THE CLOUDS ARE LIFTING: THE PROBLEM OF TITLE TO SUBMERGED LANDS IN ALASKA

I. INTRODUCTION

Ownership of Alaska's submerged lands has been disputed ever since Alaska gained statehood. At stake is title to a sizeable amount of land, some of which is highly valued for natural resources like gold, oil, sand, and gravel. The federal government, the State of Alaska, and Native groups all have conflicting title claims to ownership of the lands under Alaska's lakes, rivers, and streams. Resolution of these conflicting claims has been complicated by the methods used by the Bureau of Land Management ("BLM") to survey public land conveyances. Discrepancies between the survey methods used in Alaska and the methods used in the lower forty-eight states have imposed staggering administrative, financial, and litigation burdens on all parties to Alaska title disputes.

Recently, two significant events have occurred that directly affect the determination of title claims to submerged lands in Alaska. In 1988 Congress passed an amendment to the Alaska National Interest Lands Conservation Act ("ANILCA") that, in effect, ratifies an agreement between the federal government, the State of Alaska, and Native groups that the methods for conveying Alaska's submerged lands should conform to those used in other states. When Congress ratified this agreement, it eliminated the final barrier hindering the efficient surveying and conveyance of these lands. By imposing a uniform standard on all states, Congress has ensured that undue hardship will

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1. For an excellent discussion of the controversy surrounding the disposition of submerged lands in Alaska up until 1988, see Duncan Hollomon, The Struggle for Alaska's Submerged Land, 5 ALASKA L. REV. 69 (1988). This note addresses the subsequent developments in the area of title disputes over submerged lands in Alaska.

2. Estimates of the amount of submerged lands in Alaska range from 783,000 acres (Alaska Department of Natural Resources estimate) to 1,895,000 acres (Bureau of Land Management estimate). Hollomon, supra note 1, at 78 n.48 (citing Memorandum from the Director of the Alaska Department of Natural Resources to the Director of the Bureau of Land Management, Alaska State Office (May 1, 1987)).


no longer be imposed on parties with claims to Alaska's submerged public lands.

Additionally, a subsequent Ninth Circuit decision, *Alaska v. Ahtna, Inc.*, 6 helps redress the inequity of imposing a uniform national standard for resolving title litigation over submerged lands that does not adequately take into account the uniqueness of Alaska's geography. The Ninth Circuit interpreted the federal test of navigability in a broad manner, thereby allowing the State of Alaska to lay claim to title to a greater acreage of submerged lands. By making the standard more flexible, the Ninth Circuit overcomes the inequity of defining navigability in a manner that excludes a large percentage of Alaska's waterways.

Both of these recent developments give the State of Alaska greater control of Alaska's submerged lands in a manner that corresponds more exactly to the control exercised by other state governments. This note will assess the origins, rationale, and impact of these developments on submerged lands ownership. Parts II and III provide an overview of the historical approach to determining title to submerged lands under the equal footing doctrine of the United States Constitution and under the federal test of navigability set out in *The Daniel Ball*. 7 The purpose and effects of Congress' amendment of ANILCA are presented in Part IV, and Part V discusses the reasoning and impact of the Ninth Circuit's interpretation of the concept of navigability in *Gulkana II*. Finally, this note addresses the possible combined effects of the ANILCA amendment and the Ninth Circuit decision on future submerged lands title disputes.

II. DETERMINING TITLE TO SUBMERGED LANDS UNDER THE UNITED STATES CONSTITUTION 8

With few exceptions, title to land under waters that are navigable belongs to the states. Title to lands beneath non-navigable waters, on the other hand, remains in the federal government. Under both the equal footing doctrine and the Submerged Lands Act, 9 federal law defines navigability, and thus federal law ultimately determines who has title to submerged lands in Alaska.

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6. 891 F.2d 1401 (9th Cir. 1989), cert. denied, 110 S. Ct. 1949 (1990) ("Gulkana River II"). As cases dealing with submerged lands are commonly referred to by the body of water involved, for the purpose of clarity subsequent citations of these cases will use this form.
7. 77 U.S. (10 Wall.) 557 (1870).
8. For additional discussion of the equal footing doctrine, see Hollomon, *supra* note 1, at 73-75.
Although not explicitly stated in the United States Constitution, the equal footing doctrine is derived from Article IV, Section 3.\(^{10}\) The doctrine establishes that all states, at the time they are admitted to the Union, are considered to be on "equal footing" with the original thirteen states.\(^{11}\) The significance of this doctrine for submerged lands disputes becomes apparent when one examines the origins of title to these lands. Prior to the Revolutionary War, the English crown held title to all navigable waters within its boundaries, and the lands submerged beneath the navigable waters were held in trust for the people as a whole.\(^{12}\) Title was viewed as an essential attribute of sovereignty because it gave the sovereign the ability to control trade and navigation upon commercially useful waterways for the public good.\(^{13}\)

