U.S. Government Accountability Office

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Alaska Land Management: Resolving Ownership of Submerged Lands

GAO-23-106235
Report to Congressional Requesters

July 27, 2023

Why This Matters

Alaska contains over 12,000 rivers and more than 3 million lakes, with over 14 percent of the state's total square miles consisting of waterways. Because there is a limited highway system in Alaska, waterways often serve as important transportation corridors. Many of these waterways and the submerged lands beneath them—the beds and banks of waterways and their associated natural resources, such as minerals—are managed by the federal government, which is the largest landowner in Alaska.

Under federal law, a state owns the unreserved submerged lands beneath waters that were navigable as of the date of statehood, which was 1959 for Alaska.[1] The Supreme Court of the United States has defined navigability for title, stating that waters 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."[2]

State and federal agencies have different missions, laws, and regulations that govern how they manage lands in Alaska. As a result, who owns submerged lands affects a range of land management functions, including collection of fees; decisions about use of resources, such as access to waterways for commercial tour operators; and law enforcement.

We were asked to examine issues related to the ownership of submerged lands in Alaska. This report provides information on the processes used for resolving ownership of submerged lands in Alaska and actions that federal agencies have taken to clarify land management responsibilities between the federal government and the state, while ownership of submerged lands is being resolved.

Key Takeaways

- Two processes can be used for resolving ownership of submerged lands, depending on the situation: an administrative process or a judicial process.
  - Under the administrative process, since 2003, the Bureau of Land Management (BLM) has made determinations in 36 instances that Alaska owns specific submerged lands, in response to applications submitted by the state. The state pays BLM's administrative costs to complete the process. The administrative process has taken 5 years, on average, to complete.
  - Under the judicial process, the state has filed at least 10 lawsuits since 1980, according to BLM. For closed cases, there has been a range of outcomes, including the court ruling in favor of either party. BLM officials indicated that the process is complex and can take years to complete for each case.

- While ownership of specific submerged lands is being resolved, federal land managers have taken some steps toward management of these lands through an interagency workgroup. However, federal land management agencies have not developed a process for collaborative land management that involves the state.
- GAO is recommending that the Department of the Interior and the Department of Agriculture ensure that the relevant federal land management agencies coordinate to use third-party facilitation to help those agencies and the State of Alaska work toward agreement on a collaborative approach for the management of submerged lands in Alaska while ownership is being resolved.

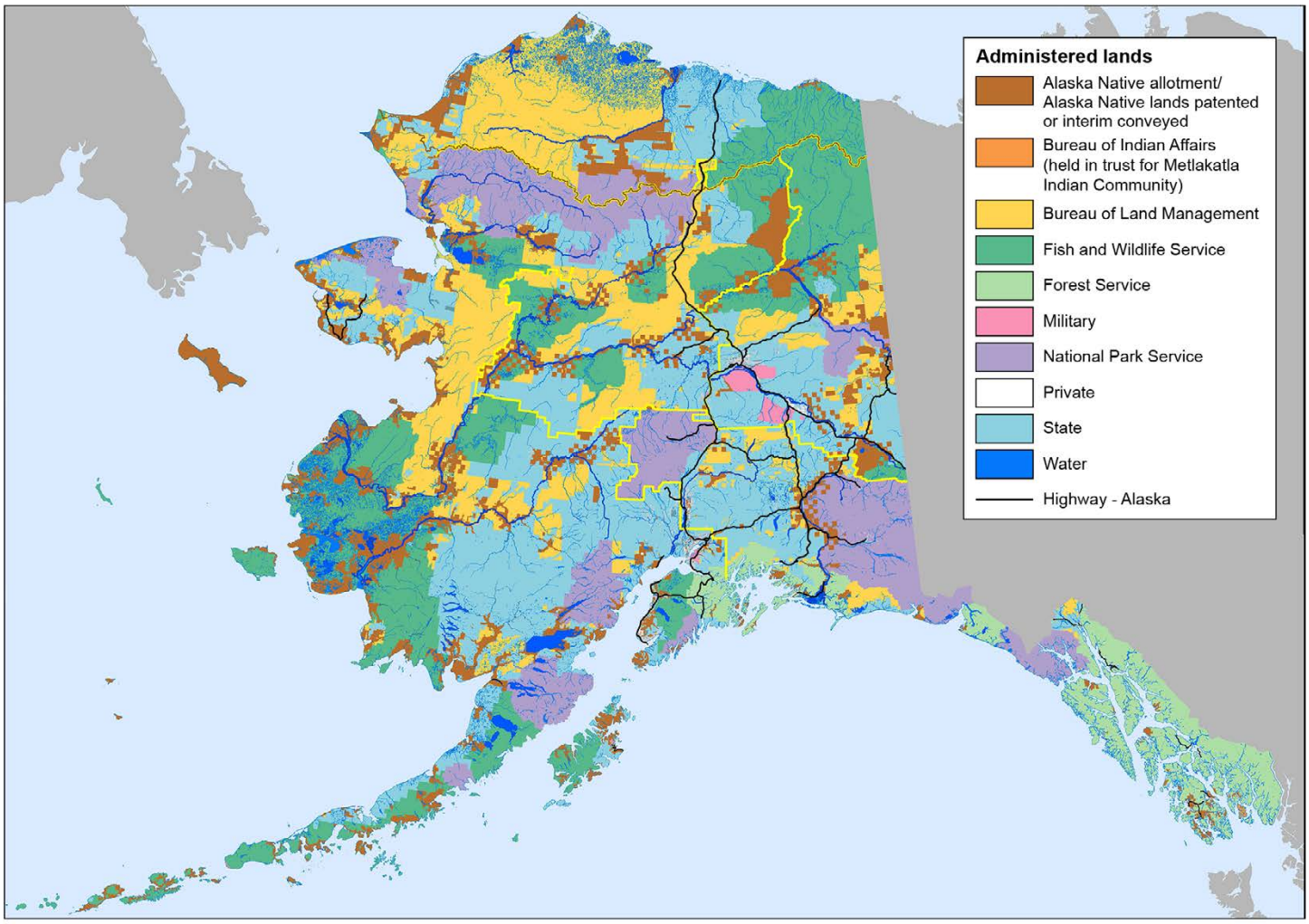
Background

Ownership of submerged lands has a number of implications for the users of these waterways, such as recreational users and individuals carrying out subsistence fishing, including Alaska Natives. Additionally, there may be implications for other entities and individuals in the state, such as landowners, including Alaska Native Corporations—local and regional entities organized under Alaska state law in accordance with the federal Alaska Native Claims Settlement Act.[3]

The importance of resolving ownership of submerged lands was highlighted by the 2019 Supreme Court decision in the case of *Sturgeon v. Frost*.[4] The case arose after National Park Service (NPS) rangers stopped an individual from using a personal hovercraft on the Nation River, within the Yukon-Charley Rivers National Preserve, in violation of NPS regulations. The Nation River had previously been determined to be navigable, and therefore its submerged lands were state-owned. The individual ultimately filed a lawsuit, alleging that the federal nationwide hovercraft ban in the National Park System did not apply in Alaska on state-owned submerged lands beneath navigable waters. The Supreme Court, in its second opinion in a lengthy case history, held that because of the language of the federal Alaska National Interest Lands Conservation Act, the NPS regulation at issue could not apply on state-owned lands, even if they are geographically within NPS boundaries.

The decision in *Sturgeon v. Frost* has placed pressure on the four federal land management agencies in Alaska to determine how to carry out their responsibilities while ownership of submerged lands is being resolved, according to federal officials. These agencies include BLM, Fish and Wildlife Service (FWS) and NPS—all within the Department of the Interior—and the U.S. Forest Service within the Department of Agriculture (see fig.1). The missions of the four federal land management agencies vary and broadly include resource conservation, managing energy and mineral production, preserving wildlife and wildlife habitat, protecting endangered species, and maintaining healthy and productive forests.

Figure 1: Administered Lands and Waterways in Alaska, as of November 2022



Source: Bureau of Land Management. | GAO-23-106235

How is ownership of submerged lands in Alaska resolved?

Two processes can be used for resolving ownership of the submerged lands beneath waterways, depending on the situation—an administrative process and a judicial process.

Administrative process

Under the administrative process, BLM may issue a "disclaimer" of federal interest in lands, including submerged lands, when certain conditions exist, in response to an application from an entity claiming title to those lands. BLM does so by issuing a recordable disclaimer of interest (RDI), as authorized under the Federal Land Policy and Management Act of 1976.[5] According to BLM regulations, the objective of an RDI is to eliminate the necessity for court action in those instances where the United States asserts no ownership or interest, based on a determination that there is a cloud on the title to the lands, attributable to the United States.

Under BLM regulations, RDI applications generally must include certain specified information, such as the nature and extent of the alleged cloud on the title and the reasons the applicant believes that the federal interest in the lands included in the application has terminated by operation of law or is otherwise invalid. Applications must also include any available documents or title evidence, such as

historical and current maps, photographs, and water movement data that support the application. If BLM accepts an application as supported by the evidence, it issues a document that disclaims any federal interest in the submerged lands. Generally, the effect of issuing such a disclaimer in response to the state's application is that the State of Alaska's ownership of the submerged lands is confirmed, so the state may then manage them.

Conversely, if BLM denies an application, then it does not issue a disclaimer of federal interest. For example, BLM could determine that the state's evidence is insufficient or that an affected federal land managing agency has filed a valid objection presenting sustainable rationale that claims U.S. title to the lands. The effect of denying an application is that federal agencies continue to manage the submerged lands in accordance with the agencies' missions and applicable federal laws and regulations. In the event of a denial, the state has the option to file an appeal to the Interior Board of Land Appeals, which decides appeals resulting from BLM or other Interior agency decisions relating to the use and disposition of public lands and their resources. The state may also bypass this administrative appeal in favor of pursuing the judicial process.

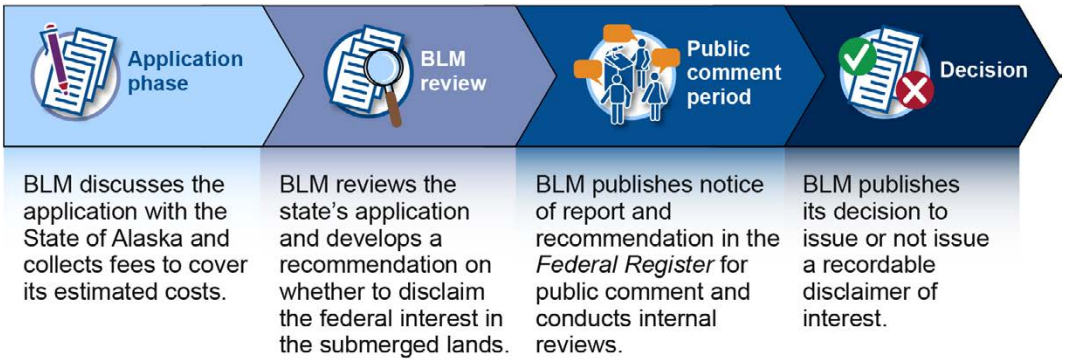
Judicial process

Under the judicial process, the state may file a lawsuit in federal court under the Quiet Title Act in some situations.[6] Essentially, under this process, the state sues the federal government to adjudicate disputed title to property, including submerged lands, in which the United States has claimed an interest (e.g., when BLM has determined that all or part of a waterway is nonnavigable). Before bringing an action under the Quiet Title Act, the state must provide the United States with notice of at least 180 days of its intention to file suit, the basis for the lawsuit, and a description of the lands included in the lawsuit. If the federal district court rules for the state, the ruling confirms state title to the lands at issue. Any decision rendered by a district court could then be subject to further appeal.

What are key steps in the administrative process?

There are four key steps in the administrative process for resolving ownership of submerged lands in Alaska, according to BLM, as shown in figure 2.

Figure 2: Key Steps for BLM in the Recordable Disclaimer of Interest Administrative Process for Resolving Ownership of Submerged Lands in Alaska



Sources: GAO analysis of Bureau of Land Management (BLM) documents; GAO (icons). | GAO-23-106235

Text of Figure 2: Key Steps for BLM in the Recordable Disclaimer of Interest Administrative Process for Resolving Ownership of Submerged Lands in Alaska

1. Application phase: Figure 2: Key Steps for BLM in the Recordable Disclaimer of Interest Administrative Process for Resolving Ownership of Submerged Lands in Alaska

2. BLM Review: BLM reviews the state's application and develops a recommendation on whether to disclaim the federal interest in the submerged lands.
3. Public Comment Period: BLM publishes notice of report and recommendation in the Federal Register for public comment and conducts internal reviews.
4. Decision: BLM publishes its decision to issue or not issue a recordable disclaimer of interest.

Sources: GAO analysis of Bureau of Land Management (BLM) documents; GAO (icons). | GAO-23-106235

- **Application phase.** The state notifies BLM that it intends to apply for an RDI in submerged lands under a specific waterway. BLM and the state have a preapplication meeting to discuss the waterway; the components of the application; and BLM's estimated administrative costs to process the application, which must be paid by the state.[7] The state then submits an application and processing fees to BLM. In its application, the state includes evidence to support its application, such as information on the historical use or physical characteristics of the waterway.
- **BLM review.** BLM reviews the application and drafts a report summarizing its analysis and its recommendation on whether to disclaim the federal interest in the submerged lands. In addition, BLM must consider whether the federal government made any prestatehood land withdrawals that would prevent BLM from issuing a disclaimer. Such withdrawals could include a public land order designating a national park, like Glacier Bay, or reservation of the land for military use, like Elmendorf Air Force Base in Anchorage.[8]
- **Public comment period.** BLM releases information about the application, as well as its draft report, for public comment. Specifically, BLM publishes notice of the application and the grounds supporting it in the *Federal Register* at least 90 days before issuance of a disclaimer, as required by statute.[9] BLM also provides notice, typically in the same *Federal Register* notice, of its draft report, including its recommendation whether to issue a disclaimer, and makes it available for public comment, typically for 60 days. In addition, BLM provides the draft report to federal land management agencies and other identified parties, such as Alaska Native Corporations, for their review and comment. BLM also provides the report to Interior's Office of the Solicitor for review and approval prior to making a disclaimer recommendation for the agency. BLM may use any comments received to update its report and recommendation.
- **Decision.** Once BLM has received payment from the state for all required costs, including the administrative costs of processing the application, BLM finalizes its decision to accept or deny the application. If BLM accepts the application, it issues a disclaimer, effectively determining that the United States does not hold a valid interest in the lands. If BLM issues a decision denying the application, the state can appeal the final decision to the Interior Board of Land Appeals or file a lawsuit in federal court regarding the issue of title to the submerged lands.

How does BLM determine navigability?

When determining whether a waterway is navigable, BLM generally considers evidence showing either (1) prestatehood historical use demonstrating navigability or (2) physical characteristics of the waterway and more recent uses indicating susceptibility to navigation. Navigability or susceptibility to navigation for commerce must be determined based on the time of statehood—January 3, 1959, for Alaska.

Historical use

There is not a comprehensive historical inventory of navigable rivers and lakes in Alaska. Evidence for historical use for navigation may include photographs (see fig. 3), journals, film, or logbooks showing the use of certain waterways for commercial purposes, such as transporting mail or building materials, according to BLM. Historical information may document boat use, weights, loads, and frequency, among other things. Typically, BLM uses a historian to gather this type of information. According to BLM staff responsible for determining navigability, such evidence can make a clear case for navigability without the need for expensive fieldwork. For example, as part of BLM's disclaimer in 2005 for the Porcupine River, BLM found evidence of a variety of travel for commerce prior to statehood, including two steamboats, at least three barge operators, and 30- to 40-foot boats carrying 4 to 5 tons of cargo each.

Figure 3: Photograph Showing Historical Use of Waterway for Travel for Commerce

Watercraft used on the Takotna River in 1914.

Source: University of Washington Libraries, Special Collections, AWC4763. | GAO-23-106235

Susceptibility to navigation

In the absence of evidence supporting historical use, BLM can determine if a waterway could have been susceptible to navigation at the time of statehood. To do this, BLM evaluates the physical characteristics of the waterway to determine whether it could have been used in its ordinary condition as a highway of commerce by watercraft in use at the time of statehood. BLM makes such determinations based on current information, including water depth, accessibility, flow rate, gradient, seasonality, and obstructions in the water body.

BLM officials stated that determining navigability based on susceptibility is challenging and increases the time to complete the administrative process to determine whether to issue an RDI. According to those officials, susceptibility determinations include expensive and time-consuming fieldwork and must be performed on a case-by-case basis for each segment of a waterway, as the physical characteristics of a waterway typically differ along its total length. For example, according to BLM officials, fieldwork might entail using helicopters to

view the physical characteristics of waterways, which can cost as much as $15,000 per trip.

According to BLM officials, there is disagreement with the state about the appropriate standards for determining navigability due to the lack of clear statutory criteria and sparse case law precedent. For example, according to BLM, there is no consensus regarding the type, load capacity, size, or method of propulsion for watercraft used in making the determination. Further, state officials expressed concerns that BLM has not articulated clear and specific standards regarding the physical characteristics of a waterway and susceptibility criteria that BLM will use to determine navigability based upon federal case law.

BLM officials stated that they are reluctant to develop standards that are more specific than those used by federal courts in interpreting navigability. Without statutory standards, navigability is determined primarily as interpreted by courts, and any navigability determinations that the agency makes based on more specific standards may be overturned by the courts, according to BLM officials.

How many applications has BLM processed, and how long did it take?

Since 2003, when BLM amended its regulations to allow states to apply for disclaimers at any time,[10] BLM has issued disclaimers based on 36 applications from the State of Alaska, according to BLM.[11] The state submitted the majority of the applications (27 of 36) between 2003 and 2006.

While BLM has taken, on average, about 5 years to complete the administrative process and issue a disclaimer, the time taken to complete the process for individual applications has varied from less than 1 year to more than 16 years. For example, BLM completed the process in about 9 months for the state's Fish Lake application, in part because of the significant historical evidence, including a previous navigability determination that BLM had made.[12] In contrast, BLM processed the state's Stikine River application over a 14-year period because of the complexity of the waterway and the time spent on an appeal to the Interior Board of Land Appeals and a related Quiet Title Act suit, among other factors, according to BLM officials.

