

State of Alaska FY2008 Governor's Operating Budget

Department of Natural Resources RS 2477/Navigability Assertions and Litigation Support Component Budget Summary

Component: RS 2477/Navigability Assertions and Litigation Support**Contribution to Department's Mission**

To defend and assert the State's ownership and rights to navigable and public waters and to trails established under federal Revised Statute (RS) 2477, thereby allowing access for economic development and use of the state's land and resources.

In FY08, DNR will continue to assert state ownership of navigable waters through the federal Recordable Disclaimer of Interest process. In FY08, DNR will also support the Attorney General's Office in litigation (Quiet Title) against the federal government to secure state ownership of two RS 2477 trails in Northern Alaska.

Core Services**NAVIGABILITY**

This component funds three closely related projects: 1) ongoing identification and assertions of navigable waters and public rights to navigable and public waters; 2) a project to catalog navigable waters as called for in SB 305; and 3) applications to the US Bureau of Land Management (BLM) for Recordable Disclaimers of Interest for navigable waters. All three projects are part of the State's effort to identify and assert State ownership of navigable waters.

Identification and assertions of navigable waterways. The State owns the beds of most navigable waters in Alaska. Determining whether or not a water body is navigable is generally fact specific. In addition, federal and state criteria for navigability differ significantly. As a result, it is an evolving process to conclusively determine which water bodies are navigable and therefore owned by the State. There is no easy method to settle title disputes concerning navigable waters. Until 2003, the only method to resolve this question was for the State to file Quiet Title action in federal court. Quiet Title has been established for only 13 water bodies statewide. Since 2003, the state and federal governments agreed to use the Recordable Disclaimer of Interest process to determine navigability for title purposes on specific water bodies.

Navigability determinations for specific water bodies are performed by DNR for a variety of reasons, including; making navigability determinations for state conveyances and projects on state lands, providing information to the public and agencies regarding the location and public rights to navigable and public waters, supporting litigation asserting State ownership through research and other work. In addition to making navigability determinations, the State maintains and updates data bases, files and maps of State owned navigable waters; and reviews federal conveyances to Natives groups to assure that State ownership of submerged lands and the public use of the water bodies associated with them, are protected.

Mapping of navigable waterways. In 2004, the Legislature (through Senate Bill 305) directed and funded DNR to map the navigable and non navigable waters within the State. This effort was anticipated to take one-and-a-half years and started in mid FY05. DNR experienced difficulty with turnover and recruitment of staff with the Arc/GIS skills necessary to complete this project. Progress was made on base hydrologic information which is necessary for the proposed user friendly, interactive GIS web site. DNR will continue this project in FY08 to complete the database and website.

In addition to populating the navigability map through the submission of Recordable Disclaimer of Interest applications, DNR is conducting research on other water bodies by utilizing the State navigability criteria and making determinations in order to provide additional information on navigable waterways in the State.

Recordable Disclaimers of Interest (RDI). In January 2003, the Department of Interior adopted new regulations that allow BLM to issue RDIs for navigable waters. Rather than requiring that the State initiate a Quiet Title Action on each waterway, under these new regulations, the State may submit an application to the BLM requesting that the BLM issue a document stating that the federal government disclaims any property interest in the submerged lands. To date, the State has submitted 34 applications for RDIs on 56 water bodies. As of September 2006, the BLM had issued 10 disclaimers for 28 rivers and lakes. The State has requested suspensions on 4 applications affecting 4 water bodies, due to the administrative finality issue BLM is using to deny RDIs. In FY07, DNR negotiated a "bundling" of applications

for water bodies in geographically similar areas, reducing cost recovery and application fees that must be paid to BLM.

DNR, working with the Department of Fish and Game (ADF&G) and the Attorney General's office, intends to file applications on as many as 50 waterways in FY08, including numerous streams in the Tanana, Kuskokwim and the Copper River basins. These projected numbers have dropped from the previous fiscal year due to the fact that in researching the upland ownership of river basins, there is often no federal ownership interest and thus, no need to file for a disclaimer. To prepare these applications, DNR is required to conduct extensive research into the historical use for trade and commerce as well as hydrology. Upland owner land status maps and a legal description must also be prepared for each water body. Finally, once an application is submitted to the Department of Interior, DNR and ADF&G staff must respond to requests for additional information from BLM, review and comment on the draft reports issued by BLM and respond to numerous public inquiries about the applications. DNR must also pay for BLM's cost recovery and publish and pay for public notices.

Under the Assistance Agreement between BLM and DNR, the BLM has provided funding to DNR to conduct research on areas of the State where information is scarce, or where prior BLM regional reports have not been compiled on river basins. In FY 07, DNR entered into a scope of work agreement with BLM to research river basins for the purposes of using the work product as an attachment to justify DNR's RDI applications. The Office of History and Archeology is managing and producing the work product with mostly federal funds. Upon completion, the work product, should expedite the processing time by BLM, reduce cost recovery by BLM and ultimately result in more RDI applications being filed. Until then, DNR anticipates a temporary decline in the number of applications filed.