Following the Revolutionary War, the thirteen original states, in their sovereign capacity, succeeded to title in the submerged lands within their state boundaries.\(^{14}\) By virtue of the equal footing doctrine, all territories subsequently admitted to statehood also succeeded to title in the lands submerged beneath their navigable waterways.\(^{15}\) Such title "is conferred not by Congress but by the Constitution itself."\(^{16}\) Conversely, if a waterway is non-navigable at the time of a territory's admission, title remains in the federal government.\(^{17}\)

In the Submerged Lands Act,\(^{18}\) Congress essentially codified the equal footing doctrine's premise that a state acquires title to lands submerged beneath navigable waterways in its territories.\(^{19}\) Under this Act, a state gains title and ownership to this land upon admission to

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10. Article IV, Section 3 provides, in part:
   The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State. U.S. CONST. art. IV, § 3.
15. Pollard's Lessee, 44 U.S. (3 How.) at 221.
19. Id. § 1311(a).
the Union, and holds such lands in the public trust. This ownership specifically includes “the natural resources within such lands and waters,” and entails “the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law.”

In the area of regulation, the states’ power to regulate beds of navigable waters “is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.” In fact, for regulatory purposes, a state is free to adopt its own definition of navigability. Under the State of Alaska’s expansive definition of navigability, significantly more waterways are considered navigable than under the more restrictive federal definition. In the area of title disputes, however, Alaska’s definition of navigability is irrelevant, as the federal definition controls.

Although the equal footing doctrine is not absolute, exceptions are rare. The federal government may convey land to a third party prior to statehood, but only if an appropriate public purpose is served by so doing. The United States Supreme Court has determined that


21. Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892). The Supreme Court noted that a state’s title to submerged lands “is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”

22. Id.


25. The State of Alaska defines “navigable water” as:

any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including . . . commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing or other public recreational purposes . . . .

ALASKA STAT. § 38.05.965(12) (1989).

26. The federal definition of navigability was established in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870). The Supreme Court defined navigable waterways as waterways that could be “used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” Id. at 563. For an analysis of this definition, see infra notes 38-60 and accompanying text.

27. This principle was established in Shively v. Bowlby, 152 U.S. 1, 48 (1894):

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the
it is Congress' policy to do this only in truly unusual circumstances, and thus the Court will not lightly infer Congressional intent to defeat a future state's title.28 Indeed, there is a strong presumption against such conveyances. Submerged lands will not be considered to have been conveyed unless Congress' intention was "definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters ...."29

_Chocataw Nation v. Oklahoma_30 is the sole case in which the United States Supreme Court has allowed the federal government to defeat a state's title to submerged lands by conveying land prior to statehood. The Court found that Congress, in a pre-statehood conveyance to the Choctaw Indians, intended to grant title to submerged lands as well as the surrounding uplands.31 Subsequently, in _Utah Lake_,32 the Court limited the precedential impact of _Chocataw Nation_ by stating that the conveyance to the Choctaw Indians was a "singular exception" to the rule that title to submerged lands automatically vests in a state upon statehood.33 The basis for holding that Congress intended to convey the submerged Choctaw lands was, according to the Court, the unusual history of the Indian treaties involved, which explicitly guaranteed that no portion of the Choctaw Reservation would ever become part of a state.34

The difficulty in overcoming the presumption in favor of the equal footing doctrine is especially pertinent in Alaska, where the Statehood Act disclaims all rights and title to property that "may be held" by Natives or was being held by the United States in trust for promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

_Id._
29. Montana v. United States, 450 U.S. 544, 552 (1981) (citations omitted); _see also_ United States v. Oregon, 295 U.S. 1, 14 (1935) ("Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged ....").
31. _Id._ at 635-36.
33. _Id._ at 198.
34. _Id._ In the Treaty of Dancing Rabbit Creek, the Choctaw Nation agreed to leave Mississippi when the United States government granted them fee simple title to their new land and guaranteed them that "no part of the land granted them shall ever be embraced in any Territory or State." _Chocataw Nation_, 397 U.S. at 625.
Natives. As discussed below, Gulkana River II specifically addressed this issue.

III. Determining Title Under the Federal Navigability Test

Since the states' title to submerged lands is derived from the United States Constitution, federal law has dictated the ground rules for resolving title disputes. As a state gains title only to lands submerged beneath navigable waters, the first question to address in determining title is whether or not the waterway is navigable. The federal test of title navigability was formulated in The Daniel Ball. The premise underlying the Daniel Ball test is that if a stream is navigable in fact, it is navigable in law. Waterways are navigable in fact if they can be "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Although initially viewed as establishing federal court admiralty jurisdiction limits, the test has been extended to determinations of navigability for title as well as for Commerce Clause purposes. The Daniel Ball test has been consistently reaffirmed and remains the standard for title navigability determinations in the federal courts.