Table 1 shows the number of applications from the state that resulted in a disclaimer by BLM, the average processing time, and examples of waterways included in applications, by the year in which each application was submitted.

Table 1: Applications Submitted to the Bureau of Land Management (BLM) by the State of Alaska Resulting in a Disclaimer

Application year[a]	Number of applications resulting in a disclaimer	Average processing time (years)	Examples of waterways included in applications
2003	6	1.50	Porcupine River
2004	3	3.05	Chilkoot River and Lake
2005	7	8.99	Stikine River
2006	11	6.90	Kulik Lake
2010	1	7.18	Kisaralik River and Lake
2012	1	6.55	Pegati Lake
2013	2	3.16	Nabesna River
2015	2	2.03	Tazlina River
2016	1	2.41	Becharof Lake
2017	2	1.73	Fortymile River System
All	36[b]	5.15	

Source: GAO analysis of BLM data. | GAO-20-106235

[a]Application year refers to the final application date; some applications were resubmitted or updated over time.

[b]Some applications resulted in multiple disclaimers for different segments of the waterway.

In addition to the applications that have resulted in a disclaimer, the state submitted eight additional applications between September 2016 and October 2022. The status of these applications varies: two remain in the application phase as BLM and the state finalize the administrative costs; four are in the BLM review phase; and two are awaiting final decisions pending the outcome of related ongoing Quiet Title Act litigation, according to BLM.

Which factors affect the amount of time to process applications?

BLM officials told us that a number of factors can lengthen the amount of time to complete the administrative process. The factors include the following:

- **Complexity of the waterway.** BLM officials stated that the length and complexity of the waterway might increase the processing time for the administrative process. For example, a section of the Kuskokwim River that BLM reviewed as part of an application spans approximately 540 miles. BLM must review rivers on a case-by-case basis for each segment of the river, which may lead to increased processing time, as each segment must have its own navigability determination, according to BLM officials. For example, for the Knik River, BLM made navigability determinations for three different segments of the river that each relied on different types of evidence.
- **Need for fieldwork.** If there is no evidence of historical use for a particular waterway, BLM relies on fieldwork to make susceptibility-based navigability determinations. BLM officials stated that fieldwork will likely be costly and take significant time, in part because of the limited available season in Alaska for fieldwork and the extreme remoteness of many waterways that may require helicopters or planes to access. Use of these forms of transportation is costly and difficult to arrange because of the competition in Alaska to secure available and suitable aviation resources, according to BLM officials. Fieldwork can be further complicated by weather that may limit accessibility to a waterway, necessitate a change in plans, or invalidate findings. For example, major flooding conditions could skew river flow, necessitating additional data collection to identify the normal flow of the waterway. BLM officials also stated that fieldwork can be delayed due to resource constraints, such as staff members having competing demands because of responsibilities related to Quiet Title Act suits, among other things.
- **Level of effort for internal reviews.** BLM officials said that reviews by Interior's Office of the Solicitor, which occur prior to issuance of a disclaimer, have taken up to 6 months, depending on the evidence in an application, among other factors.

State officials have repeatedly raised concerns and expressed frustration regarding the costs and length of time taken to process applications in the administrative process. Specifically, state officials said that BLM has taken a number of years to render decisions on most applications and has effectively stopped work on the administrative process since the state filed a Quiet Title Act lawsuit in 2018. The officials further noted that they believe the process should be closer to one year in length. State officials said that they have lost confidence in the administrative process and have begun to focus more attention on pursuing the judicial process to clarify ownership of submerged lands, although that process is also costly and time-consuming.

BLM officials stated that they began developing a "navigability library" in 2020 to help expedite the administrative process and achieve cost savings. Specifically, BLM is working to identify waterways that may be good candidates for the administrative process prior to the state submitting an application, such as those

with a significant amount of historical evidence. Since the navigability library is still under development, the extent to which it will address the state's concerns about the administrative process is unknown. However, state officials said that BLM has been working on the navigability library for several years and has yet to make or communicate any meaningful progress.

What are key steps in the judicial process, and how often is it used?

The Quiet Title Act authorizes lawsuits against the federal government to adjudicate disputed title to real property in which the United States claims an interest, subject to exception. Parties, such as the State of Alaska, can file a lawsuit against the United States in federal district court when they have grounds for their complaint. Such grounds can include the federal government taking management action on state-claimed waters, such as BLM determining that a waterway is nonnavigable. The judicial process involves three main steps:

- **Notice of intent to sue**. Under the Quiet Title Act, states are required to provide at least 180 days' notice to the federal agency with jurisdiction over the lands in question of the state's intention to file a lawsuit, as well as the basis for the lawsuit and a description of lands included in the lawsuit. The state may file suit at any point following the 180-day period after providing such notice, although filing a notice does not obligate the state to file suit.
- **Discovery**. If the state files a lawsuit, the parties enter into the formal phase of information gathering and exchange, known as the discovery phase. The Department of Justice (DOJ), which takes the lead in representing the federal government in litigation, coordinates with BLM throughout the Quiet Title Act process. BLM assists in the information-gathering process, including by identifying relevant documents for any previous navigability determinations, as well as collecting new physical evidence about the waterways.
- **Trial**. If the title dispute between the state and the federal government is not resolved during the information-gathering phase, the case proceeds to trial. If a trial does occur, DOJ and state attorneys present each party's arguments before the federal district court. At the trial's conclusion, the court issues a decision based on the evidence presented. If the court rules in favor of the state, title to the submerged lands is confirmed.

According to BLM, the state has filed notices of intent to sue that cover over 200 waterways in the state. From these notices, according to BLM, the state has filed at least 10 Quiet Title Act lawsuits historically, including several cases that are still pending.

For closed cases, both sides have received favorable outcomes, with the court ruling in favor of either party. For example, in the Slopbucket Lake case in 1985, the Ninth Circuit ruled for the United States, concluding that floatplane use on the small lake in southern Alaska was not determinative of navigability.[13] A number of rulings have also been in favor of the state; for example, in the Gulkana River case in 1987, the Ninth Circuit ruled for the State of Alaska, determining that the lower Gulkana River was navigable based on susceptibility for use by various craft for commerce.[14] In another case, the United States opted to issue a Quiet Title Act disclaimer before a ruling.

BLM officials told us that the state has increased Quiet Title Act activity in recent years. According to BLM officials, the judicial process is expensive and complex and can take years to complete for individual Quiet Title Act cases. For example, the State of Alaska filed a complaint regarding submerged land underlying the

Middle and North Forks of the Fortymile River in federal district court in 2018, and the case is still pending as of June 2023.

What actions have federal agencies taken to clarify land management responsibilities between the federal government and the state while ownership of submerged lands is being resolved?

BLM and other federal land management agencies, including FWS, NPS, and the U.S. Forest Service, formed the Alaska Federal Interagency Navigability Management Workgroup in 2021 partly to support developing consistent approaches for land management decisions while ownership of submerged lands is being determined. Federal agencies led the creation of the workgroup to address uncertainty among federal land managers concerning their enforcement responsibilities and public confusion about whether the federal or state government was responsible for management of various submerged lands in Alaska. Public awareness of the ownership issues has been heightened by the Governor of Alaska's Unlocking Alaska Initiative— an assertion of the state's management authority over submerged lands beneath waters it claims to be navigable, including in parks and recreation areas currently under federal management which the federal government has not disclaimed. According to a press release from the state, the initiative is in response to frustration with the slow pace of the administrative process for determining ownership of submerged lands and federal management practices that the state perceives as too restrictive, among other things. The press release asks that federal agencies work cooperatively with the state to resolve issues of disagreement as it asserts its right to manage these resources for recreation and commerce.

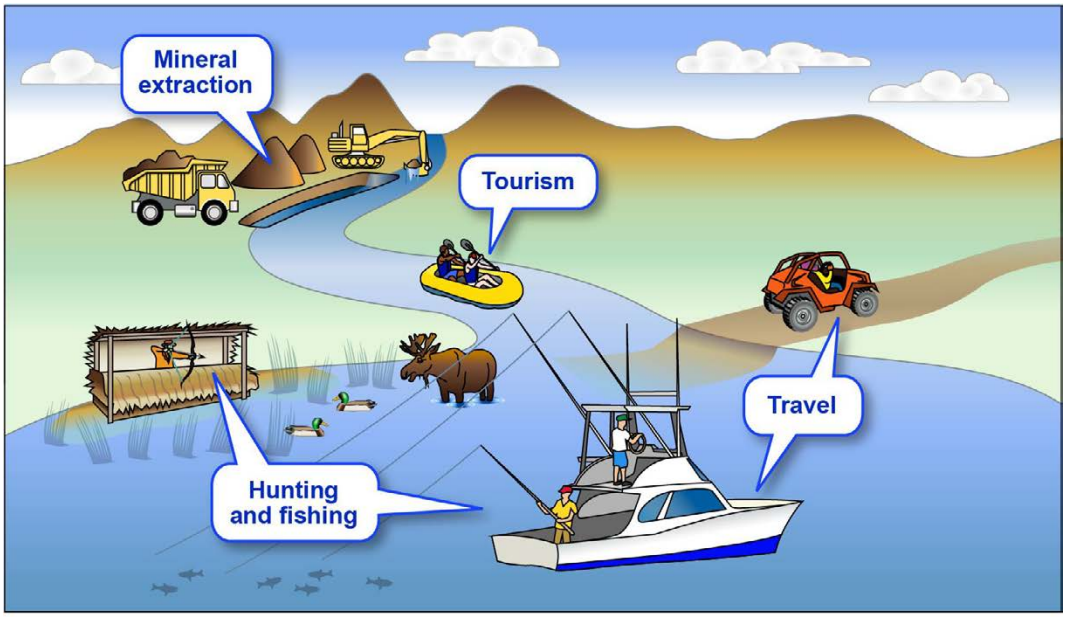
Although the workgroup is still in its formative stage, a key goal is to help determine whether federal rules, state rules, or some combination should apply to federally managed lands to which the state has asserted ownership. For example, the workgroup plans to consider approaches for land management related to controlling invasive species, extracting mineral resources, and providing commercial access to recreational tour operators.

What challenges remain in clarifying land management responsibilities?

While the formation of the federal interagency workgroup is a positive step, according to federal officials, the four federal land management agencies have not developed a process for involving the state to consider collaborative approaches for land management. According to federal officials, there are uncertainties in a number of areas, including which type of activities to allow on waterways and submerged lands, whether and how to authorize those activities, and whether and how to enforce rules while questions of ownership exist.

Some activities allowed on state lands and federal lands differ. For example, the state allows suction dredge mining, a process to vacuum up sediment from the bottom of rivers and other waterways to search for gold, which is prohibited on NPS lands. In addition, the state allows recreational all-terrain vehicles to access the gravel beds of waterways, which is generally prohibited within national parks (see fig. 4).

Figure 4: Examples of Activities on Alaskan Waterways Where Federal and State Management May Differ



Source: GAO illustration based on information from the Bureau of Land Management. | GAO-23-106235

Differences in how the state and federal agencies manage lands have created challenges. For example:

- In 2022, the state submitted a cease-and-desist notice to the U.S. Forest Service for enforcing a Forest Service prohibition on the use of motorized watercraft on Mendenhall Lake, within Tongass National Forest, except as specifically authorized by permit. The state notified the public that they should contact the Alaska Department of Natural Resources if the U.S. Forest Service attempted to enforce regulations related to motorized watercraft.
- Also in 2022, the state, asserting ownership of submerged lands, submitted a notice of trespass to NPS for constructing and using a dock without a permit within Lake Clark National Park and Preserve, which is managed by NPS.
- According to NPS officials, on numerous occasions, members of the public have inquired with NPS personnel whether certain activities are allowed within a national park. NPS officials stated that ambiguities regarding ownership and land management responsibilities in Alaska place the public and agency personnel in a difficult position.

BLM and other federal and state officials we interviewed stated that third-party facilitation could be useful to help improve the relationship between federal land management agencies and the state and help them carry out their missions. According to a September 2012 *Memorandum on Environmental Collaboration and Conflict Resolution* issued by the Office of Management and Budget and the Council on Environmental Quality, departments and agencies should increase the appropriate and effective use of third-party assisted environmental collaboration, as well as environmental conflict resolution, to resolve problems and conflicts that arise in the context of environmental, public lands, or natural resource issues.[15]

BLM and the state previously attempted to mediate issues related to the administrative process of resolving ownership of submerged lands. Specifically, in 2018 and 2019, BLM and the state used a court-appointed mediator to help address challenges related to the administrative process, such as the lengthy amount of time to complete the process. According to BLM officials, while the mediation produced some positive results, the agency was unable to reach agreement with the state due to the inherent complexities of the administrative process, including challenges and disagreements around how to define standards for navigability. State officials indicated that the court-sponsored mediation extended over a long period, with no demonstrable action.

However, third-party facilitation not specific to litigation regarding ownership of submerged lands and, instead, focused on collaboration on land management responsibilities may have a higher likelihood of success. For some waterways, the parties may be able to identify mutually agreeable cooperative approaches to management of the submerged lands while ownership is being determined. Further, third-party facilitation provides an opportunity to bring together senior-level decision makers from all relevant federal agencies and the state. All parties should recognize an incentive to help establish mutually agreeable cooperative approaches to managing submerged lands in light of the time and cost it often takes to determine ownership.

As noted earlier, completing the administrative process takes 5 years, on average, and there are millions of waterways across Alaska. Moreover, the state has identified about 150 waterways of interest that it may include in future applications for federal recordable disclaimers of interest. Consequently, it would likely take many decades to resolve all of these applications through the administrative process. Additionally, since the state has asserted ownership of a number of submerged lands currently under federal management, it is important for federal agencies to discuss the management of such lands with the state while ownership is being resolved. By using an independent third-party facilitator to help find possible areas of agreement with the state on collaborative approaches to managing submerged lands, federal agencies could help reduce intergovernmental conflicts and minimize uncertainties for members of the public.

In addition, third-party facilitation around land management may provide an opportunity for the agencies to discuss the perspectives of other stakeholders and consider possible implications on these stakeholders, as well as legal and other obligations. For example, according to representatives from one Alaska Native Corporation that we interviewed, it is important for the federal government to involve corporations in a meaningful way when considering decisions about submerged lands because of the possible impacts of land ownership and management decisions on the corporations. Finally, because some conflicts over the management of these submerged lands may persist even after ownership is determined, developing a process for collaborating on land management through third-party facilitation may have further long-term benefits.

Conclusions

BLM is responsible for making determinations about whether there is a federal interest in submerged lands in Alaska. Such determinations involve a range of legal considerations and have significant implications for federal land managers, the state of Alaska, and the public.

Accordingly, it is important for federal agencies to involve the state in meaningful discussions involving senior-level officials about how to collaborate on land management responsibilities. In doing so, federal agencies, taking into account any legal or other obligations, as necessary, can also consider the potential impacts on stakeholders, including Alaska Native Corporations. Further, federal

agencies, in collaboration with the state, should consider how to communicate effectively and consistently to the public about land management decisions. By working with the state through third-party facilitation to resolve issues of disagreement and develop a collaborative approach for land management consistent with their missions and obligations, federal agencies could help reduce intergovernmental conflicts and minimize uncertainties for the public and stakeholders.

Recommendations for Executive Action

We are making two recommendations—one to the Department of the Interior and one to the Department of Agriculture. Specifically:

The Secretary of the Interior should ensure that the Directors of BLM, FWS, and NPS coordinate with the Chief of the Forest Service to secure an independent third-party facilitator to help agencies within the Department of the Interior and the Department of Agriculture and the State of Alaska work toward agreement on a collaborative approach for the management of submerged lands in Alaska while ownership is being resolved. (Recommendation 1)

The Secretary of Agriculture should ensure that the Chief of the Forest Service coordinates with the Directors of BLM, FWS, and NPS to secure an independent third-party facilitator to help agencies within the Department of the Interior and the Department of Agriculture and the State of Alaska work toward agreement on a collaborative approach for the management of submerged lands in Alaska while ownership is being resolved. (Recommendation 2)

Agency Comments, Third-Party Views, and Our Evaluation

We provided a draft of this report to the Department of Agriculture and the Department of the Interior for review and comment. In addition, we provided a copy of the draft report to the State of Alaska to obtain its views because, in implementing our recommendation, the federal agencies would include the state when selecting and working with an independent third-party facilitator. The following summary outlines the key comments submitted to GAO in letters from the U.S. Forest Service (responding on behalf of the Department of Agriculture), the Department of the Interior, and the State of Alaska (reprinted in appendices I, II, and III, respectively), as well as our response. Both federal agencies and the state also provided technical comments that we incorporated as appropriate.

The U.S. Forest Service and the Department of the Interior agreed with our recommendation to obtain the assistance of a third-party facilitator to work with the State of Alaska toward agreement on a collaborative approach for management of submerged lands in Alaska. The U.S. Forest Service said that in coordination with the Department of the Interior, the agency supports working with the state toward a collaborative approach to managing submerged lands in Alaska. The Department of the Interior said that it will work with the Chief of the Forest Service to implement the recommendation, with a target date of December 2023.

The State of Alaska expressed concerns about several aspects of our report, and our recommendation. We grouped these concerns into four categories:

- The extent to which the report addressed all of the topics of interest included in the congressional request for our review. The State of Alaska maintains that the congressional request letter sought a more comprehensive evaluation of BLM's program for administratively determining the navigability of submerged lands in Alaska.
- The extent to which the report's findings recognized deficiencies with BLM's administrative process for resolving the ownership of submerged lands. For example, the state maintains that the report does not

adequately address the considerable time and expense involved in filing an RDI application and dealing with the RDI program.

- The tone of the report and the extent to which it considered the state's perspective. The State of Alaska maintains that the report does not give adequate consideration to its concerns and complaints regarding BLM's program.
- The extent to which the report's recommendation is appropriate. Specifically, the State of Alaska maintains that the recommendation sidesteps the issue of determining ownership of submerged lands and empowers continued federal management of state property.

