

# Public Access Assertion and Defense Unit (PAAD)



Suite 1420 Atwood Building

# Mission Statement

- ◆ Protecting the Alaskan lifestyle through the assertion and defense of access to Alaska's Public Lands and Waters



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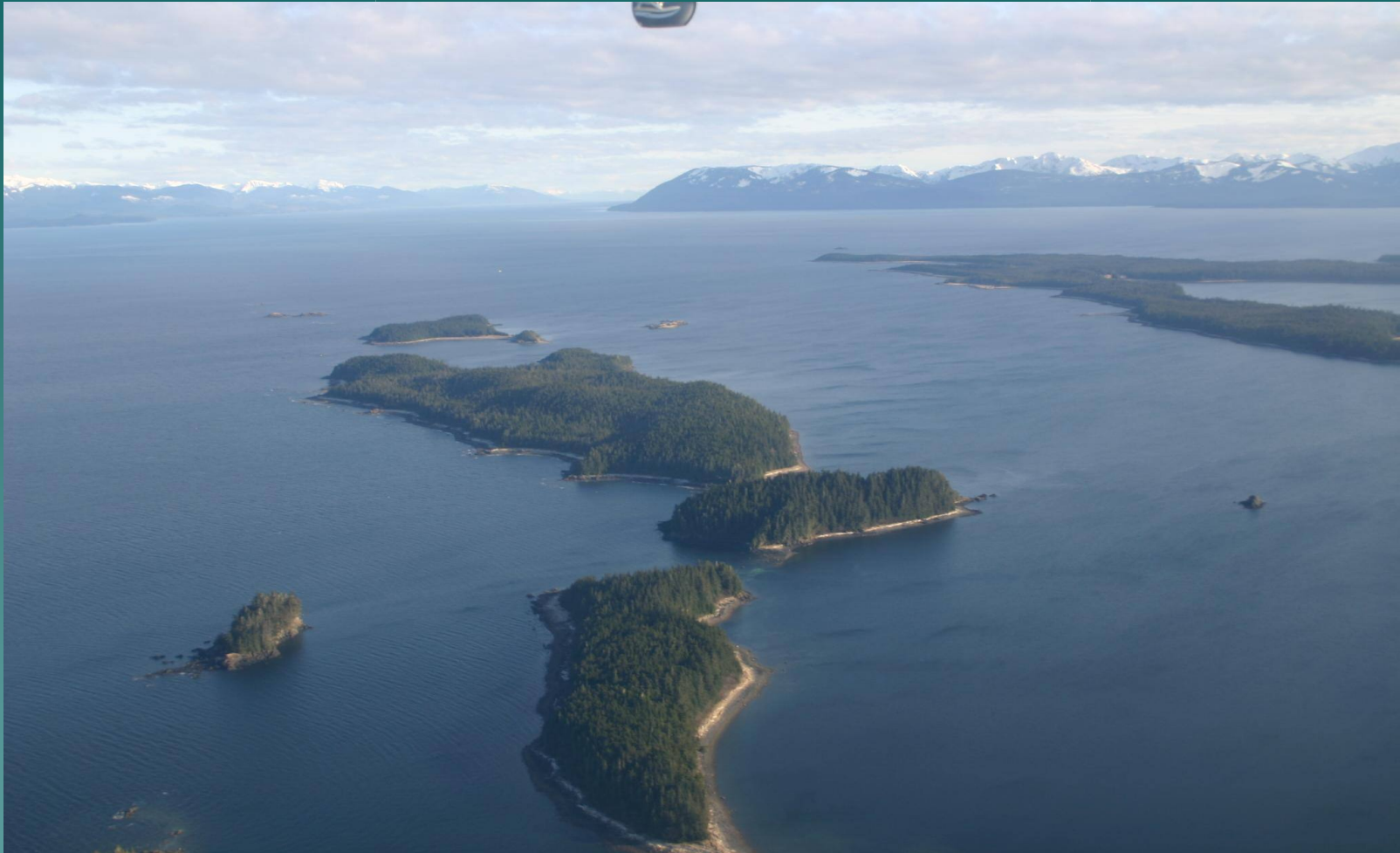
# Interagency Navigability & Access Team



- ◆ Department of Natural Resources
- ◆ Department of Fish and Game
- ◆ Department of Law



# Navigability



- ◆ Coordinating statewide navigability policy
  - ◆ Public Trust and Title Navigability

# Navigability

- ◆ Navigability determinations, who needs them and why?
- ◆ Federal agencies
- ◆ State agencies
- ◆ Local governments
- ◆ Private citizens, both Public Trust and Federal/State Conflict.





# Equal Footing Doctrine

- ◆ All states are admitted to the union on equal footing with the other states, including the 1953 Submerged Land Act, which granted the title to the submerged lands beneath Navigable waters





# TITLE 43--PUBLIC LANDS

## CHAPTER 29

### ◆ SUBMERGED LANDS ACT OF 1953

- ◆ SUBCHAPTER II--LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES
- ◆ Sec. 1311. Rights of States (a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use.