The most significant aspect of the Daniel Ball test concerns the "highways for commerce" requirement. In an early Commerce Clause


36. For additional discussion of the federal navigability test, see Hollomon, supra note 1, at 75-92.

37. United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926) ("Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts."); see also Utah v. United States, 403 U.S. 9, 10 (1971) ("Great Salt Lake") ("The question of navigability is a federal question.").

38. 77 U.S. (10 Wall.) 557 (1870).

39. Id. at 563.

40. Id.


43. See, e.g., Great Salt Lake, 403 U.S. 9, 10 (1971); Colorado River, 283 U.S. at 76.
case involving the Daniel Ball test, the Court indicated that "[t]he capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use." Subsequent Supreme Court decisions focusing on title disputes have indicated that "the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce," and have consistently reaffirmed that the use of the waterway as a highway for commerce "is the gist of the federal test." Great Salt Lake is the most liberal interpretation of the highway for commerce requirement. In this case, the Court concluded that evidence of ranchers transporting their cattle from the mainland to an island was relevant in determining navigability. The Court indicated that it did not matter whether the cattle were transported for ranching purposes or as water-borne freight; the type of commerce involved was an "irrelevant detail."

The "used, or are susceptible of being used" portion of the Daniel Ball test means that a determination of title navigability cannot depend solely upon actual commercial development of the waterway. As others have noted, the "susceptible" aspect of this requirement is especially important in Alaska. Many Alaska waterways are very isolated, and, consequently, little commerce has been conducted upon them. Susceptibility permits a finding of navigability for remote waterways that are capable of bearing trade or travel but have not been so used because of the lack of demand for such uses. In Colorado River, the Supreme Court rejected the government's argument that the Court should look only at actual usage of the waterway at the time of statehood because future uses of the waterway were too speculative. The Court noted that "the possibilities of growth and future profitable use are not to be ignored." It was a question of fact whether the waterway in its ordinary condition could be brought into use by "the

44. The Montello, 87 U.S. (20 Wall.) 430, 441 (1874) (emphasis added).
45. Colorado River, 283 U.S. at 86.
46. See, e.g., Great Salt Lake, 403 U.S. at 11; Colorado River, 283 U.S. at 76; United States v. Holt State Bank, 270 U.S. 49, 56 (1926).
47. 403 U.S. 9 (1971).
48. Id. at 11.
49. Id.
50. See, e.g., Great Salt Lake, 403 U.S. at 12 (taking into consideration water conditions which would have permitted commercial navigation).
51. See, e.g., Hollomon, supra note 1, at 88 ("In the Alaska context, ... the courts may well find many waterways navigable as a matter of law, even though as a matter of fact there is no evidence of commercial use. The critical factor is the susceptibility of such use.").
52. 283 U.S. 64, 83 (1931).
53. Id.
growth of the population, the multiplication of activities and the development of natural resources.” In general, this capacity may be shown by observing a waterway’s physical characteristics, as well as by examining the uses to which it has been put.

The remaining portions of the Daniel Ball test concern the type of evidence admissible to demonstrate that a body of water is susceptible to use as a highway for commerce. The “ordinary condition” requirement functions on one level as a time restriction on pertinent evidence. This phrase signifies that the test is applied to the waterway as it existed at the time of statehood, as if a snapshot had been taken of its dimensions and configurations at that time. Subsequent changes in the waterway are deemed immaterial to title navigability determinations. Therefore, if a waterway is navigable upon statehood, and subsequently becomes non-navigable, it is still deemed navigable in law. This aspect of the ordinary condition requirement is insignificant in Alaska because its waterways have remained virtually unchanged since the time of Alaska’s relatively recent statehood.

However, a second aspect of the ordinary condition requirement indicates that “ordinary” is restricted to waterways that flow naturally. In Alaska, where waterways can remain frozen for over six months each year, determining the “ordinary condition” of a waterway is potentially quite difficult. Frozen uses probably cannot be considered in determining if the waterway is navigable and therefore susceptible to commerce. In one case, the Supreme Court concluded that a riverbed which is flooded for two weeks and dry for the remainder of the year would not be considered navigable in its “ordinary condition.” By analogy, if a waterway is frozen for all but two weeks of the year, courts would probably not consider it navigable in its “ordinary condition.”

54. Id.
55. Oregon v. Riverfront Protection Ass’n, 672 F.2d 792, 794 (9th Cir. 1982). Compared to the commerce clause use of the Daniel Ball test, this is quite stringent. In commerce clause cases, the test is applied to the waterway as it exists at the time of litigation, not as it appeared at the time of statehood. See, e.g., United States v. Appalachian Elec. Power Co., 311 U.S. 377, 380-81 (1940).
58. See Gulkana River I, 662 F. Supp. at 468 n.13. Although a waterway running freely for only two weeks a year would probably be considered non-navigable, the court noted that “it is well established that climatic changes rendering a waterbody
The "customary modes of trade and travel on water" aspect of the test also restricts the type of evidence considered relevant to prove use as a highway for commerce. Like the "ordinary condition" requirement, the time restrictions imposed by this aspect are not especially relevant for Alaska because the modes of travel have changed very little since the time of statehood. Yet this does not mean that all modern kinds of watercraft will satisfy this element of the test. For instance, the use of float planes was deemed irrelevant as evidence of navigation because they merely pause upon the water prior to traveling to another waterway and do not travel up, down or across the waterway.\(^5\) In general, though, this element favors a recent state like Alaska because the types of craft used today are similar enough to be deemed relevant in determining whether the body of water was susceptible for use as a highway for commerce at the time of statehood.\(^6\)