In response to the State of Alaska's views, we made certain revisions to the report to more fully reflect the state's views and provide additional context. For example, we added text to reflect the state's frustration with the costs and length of time it takes BLM to complete the administrative process. We also added further details describing the state's Unlocking Alaska Initiative that asserts the state's management authority over certain waters it views as navigable. However, we found that some of the state's comments did not reflect an understanding of why we examined the federal process for determining ownership of submerged lands in Alaska or how we determined the scope of our analysis.

First, regarding the extent to which our report addressed all of the topics of interest included in the congressional letter requesting our review, it is important to note that GAO is an independent and nonpartisan agency. We use our professional judgment in planning and conducting our work and in reporting our findings. The request letter presented a broad range of questions, including a number of matters related to ongoing legal proceedings involving the federal government and the State of Alaska concerning issues related to submerged lands. Generally, GAO does not take a position or express an opinion on disputed matters in litigation. We presented to our congressional requesters a scope of work that could be developed according to our audit standards, and within the desired time frames of the requesters.

Second, regarding the extent to which our findings recognized deficiencies with BLM's administrative process for resolving the ownership of submerged lands, we collected documentary and testimonial evidence about BLM's administrative process that we summarize in the report, including factors that affect the cost and length of time to make navigability determinations. In part because some of the issues related to BLM's administrative process are the subject of ongoing litigation, we provided important context about BLM's administrative process and elected to develop a recommendation focused on land management more broadly rather than BLM program deficiencies specifically.

While the State of Alaska is clearly frustrated with BLM's management of the administrative process, it is our professional judgment that the program deficiencies we identified do not warrant a recommendation, in part because the agency is already taking actions to address them. Moreover, we believe that any recommendation directed at BLM's administrative process based on our findings would ultimately not resolve the state's broader concerns regarding BLM's process and the state's legal rights and ownership interests.

Third, regarding the tone of our report and the extent to which it adequately reflected the State of Alaska's perspective, we included the state's viewpoint in numerous places throughout the report. However, many of the topics and pieces of information referred to in the state's letter are beyond the scope of our review.

For example, the state provided information about issues that are historical or issues that existed prior to changes in BLM's administrative process. During the course of our review, which focused on BLM's current administrative process, we solicited and collected evidence and perspectives from various federal land management agencies, the State of Alaska, and an Alaska Native Corporation. As an independent, non-partisan agency, we worked to present these varying and sometimes conflicting perspectives throughout our report, as appropriate given the scope of our work.

Finally, regarding the appropriateness of our report's recommendation, it is important to note that in developing our recommendation, we considered longstanding conflicts between BLM and the State of Alaska. We concluded that working with an independent third-party facilitator to address land management responsibilities—rather than using litigation—may offer a greater likelihood of success in resolving the state's frustrations with BLM's administrative process and respecting the state's rights and interests regarding management of these lands. Further, because both federal and state officials we interviewed cited a failure to communicate at the senior executive level, we believe our recommendation would create an opportunity to bring together the relevant decision makers from all agencies and develop more cooperative and productive approaches to resolving land management and ownership.

More specifically, we believe that independent third-party facilitation would provide an opportunity for BLM and the state to discuss several potential solutions, including those offered by the state, such as measures related to the timeliness of the administrative process. Such measures could be addressed through a third-party facilitation process. In addition, through a facilitated process, Alaska officials may be able to work to directly achieve the state's goals of removing federal restrictions on the uses of these lands, in light of federal court decisions related to permissible uses on submerged lands. Such an outcome would directly support the state's legal rights and interests.

How GAO Did This Study

To inform all of our work, we analyzed and reviewed relevant laws, regulations, policies, and guidance related to the administrative and judicial processes for resolving ownership of submerged lands in Alaska. For example, we reviewed documentation on the key steps and timing of the administrative and judicial processes, such as flowcharts. We also reviewed past disclaimers issued by BLM and analyzed summary information from BLM's case files, which allowed us to identify the number and time frame of completed applications in the administrative process.

We also visited several waterways in Alaska with officials from BLM and the State of Alaska to help understand the considerations for making navigability determinations. As part of our site visit, we interviewed staff from BLM, such as the RDI program manager, and officials from the State of Alaska's Department of Natural Resources, including the Public Access Assertion and Defense Section manager, to gain their views on the key steps and challenges related to the administrative and judicial processes for resolving ownership of submerged lands in Alaska. In addition, we interviewed officials from other relevant federal and nonfederal stakeholders, such as NPS, FWS, the U.S. Forest Service, and an Alaska Native Corporation, to gain information and perspectives on key steps of the administrative and judicial processes.

We conducted this performance audit from September 2022 to July 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and

conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

List of Requesters

The Honorable Lisa Murkowski
Ranking Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations
United States Senate
The Honorable Dan Sullivan
United States Senate

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Secretary of Agriculture, the Secretary of the Interior, and other interested parties. In addition, the report will be available at no charge on the GAO website at https://www.gao.gov.

GAO Contact Information

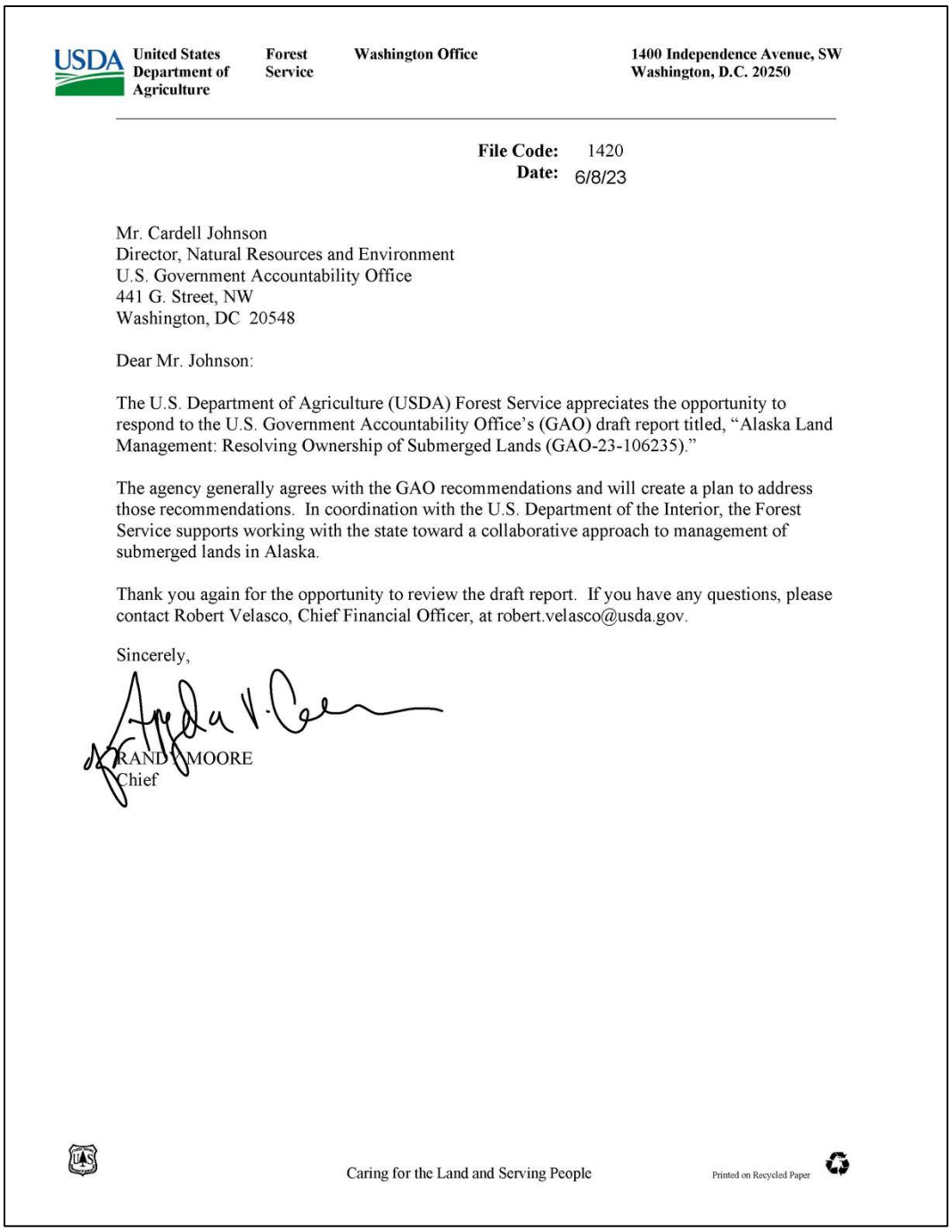
For more information, contact: Cardell D. Johnson at (202) 512-3841 or johnsoncd1@gao.gov.

Chuck Young, Managing Director, Public Affairs, YoungC1@gao.gov, (202) 512-4800

A. Nicole Clowers, Managing Director, Congressional Relations, ClowersA@gao.gov, (202) 512-4400

Staff Acknowledgments: Casey L. Brown (Assistant Director), Anthony C. Fernandez (Analyst in Charge), Skip McClinton, Breanne Cave, Tricia Moye, Cynthia Norris, and Dan Royer.

Appendix I: Comments from the Department of Agriculture



USDA United States Department of Agriculture | Forest Service | Washington Office | 1400 Independence Avenue, SW Washington, D.C. 20250

File Code: 1420
Date: 6/8/23

Mr. Cardell Johnson
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G. Street, NW
Washington, DC 20548

Dear Mr. Johnson:

The U.S. Department of Agriculture (USDA) Forest Service appreciates the opportunity to respond to the U.S. Government Accountability Office's (GAO) draft report titled, "Alaska Land Management: Resolving Ownership of Submerged Lands (GAO-23-106235)."

The agency generally agrees with the GAO recommendations and will create a plan to address those recommendations. In coordination with the U.S. Department of the Interior, the Forest Service supports working with the state toward a collaborative approach to management of submerged lands in Alaska.

Thank you again for the opportunity to review the draft report. If you have any questions, please contact Robert Velasco, Chief Financial Officer, at robert.velasco@usda.gov.

Sincerely,

RANDY MOORE
Chief

Caring for the Land and Serving People

Printed on Recycled Paper

Text of Appendix I: Comments from the Department of Agriculture

Mr. Cardell Johnson

Director, Natural Resources and Environment

U.S. Government Accountability Office 441 G. Street, NW

Washington, DC 20548 Dear Mr. Johnson:

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the Forest Service supports working with the state toward a collaborative approach to management of submerged lands in Alaska.

Thank you again for the opportunity to review the draft report. If you have any questions, please contact Robert Velasco, Chief Financial Officer, at robert.velasco@usda.gov.

Sincerely,

RANDY MOORE

Chief

Appendix II: Comments from the Department of the Interior

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

Cardell Johnson
Director, Natural Resources and Environment
U.S. Government Accountability Office
Washington, DC 20548

Dear Director Johnson:

Thank you for the opportunity to review and comment on the Government Accountability Office (GAO) draft report titled, "Alaska Land Management: Resolving Ownership of Submerged Lands" (GAO-23-106235).

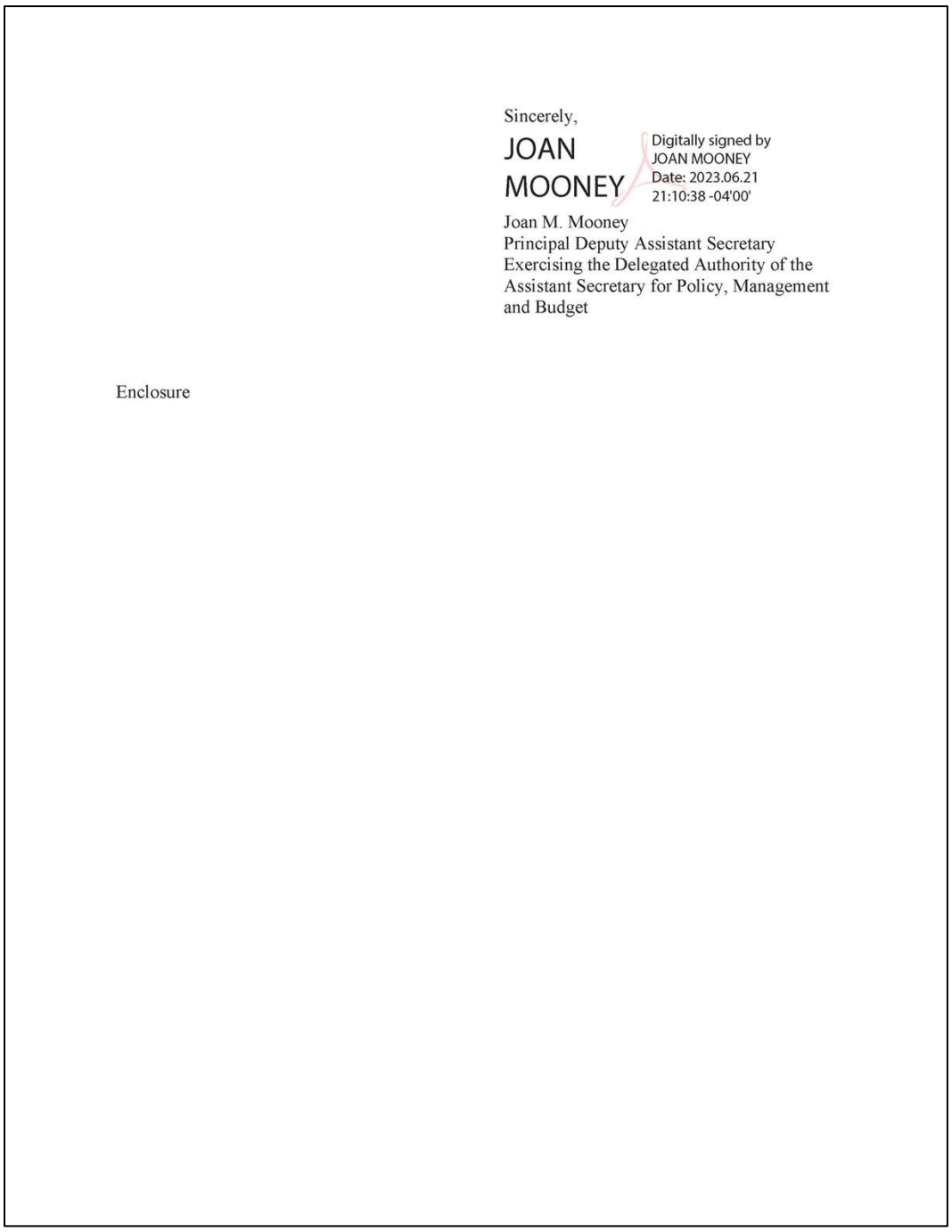
The GAO issued one recommendation to the Department of the Interior (Department). The Department concurs with the recommendation. Below is a summary of the actions planned by the Department to implement the recommendation.

Recommendation 1: The Secretary of the Interior should ensure that the Directors of Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS) coordinate with the Chief of the Forest Service to obtain the assistance of an independent third-party facilitator to help agencies within the Department of the Interior and the Department of Agriculture and the State of Alaska work toward agreement on a collaborative approach for the management of submerged lands in Alaska while ownership is being resolved.

Response: Concur. The Directors of BLM, FWS, and NPS will coordinate with the Chief of the Forest Service to obtain the assistance of an independent third-party facilitator to help agencies within the Department and the Department of Agriculture and the State of Alaska work toward agreement on a collaborative approach for management of submerged lands in Alaska while ownership is being resolved.

Target Date: December 29, 2023

If you should have any questions about this response or need additional information, please contact the Office of Financial Management, Audit Management Division at DOI_PFM_AM@ios.doi.gov.



Text of Appendix II: Comments from the Department of the Interior

Cardell Johnson
Director, Natural Resources and Environment
U.S. Government Accountability Office Washington, DC 20548

Dear Director Johnson:

Thank you for the opportunity to review and comment on the Government Accountability Office (GAO) draft report titled, “Alaska Land Management: Resolving Ownership of Submerged Lands” (GAO-23-106235).

The GAO issued one recommendation to the Department of the Interior (Department). The Department concurs with the recommendation. Below is a summary of the actions planned by the Department to implement the recommendation.

