. Att'y Gen. No. 9 (Oct. 7) by Assistant Attorney General Thomas Meacham). There is an argument that the state, although unable to simply disclaim ownership to real property, could issue a certificate that, according to a state survey, certain lands were accreted and were no longer tidelands and hence were apparently not state-owned. This method would encounter at least two problems. First, as noted above, it is doubtful that DNR has authority to dispose of state lands by this method (although theoretically this would not be a disposal, but rather a recognition of lack of state title); and secondly it would also not bind the state from changing its interpretation of either the facts or the law in the future. A third problem would be that such a document probably could not be recorded and hence would be of doubtful validity in establishing an unclouded chain

of title to the lands in question. 2/

In short, the only method of signifying that the land has changed title through accretion which would provide certainty and a clear recordable proof of title is a decree under quiet title litigation. Of course, if the state determines that accretion has in fact occurred and that the state has no arguable claim to accreted lands, it should not mount a spurious defense to a quiet title action. It should, however, create a record in such a proceeding to demonstrate that the factual and legal situation has in fact been examined sufficiently to demonstrate the lack of an arguable state claim. In such a proceeding the burden would be on the upland claimant to establish the accretion and the right to a recordable deed of title. We believe this burden is not unjust given the fact that such a determination would be for the benefit of the upland owner and given the rarity of true accretion situations, and should not give rise to any great increase in litigation.

I hope this answers your questions. Let us know if you have further inquiries.

DKM:dlm

cc: Paula Twelker
DNR-SEDO

Dave Zimmerman
F&G - SERO

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2/ It has been suggested that AS 38.05.035(b)(2) could be a device for allowing a state deed to be issued for accreted state lands. That section, however, permits alienation of state land only to correct "errors or omissions" by the state or federal government; an accretion might be considered an error by nature, at least by the tideland owner who loses title, but it could hardly be considered an error by the government.

# Fairbanks Municipal Utilities System

August 14, 1997

Herb Mann, Platting Officer
Fairbanks North Star Borough
Planning Department
P.O. Box 71267
Fairbanks, Alaska 99707-1267

**Re: Replat of Portion of Tract "D" Fairbanks Townsite**

Dear Herb:

As you know, the City is in the process of selling the Fairbanks Municipal Utilities System to a consortium of buyers. The resulting "break up" of the system requires that we replat this tract, which contains both the power generating and the water treatment facilities. Three of the utility buyers will acquire an interest in what is now a single lot. The City has submitted a replat application. We understand that Borough staff has made an initial administrative judgment that the approval of the State of Alaska, Department of Natural Resources, is necessary as an "affected agency." Although the State has no objection to the replat, it has taken a new position that its consent can only be given through a quiet title action. A quiet title action is an action filed in the superior court to establish property rights.

The added costs and delay of a quiet title action are not warranted in a case like this, where there is no dispute as to accretion. We respectfully request that the Borough reconsider the initial position and permit the replat application to proceed. The alternative approach (requiring a quiet title action) will have far-reaching effects on the many owners of riverfront property in the state.

**Background.**

Tract "D" has been the riverfront home of the City's power plant for many decades. As the replat drawing shows, since 1922 there has been a substantial increase on the northern boundary of the tract due to the "gradual and imperceptible increase in land area beside a body of water." The process is called accretion. As you know, ownership of accreted lands ordinarily vests in the shoreline owner. *Honsinger v. State, 642 P.2d 1352 (Alaska 1982).* At common law, there is no disagreement on this point:

> The question is well-settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary **including the accumulated soil.** No other rule can be applied, on just principles. Every proprietor whose land is so bounded, is subject to loss by the same means which may add to this territory.

*Clark, Surveying and Boundaries* (5th edition, 1976) (emphasis added). Accretion can occur due to either natural or artificial deposits, but the party claiming the benefit cannot have caused the accumulation. The State holds title to the land underlying navigable waters like the Chena; the State's ownership interest ends at the point of mean high water. Accreted lands above mean high water belong to the adjacent landowner. *See, State v. Pankratz* 538 P. 2d 984 (Alaska, 1975)[1] The vast majority of our power and water facilities are located on the accreted land, and have been for decades.

In some cases, questions arise as to the cause of accretion; we have all heard of the tales of "accretion by D-8 caterpillar." That is not so here. Ms. Nancy Welch, Regional Manger of the Department of Natural Resources, Division of Land, wrote the following on July 24, 1997 about this parcel: "It is apparent that accretion has occurred and appears to be the normal, gradual increase to the parcel's boundary."