Applying the federal title navigability test to Alaska waterways is crucial in the context of public land conveyances by the federal government. If public lands contain submerged lands under navigable waterways, the state holds title to the submerged lands and the federal government cannot convey the lands to anyone else. A determination of navigability thus becomes a key issue. The prevalence of public land conveyances to the state and to Native groups makes navigability a particularly vital issue for Alaska.

IV. ACHIEVING UNIFORMITY FOR ALASKA LAND CONVEYANCES: THE CONGRESSIONAL AMENDMENT OF ANILCA

Title disputes over submerged lands in Alaska have been exacerbated by the methods the BLM has used to survey public land selections in Alaska. By relying on navigability determinations rather than the established survey methods used in the lower forty-eight states, BLM complicated the assessment of how submerged lands are conveyed and charged against the entitlements of the State of Alaska pursuant to the Statehood Act\(^6\) and Native groups pursuant to the non-navigable on a \textit{seasonal} basis do not preclude a finding of overall navigability.\(^\text{Id.}\) (emphasis added).


\(^6\) See, e.g., Gulkana River II, 891 F.2d 1401, 1405 (9th Cir. 1989), cert. denied, 110 S. Ct. 1949 (1990) ("[T]he watercraft customary at statehood could have at least supported commercial activity of the type carried on today, with minor modifications due to a more limited load capacity and rudimentary technology.").
Alaska Native Claims Settlement Act. In response to the navigability problems hindering the survey and conveyance of public lands in Alaska, Congress amended the Alaska National Interest Lands Conservation Act in 1988. The "primary purpose" of this amendment was "to clarify the conveyance and ownership of submerged lands by Alaska Natives, Native Corporations and the State of Alaska."

The key issue in conveyance disputes is chargeability, which determines how the acreage in a federal public land conveyance is assessed against the entitlements due to the state and Native groups. The issue is crucial because it involves balancing federal, state, and Native interests in Alaska's submerged lands. Since designated submerged lands are not counted against state and Native entitlements, BLM's method of designating these submerged lands determines how much additional land the federal government must transfer to the state and to Native groups. Prior to the ANILCA amendment, the navigability aspect of the BLM's chargeability policy imposed significant administrative, financial, and legislative burdens on the federal government, state government and Native groups. When Congress enacted the ANILCA amendment, they essentially "'approve[d] and clarified [the] agreement between the Department of the Interior, the State of Alaska, and Alaska Native groups regarding land surveying and conveyances in the State of Alaska.'"

Prior to its negotiated policy change, BLM's chargeability determinations were based on whether the waterbodies on conveyed lands were navigable. This practice arose from BLM's literal compliance

62. 43 U.S.C. §§ 1601-1629 (1988) [hereinafter ANCSA]. ANCSA authorized Native Alaskans to receive a substantial monetary payment and to select approximately 44 million acres from federal lands in exchange for releasing their aboriginal claims to the land. Id.


65. See, e.g., CONG. REC. 23,377 (1980) (“Even a conservative extrapolation from [recent litigation] gives some indication of the staggering administrative, financial, and litigatory burden placed upon the Federal and State governments and the Native Corporations by the present situation.”); S. REP. No. 302 at 15, reprinted in 1988 U.S.C.C.A.N. at 1367 (statement of Robert F. Burford, director, Bureau of Land Management, Department of the Interior) (BLM “favor[s] enactment of [the ANILCA amendment] because it enacts into law the current policy of the Administration with regard to submerged lands in Alaska and may eliminate the possibility of much litigation.”).

with section 6(g) of the Alaska Statehood Act. According to BLM's reading of this section, when public lands selected by the State were unsurveyed, the Secretary of the Interior must survey the exterior boundaries and then issue a patent based on this survey. In implementing this statute, BLM essentially determined that the term "public lands" included lands submerged beneath non-navigable waters. To separate chargeable submerged lands from non-chargeable submerged lands, BLM had to ascertain which submerged lands automatically belonged to the state by virtue of the equal footing doctrine. The only way for BLM to do this was to make a navigability determination of the waterbody.

Chargeability in Alaska thus became linked to navigability, which meant that land selections could not be conveyed until BLM determined whether the selection contained navigable waterbodies. Significantly, the difficulties associated with calculating and litigating navigability determinations were confined to public land conveyances pursuant to the Statehood Act and ANCSA. For all other land conveyances inside and outside Alaska, BLM followed its long-established policy of recognizing that title to lands bordering on non-navigable waters extends to the center of these waters. While entitlements of the state government and Native groups were being charged for lands under non-navigable waterbodies, all other recipients of federal land conveyances were not charged for such lands.