Recommendation 1: **The Secretary of the Interior should ensure that the Directors of Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS) coordinate with the Chief of the Forest Service to obtain the assistance of an independent third-party facilitator to help agencies within the Department of the Interior and the Department of Agriculture and the State of Alaska work toward agreement on a collaborative approach for the management of submerged lands in Alaska while ownership is being resolved.**

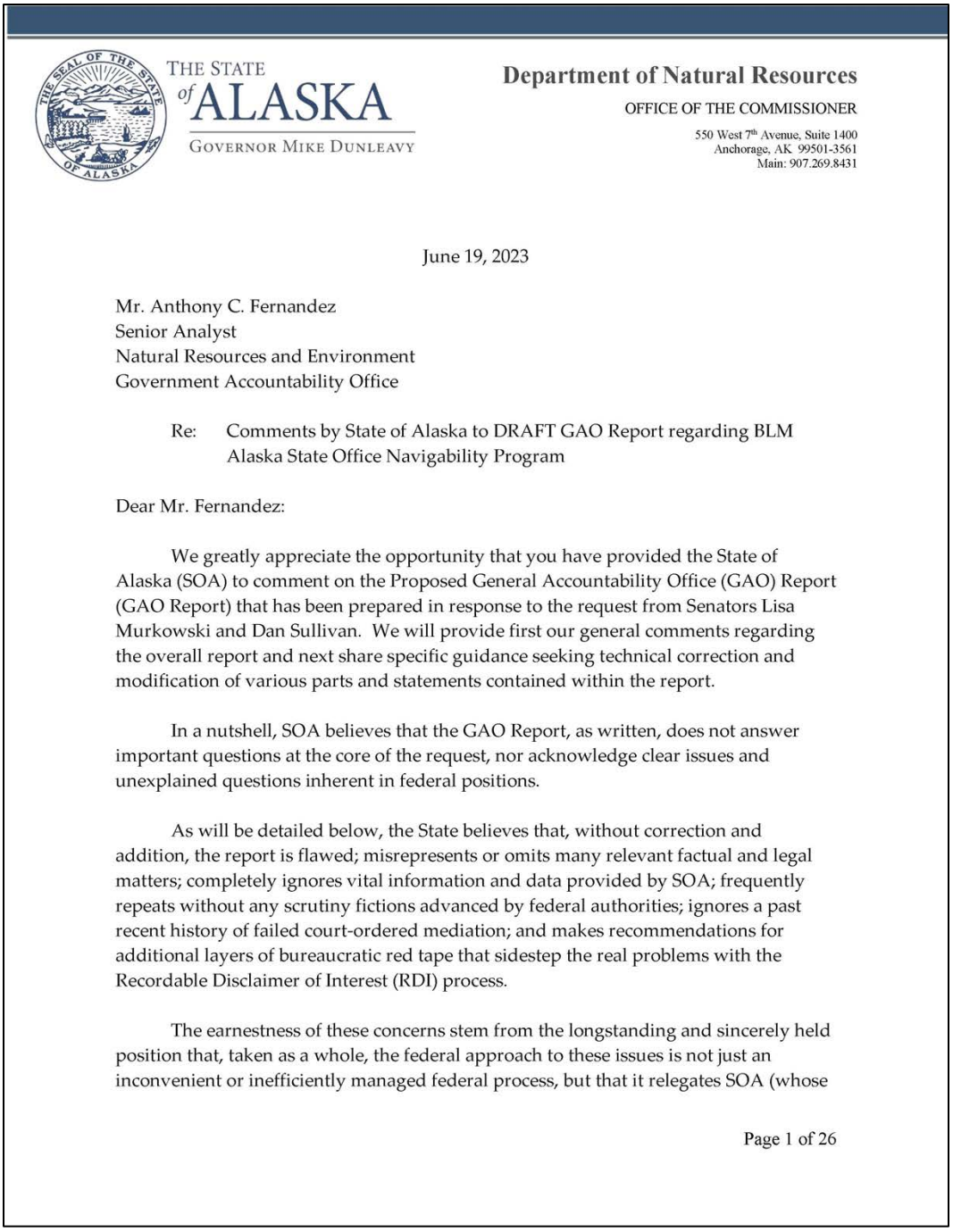
Response: Concur. The Directors of BLM, FWS, and NPS will coordinate with the Chief of the Forest Service to obtain the assistance of an independent third-party facilitator to help agencies within the Department and the Department of Agriculture and the State of Alaska work toward agreement on a collaborative approach for management of submerged lands in Alaska while ownership is being resolved.

Target Date: December 29, 2023

If you should have any questions about this response or need additional information, please contact the Office of Financial Management, Audit Management Division at DOI_PFM_AM@ios.doi.gov.

Sincerely,
Joan M. Mooney
Principal Deputy Assistant Secretary Exercising the Delegated Authority of the Assistant Secretary for Policy, Management and Budget

Appendix III: Third-Party Views from the State of Alaska



THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources
OFFICE OF THE COMMISSIONER
550 West 7th Avenue, Suite 1400
Anchorage, AK 99501-3561
Main: 907.269.8431

June 19, 2023

Mr. Anthony C. Fernandez
Senior Analyst
Natural Resources and Environment
Government Accountability Office

Re: Comments by State of Alaska to DRAFT GAO Report regarding BLM Alaska State Office Navigability Program

Dear Mr. Fernandez:

We greatly appreciate the opportunity that you have provided the State of Alaska (SOA) to comment on the Proposed General Accountability Office (GAO) Report (GAO Report) that has been prepared in response to the request from Senators Lisa Murkowski and Dan Sullivan. We will provide first our general comments regarding the overall report and next share specific guidance seeking technical correction and modification of various parts and statements contained within the report.

In a nutshell, SOA believes that the GAO Report, as written, does not answer important questions at the core of the request, nor acknowledge clear issues and unexplained questions inherent in federal positions.

As will be detailed below, the State believes that, without correction and addition, the report is flawed; misrepresents or omits many relevant factual and legal matters; completely ignores vital information and data provided by SOA; frequently repeats without any scrutiny fictions advanced by federal authorities; ignores a past recent history of failed court-ordered mediation; and makes recommendations for additional layers of bureaucratic red tape that sidestep the real problems with the Recordable Disclaimer of Interest (RDI) process.

The earnestness of these concerns stem from the longstanding and sincerely held position that, taken as a whole, the federal approach to these issues is not just an inconvenient or inefficiently managed federal process, but that it relegates SOA (whose

Page 1 of 26

actual property interests are involved) to a mere bystander while federal land managers continue to unilaterally make decisions and manage lands belonging to SOA. Far from improving the current status quo, we believe that the GAO Report will embolden federal authorities to continue using dilatory tactics to deny Alaska one of its fundamental promises of statehood.

It has been over sixty-four years since Alaska became a state, and BLM has only confirmed state ownership to a small fraction of the submerged lands promised by the Equal Footing Doctrine of the United States Constitution. At the current pace, it will take hundreds – or even thousands – of years for Alaska to achieve fully what was promised in 1959. We do not believe the GAO Report, as written, identifies the clear and executable federal actions that can shorten this timeframe and avoid even further delay of what Alaska was promised.

General Comments

As we discussed during our recent teleconference, SOA is disappointed with the draft report that was prepared. Our assessment is based on the following that will be addressed individually below:

- ***The report that is prepared does not respond to the specific issues that Senators Murkowski and Sullivan asked be addressed.***

In their letter requesting the comprehensive accounting of the Bureau of Land Management (BLM) Alaska State Office Navigability Program (Navigability Program), Senators Murkowski and Sullivan asked that GAO include in its examination the following:

1. *The status of congressional appropriations for the Alaska Navigability program and how those funds have been allocated, managed, and accounted for;*

2. *What processes are in place to efficiently issue RDIs, and what expense and timeline targets the Department maintains for this process;*

3. *What RDIs have actually been issued by the Department, and the timeline, costs, and process that resulted in these actions;*

4. *What standards BLM follows for assessing the navigability-in-fact of waters identified in RDI applications;*

5. *What instructions BLM provides to third-party contractors for assessing the navigability-in fact of waters identified in RDI applications;*

6. *What process are in place for contesting or settling Quiet Title Act litigation with the State of Alaska;*

7. *What controls are in place to ensure litigation positions taken by the federal government are consistent with existing case law and the efficient management of resources; and*

8. *What adjustments to policy and procedures have been put in place in response to both the prior judicial finding of bad faith and the U.S. Supreme Court rulings in Sturgeon v. Frost.*

The GAO Report partially responds to the third and fourth items above, but otherwise, the GAO Report does not address any of the items that Senators Murkowski and Sullivan asked GAO to examine. These are not partisan or rhetorical questions, but substantive questions about federal processes, controls, appropriation accounting, and compliance with law and policy. We believe a responsive report should speak directly on all of these questions, even if GAO's review identified additional areas that you determine should be included in, or even the focus of, the final report. Numbered responses corresponding to the bullets below follow:

1. GAO does not address the status of congressional appropriations for the Navigability Program or how those funds have been allocated, managed or accounted for. Nor does GAO even mention known mismanagement of funds and resources: that the BLM Alaska State Office lost over one-hundred-and-twenty-thousand dollars of SOA's money that was supposed to be held in trust for RDI adjudication, or that BLM and the Department of Justice (DOJ) were determined by the federal Alaska District Court to have proceeded in bad faith in the Mosquito Fork case, incurring a punitive sanction of attorney's fees and costs. We believe an analysis of how public resources were allocated to this litigation, how decisions to continue and discontinue it were made, and the source of the funds used to pay the penalty amounts to the State would all be necessary elements of a properly responsive report.

Nor does GAO provide any cost accounting for many of the RDIs mentioned in the report. If BLM Alaska State Office does not maintain or even know the information

and data associated with costs and budgets for RDI personnel, RDI adjudication, etc. needed to respond to this inquiry, GAO should have, at the very least, mentioned that in the report. Part of what Senator Murkowski and Sullivan are seeking is to find out where the taxpayers' money is being spent and whether good stewardship, efficiency and productivity are being achieved. This is a significant omission from the report.

The BLM Alaska State Office added personnel to the Alaska Navigability program with congressional appropriations, subsequently productivity has dropped not increased. The status of these personnel, and what work they complete should be included in the GAO report.

2. GAO does not address expense and timeline targets that the Navigability Program maintains. Nothing in the way of an accounting is reported anywhere in the report outlining internal expense and timeline targets that the Navigability Program maintains. We believe such standards, even if solely aspirational, are foundational to a responsible program. To the extent that the Navigability Program does not prepare that data and information, GAO should, at minimum, document such absence. Once again, such information would be very helpful and relevant to Senators Murkowski and Sullivan in assessing whether the taxpayers' money invested in the program is being well-spent on the very thing (RDIs) for which the money was appropriated in the first place. This is another remarkable omission from the report.

3. GAO mentions the fact that the Navigability Program has no real standards for assessing navigability-in-fact for RDI decisions, but then, without any further exploration or examination, GAO excuses such lapse by echoing the same, tired arguments (the lack of caselaw, etc.) continually made by BLM that led to the finding of bad faith in the Mosquito Fork case. Contrary to BLM's claims, there is ample caselaw, rich in factual detail, from which basic standards for determining navigability could be made. It is BLM's fallacious insistence that confusion and ambiguity exist and its reliance upon its own manufactured standards that have been repudiated by the federal courts that account for its dismal track record of cases over more than the last decade before the Interior Board of Land Appeals and within the Federal Court System. Far from being a mixed bag of results in litigation, SOA's litigation scorecard for the past two decades is unblemished, and one must generally look to the Twentieth Century to find a loss. Pretextual federal agency responses as to why standards are not in place need to be investigated as opposed to taken at face value.

5– 7. GAO is completely silent in its report on items five through seven above, even though they are all material to the RDI program and broader efforts to resolve navigability and submerged land ownership issues. Indeed, GAO could—by

recommending the federal agencies accede to or provide reasoned alternatives to the navigability standards offered by SOA—provide a genuine path forward. The silence in the report misses a real opportunity for crafting a meaningful solution, well-grounded in settled federal law, to accelerate the dormant and moribund RDI program.

8. A response to the eighth item is conspicuous for its absence from the report. The actual answer is that, in the four years following the second unanimous opinion of the United States Supreme Court in Sturgeon v. Frost, no federal agency ((none of the National Park Service (NPS), United States Fish and Wildlife Service (USFWS), United States Forest Service (USFS) nor BLM)) has taken any action whatsoever to implement the Sturgeon decision. As of the date of this letter, the very factual predicate that led to the Sturgeon litigation (plaintiff's operation of a hovercraft on the Nation River within the Yukon-Charley Rivers National Preserve) is still illegal. Despite Justice Kagan's unusually specific statement that Sturgeon "can rev up his hovercraft" on the Nation River, NPS has not even initiated the process to modify its regulations that criminalize the operation of a hovercraft on the Nation River, or any other river for that matter.

We believe GAO should recommend, at a minimum, BLM prepare a report on how this decision implicates their responsibilities vis-à-vis submerged lands in Alaska. Including references that federal agencies are feeling "pressure" to follow—albeit begrudgingly and laggardly—the explicit directives of the United States Supreme Court is inadequate to respond to the scope of the request.

- ***The report does not provide any analysis or accounting regarding the large sums of money that have been devoted to the BLM Alaska State Office RDI program with such little production.***

One of the themes of the referral letter to GAO is fiscal accountability and responsibility. Over the past five or more years, the size and budget of the Navigability Program has ballooned while productivity has plummeted. Many new staff members have been added to the BLM Alaska State Office team, and their budgets for third-party contractors (Paleo West, Inc.) have skyrocketed. Parallel with this explosion in funding, productivity has fallen through the floor. Analyzing this should be at the core of the GAO's investigation. As far as the State is aware, the BLM Navigability Team has done absolutely nothing on any pending RDI application for over four years. How can we make such a statement? We get the bills (*or are supposed to receive them*), and our trust account is to be charged for RDI work. We have seen no activity.

A few examples to evince this absolute absence in productivity are helpful.

As we shared with you, it took BLM navigability staff months to assign a tracking number to a SOA RDI application (Unuk River); it has been almost a year since

we filed the RDI application for the Unuk River and we have yet to even go through the formality of a "pre-application" meeting; and we have yet to receive the cost estimate for the adjudication of this application almost a year after its filing.

Navigability reports prepared by BLM staff were completed years ago for the Delta River and the West Fork and Denison Fork of the Fortymile River, and the RDI applications were filed over two years ago. Nothing has happened on either application; no timelines for adjudication have been shared; and nothing is happening on these rivers that BLM has previously—prior to the infusion of new staff and budget—declared navigable.

The navigability reports for the Eek, Goodnews and Arolik Rivers have been "under consideration" by the BLM Solicitor's Office since well before 2019.

The report provides no analysis of recent RDI applications with a goal of understanding costs charged to SOA as applicant. For instance, BLM issued an RDI for the Aniak River in 2012 and in its RDI decision stated that it "always" believed the Aniak River was navigable. Nevertheless, billing records reveal that the State of Alaska was charged approximately $45,000.00 for the 759 hours of BLM's time that was spent processing the application.

And the much-touted BLM "Navigability Library Project" has been in the works for over six years now with only negligible results (*we have received only sketchy and incomplete files for only three waterbodies*) and at a cost SOA can only imagine as it—unlike GAO--is not privy to such financial information.

All of the foregoing begs the question: what is the BLM Alaska State Office doing with all of the taxpayer money earmarked for RDI adjudication since it does not seem to be spending it adjudicating RDI applications? We believe a thorough accounting will serve the public and the agency as it continues to receive significant funding. GAO has not undertaken any financial analysis or financial audit as was requested.

- ***The report needs to acknowledge that the program exists to meet state needs and federal obligations to fulfill them.***

We feel the report misses the State's interest at stake in the requested investigation—namely to pinpoint where a once vibrant program over the first decade of its existence went off track to the point where there has been no meaningful progress by BLM Navigability Staff in over four years and federal court litigation is a quicker means of redress for the State and to identify steps to remedy the dysfunction. There are federal obligations to ensure that the right submerged lands are under the State's control – that disclaimers are not overly broad – but the core of the program is the need for massive

disclaimers to the huge areas of submerged lands that are Alaska's. Both BLM, and GAO for purposes of the report, need to acknowledge this.

SOA has never taken the position that the RDI program has been broken since its inception; rather, SOA believes—as do Senators Murkowski and Sullivan based upon their letter—that the RDI program started strong and has devolved into dysfunction over the past two decades. This is the raison d'être for the GAO Report, but something that it does not achieve.

One reason for this failure is that the GAO Report aggregates the RDI process from its inception to the current date—giving the current program credit for early successes—and making no effort to understand why current RDI applications take so long and cost so much money when earlier RDI applications were issued quickly and far more cheaply. The GAO Report treats the RDI program as a collective whole from its inception, and no effort is made to audit or understand where things went off track. The unwillingness through analysis to break apart the RDI process over time, to examine differing results over time, and to identify and discuss the reasons for the downward trend, is a significant omission from the report. Adding such a deep dive to the GAO report would render its conclusions and recommendations far more useful.

- ***The tone of the report suggests that everything is moving along just perfectly from the federal perspective and that state complaints are meritless.***

None of SOA's bona fide grievances are addressed anywhere to any appreciable degree within the report. There is no digging, analysis, critique or audit of the amount of time BLM devotes to RDI applications, the costs of RDI applications, the staff time devoted to RDI applications, the reasons why BLM will not adopt standards or criteria for assessing RDI applications, practical improvements for the program, etc. The GAO report rather accepts wholesale, without meaningful scrutiny, BLM excuses and justifications for its poor performance. Nowhere is it questioned why a small team at SOA--during the last four years when no action has been taken on any pending RDI application by BLM—has been able to perform navigability assertions for over two thousand rivers and lakes within federal areas statewide in addition to their other job responsibilities including litigation and fieldwork. These are the facts, but a fair review of the GAO report suggests the contrary—that everything is moving along wonderfully notwithstanding state nitpicking. Suffice it to say, such a tone will only have a very negative impact on solving this enormously important issue for Alaskans.

- ***The solutions recommended in the report are not workable or consistent with the State's legal rights and ownership interests.***

The State is concerned the solutions proposed are not workable because they seek to remedy federal bureaucratic delay by adding new levels of federal bureaucracy in which state participation is minimal and federal authorities are unilaterally empowered to manage state lands however they deem fit with no deadlines. This sidesteps the real issue of confirming state ownership to its submerged lands in favor of empowering continuing federal management of state property, where federal land managers are given free rein to manage state property without state consent or participation for however long they decide interim management should continue.

The only recommendations for improvements contained within the report include possible mediation by some third party to be chosen by federal land managers with no involvement from SOA in the selection process and an additional level of bureaucratic approval that would be added to the already cumbersome, slow and inefficient process that already exists.

These recommendations ignore the fact that BLM and SOA have already engaged in a court-ordered mediation that lasted well over a year without positive result. BLM repeatedly rebuffed all practical solutions recommended by SOA and offered nothing of substance. It became obvious to all SOA parties involved with the mediation that BLM has no desire to improve the RDI process; rather, BLM likes the status quo whereby confirmation of state property rights in submerged lands can be put off interminably and federal land managers will be given free rein to pursue their unilateral management objectives free from the participation of the real landowner (SOA). What is even more distressing about the mediation recommendation is that nowhere in the GAO Report is it suggested that SOA would have any say in the selection of the mediator which would be left solely to BLMs' choosing. We do not believe the proposed mediation, with the deck stacked against SOA, is workable.

More importantly, the recommendation for another level of federal bureaucracy to solve a bureaucratic mess is the recipe for making a dysfunctional situation even worse. It seems axiomatic that you do not cut red tape by adding red tape. This recommendation, if implemented, will further delay fulfillment of one of Alaska's promises of statehood and may lead SOA to conclude that further participation in the RDI process is not worth the time and effort that could be expended in litigation that we know will lead to results.