- ◆ It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

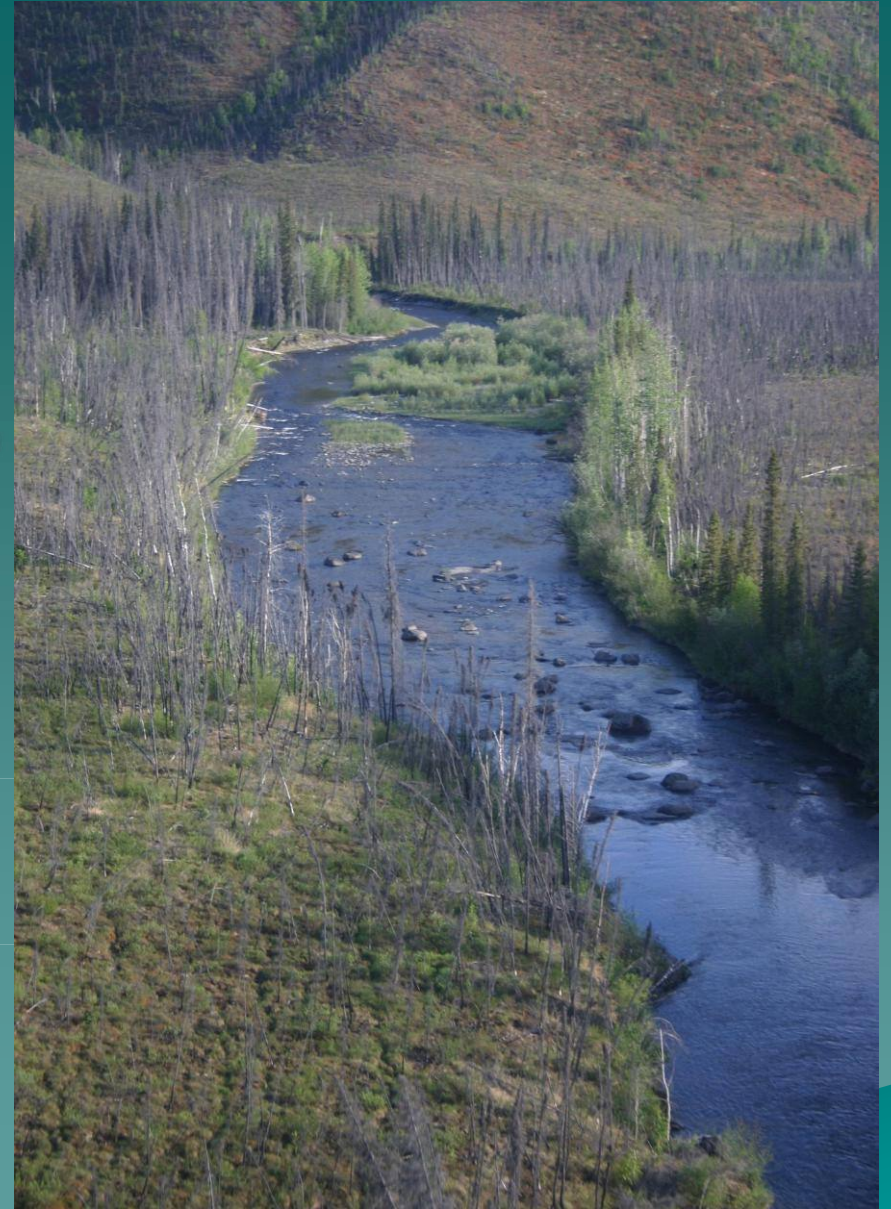
- ◆ (b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases
- ◆ (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

- ◆ (d) Authority and rights of United States respecting navigation, flood control and production of power
- ◆ Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;



# Is it Navigable?

- ◆ Tidelands
- ◆ Shorelands
- ◆ Submerged lands



- ◆ Sec. 1301. Definitions (Submerged Land Act)
- ◆ When used in this subchapter and subchapter II of this chapter (a) The term "lands beneath navigable waters" means (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

- ◆ Whether a river is navigable for purposes of state ownership is decided according to federal law. *State of Alaska*, 891 F.2d at 1404, citing *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926). The basic definition for navigability was expressed in *The Daniel Ball*, 77 U.S. (19 Wall) 557, 563 (1870), as follows:
- ◆ Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are 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.
- ◆ *Ibid.* As the appeals board for the U. S. Department of Interior noted in *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692, 698 (ANCAB 1979), the U. S. Supreme Court used that definition in the *Holt State Bank* case, 270 U.S. at 56, as the basic test for determining those “streams and lakes” which are navigable for state title.



◆ U. S. Supreme Court authority:

◆ The presence of rapids, sandbars, shallow waters, and other obstructions making navigation difficult or even impossible in sections ... does not destroy title navigability so long as the river or part of it is usable or susceptible to use as a highway for commerce for a significant portion of the time. *United States v. The Montello*, 87 U.S. 430 (1874); *United States v. Utah*, 283 U.S. 64 (1931). \* \* \* A recent case emphasized that sporadic and short-lived use of a waterway for travel and transportation by local residents for their own purposes and not for hire meets the requirement that a waterway be useful as a highway for commerce. *Utah v. United States*, 403 U.S. 9 (1971). \* \* \* Neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation. 86 Interior Dec. at 697.