The inequity of this discrepancy in BLM's chargeability policy was initially resolved in 1983 when negotiations between BLM, the


69. Id.

70. Id.

71. Id. The Director of BLM noted that "BLM, in its efforts to convey the lands that have been selected by the State and the Native Corporations, has been required to make initial determinations as to the navigability of hundreds of lakes and rivers." Id.

72. Id. at 10, reprinted in 1988 U.S.C.C.A.N. at 1363-64.

73. Id. at 9, reprinted in 1988 U.S.C.C.A.N. at 1363. Authority for this position is derived from the Act of May 18, 1796, which established that title to lands bordering on non-navigable streams extends to the center of the stream. Id. In Hardin v. Jordan, 140 U.S. 371, (1891), the Supreme Court extended this principle to nonnavigable lakes or ponds, stating that "[i]t has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water." Hardin, 140 U.S. at 380.

state government, and Native groups led BLM to treat conveyances under the Statehood Act and ANILCA the same way it treated all other public land conveyances. Under this negotiated agreement, chargeability of submerged lands no longer depended solely upon the navigability of waterways. Instead, chargeability was determined according to the guidelines of the 1973 BLM Manual of Surveying Instructions. The manual requires that "all navigable bodies of water and other important rivers and lakes" be segregated from the rest of the land being surveyed. To ascertain the quantity of land remaining after this segregation, all lakes of fifty acres or more and all rivers wider than 198 feet must be "meandered." Meandering is a surveying term referring to a line shown on the survey plot that defines the winding and curving of a waterbody's banks. When using this survey method, BLM excludes lands underneath meanderable waters from the acreage total of the land selection; in essence, land beneath large bodies of water passes to the grantee without charge.

BLM's decision to determine chargeability in Alaska by meandering had a major impact on land conveyances to the state and Native groups because it expanded both the definition and the beneficiaries of non-chargeable submerged lands. As noted above, BLM previously had required navigability in order for submerged lands in Alaska to be non-chargeable. After BLM revised its chargeability policy, land underneath large bodies of water, regardless of whether the waterbody was navigable or non-navigable, was not charged against the acreage entitlement of the state or Native groups.

Despite the beneficial aspects of the revised BLM policy, designating meanderable areas as non-chargeable excited a good deal of controversy. Environmentalists believed that the policy effectively

75. Id.
76. BUREAU OF LAND MANAGEMENT, MANUAL OF INSTRUCTIONS FOR THE SURVEY OF THE PUBLIC LANDS OF THE UNITED STATES (1973) [hereinafter MANUAL OF SURVEY INSTRUCTIONS].
77. Id. at § 3-115.
78. Id. at § 3-121. Exceptions are made for artificial lakes and reservoirs, as well as for shallow or poorly defined temporary lakes that form due to permafrost and lack of drainage. Id.
79. The surveying term used in the manual to indicate the width of a meanderable river is "3 chains wide." Id. at § 3-120. Each chain is 66 feet long; three chains therefore total 198 feet. BLACK'S LAW DICTIONARY 229 (6th ed. 1990).
80. MANUAL OF SURVEY INSTRUCTIONS, supra note 76, at § 3-115.
81. For an excellent treatment of the intricacies of this meandering technique, see Hollomon, supra note 1, at 111-12.
82. See S. REP. NO. 302 at 12, reprinted in 1988 U.S.C.C.A.N. at 1365-66; see also Wilderness Soc'y v. Griles, 824 F.2d 4, 14 n.9 (D.C. Cir. 1987) ("under the new rule BLM no longer, as a threshold matter, bothers to make navigability determinations at all, but instead simply excludes submerged lands automatically from acreage totals.")
relinquished millions of acres to the state and Native groups to the
detriment of the environment. In *Wilderness Society v. Carruthers*, the Wilderness Society and the Sierra Club initiated suit against the
Department of the Interior, charging that the policy violated the Ad-
inistrative Procedure Act and was contrary to Congress' intent in
enacting ANCSA and the Statehood Act.

The environmental groups argued that if a Native group or the
state had a choice between two plots of land, both of identical acreage,
the grantee would choose the plot with a larger amount of submerged
lands. By so doing, the grantee would obtain the same acreage but be
charged for fewer acres, thus allowing the grantee to choose additional
entitlements later. The groups maintained that this would allow the
state and the Native groups to obtain greater acreage than Congress
intended them to receive under ANCSA and the Statehood Act.

While the environmentalists' argument that Congress did not in-
tend the BLM policy change may initially have been sound, Congress
laid any doubts about its intentions to rest in 1988 when it codified the
BLM policy changes. Congress knew of the discord that the change
in BLM policy had created among environmentalists, yet chose to
uphold national uniformity in surveying and chargeability procedures.
Despite environmentalists' charges to the contrary, the ANILCA
amendment does not “give away” millions of acres to which the state
and Native corporations are not entitled. It merely brings the survey
and conveyance procedures used by the rest of the United States into
use in Alaska.