Instead of the general – and we believe misplaced – recommendations for improvements contained in the GAO report, a better course would be to recommend the specific and workable solution recommended by SOA during and after the GAO

field visit this past winter. We would also welcome discussing or modifying these requests as a show of good faith and desire to reach workable solutions. Specifically, we believe GAO should recommend items like:

1. Setting a deadline on BLM of three hundred days following receipt of a SOA RDI application to finish fully its adjudication. If BLM has not responded affirmatively or negatively by the end of three hundred days on the RDI application, it will be granted. If a portion of the RDI application has been adjudicated, but other portions have not been adjudicated by the three-hundred-day deadline, the RDI for those unadjudicated portions will be granted.

2. Until such time as SOA's remaining statehood land entitlement is fulfilled, SOA will pay no costs for adjudicating a RDI application except the application fee and out-of-pocket costs associated with notice and publication required prior to issuance of a RDI.

3. All RDI applications will be assessed by the following criteria derived from governing caselaw, historical experience and common sense for Alaska which became a state in 1959:

   a. The Gulkana Appeal applies to other rivers in Alaska.

   b. Personal use is evidence that a river is physically susceptible to navigation.

   c. Navigability does not require a clear channel (it does not need to be without difficulty).

   d. Historical evidence of navigation is not required as long as SOA can show the river is susceptible to navigation. BLM continues to require evidence of historical use before it will conclude a river is navigable for title purposes. In doing so, the agency fails to recognize that historical evidence is not required as long as SOA can show that the river is physically susceptible to navigation.

   e. Inflatable rafts, poling boats, canoes, jetboats, motorized and non-motorized riverboats and airboats are either customary and traditional watercraft or meaningfully similar to customary and traditional watercraft.

f. Watercraft are meaningfully similar if they have similar draft requirements and a similar weight-bearing capacity.

g. In general, a showing that a river is boatable at least one-third of the open water season is sufficient to establish navigability for title purposes.

h. Two-way traffic is not required. BLM has taken the position, which is not found in caselaw, that SOA must show two-way travel (upstream and downstream) on a river in order for the agency to conclude the river is navigable.

i. Overland travel along the river via trail or road during the open-water season does not defeat a river's navigability. BLM has informed SOA that it will not issue RDIs for rivers that have a road or trail system running alongside as is the case with the Gulkana River.

Such recommendations should have been included within the report.

- ***The report should include the information provided by SOA during the field visit by GAO personnel and the SOA's suggestions for improvements advanced during and after those meetings.***

Well over a dozen SOA employees met with GAO personnel over the large part of two business days during their field visit to Alaska. SOA provided voluminous documents to the GAO team including all of the incomplete financial statements provided by BLM to account for RDI funds; in-depth analysis of numerous RDI applications; suggestions for improvements; documentation regarding the failed court-ordered mediation; etc. SOA further prepared a detailed overview of the RDI process and its history as well as the issues of navigability, tidal influence, pre-statehood withdrawals, etc. in an ArcGIS Story Map that was made available for future use. SOA further took GAO personnel on site visits to see examples of plainly navigable waters that BLM claims are non-navigable. We believe this information should be referenced and incorporated into the report.

What is particularly frustrating about the GAO report, as written, is that very, very little of the state perspective and the facts, figures and information provided by

SOA is even mentioned—much less addressed on the merits. None of our legitimate and documented grievances are given anything but cursory and generalized mention before they are effectively ignored. As we have seen the federal contentions before in numerous forums, moreover, it appears as if the majority of the report was developed by relying on statements by BLM and its Solicitors on their face, without further investigation or analysis.

The treatment given the Stikine River RDI application is a prime example of this deference – that we believe then omits material information from GAO's report. The report cites as authoritative BLM's bewildering contention that the Stikine River RDI took over fourteen years to adjudicate due to its "complexity". Nothing could be farther from the truth. All federal parties agreed that the Stikine River was tidally influenced and/or navigable-in-fact from the outset. For context, the Stikine River is one of the largest rivers in the United States.

For reasons that were never explained, USFS objected to issuance of the RDI. BLM refused to determine whether or not this objection was legitimate and instead took the position that another federal agency would *never* make an objection that was not valid. On this basis, the RDI application was rejected approximately five years after it was filed, and SOA appealed to the IBLA which ruled that BLM must scrutinize any objection to determine its legitimacy and that BLM must adopt standards to assess legitimacy. The matter was remanded to the agency to assess the legitimacy of the objection and develop legitimacy criteria. Another five years passed, and BLM did nothing. It was then that SOA filed suit in federal court, and DOJ issued a quiet title disclaimer without even filing an answer—presumably recognizing BLM's untenable posture. Court action, therefore, was needed to break the logjam that BLM was itself unwilling to remedy. The "complexity" throughout this process was not in disputed facts or legal standards – but why BLM was not willing or able to articulate the basis for its inaction.

A more responsive, thorough and appropriate GAO Report would, SOA respectfully submits, have included the gravamen of Alaska's complaints and suggestions, meaningful analysis of those matters, and viable suggested solutions. In other words, the GAO Report would have provided a roadmap for reforming this broken program – or at least substantively analyzed supported allegations that it is broken. Regurgitation of BLM's stale, fictional excuses does nothing to move towards fruitful change, but only reinforces BLM's perpetuation of a stagnant status quo. The State feels the GAO Report, as currently written, seems far distant from what Senators Murkowski and Sullivan requested.

Technical Points

As detailed below, we believe many areas of the report omit important information and context, and include misleading and inaccurate characterizations. The following comments relate to the sections in the GAO Report cited and referenced by their headings:

Why This Matters Section

This section should acknowledge two core points at the appropriate level of generality. First, while it is important that navigability determinations are not over-inclusive and thus intruding on federal ownership and management responsibilities, the reality that non-determined areas are being treated as federally owned and managed is incredibly under-inclusive, contrary to the valid interests of the State if not subject to an efficient program for resolution upon the State's request, and should be efficiently and effectively remedied as a matter of public policy and federalism. Second, that it is fair to assume that there are huge numbers of unquestionably navigable waters in Alaska – and that anything other than a high percentage of these waters being quickly resolved is per se evidence of federal inefficiency in this area.

The Section should also preview an area of potential further investigation for the report, a successive report, or agency action: an audit or accounting of funds associated with the program and what they have produced.

Key Takeaways Section

First Bullet Point

Ownership of submerged lands can also be implicitly determined in other ways than the two pathways listed in the DRAFT GAO Report.

For example, BLM routinely fails to meander navigable and tidally influenced waters in conveyances made to Alaska Native Corporations (ANCs) and Native Allottees (NAs). This routine practice results in ANCs and NAs being routinely shortchanged in the total acreage of uplands that are owed pursuant to the Alaska Native Claims Settlement Act (ANCSA) and otherwise. It also harms SOA as state-submerged lands are purportedly conveyed by the Federal Government in violation of fiduciary obligations owed to the State to innocent parties such as ANCs and NAs – and placing a burden on the State to seek remedy for these errors. Such misfeasance forces

needless and completely avoidable controversy between SOA on the one hand and ANCs and NAs on the other, but nevertheless, BLM takes the position that its conveyance decision—however wrongful it may be—constitutes final agency action and determination on the question of navigability from the federal perspective.

As a second example, SOA is actively conducting and issuing state navigability determinations and assertions that will inform the public and will govern, from the state perspective, issues of ownership management and control. It is important to remember that these submerged lands were conveyed to SOA on the date of statehood—meaning SOA already owns these submerged lands and the only effect that post-statehood navigability determinations have is to confirm what has already happened legally. With navigable-in-fact and tidally influenced waters that are not subject to a valid pre-statehood withdrawal that expressly includes the submerged lands, Alaska is and has been the owner since 1959 and is entitled to act as the legitimate owner following confirmation through fair analysis. This burden shifting should be acknowledged as a path to resolution of these issues, where BLM is tasked with disagreeing with state determinations and assertions, and suing SOA to quiet title.

Second Bullet Point

SOA has never indicated that the RDI process has been a failure since its inception. Instead, the RDI program that seemed to work well at its inception has devolved into a wholly dysfunctional bureaucratic quagmire that it is presently. Starting out as a relatively inexpensive and timely alternative to quiet title litigation, the current state of the RDI program has led SOA to conclude that federal court litigation is quicker and cheaper. Rhetoric aside, this bullet point should be amended to reflect the factual information that the pace of RDIs has progressively deteriorated over time, while their cost has increased. An average across the full life of the program does not capture this fact.

SOA has provided analysis showing that length of time required for complete processing and associated costs for early RDI applications compared with the current RDI program in which we have not seen any movement on any pending RDI application in over four years; all while the pace for RDI adjudication has dramatically slowed and costs have skyrocketed. This is despite the increased funding that the Alaska BLM State Office has recently enjoyed for its RDI program. The letter from Senators Murkowski and Sullivan initiating this GAO inquiry supports this view that the investigation should be focused on why the current RDI program is falling far short

of optimal performance and suggestions for how the RDI program can get back on track.

Third Bullet Point

Aside from a few early cases with mixed results, SOA has a remarkable track record for success in litigation over the past decade while BLM and DOJ have fared far worse. This is because the State has adjusted its litigation positions in response to Court decisions setting bounds and standards for navigability. We have ceded and changed positions that have been determined to be invalid. We maintain that the federal government has not.

Nowhere in the report, for instance, is the Mosquito Fork case discussed in any depth, and nowhere is the resounding relevance of that case given its due. In the Mosquito Fork decision, the BLM and DOJ were found to have acted IN BAD FAITH, among other things, by failing to follow settled judicial precedent regarding navigability standards announced in the Gulkana case. As pointed out above, the Gulkana case was also a substantial victory for SOA versus the Federal Government – but the federal agencies have not adjusted their positions accordingly. The bad faith exhibited was to such a degree that SOA was awarded its attorney's fees and costs as a punitive sanction.

The Sturgeon litigation likewise was not given its due in the DRAFT GAO report. In that case, the United States Supreme Court in two separate unanimous opinions in the same proceedings (something that we are advised has never happened before) completely found against the Federal Government and in favor of the issues of state sovereignty advocated by the private litigant and SOA. We are not asserting this case controls all quiet title actions or navigability determinations, or expands the State's ownership rights – but it is unambiguous direction to federal managers to pay attention to Alaska's unique attributes.

In a nutshell, SOA has an unblemished record against the Federal Government in quiet title navigability litigation for more than a decade— resulting in findings of federal bad faith and punitive sanctions but not a single federal success. We believe GAO should acknowledge this is an area for agency evaluation and process change to avoid even the possibility of repeating this outcome.

Fourth Bullet Point

SOA is aware of no proactive steps whatsoever that the Federal Government has taken regarding interim management with SOA for any purpose. Any cooperation that federal land managers exhibit is forthcoming only under threat of imminent litigation by SOA. Federal land managers only begrudgingly participate in the free-of-cost-for-governmental-entities state permitting process for use of state-owned submerged lands when SOA sends cease-and-desist letters and threatens trespass and other legal proceedings. Federal land managers continue to misinform the public regarding state ownership of submerged lands in federal areas. Federal land managers continue to harass Alaska citizens who seek to use state-owned submerged lands in ways permissible under state law that happen to fall within federal boundaries. To suggest that there is any effort under way to work together with SOA in management of submerged lands pending navigability adjudication is simply false.

But even more fundamentally, SOA is and has been the owner of the submerged lands under navigable-in-fact and tidally influenced waters, not subject to a valid pre-statehood withdrawal expressly including the submerged lands, since the date of statehood (1959). These submerged lands are, and have been for over sixty years, state property subject to state management and control. Except for permissible federal regulation of water quality and other lawful reasons, federal agencies have no business whatsoever managing state property without state involvement, participation and consent. Assuming arguendo that federal efforts at interim management are underway, those unilateral efforts without involvement of the lawful owner represent clouds on valid state title; violate fiduciary obligations owed by the Federal Government to the state pursuant to the Equal Footing Doctrine, the Alaska Statehood Act and the Federal Submerged Lands Act; and represent federal overreach. Essentially, the Federal Government is eluding the issue of confirming state title to submerged lands to SOA by stepping up its efforts to unilaterally manage state property interests according to federal management priorities without state involvement or participation. To view this unilateral federal working group as an example of how the Federal Government is working to resolve navigability issues with SOA is a mischaracterization at best.

Background

In the first paragraph of this section, the report notes that an ANC observed that it was worried about trespass on its lands due to state ownership of adjacent submerged lands—seeming to suggest that this concern is relevant to determining whether or not SOA owns the submerged lands and something relevant that BLM should consider in

quieting title. While this is a valid land *management* concern – that land *owners* must work cooperatively on – it does not guide land ownership. The United States Constitution, Congress, and the U.S. Courts have all held that SOA owns the submerged lands underneath all navigable-in-fact or tidally influenced waters within its borders in the absence a valid pre-statehood withdrawal that expressly includes the submerged lands. The navigability-for-title analysis has therefore two parts: (1) determining whether the waters are navigable-in-fact or tidally influenced and (2) determining whether a valid pre-statehood withdrawal defeats state title. BLM has no authority whatsoever to consider preferences such as whether an adjacent property owner desires the State as a neighbor. Such matters are management considerations to be addressed after the navigability-for-title issues are resolved. As BLM itself has observed, good land management can only follow after a clear determination of ownership and boundaries are made, but such preferences of third parties and hypothetical concerns about future trespass have no place and no relevance in a navigability-for-title analysis.

The following salient points about the Sturgeon decisions should be acknowledged in this context:

- John Sturgeon was advised by NPS officials that his operation of his hovercraft, as he had done for many years, on the Nation River that flows within the Yukon-Charley Rivers National Preserve was prohibited by federal law. The Nation River is a navigable-in-fact river—meaning that the submerged lands (even within the federal boundaries) are owned, managed and controlled by the State and that boat usage of the river is therefore governed by state law. Even when this was explained to the federal law enforcement authorities, they were undeterred and indicated that he would be subject to criminal sanction if he used his hovercraft on the Nation River. Sturgeon subsequently sued.

- The United States Supreme Court in two UNANIMOUS opinions held, among other things, that state law—not federal law—governs the use of flowing waters above state-owned submerged lands even within the boundaries of federal areas and that the NPS could not lawfully prevent John Sturgeon from using his hovercraft on the Nation River.

- The second UNANIMOUS opinion in the Sturgeon litigation was issued on March 26, 2019.

- Over four years later, no federal agency has taken any formal action whatsoever to implement the Sturgeon holding in their regulations. Over four years later, the Federal Government has made no substantive changes in response to the Case. Indeed, it remains unlawful according to NPS regulations to operate a hovercraft on the Nation River or any other river located within the boundaries of other NPS areas in Alaska over four years after the UNANIMOUS United States Supreme Court saying that Sturgeon was lawfully allowed to do just that.

- To state in the GAO report that federal agencies in Alaska are under "pressure" to implement the Sturgeon holding accommodates this inaction. Not a single federal agency—and certainly not BLM—has taken affirmative steps to incorporate the Sturgeon holding of the United States Supreme Court in over four years. Similar to the attitude that the Federal Government took in the Mosquito Fork case when it decided that it was not bound by the decision of the Ninth Circuit Court of Appeals in the Gulkana case, none of the federal agencies have done anything to conform their regulations to the legal conclusions of the United States Supreme Court in the Sturgeon case. That is certainly not suggestive that any of the federal agencies are feeling "pressure" or are inclined to do anything except continue with the same status quo that flaunts state ownership, management and control of its sovereign property; is confusing and detrimental to the public good; and that frustrates the Equal Footing Doctrine of the United States Constitution.

How Does BLM Determine Navigability

The State contends this section does not reflect the reality or complexity of the issues and processes at play; but instead represents repetition of BLM's charitable self-characterization of its processes. We do not believe it fairly characterizes SOA's legitimate issues with the RDI program.

Historical Use

While it is certainly true that historical evidence can powerfully demonstrate navigability at the date of statehood, the problem is that Alaska is a vast state and (both now and before statehood) has had a small population. This means that in many instances the historical record of use is far from robust and will not alone prove dispositive on navigability questions for many, many waters. This is why navigability caselaw so clearly lays out the alternate path of susceptibility for navigability determinations. We believe GAO should direct BLM to examine and adopt this caselaw.

SOA's frustration with BLM's emphasis on historical evidence of use stems from BLM's attempts to utilize it as evidence of susceptibility, and thus continue using it as the functional standard. For example:

- For rivers and lakes with scant historical proof, BLM is far too willing to throw up its hands and conclude that the "absence of evidence" is "evidence of absence"—meaning that the river must not be susceptible to navigation (despite its physical characteristics) because no gold miner, trapper or other pre-statehood user took the time to memorialize trip information that is now maintained in a historical archive.

- We believe BLM avoids issuing decisions based purely on susceptibility so it can continue to focus expending huge amounts of public funds on studying historical use in other applications and areas. If BLM says that a river asserted as susceptible to navigation is non-navigable, SOA will sue. If, on the other hand, BLM were to say the river is navigable, the agency would have to rely on susceptibility criteria which it has been completely unwilling to do. As a result, BLM simply sits on such RDI applications and takes no action as the years roll by.

- BLM demands historical evidence of boat usage that exceeds what is required by caselaw. Contrary to BLM complaints about the sparsity of caselaw governing what is required to establish navigability in Alaska, SOA submits that there is ample federal judicial authority that defines practically and specifically what it means for a river to be determined navigable-for-title. The Gulkana decision, Mosquito Fork decision, and others clearly lay out what types of boat usage can be utilized to demonstrate navigability—listing in detail numerous types of watercraft in use at the date of statehood and appropriate load weights that satisfy legal requirements for trade, travel and commerce. BLM routinely does not follow the law and requires proof that exceeds requirements of judicial precedent in Alaska. BLM, for example, requires customarily proof of two-way travel; proof of two-thousand pound loads exceeding the eight-hundred-to-twelve-hundred pound loads set by the Ninth Circuit Court of Appeals; wrongfully excludes passenger weights from the total calculation; refuses to consider proof of usage by inflatable boats; etc.

Susceptibility to Navigation

The section is misleading and simply regurgitates as fact assertions advanced by BLM and claims of legal uncertainty where caselaw is instead well-settled and prescriptive.

BLM claims that determining navigability based upon susceptibility is expensive and time-consuming. At its core, the State agrees – which is why we request a collaborative, efficient process to avoid contesting every waterway, no matter how clearly susceptible to navigation it may be. Rather than a response to State assertions, this is a state assertion.