- ◆ As the Ninth Circuit Court also stated, with regard to the Gulkana River: *State of Alaska*  
"A river's use 'need not be without difficulty, extensive, or long and continuous' for the river to be a highway for commerce.", 891 F.2d at 1404 (quoting from *Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982) (finding 32-mile stretch of river navigable in its natural and ordinary condition based on its use for driving logs downstream by the "rough means" of temporarily deepening the channel, using horse teams to move logs over "exposed gravel bars, boulders, and shoals," and breaking up "intractable log jams" with dynamite). That court emphasized: "Although the river must be navigable at the time of statehood, . . . this only means that, at the time of statehood, regardless of the actual use of the river, the river must have been susceptible to use as a highway of commerce." \* \*  
\* [I]t is not even necessary that commerce be in fact conducted . . . 'The extent of existing commerce is not the test.'" *Ibid.* (citing and quoting from *United States v. Utah*, 283 U.S. 64, 75, 82-83 (1931) (emphasis added)). Rather, it is enough to show:
  - ◆ the capacity of the rivers in their ordinary condition to meet the needs of commerce as they may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put. *United States v. Utah*, 283 U.S. at 83.

## Supreme Court of the United States

- ◆ PHILLIPS PETROLEUM COMPANY and Cinque Bambini Partnership, Petitioners v. MISSISSIPPI and Saga Petroleum U.S., Inc.

**No. 86-870.** Argued Nov. 9, 1987.

Decided Feb. 23, 1988.

Rehearing Denied May 16, 1988.

486 U.S. 1018, 108 S.Ct. 1760.

- ◆ States, upon entry into the Union, received ownership of all lands under waters subject to ebb and flow of the tide; therefore, land underlying Mississippi waters which were not navigable-in-fact but which were indirectly influenced by tide running in Gulf of Mexico, by virtue of being adjacent and tributary to navigable river flowing into Gulf, passed to State of Mississippi at time of statehood.



# Internal (State) Uses of Navigability Determinations

- ◆ Mining permits, gold and gravel
- ◆ Hunting and fishing access & regulation
- ◆ Oil and gas
- ◆ Mental health lands
- ◆ Land disposal
- ◆ Muni entitlements
- ◆ Conservation Unit jurisdictional disputes
- ◆ DOT rights of way
- ◆ Review of Native conveyances
- ◆ Public Trust access issues
- ◆ Hydrokinetic & other permits

# Art VIII Sec 14 Access to Navigable Waters



- ◆ Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

# Public Trust v Title Navigability

Public Trust Doctrine providing that shorelands, submerged and submersible lands are preserved for public use, including but not limited to, navigation, fishing, and recreation; and the State of Alaska, as trustee for the people, bears responsibility of preserving and protecting the right of the public to the use of waters for those purposes.





# Title Navigability

- ◆ Article VIII § 6. State Public Domain
- ◆ Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.



# Title Navigability

- ◆ **AS 38.04.062.**  
**Identification of State Submerged Land.**
- ◆ **(g)** In this section,
- ◆ **(1)** "navigable water" means water that, at the time the state achieved statehood, was used, or was susceptible of being used, in its ordinary condition as a highway for commerce over which trade and travel were or could have been conducted in the customary modes of trade and travel on water; the use or potential use does not need to have been without difficulty, extensive, or long and continuous;



# Title Navigability

## **AS 38.05.965 (22)**

"submerged land" means land covered by tidal water between the line of mean low water and seaward to a distance of three geographical miles or further as may hereafter be properly claimed by the state;





# Title Navigability



- ◆ **AS 38.05.965 (20)** "shoreland" means land belonging to the state which is covered by nontidal water that is navigable under the laws of the United States up to ordinary high water mark as modified by accretion, erosion, or reliction;

# Public Trust Navigability

## ◆ AS 38.05.965. Definitions.

**13)** "navigable water" means 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 but not limited to water suitable for 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;



# Ordinary High Water Mark



- ◆ The ordinary high water mark (OHWM) is the boundary between **non-tidal waters** and adjoining uplands.



# OHWM on Braided Streams

- ◆ In the case of braided streams and delta areas where there can be several stream channels or the channels frequently shift naturally, the stream bed is defined as lying between the outer OHWM of the most distant channels.



# Mean High Water Mark (Tide)

- ◆ The point on the shore which the average high tide will reach.  
(Blacks Law)





# Who's land is it?



# Navigable Waters Web mapping application

<http://www.dnr.state.ak.us/mlw/nav>

- ◆ Developed using **ArcServer** to meet Alaska Public Land Statute 38.04.062(b)
- ◆ Search for navigability status of waterways using MTR's, waterbody name or zoom tools



# Link to Alaska DNR Nav Site

<http://dnr.alaska.gov/mlw/nav/>