Likewise, TransAlaska Title, in its Commitment for Title Insurance dated December 17, 1996, note that title to Tract "D" is vested in the City of Fairbanks, including "those accreted lands lying North of Tract "D" and South of the mean high water line of the Chena River."

**A Quiet Title Action is not necessary for the Borough to process the replat.**

The source of the state's position is not any particular statute or regulation. Citing a 1984 Attorney General Opinion, DNR takes the position that -- even when there is no question about accretion -- the agency lacks the authority to "convey" accreted land. This opinion is based upon an apparent lack of express authority given the commissioner of Natural Resources. In short, the state admits that the tract is not state property, but takes the overly cautious position that a judicial action is needed before it can properly consent. Nothing in state statute or administrative code requires such a position.

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[1] Also known as "Pankratz I." A later case, *Pankratz v. State* 652 P.2d 68, "Pankratz II" further refined the state of the law in Alaska.

The City is not asking for any conveyance from the state, only the Borough's consent to replat the land it already owns. Replating the tract will not affect the State's internal procedures. In light of the fact that nothing in the Borough's code requires the State's consent to this replat, and the lack of any dispute about the accretion, it would not be desirable public policy for the borough to adopt a policy which would waste scarce judicial resources. Many riverfront parcels experience accretion. To require a quiet title action for every replat of a lot with accreted land will waste the public's money and burden the courts with needless proceedings. Instead, it would make more sense to simply inform the state of any proposed replat containing accreted lands. The state could initiate a quiet title action in cases where the validity of the accretion was in question.

Our staff is ready at any time to meet to discuss any questions you may have. We appreciate your continuing professional cooperation.

CITY OF FAIRBANKS

Patrick B. Cole
Deputy City Attorney - Utilities

Attachment: 7/24/97 Welch letter.

cc: James C. Hayes, City Mayor
Frank J. Biondi, FMUS General Manager
Rufus Bunch, Utilities Manager/City Engineer
Dave McNary, City Surveyor

# STATE OF ALASKA

*TONY KNOWLES, GOVERNOR*

**DEPARTMENT OF NATURAL RESOURCES**

*DIVISION OF MINING, LAND AND WATER*

*550 W 7th Ave., Suite 650*
*ANCHORAGE, ALASKA 99501-3576*
*PHONE: (907) 269-8523*
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April 7, 2000

Loriann C. Burchfield
Platting Officer
Department of Community Planning
Fairbanks North Star Borough
809 Pioneer Road
Fairbanks, Alaska, 99707

File: **FNSB - RP 050-00 (Lementa Subdivision Replat)**
Subj: Noyes Slough Accretions

Dear Ms. Burchfield:

The preliminary plat of this subdivision indicates that a significant amount of accretion has occurred between the record meander line of Noyes Slough and the present day water line of Noyes Slough. By "common law" accretions belong to the owner of the uplands to which the accretions became attached. However, it is important to bear in mind that ownership of the accretions is held under a *Cloud of Title* in that the upland owners cannot show where they got good title to the accreted area. The only way that the Cloud of Title can be cleared up is for the upland owner to go through the Quiet Title process and have the court issue a Deed of the Clerk of the Court awarding title to them. Until this Cloud of Title is removed, the ownership of the accretions is subject to an adverse claim by a previous owner in the chain of title or possibly by the State of Alaska as the owner of the beds of navigable water bodies. From a platting perspective this cloud of title may not be a big problem for the FNSB but it could become a problem for the owners or future owners if they try to acquire title insurance or bank financing.

It is my recommendation that the owners go through the Quiet Title process to remove the "Cloud" on the title. It is highly unlikely that the state or anyone else would contest the claim. The Department of Natural Resources (DNR) cannot force the owners to go through this process because it is a matter that is subject to local platting authority.

One fact that is frequently overlooked when accretions are platted and subdivided without going through the Quiet Title Action is that state land boundaries are also replatted without the state's concurrence. Under some circumstances this could amount to a taking of a state (public) interest without notice.

In the Unorganized Borough, where DNR is the platting authority, DNR would not approve a subdivision plat containing accretions unless the upland owner had gone through the Quiet Title Process and obtained good title. It is DNR'S position that the upland owner cannot legally sign the Certificate of Ownership and Dedication certifying that he is the owner unless he can show how he acquired title.

Should you have any questions, I may be contacted at 269-8517.

Sincerely,

William S. Brown

William S. Brown
Cadastral Surveyor

Cc: Gerald Jennings, Platting Supervisor, DML&W
Joe Sullivan, NRO, DML&W