BLM, to date, has never determined a river or lake to be navigable based upon susceptibility standards or physical characteristics. BLM has never undertaken a susceptibility analysis in any RDI determination and has instead insisted solely on historical proof—thereby negating the SOA from demonstrating navigability on this basis that is a particularly apt way to legally do so considering Alaska's enormous size, small population and limited historical record. BLM may have expended significant public resources trying to assess susceptibility, or may desire to avoid doing so because of the expense – the State believes both of those encourage mediated resolution of these issues rather than recalcitrance at every turn.

Additionally, BLM avoids accepting simpler ways to establish susceptibility. While helicopters may be expensive to charter for fieldwork, there exists at little or no cost: robust aerial imagery from numerous sources; detailed user accounts from guides and other members of the public using watercraft meaningfully similar to watercraft in use at the time of statehood; gage data maintained by United States Geological Survey (USGS) or National Oceanic and Atmospheric Administration (NOAA); and most importantly information and data maintained by NPS, USFWS, USFS and BLM within their own files regarding usage of navigable waters. Using these and other sources, a small team with SOA was able to undertake navigability assessments for over two thousand rivers and lakes during the same period that BLM was able to make zero progress on even a single RDI application.

BLM, furthermore, claims that uncertainty within caselaw renders the agency unable to develop susceptibility criteria. This if far from a truthful statement. There is ample caselaw that establishes what it means for a river to be deemed navigable-for-title, and one Alaska case in particular – the Gulkana decision from the Ninth Circuit Court of Appeals – resolves many of the issues that BLM claims have not been settled. A more accurate statement would be that BLM does not like the caselaw that exists and will go to great lengths to avoid implementing the same. In the Mosquito Fork case, for example, the lead historian for BLM Alaska State Office remarked that BLM decided that it was not bound by the Ninth Circuit's Gulkana decision if it did not wish to be. The audacity of such an attitude pervades the Navigability Program, and that—not an

unsettled set of judicial precedents—underlies BLM's unwillingness to adopt susceptibility criteria.

How many applications has BLM processed and how long did it take?

The conclusions reached in this section are misleading because the RDI program has been treated as unchanging since its inception to date, and no attempt is made to analyze why the RDI program has broken down over time.

In the last sentence of the first paragraph of this section, GAO observes that twenty-seven of the thirty-six RDI applications submitted by SOA were resolved within the three-year period between 2003 and 2006. Stated differently, seventy-five percent of the RDIs that have been issued by BLM Alaska State Office occurred in a three-year period approximately seventeen years ago. This means that for the period of 2006 to 2023 BLM has only issued nine RDIs. This statistical contrast should, but does not, lead to further investigation and analysis.

GAO further softens the full impact of this statistical contrast when it allows the rapid adjudication of RDI applications between 2003 and 2006 to improve the timelines of all RDI adjudications after that period. A more accurate analysis would have calculated the timelines and costs for only those RDIs adjudicated after 2006 to get a better understanding of the unsoundness of the current RDI program.

GAO's discussion of the Stikine River RDI is additionally noteworthy as what is reported is inconsistent with the actual facts of the matter. As discussed above, that application took fourteen years to decide because BLM was unwilling to establish standards for determining the legitimacy of objections to RDI issuance and was unwilling to rule against a sister federal agency. There was nothing factually or legally complex about the Stikine RDI application; it was for a massive, international scale river. It was BLM's dereliction of its statutory and administrative duties, requiring court action to redress, that accounted for SOA having to wait almost a decade and a half for relief.

The assessment of the current state of pending RDI applications does not summarize the extremely limited BLM action.

1. The Unuk River RDI application was filed on July 28, 2022. It took months for BLM to assign this application a tracking number. As we approach the one-year

anniversary of its filing, BLM has not yet conducted the pro forma pre-application meeting and has provided no cost estimate for the adjudication.

2. The Kwethluk RDI application was filed on February 21, 2019. In the more than four years since its filing, BLM has not yet conducted the pro forma pre-application meeting and has provided no cost estimate for the adjudication.

3. The West Fork and Denison Fork (Fortymile River) RDI application was filed on February 19, 2019. Even though a thorough navigability determination prepared by BLM already exists, the agency has not yet conducted the pro forma pre-application meeting and has provided no cost estimate for adjudication.

4. The Delta River RDI application was filed on May 14, 2019. Even though a thorough navigability determination prepared by BLM already exists, the agency has not yet conducted the pro forma pre-application meeting and has provided no cost estimate for adjudication.

5. The Arolik River RDI application was filed on September 15, 2016. According to BLM staff, the internal decision has been with the BLM Solicitor's Office for review for over four years.

6. The Eek River RDI application was filed on January 4, 2018. According to BLM staff, the internal decision has been with the BLM Solicitor's Office for review for over four years.

7. The Goodnews River RDI application was filed on January 2, 2018. According to BLM staff, the internal decision has been with the BLM Solicitor's Office for review for over four years.

The above facts represent a far cry from the business-as-usual language contained within the GAO report.

Which factors affect the amount of time to process applications?
First Bullet Point

The Kuskokwim River is cited as an example of complexity for RDI adjudication, but in actuality, the Kuskokwim River is ninth largest river in the United States by average discharge volume at its mouth and seventeenth largest by basin drainage area. The Kuskokwim River is the longest river system contained entirely within a single U.S. state. Except for its headwaters in the mountains, the river is broad and flat for its entire course, making it a useful transportation route for many types of watercraft, as well as road vehicles during the winter when it is frozen over. It is the longest free flowing river in the United States. To argue that adjudication of the navigability of the 540 miles mighty Kuskokwim River is unduly complex and time-consuming, fundamentally, is the State's point. BLM should not approach such a river with the framing that: "this river is 540 miles long so the entire portion must be complex and in need of investigation." Instead, it should be second nature for them to assume: "at 540 miles, huge portions of this river are inherently navigable. We should work quickly and efficiently to confirm those sections, and only expend public resources if specific areas are contested or in need of resolution."

The reference to the Knik River as another example of complexity is also puzzling and frustrating. To begin with, SOA has never applied for a RDI for the Knik River because BLM declared in the 1980s that the lower section was navigable. However, the River magically becomes non-navigable precisely at the township line. SOA repeatedly unsuccessfully asked BLM to amend this obviously erroneous determination on numerous occasions. As a result of inaction to these requests, the SOA was forced to sue to quiet title to the upper portion of the Knik River in 2017. Instead of filing a responsive pleading, DOJ disclaimed the entirety of the river to SOA— recognizing its obvious navigability when faced with having to assert otherwise in Court.

Second Bullet Point

BLM's discussion of the high costs of fieldwork necessary to make a navigability determination based solely on susceptibility would be far more persuasive if BLM had ever, in fact, made a navigability determination based upon susceptibility. The fact of the matter is that BLM has only issued RDIs upon stout historical evidence of use. Moreover, there are numerous other ways of establishing susceptibility to navigation without chartering helicopters. As listed above, robust aerial imagery, photogrammetry, user accounts (*particularly guide accounts who are using the river for a commercial purpose*), gage data and even the copious amounts of information maintained by the various federal agencies for rivers flowing through federal areas and beyond are excellent

means for establishing navigability-for-title that have been a staple of proof in quiet-title litigation from the date of statehood onwards. Even without the advantage of deep federal coffers, SOA has been able to conduct extensive fieldwork as well as leveraging existing proof to make navigability assessments for over two thousand rivers as well as prosecuting successfully an ambitious suite of litigation cases during the time period that BLM has not taken any meaningful action on any SOA RDI application. Simply put, BLM's suggestion that susceptibility determinations are too expensive is part of why the State encourages GAO to investigate how BLM expends and manages funds for these purposes.

Third Bullet Point

The claim that reviews by the BLM Solicitor's Office take six months to complete on average is inaccurate. Of SOA's current RDI applications, BLM staff has advised that three applications (Arolik, Eek and Goodnews Rivers) have been under review by the BLM Solicitor's Office since 2019. Given that length of time, review by that office in practice seems to put SOA RDI applications on permanent hold. As with many things associated with the RDI process, SOA believes that litigation in federal court with all that entails is almost always a quicker way to achieve results than the RDI process.

BLM Navigability Library Project

The last paragraph of this section discusses the much-heralded and long-awaited BLM Navigability Library. This proposal was announced in 2018 but has repeatedly been delayed despite great promises of results. With deadline-after-deadline missed, SOA, to date, has only received three incomplete reports of dubious value to the navigability process. BLM has paid outside experts (*Paleo West, Inc. is the name of the only contractor shared with SOA*) unknown sums of money for their work. Considering the referral from Senators Murkowski and Sullivan to examine the finances of the Navigability Program, it would seem logical that the costs of this Navigability Library venture would be contained within the report, but such information is not present.

What are the key steps in the judicial process and how often is it used?

Two matters deserve attention in this section.

First, the suggestion that litigation results represent a range of outcomes balanced between SOA and the Federal Government is misleading in that one must

look to a time before the Twenty-First Century to find a substantively favorable decision to the Federal Government. The case cited as an example of a federal win is the Slopbucket Lake decision from 1985. The list of recent state victories, by contrast, is long and getting longer (Gulkana, Mosquito Fork, Stikine, Knik, etc.). As recently as last year in what BLM described as the test case for resolving lingering navigability issues, DOJ disclaimed over eighty percent of what SOA claimed, and the remainder is subject to a pending motion for summary judgment. The ledger of courtroom results, therefore, is far more lopsided than the GAO report suggests. As stated above, this is because the State has adjusted its assertions and litigation positions since the 1985 defeat. We do not feel BLM has, and that this should be acknowledged by BLM.

Second, BLM's citation of the Mosquito Fork case as an example of how expensive litigation can be and how long it takes is inexplicable. In that case, SOA obtained total victory in a timeframe far shorter than what is expected with RDI applications and recovered its attorney's fees and costs from DOJ/BLM due to their bad faith. Having to respond to vexatious and unmerited litigation was, as far as navigability disputes go, a timely bargain for the State.

The point, we believe, that needs to be stressed in this section is that BLM—if it followed existing caselaw, acted objectively and timely, and divorced itself from issues immaterial in adjudicating issues of navigability—could have a vital and meaningful RDI program. This was once the case, but somehow, over time, the RDI program has lost its way and ground practically to a halt. The GAO Report should point that out and guide BLM again to find its way.

What actions have federal agencies taken to clarify land management responsibilities between the federal government and the state?

Best intentions aside, the point needs to be made that, to date, federal agencies—including the working group of which SOA was unaware—have done nothing to clarify responsibilities between the federal government and the State. What some working group, with no track record of performance, intends to do at some unstated date in the future should not be given undue credit in the GAO report that was commissioned to examine problems and recommend concrete answers with policies, practices, and budget administration.

What challenges remain in clarifying land management responsibilities?

The State maintains the real challenge that remains is accepting that these processes do not have to be complicated or contentious in most cases. Management is only relevant following a clear determination of title. Deciding questions of management authority is both irrelevant and illegal if the lands involved are not owned by the entities proposing to manage the same, and prematurely assuming management authority clearly puts the cart before the horse. The only real challenge remaining is hence clarifying who owns what between SOA and the Federal Government with the submerged lands located within state boundaries. Interim management and all of the other considerations listed in this section represent clouds on SOA's valid title to its submerged land that was conveyed on the date of statehood. Once ownership is clear, then and only then can SOA and the Federal Government work together as adjacent landowners for the public good, and any usurpation of state ownership, management and control by federal land managers through their decisions and actions, regardless of their motivations, are unlawful, presumptuous and represent federal overreach.

Discussion of the merits of "interim" management by federal authorities over state property that, according to the law, was held in trust pre-statehood and conveyed on the date of statehood is beyond the scope of the request made by Senators Murkowski and Sullivan; and is unlawful..

Conclusions and Recommendations

It should be noted in the GAO report that:

- SOA has no interest whatsoever in participating in a mediation process in which SOA plays no role in selecting the mediator which falls entirely within the discretion of federal agencies.

- SOA has no interest in participating in an open-ended mediation without an agreed definite agenda, time constraints and identified possible outcomes.

- SOA does not agree that the input of third parties, not contained within the chain of title, plays any part in resolving and clarifying navigability-for-title issues.

- SOA intends to manage state property as such in perpetuity and believes that collaboration regarding management objectives is only proper following the settlement of ownership questions.

- SOA intends to treat any interim management by federal agencies of state-owned submerged lands that is without its agreement, consent and involvement as a cloud on its title pursuant to the Federal Quiet Title Act.

- SOA does not believe that the proposed recommendations will have a positive effect on navigability issues existing between SOA and the Federal Government without further identification and analysis of the issues in this letter.

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As was said at the outset of this letter, we are displeased with the GAO Report that was shared with us and believe the comments outlined in this letter should be addressed. We are further hopeful that Senators Murkowski and Sullivan will be equally dissatisfied unless a reconsideration, supplementation, and rewriting of this report is undertaken. To the extent that GAO intends to do the same, we stand ready to assist in any way.

Sincerely Yours,

Brent Goodrum
Deputy Commissioner
Alaska Department of Natural Resources

CC: Cardell Johnson, Director
Casey Brown, Assistant Director
Natural Resources and Environment Section

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Text of Appendix III: Third-Party Views from the State of Alaska

June 19, 2023

Mr. Anthony C. Fernandez Senior Analyst

Natural Resources and Environment Government Accountability Office

Re: Comments by State of Alaska to DRAFT GAO Report regarding BLM Alaska State Office Navigability Program

Dear Mr. Fernandez:

We greatly appreciate the opportunity that you have provided the State of Alaska (SOA) to comment on the Proposed General Accountability Office (GAO) Report (GAO Report) that has been prepared in response to the request from Senators Lisa Murkowski and Dan Sullivan. We will provide first our general comments regarding the overall report and

next share specific guidance seeking technical correction and modification of various parts and statements contained within the report.

In a nutshell, SOA believes that the GAO Report, as written, does not answer important questions at the core of the request, nor acknowledge clear issues and unexplained questions inherent in federal positions.

As will be detailed below, the State believes that, without correction and addition, the report is flawed; misrepresents or omits many relevant factual and legal matters; completely ignores vital information and data provided by SOA; frequently repeats without any scrutiny fictions advanced by federal authorities; ignores a past recent history of failed court-ordered mediation; and makes recommendations for additional layers of bureaucratic red tape that sidestep the real problems with the Recordable Disclaimer of Interest (RDI) process.

The earnestness of these concerns stem from the longstanding and sincerely held position that, taken as a whole, the federal approach to these issues is not just an inconvenient or inefficiently managed federal process, but that it relegates SOA (whose actual property interests are involved) to a mere bystander while federal land managers continue to unilaterally make decisions and manage lands belonging to SOA. Far from improving the current status quo, we believe that the GAO Report will embolden federal authorities to continue using dilatory tactics to deny Alaska one of its fundamental promises of statehood.

It has been over sixty-four years since Alaska became a state, and BLM has only confirmed state ownership to a small fraction of the submerged lands promised by the Equal Footing Doctrine of the United States Constitution. At the current pace, it will take hundreds – or even thousands – of years for Alaska to achieve fully what was promised in 1959. We do not believe the GAO Report, as written, identifies the clear and executable federal actions that can shorten this timeframe and avoid even further delay of what Alaska was promised.

General Comments

As we discussed during our recent teleconference, SOA is disappointed with the draft report that was prepared. Our assessment is based on the following that will be addressed individually below:

- The report that is prepared does not respond to the specific issues that Senators Murkowski and Sullivan asked be addressed.

In their letter requesting the comprehensive accounting of the Bureau of Land Management (BLM) Alaska State Office Navigability Program (Navigability Program), Senators Murkowski and Sullivan asked that GAO include in its examination the following:

1. The status of congressional appropriations for the Alaska Navigability program and how those funds have been allocated, managed, and accounted for;
2. What processes are in place to efficiently issue RDIs, and what expense and timeline targets the Department maintains for this process;
3. What RDIs have actually been issued by the Department, and the timeline, costs, and process that resulted in these actions;
4. What standards BLM follows for assessing the navigability-in-fact of waters identified in RDI applications;
5. What instructions BLM provides to third-party contractors for assessing the navigability-in fact of waters identified in RDI applications;
6. What process are in place for contesting or settling Quiet Title Act litigation with the State of Alaska;
7. What controls are in place to ensure litigation positions taken by the federal government are consistent with existing case law and the efficient management of resources; and
8. What adjustments to policy and procedures have been put in place in response to both the prior judicial finding of bad faith and the U.S. Supreme Court rulings in Sturgeon v. Frost.

The GAO Report partially responds to the third and fourth items above, but otherwise, the GAO Report does not address any of the items that Senators Murkowski and Sullivan asked GAO to examine. These are not partisan or rhetorical questions, but substantive questions about federal processes, controls, appropriation accounting, and compliance with law and policy. We believe a responsive report should speak directly on all of these questions, even if GAO's review identified additional areas that you determine should be included in, or even the focus of, the final report. Numbered responses corresponding to the bullets below follow:

1. GAO does not address the status of congressional appropriations for the Navigability Program or how those funds have been allocated, managed or accounted for. Nor does GAO even mention known mismanagement of funds and resources: that the BLM Alaska State Office lost over one-hundred-and-twenty-thousand dollars of SOA's money that was supposed to be held in trust for RDI adjudication, or that BLM and the Department of Justice (DOJ) were determined by the federal Alaska District Court to have proceeded in bad faith in the Mosquito Fork case, incurring a punitive sanction of attorney's fees and costs. We believe an analysis of how public resources were allocated to this litigation, how decisions to continue and discontinue it were made, and the source of the funds used to pay the penalty amounts to the State would all be necessary elements of a properly responsive report.

Nor does GAO provide any cost accounting for many of the RDIs mentioned in the report. If BLM Alaska State Office does not maintain or even know the information and data associated with costs and budgets for RDI personnel, RDI adjudication, etc. needed to respond to this inquiry, GAO should have, at the very least, mentioned that in the report. Part of what Senator Murkowski and Sullivan are seeking is to find out where the taxpayers' money is being spent and whether good stewardship, efficiency and productivity are being achieved. This is a significant omission from the report.

