

State of Alaska FY2009 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.

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 on going effort to identify, assert and map State ownership of navigable waters.

Identification and assertions of navigable waterways. The State received title to the beds of most navigable waters in Alaska at statehood. However, the United States did not expressly identify which water bodies were actually navigable in fact. Determining whether a water body is navigable for title purposes is generally fact specific, based upon historical use or susceptibility to use for travel, trade and commerce at statehood. In addition, federal and state criteria for navigability for title differs significantly. As a result, it is a process ripe for contention to conclusively determine which water bodies are navigable at statehood and therefore owned by the State. 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 the US agreed to use the Recordable Disclaimer of Interest (RDI) process when we concur on navigability for title purposes on specific water bodies.

Navigability determinations for specific water bodies are performed by DNR for a variety of reasons, including for state conveyances and projects on state lands, providing information to the public and various agencies regarding the location and public rights to navigable and public waters, and for supporting litigation asserting State ownership. In addition to making navigability determinations, the State maintains and updates databases, files and maps of State owned navigable waters; and reviews federal conveyances to Alaska Native Claims Settlement Act (ANCSA) corporations to assure that State ownership of submerged lands are not erroneously conveyed.

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 ongoing difficulty with high turnover and recruitment of staff with the Arc/GIS skills necessary to complete this project. Significant progress was made on a database of hydrologic information which is necessary for the proposed user friendly, interactive GIS web site. DNR will continue this project in FY09 to publish the website. Once the baseline website is published, the database will be updated as various water bodies and hydrological basins are researched as part of on going work. Links to important documents and case files will be available through this web site. This approach will result in a more comprehensive tool that will serve the public, and agency resource managers. This approach will reduce redundant research as issues resurface on a particular water body or basin.

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 37 applications for RDIs on 64 water bodies. As of September 2007, the BLM had issued 10 disclaimers for 28 rivers and lakes. Numerous water bodies in the Kantishna River system and the Yukon-Kuskokwin Portage are noticed on the Federal Register as of this writing. The State has requested suspensions on four applications affecting four water bodies, due to disagreements with the Federal Bureau of Land Management (BLM). A review of those four water bodies to withdraw the suspension is on going at this time.

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 40 waterways in FY09, including numerous streams in the Tanana, Kuskokwim and the Copper River basins. These projected numbers have dropped from the previous fiscal year because 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. In areas where there is little to no information, fieldwork is necessary to study hydrology, archeology and susceptibility to commercial navigation. 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 for their staff time and costs associated with publishing 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 an agreement with BLM to research river basins for the purposes of using the work product as an attachment to sufficiently justify the state'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, will expedite the RDI application processing time by BLM, reduce cost recovery by BLM and ultimately result in more RDI applications being filed. This increase in RDI filing should begin in FY2008.

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 and number of tributaries; 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 landowners and federal agencies with upland ownership of lands surrounding the water bodies. This is especially true in federal conservation units.

RS2477 MANAGEMENT

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 FY09, DNR will continue to research specific RS 2477s, will maintain RS 2477 databases, and will respond to public and agency requests for information about RS 2477s. In FY 08, DNR successfully advocated that BLM implement the Secretary of Interior's new right-of-way policy on RSTs. As such, the State will assert perpetual easements by application on high value and contentious RS 2477s. Like the RDI process, this is a much more cost effective process to assure public access than Quiet Title Actions, which can cost hundreds of thousands of dollars each. Unlike RDI's, there is no cost recovery from BLM on these ROW applications. The cost will be staff time to research and draft applications and answer specific questions from BLM. The right -of-way obtained will provide needed access in an expedited method but not diminish the existence of an RS2477 which could be later asserted through a quiet title action.

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). 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.

FY2009 Resources Allocated to Achieve Results

FY2009 Component Budget: \$413,200	Personnel:	
	Full time	2
	Part time	0
	Total	2

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 submerged lands. 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 been slow in getting the Alaska Bureau of Land Management to apply these criteria to re-assess determinations made before these court decisions.

One of the most contentious issues is, dealing with submerged lands beneath navigable waters that BLM purported to convey to certain Village Native Corporations. These state owned lands should have been excluded from ANCSA conveyances. Conflicts in the field are escalating in certain areas as the Village Corporations attempt to restrict access to the public using these rivers. Appeal or litigation may be necessary to reestablish case law and settle these specific issues.