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85. Griles, 824 F.2d at 7.
86. Id.
87. ANILCA, *supra* note 63, § 1631(b)(1). When amending ANILCA, Congress
adopted the BLM policy changes in the following provision:

> Whenever . . . the Secretary conveys land to a Native, a Native Corporation,
or the State pursuant to [ANCSA, the Statehood Act] or this Act which
abuts or surrounds a meanderable lake, river, or stream, all right, title, and
interest of the United States, if any, in the land under such lake, river, or
stream lying between the uplands and the median line or midpoint, as the
case may be, *shall vest in and shall not be charged against the acreage entitle-
ment of such Native or Native Corporation or the State.*

*Id.* (emphasis added).

88. *See, e.g.*, CONG. REc. S1599 (daily ed. Feb. 20, 1985); Senator Murkowski
noted that the Sierra Club and the Wilderness Society had recently challenged the
Department of the Interior's revised procedure for surveying public lands in Alaska.
The senator concluded that "pursuit of this litigation will result in burdensome cost to
all the interested parties and only delay resolution of the ultimate problem." *Id.*

89. *See Hearings on H.R. 2629, supra* notes 72-74 and accompanying text.
In fact, by making the amendment retroactive, Congress emphasized the inequity of the previous BLM policy in Alaska. The amendment requires that all state and Native land selections, conveyed before or after the enactment of the amendment, that "abut[] or surround[] a meanderable lake, river, or stream . . . shall not be charged against the acreage entitlement of such Native or Native Corporation or the State."

Ultimately the ANILCA amendment should make the federal government more efficient in passing title to submerged lands. Because BLM must make a navigability determination only if the waterway is relatively small, and thus non-meanderable, and because there is no requirement that BLM conduct a ground survey, delays in conveying title to land will be drastically reduced. This saves time and money for all parties involved.

Eliminating chargeability disputes does not guarantee that title disputes will also disappear. Disputes over title are still quite likely if, for instance, natural resources are discovered on submerged lands that are being conveyed to a Native group. In this case, the state is likely to claim title to the submerged lands under the equal footing

91. See, e.g., S. REP. No. 507, 99th Cong., 2d Sess. 6 (1986). The Senate Report on clarifying the status of submerged lands in Alaska specifically mentioned the costs involved when navigability is linked to chargeability:

This [section of the ANILCA amendment] clarifies that if a lake, river, stream or other body of water is required to be meandered, BLM is not required to expend the time, money and resources necessary to make an administrative determination as to whether the lake, river, stream or other body of water is or is not navigable, or whether title to the land beneath the lake, river, stream or other body of water did or did not vest in the State of Alaska at statehood.

Id.

92. ANILCA, supra note 63, § 1631(a)(4) ("Nothing in this subsection shall be construed to require ground survey or monumentation of meanderlines."). It is fortunate that ground surveys are not required, as they are quite labor and time intensive.

93. Today, the process of photogrammetry (aerial photography) may be used to survey meander lines. Although this procedure takes time and money, it does not require a person to complete an entire survey while remaining in a remote area, and thus is less time-intensive. According to the BLM manual, "meander corners" (the intersection of the bank of a navigable water and a survey standard, township or section line) must be established in the "regular manner," i.e., in the field, before photogrammetry may proceed. MANUAL OF SURVEY INSTRUCTIONS, supra note 76, §§ 3-117, 3-123. Photogrammetry has the additional benefit of creating a lasting memorial of the area surveyed in a photographic image.

94. The director of BLM conceded that "[a]lthough the Department's current policy concerning the chargeability of submerged lands has eliminated many of the problems associated with conveyances of selected lands in Alaska, the problem concerning navigability decisions remains unresolved." S. REP. No. 302 at 14, reprinted in 1988 U.S.C.C.A.N. at 1367.
doctrine. Conveying such lands to a Native group would not resolve a
title dispute because the federal government can only convey to Native
groups whatever title it has in public lands. Since lands under naviga-
table waterways pass automatically to the state under the equal footing
doctrine, title to such lands can not be conveyed to Native groups by
the federal government. The meanderable/non-meanderable distinc-
tion made for chargeability purposes would not prevent title disputes
in this situation. A determination of the navigability of the waterbody
involved would be necessary to determine title. In fact, the Gulkana
River II decision illustrates the continued potential for title navigabil-
ity disputes.

V. EXPANDING NAVIGABILITY: THE GULKANA RIVER II
DECISION

Gulkana River II was the first major title navigability case de-
cided after the BLM policy changes were implemented in Alaska. The
Ninth Circuit's determination that the Gulkana River was navigable is
crucial for future title dispute cases that are based on navigability. For
the first time, a river was deemed navigable even though the primary
use of the river was recreational. The fact that certain recreational
uses can be "commerce" within the federal title navigability test sug-
gests that the potential recreational use of Alaska's remote waterways
may prove significant for navigability determinations. By including
recreational uses within "commerce," more waterways could be
demed navigable, thus vesting title to the lands beneath them in the
state under the workings of the equal footing doctrine; as such, these
submerged lands would not be subject to conveyance by the federal
government.

