

**From:** Bennett, John F (DOT)  
**To:** [Lund, Michael C \(DOT\)](#)  
**Subject:** FW: Toolik Lake  
**Date:** Tuesday, August 13, 2013 3:24:00 PM

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Mike, I think the short answer is that M&O does have a water permit from DNR to extract from Toolik Lake. I presume our construction contractor does not and the M&O permit does not carry over for their use. While I have attached the abstract for the BLM ROW Granted to the University for the Toolik Lake, it doesn't provide any information as to whether this is a public or private ROW for the use of the University researchers only. I have a contact in BLM who is looking into it and I'll let you know when I hear. But for now, it would appear that the contractor has no right to extract water until he gets a DNR water permit and likely no right to access the lake via the existing road.  
JohnB

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**From:** Smith, Kevin L (DOT)  
**Sent:** Tuesday, August 13, 2013 1:34 PM  
**To:** Bennett, John F (DOT)  
**Cc:** Pineault, Nanette C (DOT)  
**Subject:** FW: Toolik Lake

John...based on Nanette's research and the info provided from DNR here's where we are at in terms of information available and potential hurdles for Toolik Lake:

Findings:

- Toolik Lake is situated on 906(e) State-selected lands currently under the dominion of BLM
- Unless previously reserved by the Federal Government, the water within Toolik Lake would be considered a resource open to all per Sect. 3 of the State Constitution and A.S. 45.15.30 regardless of the land estate ownership around the water body.
- Administration of the water resource is a State function of DNR, not a Federal function
- There is no evidence of any Federal Reservations of Water Rights for Toolik Lake and anything since Statehood with have to go through DNR for adjudication.
- DOT/PF is using water from Toolik Lake based on approved/active DNR Water Permits
- DOT/PF is accessing the Lake using the existing access road built for UAF's research facility

Issues to be Resolved:

- **Access:** Though the existing road is not posted or otherwise blocked from public access the University and/or BLM could try making the argument that our use is not part of their lease. Given the initial complaint seems to have originated with the University/Researchers this may be an important item to clarify with UAF to make sure we are on the same page.
- **Water Rights:** There is a possibility that BLM could come back and say that a reservation of water rights was made pre-statehood but that's a burden of proof that would be best

placed on them.

Recommended Response to BLM:

- Water use is permitted through DNR and we have the appropriate permits
- Any use will conform with the specifications of the permit (e.g. max. amounts) M&O has not been using the Lake this year...Construction's use?
- Please let us know if BLM's records show Federal reservation of the water rights that we are not aware of.

Additional Follow-up:

- Coordinate with UAF on use of access road and/or apply to BLM for additional permitting as required.

Let us know if you have any questions or need additional info..Kev

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**From:** Brooks, Henry C (DNR)  
**Sent:** Tuesday, August 13, 2013 8:20 AM  
**To:** Smith, Kevin L (DOT)  
**Subject:** RE: Toolik Lake

Kevin,

Your welcome. We are happy to help in any way we can. I noticed on the federal Master Title Plat for that township that BLM did issue a right-of-way to the University of Alaska-Fairbanks Institute of Arctic Biology under BLM case file FF-091038. However I do not know if that would be sufficient to allow either the public or other State entities to use the same access road without a separate ROW permit. I also attached a brief summary on Federal Reserved Water Rights in case that question comes up. I did not see any indication of that in BLM's database. However from painful experience with BLM I am all too aware that sometimes critical information can hide itself within their files (yes the physical ones you have to go to their office to read!) that is not always apparent from their published data.

Henry

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**From:** Smith, Kevin L (DOT)  
**Sent:** Tuesday, August 13, 2013 7:57 AM  
**To:** Brooks, Henry C (DNR); Steinberger, Wendy S (DNR)  
**Subject:** RE: Toolik Lake

Thank you Henry for the answer and education....I believe right now the separation of the resource vs. the property right is lost on BLM. However, I'm saying that from the perspective of being about three people away from the original conversation. However, I believe when we do have that feedback to BLM that the next question (which you rightfully concluded) is by what right are we accessing the lake?....which we'll do some additional research on before responding.

I will let you know how things evolve and whether we have any additional resource-related questions. Again, I very much appreciate your time and insight. –Kevin

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**Kevin L. Smith | Negotiations & Relocation Supervisor | Alaska DOT&PF, Northern Region**  
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**From:** Brooks, Henry C (DNR)  
**Sent:** Monday, August 12, 2013 3:20 PM  
**To:** Steinberger, Wendy S (DNR)  
**Cc:** Smith, Kevin L (DOT)  
**Subject:** RE: Toolik Lake

Kevin,

Here is the applicable section of A.S. 46.15.020 that sums up the issue:

**Sec. 46.15.030. Water reserved to the people.** Wherever occurring in a natural state, the water is reserved to the people for common use and is subject to appropriation and beneficial use and to reservation of instream flows and levels of water, as provided in this chapter.

Also Section 3 of the Alaska State Constitution states:

**§ 3. Common Use**

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Water as a resource is a State issue and not a Federal issue. Because water is being treated as a resource not as a property right people get confused. Unless the Federal government issued a pre-statehood Federal Reservation of Water, they cannot “complain” about a State agency using the water with a proper authorization. I did a quick check of BLM’s SDMS site for the MTRS and did not see any such withdrawal

Having said that, I would also be careful regarding how the water is being accessed. The State’s ownership of the resource does not convey to the State ownership of the land around it. If any permittee has to go through non-state land to access the water, they would still need the owner’s permission to do so. Generally this is one of the conditions listed on DNR’s water use authorizations. Do you know if DOT acquired an right-of-way permit from BLM prior to withdrawing the water? I have reviewed this particular authorization (TWUP A2013-79), and I did not see any ROW permit from BLM. Is it possible that access is the real issue?

Henry C. Brooks  
Natural Resources Manager I  
Water Management Unit  
907-269-8641

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**From:** Steinberger, Wendy S (DNR)  
**Sent:** Monday, August 12, 2013 2:27 PM  
**To:** Smith, Kevin L (DOT); Brooks, Henry C (DNR)  
**Cc:** Sorensen, Kevin L (DNR)  
**Subject:** RE: Toolik Lake  
**Importance:** High

Kevin,

I will be referring you to Henry Brooks. Henry is Manager I in the Water Management Unit, and responsible for supervising the staff that issued the TWUP for the water withdrawal. The BLM holds title the bed of Toolik Lake but the State holds the water. I will let Henry explain further and quote the law.

Wendy Steinberger  
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Division of Mining, Land and Water  
Department of Natural Resources  
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**From:** Smith, Kevin L (DOT)  
**Sent:** Monday, August 12, 2013 2:04 PM  
**To:** Steinberger, Wendy S (DNR)  
**Subject:** Toolik Lake

Good afternoon Wendy....I was feeling all confident about my newly acquired knowledge based on the information you had given me for Barrow that I was sure I could handle most anything north of the Brooks Range...then I had to find an "odd-ball" today that has me bugging you for help again.

The water body in question is Toolik Lake (Umiat T.9S R.11E Sect. 29). State 906(e) top-filed but nothing further per the BLM MTP

To put some context to the question, our Construction Section received a complaint from BLM basically saying why are you taking water from "our" lake? The reason they had been taking water from the lake was because they had received water use permits from DNR for a variety of water bodies along the Dalton – including Toolik. I have one of my staff tracking down the question of authority to our regional DNR office but while I was waiting I thought I'd drop you a line and see if you had a more global perspective on our rights here.

Holler if you need additional information and once again thank you for your help!!! --Kevin

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