The number of water bodies that the State will apply for will depend on several factors, including; 1) what information is available to support an application - if data is not readily available fewer applications can be filed as staff will need to conduct more extensive field research for susceptibility to navigation; 2) the complexity of the water body, for example, preparing the map and legal description for the Yukon River and it's tributaries will be time consuming due to the length of the river; 3) the relative degree of cooperation the State receives from the Department of Interior and other affected federal agencies; and 4) the level of controversy associated with the State's applications. This controversy can result from issues raised by the public, upland land owners and federal agencies with upland ownership of lands surrounding the water bodies. This is especially true in federal conservation units.

RS2477 MANAGEMENT

This component includes \$120,000 to continue research, mapping, and field work to support litigation with the federal government and \$40,000 to fund DNR's ongoing activities associated with RS2477 research, management and litigation. Since 1992 (when DNR received a CIP to research RS 2477s), the Division of Mining, Land and Water has researched more than 1900 routes, identified approximately 649 routes as routes qualifying as RS2477s. In FY08, DNR will continue to research specific RS 2477s, will provide litigation support to the Attorney General's office, will maintain RS 2477 databases, and will respond to public and agency requests for information about RS 2477s.

RS 2477 trail management, including researching easement vacation requests, is funded through and will be done primarily as part of the Division's ROW and easement programs (see Claims, Permits and Lease component). The US Secretary of Interior recently wrote a new policy statement for RS2477's. DNR is advocating that BLM Alaska, expeditiously implement the Secretary's policy. When implemented, if the State asserts ownership of ROWs either by RS 2477 or applications for ROWs on RS 2477s, DNR has to be willing to take some responsibility for their management, which in turn may burden DNR with additional management costs. DNR cannot assert them and then ignore them. The same is true of our navigable waters DNR is asserting through RDIs.

FY2008 Resources Allocated to Achieve Results		
FY2008 Component Budget: \$346,500	Personnel:	
	Full time	1
	Part time	0
	Total	1

Key Component Challenges

Navigability: The issue of navigability determines who owns and manages the land under water bodies in Alaska. Under federal law, if waters are determined navigable, this generally means (unless they were withdrawn before Statehood) that the State owns their beds. However, most water bodies have not had determinations made on whether or not they were navigable at statehood.

The State achieved a series of favorable court decisions on criteria for determining the navigability of Alaskan rivers. However, progress has stalled in getting the Solicitor to direct the Alaska Bureau of Land Management to apply these criteria to re-assess determinations made before these court decisions. Litigating each water body is slow and costly. This situation has been further exacerbated when BLM began implementing an arbitrary policy of treating an entire navigability determination for a river as a final agency action if any portion of the determination was used in a Native Conveyance decision. Formerly, if a determination was referenced in a Native Conveyance, the determination was only final for the portion of a water body specifically affected or contained within that Native Conveyance. The rest of the navigability determination on the water body was not considered to be final agency action. The State had no due process for the rest of the navigability determination because it had never been considered appealable final agency actions. Appeal or litigation may be necessary to settle this issue.

The department will continue pursuing additional applications for Recordable Disclaimers of Interest for navigable waters. To continue this effort in FY08, DNR must pay the processing and filing fees for the increased quantity of applications to be filed in FY08. These fees may not be paid by funds received from BLM.

RS 2477 Management: The RS 2477 program in general is an ever-increasing and inadequately funded workload. Conflicts among users and landowners of the more than 650 known RS 2477 rights of way absorb staff time to resolve. In addition, the law requires that DNR use great care in vacating an RS 2477 right of way (including most section line easements). In practice, this often involves lengthy interviews with landowners, surveyors, and other interested parties to determine whether evidence indicates that a public right exists, how certain the physical location is, whether a survey needs to be performed, and whether the owners need a realignment of the right-of-way (on their property) or to vacate the easement altogether. The vast majority of state time resolves problems for individual landowners, but has little ultimate effect on providing access for the development of state resources. This ongoing management is not funded by this component and is inadequately funded in the other components.

RS 2477 Assertions: In FY05, DNR began the research necessary to support the State's Quiet title assertion to establish state ownership of two RS 2477s. To continue this effort in FY08, DNR requires additional funds to support the Attorney General's office in this litigation and on other possible RS 2477 legal actions. Additional work may include contractual work required to produce expert witnesses, answer discovery requests from the defendant, make exhibits, conduct surveys, and further historical documentation. Every RS 2477 assertion is fact specific and requires extensive research. DNR's existing RS 2477 appropriation is not sufficient to fund the extensive historical research needed to support the existing assertions through the federal courts.

Potential Legal Impediments to Navigable Waters and RS 2477 Assertions: RS 2477 and Recordable Disclaimers of Interest (RDI) are contentious issues at the national political level. As noted above, the State intends to use the RDI process to assert ownership of navigable waters. Secretary of Interior Norton has specifically rejected the State's request to apply the RDI process to RS 2477 routes in Alaska. Litigation could also limit the effectiveness of any efforts to work with the Department of Interior to make progress on navigable waters issues. However, the new policy written by the Secretary may result in the need to redirect the State's efforts on these issues.