The title dispute over the Gulkana river bed arose early in the
summer of 1979, when BLM determined that the lower thirty miles of
the river were not navigable, and thus not owned by the State of
Alaska under the equal footing doctrine. BLM subsequently made
an interim conveyance of the submerged land to Ahtna, Inc., a Native
corporation. The State of Alaska filed suit in federal district court
against the United States and Ahtna, Inc., seeking to quiet title and

95. 891 F.2d 1401 (9th Cir. 1989), cert. denied, 110 S. Ct. 1949 (1990).
Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989), cert. denied, 110 S. Ct. 1949
(1990). The non-navigable portion of the river is basically that which lies between the
Richardson Highway Bridge and the confluence of the Copper River. Id. at 466.
97. Id. at 457. The Alaska Native Claims Settlement Act authorized the creation
of Native corporations, through which Native groups could make land selections ac-
and Ahtna, Inc., were the properly authorized Native corporations that obtained the
interim conveyance of the disputed portion of the Gulkana River from BLM. Prior to
receive a declaratory judgment concerning the navigability of the Gulkana River and the relevancy of criteria utilized by BLM in making its determination of non-navigability.\textsuperscript{98} The United States subsequently disclaimed ownership in all but the upper reaches of the Gulkana River,\textsuperscript{99} and the state of Alaska dismissed any claim to the remaining upper reaches of the river in which the United States still claimed an interest.\textsuperscript{100} As a result of these actions, no dispute remained between Alaska and the United States concerning the quiet title portion of the suit.\textsuperscript{101} The district court retained jurisdiction, however, over the navigability determination of the lower thirty miles of the Gulkana River.\textsuperscript{102} The controversy also remained alive because Ahtna, Inc., did not join the federal disclaimer of the lower portion of the river.\textsuperscript{103}

There were extensive stipulations of fact in the district court, the most notable being that the Gulkana River's attributes, its slow moving and relatively shallow, narrow waters, had not changed appreciably since statehood.\textsuperscript{104} The parties also agreed that the river was frequently used by those running the Sourdough Campground to transport campers to and from the Richardson Highway Bridge.\textsuperscript{105} Modern power boats such as jet unit craft and aluminum river boats were routinely used, as were canoes and inflatable rafts.\textsuperscript{106} The most common use of this portion of the river, however, involved recreationists using their own watercraft to travel to the Sourdough Campground.\textsuperscript{107} The court found that the stipulated facts were "more than sufficient" to satisfy the federal test of navigability, holding that the lower thirty miles of the river were navigable as a matter of law, and

\begin{itemize}
  \item[98.] Id. at 457.
  \item[99.] Id. at 457-58. This action was taken pursuant to the Judiciary Procedure Act, 28 U.S.C. § 2409a(d) (1988).
  \item[100.] Gulkana River I, 662 F. Supp. at 458.
  \item[101.] Id.
  \item[102.] Id. (retaining jurisdiction under 43 U.S.C. § 1631).
  \item[103.] Id. Ahtna still had a live controversy with Alaska as to the title of the lower 30 miles of the river. The federal government only had a live controversy in regards to the navigability of those 30 miles. \textit{Id}.
  \item[104.] Id. at 466. Much of the lower 30 miles of the Gulkana River has depth of three to six feet and width of 150 feet. Portions of the river above the Richardson Highway Bridge are only one foot deep. In some areas, the river flows at a rate of two-to-three miles per hour. \textit{Id}.
  \item[105.] Id. at 467-68.
  \item[106.] Id. at 468. Typically, boats for hire transport the campers in 16-to-24-foot flat or round-bottomed boats, 12-to-15-and-a-half-foot inflatable rafts, and 15-to-19-foot freight and double-ended paddle canoes. \textit{Id}.
  \item[107.] Id.
\end{itemize}
therefore the submerged lands beneath the river belonged to the state.\textsuperscript{108}

On appeal, the Ninth Circuit noted that the district court had misstated the \textit{Daniel Ball} test by assuming that navigability could be satisfied by evidence of either trade or travel.\textsuperscript{109} According to the district court, the \textit{Daniel Ball} test implicitly equated routes for travel and routes for conducting commerce.\textsuperscript{110} However, the Ninth Circuit used a more traditional reading of the \textit{Daniel Ball} test and based its decision to affirm the district court on its own analysis of commercial activity on the Gulkana River.\textsuperscript{111}