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 mitigates problems for individual landowners, but has little ultimate effect on providing access for the public, or 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: As mentioned before, the Department will test the Secretary's new right-of-way policy by applying for high value access across federal land.

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. The State of Alaska enjoys the only successful Recordable Disclaimer of Interest program in the Country. As noted above, the State intends to use the RDI process to assert ownership of navigable waters. As the RDI process is being tested in post statehood Conservation Units, national special interest groups are starting to adversely comment on the State's applications. Secretary of Interior Norton has specifically rejected the State's request to apply the RDI process to RS 2477 routes in Alaska. However, as noted above, the State is moving forward with an alternative process.

Significant Changes in Results to be Delivered in FY2009

DNR will complete the SB305 Navigability mapping website in FY2008. 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 2007

RS 2477

1. The Department of Law filed Quiet Title for two routes from Coldfoot to Chandalar Lake and Coldfoot to Caro. 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. In FY 07 the Department settled the case in favor of the State and located, and surveyed the route.
2. Researched many other RS 2477 and 17(b) routes where access issues and problems surfaced.
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.
5. Successfully met and negotiated with BLM to implement the Secretary of Interior's new easement policy for establishing uncontested access on RS 2477 easements.

Navigability

1. As of September 2007, filed 37 applications with BLM for Recordable Disclaimers of Interest (RDI) for 64 water bodies. BLM has issued 10 disclaimers for 28 water bodies. DNR has requested suspension of applications for four water bodies due to disagreements with BLM.
2. Issued navigability determinations for various bridges, road, and other development projects and made navigability determinations for state land conveyances to municipalities and private parties.
3. Reviewed and responded to BLM navigability determinations and proposed BLM land conveyances.
4. Assisted the Attorney General's Office in research related to administrative appeals and litigation regarding navigable waters and 17(b) easements.
5. 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.
6. Achieved reversal to the BLM's administrative finality policy.

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

	FY2007 Actuals	FY2008 Management Plan	FY2009 Governor
Non-Formula Program:			
Component Expenditures:			
71000 Personal Services	252.5	110.2	187.0
72000 Travel	10.7	16.7	16.7
73000 Services	203.3	202.5	202.5
74000 Commodities	21.5	7.0	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	488.0	336.4	413.2
Funding Sources:			
1004 General Fund Receipts	420.5	266.5	268.1
1007 Inter-Agency Receipts	67.5	69.9	74.2
1061 Capital Improvement Project Receipts	0.0	0.0	70.9
Funding Totals	488.0	336.4	413.2

Estimated Revenue Collections

Description	Master Revenue Account	FY2007 Actuals	FY2008 Management Plan	FY2009 Governor
Unrestricted Revenues				
None.		0.0	0.0	0.0
Unrestricted Total		0.0	0.0	0.0
Restricted Revenues				
Interagency Receipts	51015	67.5	69.9	74.2
Capital Improvement Project Receipts	51200	0.0	0.0	70.9
Restricted Total		67.5	69.9	145.1
Total Estimated Revenues		67.5	69.9	145.1

**Summary of Component Budget Changes
From FY2008 Management Plan to FY2009 Governor**

All dollars shown in thousands

	<u>General Funds</u>	<u>Federal Funds</u>	<u>Other Funds</u>	<u>Total Funds</u>
FY2008 Management Plan	266.5	0.0	69.9	336.4
Adjustments which will continue current level of service:				
-FY 09 Bargaining Unit Contract Terms: General Government Unit	1.6	0.0	4.3	5.9
Proposed budget increases:				
-Add CIP receipts for new RS2477 Surveys Capital Project Position	0.0	0.0	70.9	70.9
FY2009 Governor	268.1	0.0	145.1	413.2

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

Authorized Positions		Personal Services Costs		
	<u>FY2008</u> <u>Management</u> <u>Plan</u>	<u>FY2009</u> <u>Governor</u>		
Full-time	1	2	Annual Salaries	111,161
Part-time	0	0	COLA	9,367
Nonpermanent	0	0	Premium Pay	0
			Annual Benefits	67,586
			<i>Less 0.59% Vacancy Factor</i>	<i>(1,114)</i>
			Lump Sum Premium Pay	0
Totals	1	2	Total Personal Services	187,000

Position Classification Summary

Job Class Title	Anchorage	Fairbanks	Juneau	Others	Total
Natural Resource Spec II	2	0	0	0	2
Totals	2	0	0	0	2