Significant Changes in Results to be Delivered in FY2008

DNR will complete the SB305 Navigability mapping website in FY 2008. Regarding the navigability program, DNR anticipates filing additional applications for Recordable Disclaimers of Interest (RDI) for up to 50 additional water bodies and to receive from BLM RDIs for 10-20 water bodies.

Major Component Accomplishments in 2006

RS 2477

1. In FY 06 the Department of Law filed complaints for two routes as one of the routes was later determined to have

excessively complex land ownership issues. DNR conducted extensive historical research on the use of the trails and supported the Department of Law with survey, land status and other items needed for discovery and exhibits.

2. Researched many other RS 2477 routes where access issues and problems surfaced, including one in Fairbanks that was obstructed by a private property owner and is still in court regarding the legality of the RS 2477 assertion and DNR's order to remove obstructions.
3. Reviewed all state and federal land conveyances for RS 2477 and ANCSA Section 17(b) easement conflicts and assertions.
4. Reviewed requests for subdivision plats for RS 2477 easement conflicts to ensure viable alternative access is provided.

Navigability

1. As of September 2006, filed 34 applications with BLM for Recordable Disclaimers of Interest (RDI) for 56 water bodies. BLM has issued 28 disclaimers for 56 water bodies. DNR has requested suspensions of 4 applications for 4 water bodies due to the administrative finality issue.
2. Worked with BLM to refine and streamline the process for submitting and processing RDI applications. This is the first such process in the nation where the federal government and a state are resolving ownership of navigable waters through use of Recordable Disclaimers. In FY 07 DNR negotiated "bundling" multiple water bodies into one application where geographic similarities exist, reducing cost recovery and advertising costs.
3. Issued navigability determinations for various bridge, road, and other development projects and made navigability determinations for state land conveyances to municipalities and private parties.
4. Reviewed and responded to BLM navigability determinations and proposed BLM land conveyances.
5. Assisted the Attorney General's Office in research related to administrative appeals and litigation regarding navigable waters and 17(b) easements.
6. Provided information to the legislature, agencies and the public on the navigability of water bodies. Responded to requests submitted by phone, e-mail, navigability website, letters, etc.

Statutory and Regulatory Authority

AS 19.30.400
AS 38.04
AS 38.05
11 AAC 51

Contact Information

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**RS 2477/Navigability Assertions and Litigation Support
Component Financial Summary**

All dollars shown in thousands

	FY2006 Actuals	FY2007 Management Plan	FY2008 Governor
Non-Formula Program:			
Component Expenditures:			
71000 Personal Services	184.3	182.4	120.3
72000 Travel	4.0	19.7	16.7
73000 Services	255.2	214.5	202.5
74000 Commodities	18.3	12.0	7.0
75000 Capital Outlay	0.0	0.0	0.0
77000 Grants, Benefits	0.0	0.0	0.0
78000 Miscellaneous	0.0	0.0	0.0
Expenditure Totals	461.8	428.6	346.5
Funding Sources:			
1004 General Fund Receipts	461.8	358.6	276.6
1007 Inter-Agency Receipts	0.0	70.0	69.9
Funding Totals	461.8	428.6	346.5

Estimated Revenue Collections

Description	Master Revenue Account	FY2006 Actuals	FY2007 Managem ent Plan	FY2008 Governor
Unrestricted Revenues				
None.		0.0	0.0	0.0
Unrestricted Total		0.0	0.0	0.0
Restricted Revenues				
Interagency Receipts	51015	0.0	70.0	69.9
Restricted Total		0.0	70.0	69.9
Total Estimated Revenues		0.0	70.0	69.9

**Summary of Component Budget Changes
From FY2007 Management Plan to FY2008 Governor**

All dollars shown in thousands

	<u>General Funds</u>	<u>Federal Funds</u>	<u>Other Funds</u>	<u>Total Funds</u>
FY2007 Management Plan	358.6	0.0	70.0	428.6
Proposed budget decreases:				
-Fourth Year Fiscal Note: Asserting State Title to Submerged Lands CH42 SLA2004 SB305	-94.5	0.0	0.0	-94.5
Proposed budget increases:				
-FY 08 Retirement Systems Rate Increases	12.5	0.0	-0.1	12.4
FY2008 Governor	276.6	0.0	69.9	346.5

**RS 2477/Navigability Assertions and Litigation Support
Personal Services Information**

Authorized Positions		Personal Services Costs		
	<u>FY2007</u> <u>Management</u> <u>Plan</u>	<u>FY2008</u> <u>Governor</u>		
Full-time	2	1	Annual Salaries	75,667
Part-time	0	0	Premium Pay	1,693
Nonpermanent	1	0	Annual Benefits	45,854
			<i>Less 2.36% Vacancy Factor</i>	<i>(2,914)</i>
			Lump Sum Premium Pay	0
Totals	3	1	Total Personal Services	120,300

Position Classification Summary

Job Class Title	Anchorage	Fairbanks	Juneau	Others	Total
Natural Resource Spec II	1	0	0	0	1
Totals	1	0	0	0	1