Ahtna and its amicus\textsuperscript{112} argued that the principal uses of the Gulkana were recreational and thus not "commerce" under the \textit{Daniel Ball} test.\textsuperscript{113} In rejecting this argument, the Ninth Circuit concluded that transporting recreationalists for hire on the Gulkana River had evolved into a substantial industry that employed approximately four hundred persons.\textsuperscript{114} Although the court noted that the extent of existing commerce is not conclusive proof of navigability for title purposes, the court found that determining a river to be non-navigable merely because its use primarily relates to recreation was "too narrow a view of commercial activity."\textsuperscript{115} The court recognized that navigability was a "flexible concept" and that each time a court applied the \textit{Daniel Ball} test it "is apt to uncover variations and refinements which require further elaboration."\textsuperscript{116} The court then held that "under the facts of this case... the present use of the lower Gulkana is commercial and provides conclusive evidence of the lower Gulkana's susceptibility for commercial use at statehood."\textsuperscript{117}

The Ninth Circuit also rejected Ahtna's reservation of title argument.\textsuperscript{118} Ahtna admitted that a state generally obtained title to lands

\begin{itemize}
\item \textsuperscript{108} \textit{Id.}
\item \textsuperscript{109} \textit{Gulkana River II}, 891 F.2d 1401, 1404 n.3 (9th Cir. 1989), cert. denied 110 S. Ct. 1949 (1990) (citing \textit{Gulkana River I}, 662 F. Supp. at 463 (quoting \textit{Great Salt Lake}, 403 U.S. 9, 11 (1971))).
\item \textsuperscript{110} \textit{Gulkana River I}, 662 F. Supp. at 464 ("It is difficult to imagine a situation in which a waterbody is susceptible to use as a transportation route yet not susceptible to use as a highway for commerce.").
\item \textsuperscript{111} \textit{Gulkana River II}, 891 F.2d at 1405.
\item \textsuperscript{112} Arctic Slope Regional Corporation joined Ahtna as amicus. \textit{Id.} at 1403.
\item \textsuperscript{113} \textit{Id.} at 1405. Although the issue was first raised on appeal, the court chose to discuss the merits of Ahtna's argument because the issue was "purely legal and the facts [were] fully developed." \textit{Id.}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} (quoting United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 (1940)).
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{Id.} The court of appeals reached this issue although it was initially raised on appeal, and summarily dismissed this possible barrier to the state's title. \textit{Id.}
\end{itemize}
submerged beneath navigable waters upon statehood, but the Native corporation argued that the federal government, in enacting ANCSA, indicated that Natives "may have held title" to the submerged land.\textsuperscript{119} Reading this language in conjunction with the Statehood Act, Ahtna argued that there was an indication of Congressional intent to reserve title to the Natives.\textsuperscript{120} The court determined that for Ahtna to prevail, it would have to overcome the strong presumption against conveyances to an entity other than the state. To do so, it would have to show that Congress clearly intended to include the submerged lands in the federal reservation, and to "defeat the future State's title to such land."\textsuperscript{121} As Ahtna had not met this high burden, the argument was quickly dismissed. The Ninth Circuit, using an expanded definition of navigability under the federal navigability test, therefore affirmed the district court's finding that the state held title to the submerged lands under the Gulkana River.

VI. ASSESSING THE FUTURE OF SUBMERGED LAND TITLE DISPUTES

The combined effect of the ANILCA amendment and the \textit{Gulkana River II} decision gives the State of Alaska an edge in future disputes over federal land grants. Because Congress considered federal uniformity more significant than Alaska's unique geography, the ANILCA amendment gives the state efficient access to ownership of land under large, non-navigable bodies of water. As discussed above, Native groups and the federal government also benefit from this efficient transfer of federal lands. However, the Ninth Circuit's liberal interpretation of the \textit{Daniel Ball} test further favors the state by permitting the state to present recreational use, or potential for such use, as evidence of navigability.

These developments initially may be interpreted as undeserved windfalls to the state's share of federal lands in Alaska. In a larger sense, however, these developments counteract the results of imposing a rigidly uniform federal navigability test developed for the lower forty-eight states. Because Alaska has an unusually high proportion of non-navigable frozen bodies of water, the state's ownership of submerged lands is restricted to a much greater extent than the other states in the union.\textsuperscript{122} Thus, changes made for the sake of federal uniformity that benefit the State of Alaska may be viewed as simply balancing out the inequities that result from a uniform navigability test.

\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 1405-06.
\textsuperscript{122} \textit{See} notes 56-58 and accompanying text.
Similarly, the case law providing a more modern and realistic interpretation of commerce also helps to redress the inequities of defining navigability in a manner that potentially excludes so many of Alaska’s waterways.

VII. CONCLUSION

Title to Alaska’s submerged lands has been disputed since Alaska gained statehood; such disputes are not likely to end because of one case and one amendment to a statute. However, the ANILCA amendment has eliminated many disputes over the chargeability of submerged land under meanderable waters, and the Gulkana River II decision has broadened the definition of “commerce” as used in the Daniel Ball title navigability test. The combination of these two factors seem to be lifting some of the clouds that have darkened titles to Alaska’s submerged lands.

Denise Dosier