The BLM Alaska State Office added personnel to the Alaska Navigability program with congressional appropriations, subsequently productivity has dropped not increased. The status of these personnel, and what work they complete should be included in the GAO report.

2. GAO does not address expense and timeline targets that the Navigability Program maintains. Nothing in the way of an accounting is reported anywhere in the report outlining internal expense and timeline targets that the Navigability Program maintains. We believe such standards, even if solely aspirational, are foundational to a responsible program. To the extent that the Navigability Program does not prepare that data and information, GAO should, at minimum, document such absence. Once again, such information would be very helpful and relevant to Senators Murkowski and Sullivan in assessing whether the taxpayers' money invested in the program is being well-spent on the very thing (RDIs) for which the money was appropriated in the first place. This is another remarkable omission from the report.

3. GAO mentions the fact that the Navigability Program has no real standards for assessing navigability-in-fact for RDI decisions, but then, without any further exploration or examination, GAO excuses such lapse by echoing the same, tired arguments (the lack of caselaw, etc.) continually made by BLM that led to the finding of bad faith in the Mosquito Fork case. Contrary to BLM's claims, there is ample caselaw, rich in factual detail, from which basic standards for determining navigability could be made. It is BLM's fallacious insistence that confusion and ambiguity exist and its reliance upon its own manufactured standards that have been repudiated by the federal courts that account for its dismal track record of cases over more than the last decade before the Interior Board of Land Appeals and within the Federal Court System. Far from being a mixed bag of results in litigation, SOA's litigation scorecard for the past two decades is unblemished, and one must generally look to the Twentieth Century to find a loss. Pretextual federal agency responses as to why standards are not in place need to be investigated as opposed to taken at face value.

5– 7. GAO is completely silent in its report on items five through seven above, even though they are all material to the RDI program and broader efforts to resolve navigability and submerged land ownership issues. Indeed, GAO could—by recommending the

federal agencies accede to or provide reasoned alternatives to the navigability standards offered by SOA—provide a genuine path forward. The silence in the report misses a real opportunity for crafting a meaningful solution, well- grounded in settled federal law, to accelerate the dormant and moribund RDI program.

8. A response to the eighth item is conspicuous for its absence from the report. The actual answer is that, in the four years following the second unanimous opinion of the United States Supreme Court in Sturgeon v. Frost, no federal agency ((none of the National Park Service (NPS), United States Fish and Wildlife Service (USFWS), United States Forest Service (USFS) nor BLM)) has taken any action whatsoever to implement the Sturgeon decision. As of the date of this letter, the very factual predicate that led to the Sturgeon litigation (plaintiff's operation of a hovercraft on the Nation River within the Yukon-Charley Rivers National Preserve) is still illegal. Despite Justice Kagan's unusually specific statement that Sturgeon "can rev up his hovercraft" on the Nation River, NPS has not even initiated the process to modify its regulations that criminalize the operation of a hovercraft on the Nation River, or any other river for that matter.

We believe GAO should recommend, at a minimum, BLM prepare a report on how this decision implicates their responsibilities vis-?-vis submerged lands in Alaska. Including references that federal agencies are feeling "pressure" to follow—albeit begrudgingly and laggardly—the explicit directives of the United States Supreme Court is inadequate to respond to the scope of the request.

- The report does not provide any analysis or accounting regarding the large sums of money that have been devoted to the BLM Alaska State Office RDI program with such little production.

One of the themes of the referral letter to GAO is fiscal accountability and responsibility. Over the past five or more years, the size and budget of the Navigability Program has ballooned while productivity has plummeted. Many new staff members have been added to the BLM Alaska State Office team, and their budgets for third-party contractors (Paleo West, Inc.) have skyrocketed. Parallel with this explosion in funding, productivity has fallen through the floor. Analyzing this should be at the core of the GAO's investigation. As far as the State is aware, the BLM Navigability Team has done absolutely nothing on any pending RDI application for over four years. How can we make such a statement? We get the bills (or are supposed to receive them), and our trust account is to be charged for RDI work. We have seen no activity.

A few examples to evince this absolute absence in productivity are helpful.

As we shared with you, it took BLM navigability staff months to assign a tracking number to a SOA RDI application (Unuk River); it has been almost a year since we filed the RDI application for the Unuk River and we have yet to even go through the formality of a "pre-application" meeting; and we have yet to receive the cost estimate for the adjudication of this application almost a year after its filing.

Navigability reports prepared by BLM staff were completed years ago for the Delta River and the West Fork and Denison Fork of the Fortymile River, and the RDI applications were filed over two years ago. Nothing has happened on either application; no timelines for adjudication have been shared; and nothing is happening on these rivers that BLM has previously—prior to the infusion of new staff and budget—declared navigable.

The navigability reports for the Eek, Goodnews and Arolik Rivers have been "under consideration" by the BLM Solicitor's Office since well before 2019.

The report provides no analysis of recent RDI applications with a goal of understanding costs charged to SOA as applicant. For instance, BLM issued an RDI for the Aniak River in 2012 and in its RDI decision stated that it "always" believed the Aniak River was navigable. Nevertheless, billing records reveal that the State of Alaska was charged approximately $45,000.00 for the 759 hours of BLM's time that was spent processing the application.

And the much-touted BLM "Navigability Library Project" has been in the works for over six years now with only negligible results (we have received only sketchy and incomplete

files for only three waterbodies) and at a cost SOA can only imagine as it—unlike GAO--is not privy to such financial information.

All of the foregoing begs the question: what is the BLM Alaska State Office doing with all of the taxpayer money earmarked for RDI adjudication since it does not seem to be spending it adjudicating RDI applications? We believe a thorough accounting will serve the public and the agency as it continues to receive significant funding. GAO has not undertaken any financial analysis or financial audit as was requested.

- The report needs to acknowledge that the program exists to meet state needs and federal obligations to fulfill them.

We feel the report misses the State's interest at stake in the requested investigation—namely to pinpoint where a once vibrant program over the first decade of its existence went off track to the point where there has been no meaningful progress by BLM Navigability Staff in over four years and federal court litigation is a quicker means of redress for the State and to identify steps to remedy the dysfunction. There are federal obligations to ensure that the right submerged lands are under the State's control – that disclaimers are not overly broad – but the core of the program is the need for massive disclaimers to the huge areas of submerged lands that are Alaska's. Both BLM, and GAO for purposes of the report, need to acknowledge this.

SOA has never taken the position that the RDI program has been broken since its inception; rather, SOA believes—as do Senators Murkowski and Sullivan based upon their letter—that the RDI program started strong and has devolved into dysfunction over the past two decades. This is the raison d'?tre for the GAO Report, but something that it does not achieve.

One reason for this failure is that the GAO Report aggregates the RDI process from its inception to the current date—giving the current program credit for early successes—and making no effort to understand why current RDI applications take so long and cost so much money when earlier RDI applications were issued quickly and far more cheaply. The GAO Report treats the RDI program as a collective whole from its inception, and no effort is made to audit or understand where things went off track. The unwillingness through analysis to break apart the RDI process over time, to examine differing results over time, and to identify and discuss the reasons for the downward trend, is a significant omission from the report. Adding such a deep dive to the GAO report would render its conclusions and recommendations far more useful.

- The tone of the report suggests that everything is moving along just perfectly from the federal perspective and that state complaints are meritless.

None of SOA's bona fide grievances are addressed anywhere to any appreciable degree within the report. There is no digging, analysis, critique or audit of the amount of time BLM devotes to RDI applications, the costs of RDI applications, the staff time devoted to RDI applications, the reasons why BLM will not adopt standards or criteria for assessing RDI applications, practical improvements for the program, etc. The GAO report rather accepts wholesale, without meaningful scrutiny, BLM excuses and justifications for its poor performance. Nowhere is it questioned why a small team at SOA--during the last four years when no action has been taken on any pending RDI application by BLM—has been able to perform navigability assertions for over two thousand rivers and lakes within federal areas statewide in addition to their other job responsibilities including litigation and fieldwork. These are the facts, but a fair review of the GAO report suggests the contrary—that everything is moving along wonderfully notwithstanding state nitpicking. Suffice it to say, such a tone will only have a very negative impact on solving this enormously important issue for Alaskans.

- The solutions recommended in the report are not workable or consistent with the State's legal rights and ownership interests.

The State is concerned the solutions proposed are not workable because they seek to remedy federal bureaucratic delay by adding new levels of federal bureaucracy in which state participation is minimal and federal authorities are unilaterally empowered to manage state lands however they deem fit with no deadlines. This sidesteps the real

issue of confirming state ownership to its submerged lands in favor of empowering continuing federal management of state property, where federal land managers are given free rein to manage state property without state consent or participation for however long they decide interim management should continue.

The only recommendations for improvements contained within the report include possible mediation by some third party to be chosen by federal land managers with no involvement from SOA in the selection process and an additional level of bureaucratic approval that would be added to the already cumbersome, slow and inefficient process that already exists.

These recommendations ignore the fact that BLM and SOA have already engaged in a court-ordered mediation that lasted well over a year without positive result. BLM repeatedly rebuffed all practical solutions recommended by SOA and offered nothing of substance. It became obvious to all SOA parties involved with the mediation that BLM has no desire to improve the RDI process; rather, BLM likes the status quo whereby confirmation of state property rights in submerged lands can be put off interminably and federal land managers will be given free rein to pursue their unilateral management objectives free from the participation of the real landowner (SOA). What is even more distressing about the mediation recommendation is that nowhere in the GAO Report is it suggested that SOA would have any say in the selection of the mediator which would be left solely to BLMs' choosing. We do not believe the proposed mediation, with the deck stacked against SOA, is workable.

More importantly, the recommendation for another level of federal bureaucracy to solve a bureaucratic mess is the recipe for making a dysfunctional situation even worse. It seems axiomatic that you do not cut red tape by adding red tape. This recommendation, if implemented, will further delay fulfillment of one of Alaska's promises of statehood and may lead SOA to conclude that further participation in the RDI process is not worth the time and effort that could be expended in litigation that we know will lead to results.

Instead of the general – and we believe misplaced – recommendations for improvements contained in the GAO report, a better course would be to recommend the specific and workable solution recommended by SOA during and after the GAO field visit this past winter. We would also welcome discussing or modifying these requests as a show of good faith and desire to reach workable solutions. Specifically, we believe GAO should recommend items like:

1) Setting a deadline on BLM of three hundred days following receipt of a SOA RDI application to finish fully its adjudication. If BLM has not responded affirmatively or negatively by the end of three hundred days on the RDI application, it will be granted. If a portion of the RDI application has been adjudicated, but other portions have not been adjudicated by the three-hundred- day deadline, the RDI for those unadjudicated portions will be granted.

2) Until such time as SOA's remaining statehood land entitlement is fulfilled, SOA will pay no costs for adjudicating a RDI application except the application fee and out-of-pocket costs associated with notice and publication required prior to issuance of a RDI.

3) All RDI applications will be assessed by the following criteria derived from governing caselaw, historical experience and common sense for Alaska which became a state in 1959:

    a) The Gulkana Appeal applies to other rivers in Alaska.

    b) Personal use is evidence that a river is physically susceptible to navigation.

    c) Navigability does not require a clear channel (it does not need to be without difficulty).

d) Historical evidence of navigation is not required as long as SOA can show the river is susceptible to navigation. BLM continues to require evidence of historical use before it will conclude a river is navigable for title purposes. In doing so, the agency fails to recognize that historical evidence is not required as long as SOA can show that the river is physically susceptible to navigation.

e) Inflatable rafts, poling boats, canoes, jetboats, motorized and non-motorized riverboats and airboats are either customary and traditional watercraft or meaningfully similar to customary and traditional watercraft.

f) Watercraft are meaningfully similar if they have similar draft requirements and a similar weight-bearing capacity.

g) In general, a showing that a river is boatable at least one-third of the open water season is sufficient to establish navigability for title purposes.

h) Two-way traffic is not required. BLM has taken the position, which is not found in caselaw, that SOA must show two-way travel (upstream and downstream) on a river in order for the agency to conclude the river is navigable.

i) Overland travel along the river via trail or road during the open-water season does not defeat a river's navigability. BLM has informed SOA that it will not issue RDIs for rivers that have a road or trail system running alongside as is the case with the Gulkana River.

Such recommendations should have been included within the report.

- The report should include the information provided by SOA during the field visit by GAO personnel and the SOA's suggestions for improvements advanced during and after those meetings.

Well over a dozen SOA employees met with GAO personnel over the large part of two business days during their field visit to Alaska. SOA provided voluminous documents to the GAO team including all of the incomplete financial statements provided by BLM to account for RDI funds; in-depth analysis of numerous RDI applications; suggestions for improvements; documentation regarding the failed court- ordered mediation; etc. SOA further prepared a detailed overview of the RDI process and its history as well as the issues of navigability, tidal influence, pre-statehood withdrawals, etc. in an ArcGIS Story Map that was made available for future use. SOA further took GAO personnel on site visits to see examples of plainly navigable waters that BLM claims are non-navigable. We believe this information should be referenced and incorporated into the report.

What is particularly frustrating about the GAO report, as written, is that very, very little of the state perspective and the facts, figures and information provided by SOA is even mentioned—much less addressed on the merits. None of our legitimate and documented grievances are given anything but cursory and generalized mention before they are effectively ignored. As we have seen the federal contentions before in numerous forums, moreover, it appears as if the majority of the report was developed by relying on statements by BLM and its Solicitors on their face, without further investigation or analysis.

The treatment given the Stikine River RDI application is a prime example of this deference – that we believe then omits material information from GAO's report. The report cites as authoritative BLM's bewildering contention that the Stikine River RDI took over fourteen years to adjudicate due to its "complexity". Nothing could be farther from the truth. All federal parties agreed that the Stikine River was tidally influenced and/or navigable-in-fact from the outset. For context, the Stikine River is one of the largest rivers in the United States.

For reasons that were never explained, USFS objected to issuance of the RDI. BLM refused to determine whether or not this objection was legitimate and instead took the position that another federal agency would never make an objection that was not valid. On this basis, the RDI application was rejected approximately five years after it was filed,

and SOA appealed to the IBLA which ruled that BLM must scrutinize any objection to determine its legitimacy and that BLM must adopt standards to assess legitimacy. The matter was remanded to the agency to assess the legitimacy of the objection and develop legitimacy criteria. Another five years passed, and BLM did nothing. It was then that SOA filed suit in federal court, and DOJ issued a quiet title disclaimer without even filing an answer—presumably recognizing BLM's untenable posture. Court action, therefore, was needed to break the logjam that BLM was itself unwilling to remedy. The "complexity" throughout this process was not in disputed facts or legal standards – but why BLM was not willing or able to articulate the basis for its inaction.

A more responsive, thorough and appropriate GAO Report would, SOA respectfully submits, have included the gravamen of Alaska's complaints and suggestions, meaningful analysis of those matters, and viable suggested solutions. In other words, the GAO Report would have provided a roadmap for reforming this broken program – or at least substantively analyzed supported allegations that it is broken. Regurgitation of BLM's stale, fictional excuses does nothing to move towards fruitful change, but only reinforces BLM's perpetuation of a stagnant status quo. The State feels the GAO Report, as currently written, seems far distant from what Senators Murkowski and Sullivan requested.

Technical Points

As detailed below, we believe many areas of the report omit important information and context, and include misleading and inaccurate characterizations. The following comments relate to the sections in the GAO Report cited and referenced by their headings:

Why This Matters Section

This section should acknowledge two core points at the appropriate level of generality. First, while it is important that navigability determinations are not over- inclusive and thus intruding on federal ownership and management responsibilities, the reality that non-determined areas are being treated as federally owned and managed is incredibly under-inclusive, contrary to the valid interests of the State if not subject to an efficient program for resolution upon the State's request, and should be efficiently and effectively remedied as a matter of public policy and federalism. Second, that it is fair to assume that there are huge numbers of unquestionably navigable waters in Alaska – and that anything other than a high percentage of these waters being quickly resolved is per se evidence of federal inefficiency in this area.

The Section should also preview an area of potential further investigation for the report, a successive report, or agency action: an audit or accounting of funds associated with the program and what they have produced.

Key Takeaways Section

First Bullet Point

Ownership of submerged lands can also be implicitly determined in other ways than the two pathways listed in the DRAFT GAO Report.

For example, BLM routinely fails to meander navigable and tidally influenced waters in conveyances made to Alaska Native Corporations (ANCs) and Native Allottees (NAs). This routine practice results in ANCs and NAs being routinely shortchanged in the total acreage of uplands that are owed pursuant to the Alaska Native Claims Settlement Act (ANCSA) and otherwise. It also harms SOA as state- submerged lands are purportedly conveyed by the Federal Government in violation of fiduciary obligations owed to the State to innocent parties such as ANCs and NAs – and placing a burden on the State to seek remedy for these errors. Such misfeasance forces needless and completely avoidable controversy between SOA on the one hand and ANCs and NAs on the other, but nevertheless, BLM takes the position that its conveyance decision—however wrongful it may be—constitutes final agency action and determination on the question of navigability from the federal perspective.

As a second example, SOA is actively conducting and issuing state navigability determinations and assertions that will inform the public and will govern, from the state perspective, issues of ownership management and control. It is important to remember that these submerged lands were conveyed to SOA on the date of statehood—meaning SOA already owns these submerged lands and the only effect that post-statehood navigability determinations have is to confirm what has already happened legally. With navigable-in-fact and tidally influenced waters that are not subject to a valid pre-statehood withdrawal that expressly includes the submerged lands, Alaska is and has been the owner since 1959 and is entitled to act as the legitimate owner following confirmation through fair analysis. This burden shifting should be acknowledged as a path to resolution of these issues, where BLM is tasked with disagreeing with state determinations and assertions, and suing SOA to quiet title.

Second Bullet Point

SOA has never indicated that the RDI process has been a failure since its inception. Instead, the RDI program that seemed to work well at its inception has devolved into a wholly dysfunctional bureaucratic quagmire that it is presently. Starting out as a relatively inexpensive and timely alternative to quiet title litigation, the current state of the RDI program has led SOA to conclude that federal court litigation is quicker and cheaper. Rhetoric aside, this bullet point should be amended to reflect the factual information that the pace of RDIs has progressively deteriorated over time, while their cost has increased. An average across the full life of the program does not capture this fact.

SOA has provided analysis showing that length of time required for complete processing and associated costs for early RDI applications compared with the current RDI program in which we have not seen any movement on any pending RDI application in over four years; all while the pace for RDI adjudication has dramatically slowed and costs have skyrocketed. This is despite the increased funding that the Alaska BLM State Office has recently enjoyed for its RDI program. The letter from Senators Murkowski and Sullivan initiating this GAO inquiry supports this view that the investigation should be focused on why the current RDI program is falling far short of optimal performance and suggestions for how the RDI program can get back on track.

Third Bullet Point

Aside from a few early cases with mixed results, SOA has a remarkable track record for success in litigation over the past decade while BLM and DOJ have fared far worse. This is because the State has adjusted its litigation positions in response to Court decisions setting bounds and standards for navigability. We have ceded and changed positions that have been determined to be invalid. We maintain that the federal government has not.

Nowhere in the report, for instance, is the Mosquito Fork case discussed in any depth, and nowhere is the resounding relevance of that case given its due. In the Mosquito Fork decision, the BLM and DOJ were found to have acted IN BAD FAITH, among other things, by failing to follow settled judicial precedent regarding navigability standards announced in the Gulkana case. As pointed out above, the Gulkana case was also a substantial victory for SOA versus the Federal Government – but the federal agencies have not adjusted their positions accordingly. The bad faith exhibited was to such a degree that SOA was awarded its attorney's fees and costs as a punitive sanction.

The Sturgeon litigation likewise was not given its due in the DRAFT GAO report.

In that case, the United States Supreme Court in two separate unanimous opinions in the same proceedings (something that we are advised has never happened before) completely found against the Federal Government and in favor of the issues of state sovereignty advocated by the private litigant and SOA. We are not asserting this case controls all quiet title actions or navigability determinations, or expands the State's ownership rights – but it is unambiguous direction to federal managers to pay attention to Alaska's unique attributes.

In a nutshell, SOA has an unblemished record against the Federal Government in quiet title navigability litigation for more than a decade— resulting in findings of federal bad faith and punitive sanctions but not a single federal success. We believe GAO should

acknowledge this is an area for agency evaluation and process change to avoid even the possibility of repeating this outcome.

Fourth Bullet Point

SOA is aware of no proactive steps whatsoever that the Federal Government has taken regarding interim management with SOA for any purpose. Any cooperation that federal land managers exhibit is forthcoming only under threat of imminent litigation by SOA. Federal land managers only begrudgingly participate in the free-of-cost-for-governmental-entities state permitting process for use of state-owned submerged lands when SOA sends cease-and-desist letters and threatens trespass and other legal proceedings. Federal land managers continue to misinform the public regarding state ownership of submerged lands in federal areas. Federal land managers continue to harass Alaska citizens who seek to use state-owned submerged lands in ways permissible under state law that happen to fall within federal boundaries. To suggest that there is any effort under way to work together with SOA in management of submerged lands pending navigability adjudication is simply false.

But even more fundamentally, SOA is and has been the owner of the submerged lands under navigable-in-fact and tidally influenced waters, not subject to a valid pre- statehood withdrawal expressly including the submerged lands, since the date of statehood (1959). These submerged lands are, and have been for over sixty years, state property subject to state management and control. Except for permissible federal regulation of water quality and other lawful reasons, federal agencies have no business whatsoever managing state property without state involvement, participation and consent. Assuming arguendo that federal efforts at interim management are underway, those unilateral efforts without involvement of the lawful owner represent clouds on valid state title; violate fiduciary obligations owed by the Federal Government to the state pursuant to the Equal Footing Doctrine, the Alaska Statehood Act and the Federal Submerged Lands Act; and represent federal overreach. Essentially, the Federal Government is eluding the issue of confirming state title to submerged lands to SOA by stepping up its efforts to unilaterally manage state property interests according to federal management priorities without state involvement or participation. To view this unilateral federal working group as an example of how the Federal Government is working to resolve navigability issues with SOA is a mischaracterization at best.

Background

In the first paragraph of this section, the report notes that an ANC observed that it was worried about trespass on its lands due to state ownership of adjacent submerged lands—seeming to suggest that this concern is relevant to determining whether or not SOA owns the submerged lands and something relevant that BLM should consider in quieting title. While this is a valid land management concern – that land owners must work cooperatively on – it does not guide land ownership. The United States Constitution, Congress, and the U.S. Courts have all held that SOA owns the submerged lands underneath all navigable-in-fact or tidally influenced waters within its borders in the absence a valid pre-statehood withdrawal that expressly includes the submerged lands. The navigability-for-title analysis has therefore two parts: (1) determining whether the waters are navigable-in-fact or tidally influenced and (2) determining whether a valid pre-statehood withdrawal defeats state title. BLM has no authority whatsoever to consider preferences such as whether an adjacent property owner desires the State as a neighbor. Such matters are management considerations to be addressed after the navigability-for-title issues are resolved. As BLM itself has observed, good land management can only follow after a clear determination of ownership and boundaries are made, but such preferences of third parties and hypothetical concerns about future trespass have no place and no relevance in a navigability-for-title analysis.

The following salient points about the Sturgeon decisions should be acknowledged in this context:

- John Sturgeon was advised by NPS officials that his operation of his hovercraft, as he had done for many years, on the Nation River that flows within the Yukon- Charley Rivers National Preserve was prohibited by federal law. The Nation River is a navigable-in-fact river—meaning that the submerged lands (even within the federal

boundaries) are owned, managed and controlled by the State and that boat usage of the river is therefore governed by state law. Even when this was explained to the federal law enforcement authorities, they were undeterred and indicated that he would be subject to criminal sanction if he used his hovercraft on the Nation River. Sturgeon subsequently sued.

- The United States Supreme Court in two UNANIMOUS opinions held, among other things, that state law—not federal law—governs the use of flowing waters above state-owned submerged lands even within the boundaries of federal areas and that the NPS could not lawfully prevent John Sturgeon from using his hovercraft on the Nation River.
- The second UNANIMOUS opinion in the Sturgeon litigation was issued on March 26, 2019.
- Over four years later, no federal agency has taken any formal action whatsoever to implement the Sturgeon holding in their regulations. Over four years later, the Federal Government has made no substantive changes in response to the Case. Indeed, it remains unlawful according to NPS regulations to operate a hovercraft on the Nation River or any other river located within the boundaries of other NPS areas in Alaska over four years after the UNANIMOUS United States Supreme Court saying that Sturgeon was lawfully allowed to do just that.
- To state in the GAO report that federal agencies in Alaska are under "pressure" to implement the Sturgeon holding accommodates this inaction. Not a single federal agency—and certainly not BLM—has taken affirmative steps to incorporate the Sturgeon holding of the United States Supreme Court in over four years. Similar to the attitude that the Federal Government took in the Mosquito Fork case when it decided that it was not bound by the decision of the Ninth Circuit Court of Appeals in the Gulkana case, none of the federal agencies have done anything to conform their regulations to the legal conclusions of the United States Supreme Court in the Sturgeon case. That is certainly not suggestive that any of the federal agencies are feeling "pressure" or are inclined to do anything except continue with the same status quo that flaunts state ownership, management and control of its sovereign property; is confusing and detrimental to the public good; and that frustrates the Equal Footing Doctrine of the United States Constitution.

How Does BLM Determine Navigability

The State contends this section does not reflect the reality or complexity of the issues and processes at play; but instead represents repetition of BLM's charitable self-characterization of its processes. We do not believe it fairly characterizes SOA's legitimate issues with the RDI program.

Historical Use

While it is certainly true that historical evidence can powerfully demonstrate navigability at the date of statehood, the problem is that Alaska is a vast state and (both now and before statehood) has had a small population. This means that in many instances the historical record of use is far from robust and will not alone prove dispositive on navigability questions for many, many waters. This is why navigability caselaw so clearly lays out the alternate path of susceptibility for navigability determinations. We believe GAO should direct BLM to examine and adopt this caselaw.

SOA's frustration with BLM's emphasis on historical evidence of use stems from BLM's attempts to utilize it as evidence of susceptibility, and thus continue using it as the functional standard. For example:

- For rivers and lakes with scant historical proof, BLM is far too willing to throw up its hands and conclude that the "absence of evidence" is "evidence of absence"—meaning that the river must not be susceptible to navigation (despite its physical characteristics) because no gold miner, trapper or other pre- statehood user took the time to memorialize trip information that is now maintained in a historical archive.

- We believe BLM avoids issuing decisions based purely on susceptibility so it can continue to focus expending huge amounts of public funds on studying historical use in other applications and areas. If BLM says that a river asserted as susceptible to navigation is non-navigable, SOA will sue. If, on the other hand, BLM were to say the river is navigable, the agency would have to rely on susceptibility criteria which it has been completely unwilling to do. As a result, BLM simply sits on such RDI applications and takes no action as the years roll by.
- BLM demands historical evidence of boat usage that exceeds what is required by caselaw. Contrary to BLM complaints about the sparsity of caselaw governing what is required to establish navigability in Alaska, SOA submits that there is ample federal judicial authority that defines practically and specifically what it means for a river to be determined navigable-for-title. The Gulkana decision, Mosquito Fork decision, and others clearly lay out what types of boat usage can be utilized to demonstrate navigability—listing in detail numerous types of watercraft in use at the date of statehood and appropriate load weights that satisfy legal requirements for trade, travel and commerce. BLM routinely does not follow the law and requires proof that exceeds requirements of judicial precedent in Alaska. BLM, for example, requires customarily proof of two-way travel; proof of two-thousand pound loads exceeding the eight-hundred-to- twelve-hundred pound loads set by the Ninth Circuit Court of Appeals; wrongfully excludes passenger weights from the total calculation; refuses to consider proof of usage by inflatable boats; etc.

Susceptibility to Navigation

The section is misleading and simply regurgitates as fact assertions advanced by BLM and claims of legal uncertainty where caselaw is instead well-settled and prescriptive.

BLM claims that determining navigability based upon susceptibility is expensive and time-consuming. At its core, the State agrees – which is why we request a collaborative, efficient process to avoid contesting every waterway, no matter how clearly susceptible to navigation it may be. Rather than a response to State assertions, this is a state assertion.

BLM, to date, has never determined a river or lake to be navigable based upon susceptibility standards or physical characteristics. BLM has never undertaken a susceptibility analysis in any RDI determination and has instead insisted solely on historical proof—thereby negating the SOA from demonstrating navigability on this basis that is a particularly apt way to legally do so considering Alaska's enormous size, small population and limited historical record. BLM may have expended significant public resources trying to assess susceptibility, or may desire to avoid doing so because of the expense – the State believes both of those encourage mediated resolution of these issues rather than recalcitrance at every turn.

Additionally, BLM avoids accepting simpler ways to establish susceptibility.

While helicopters may be expensive to charter for fieldwork, there exists at little or no cost: robust aerial imagery from numerous sources; detailed user accounts from guides and other members of the public using watercraft meaningfully similar to watercraft in use at the time of statehood; gage data maintained by United States Geological Survey (USGS) or National Oceanic and Atmospheric Administration (NOAA); and most importantly information and data maintained by NPS, USFWS, USFS and BLM within their own files regarding usage of navigable waters. Using these and other sources, a small team with SOA was able to undertake navigability assessments for over two thousand rivers and lakes during the same period that BLM was able to make zero progress on even a single RDI application.

BLM, furthermore, claims that uncertainty within caselaw renders the agency unable to develop susceptibility criteria. This if far from a truthful statement. There is ample caselaw that establishes what it means for a river to be deemed navigable-for- title, and one Alaska case in particular – the Gulkana decision from the Ninth Circuit Court of Appeals – resolves many of the issues that BLM claims have not been settled. A more accurate statement would be that BLM does not like the caselaw that exists and will go to great lengths to avoid implementing the same. In the Mosquito Fork case, for example, the lead

historian for BLM Alaska State Office remarked that BLM decided that it was not bound by the Ninth Circuit's Gulkana decision if it did not wish to be.

The audacity of such an attitude pervades the Navigability Program, and that—not an unsettled set of judicial precedents—underlies BLM's unwillingness to adopt susceptibility criteria.

How many applications has BLM processed and how long did it take?

The conclusions reached in this section are misleading because the RDI program has been treated as unchanging since its inception to date, and no attempt is made to analyze why the RDI program has broken down over time.

In the last sentence of the first paragraph of this section, GAO observes that twenty-seven of the thirty-six RDI applications submitted by SOA were resolved within the three-year period between 2003 and 2006. Stated differently, seventy-five percent of the RDIs that have been issued by BLM Alaska State Office occurred in a three-year period approximately seventeen years ago. This means that for the period of 2006 to 2023 BLM has only issued nine RDIs. This statistical contrast should, but does not, lead to further investigation and analysis.

GAO further softens the full impact of this statistical contrast when it allows the rapid adjudication of RDI applications between 2003 and 2006 to improve the timelines of all RDI adjudications after that period. A more accurate analysis would have calculated the timelines and costs for only those RDIs adjudicated after 2006 to get a better understanding of the unsoundness of the current RDI program.

GAO's discussion of the Stikine River RDI is additionally noteworthy as what is reported is inconsistent with the actual facts of the matter. As discussed above, that application took fourteen years to decide because BLM was unwilling to establish standards for determining the legitimacy of objections to RDI issuance and was unwilling to rule against a sister federal agency. There was nothing factually or legally complex about the Stikine RDI application; it was for a massive, international scale river. It was BLM's dereliction of its statutory and administrative duties, requiring court action to redress, that accounted for SOA having to wait almost a decade and a half for relief.

The assessment of the current state of pending RDI applications does not summarize the extremely limited BLM action.

1. The Unuk River RDI application was filed on July 28, 2022. It took months for BLM to assign this application a tracking number. As we approach the one-year anniversary of its filing, BLM has not yet conducted the pro forma pre- application meeting and has provided no cost estimate for the adjudication.
2. The Kwethluk RDI application was filed on February 21, 2019. In the more than four years since its filing, BLM has not yet conducted the pro forma pre- application meeting and has provided no cost estimate for the adjudication.
3. The West Fork and Denison Fork (Fortymile River) RDI application was filed on February 19, 2019. Even though a thorough navigability determination prepared by BLM already exists, the agency has not yet conducted the pro forma pre- application meeting and has provided no cost estimate for adjudication.
4. The Delta River RDI application was filed on May 14, 2019. Even though a thorough navigability determination prepared by BLM already exists, the agency has not yet conducted the pro forma pre-application meeting and has provided no cost estimate for adjudication.
5. The Arolik River RDI application was filed on September 15, 2016. According to BLM staff, the internal decision has been with the BLM Solicitor's Office for review for over four years.
6. The Eek River RDI application was filed on January 4, 2018. According to BLM staff, the internal decision has been with the BLM Solicitor's Office for review for over four years.
7. The Goodnews River RDI application was filed on January 2, 2018. According to BLM staff, the internal decision has been with the BLM Solicitor's Office for review for over four years.

The above facts represent a far cry from the business-as-usual language contained within the GAO report.

Which factors affect the amount of time to process applications?

First Bullet Point

The Kuskokwim River is cited as an example of complexity for RDI adjudication, but in actuality, the Kuskokwim River is ninth largest river in the United States by average discharge volume at its mouth and seventeenth largest by basin drainage

area. The Kuskokwim River is the longest river system contained entirely within a single U.S. state. Except for its headwaters in the mountains, the river is broad and flat for its entire course, making it a useful transportation route for many types of watercraft, as well as road vehicles during the winter when it is frozen over. It is the longest free flowing river in the United States. To argue that adjudication of the navigability of the 540 miles mighty Kuskokwim River is unduly complex and time- consuming, fundamentally, is the State's point. BLM should not approach such a river with the framing that: "this river is 540 miles long so the entire portion must be complex and in need of investigation." Instead, it should be second nature for them to assume: "at 540 miles, huge portions of this river are inherently navigable. We should work quickly and efficiently to confirm those sections, and only expend public resources if specific areas are contested or in need of resolution."

The reference to the Knik River as another example of complexity is also puzzling and frustrating. To begin with, SOA has never applied for a RDI for the Knik River because BLM declared in the 1980s that the lower section was navigable.

However, the River magically becomes non-navigable precisely at the township line. SOA repeatedly unsuccessfully asked BLM to amend this obviously erroneous determination on numerous occasions. As a result of inaction to these requests, the SOA was forced to sue to quiet title to the upper portion of the Knik River in 2017.

Instead of filing a responsive pleading, DOJ disclaimed the entirety of the river to SOA—recognizing its obvious navigability when faced with having to assert otherwise in Court.

Second Bullet Point

BLM's discussion of the high costs of fieldwork necessary to make a navigability determination based solely on susceptibility would be far more persuasive if BLM had ever, in fact, made a navigability determination based upon susceptibility. The fact of the matter is that BLM has only issued RDIs upon stout historical evidence of use.

Moreover, there are numerous other ways of establishing susceptibility to navigation without chartering helicopters. As listed above, robust aerial imagery, photogrammetry, user accounts (particularly guide accounts who are using the river for a commercial purpose), gage data and even the copious amounts of information maintained by the various federal agencies for rivers flowing through federal areas and beyond are excellent means for establishing navigability-for-title that have been a staple of proof in quiet-title litigation from the date of statehood onwards. Even without the advantage of deep federal coffers, SOA has been able to conduct extensive fieldwork as well as leveraging existing proof to make navigability assessments for over two thousand rivers as well as prosecuting successfully an ambitious suite of litigation cases during the time period that BLM has not taken any meaningful action on any SOA RDI application. Simply put, BLM's suggestion that susceptibility determinations are too expensive is part of why the State encourages GAO to investigate how BLM expends and manages funds for these purposes.

Third Bullet Point

The claim that reviews by the BLM Solicitor's Office take six months to complete on average is inaccurate. Of SOA's current RDI applications, BLM staff has advised that three applications (Arolik, Eek and Goodnews Rivers) have been under review by the BLM Solicitor's Office since 2019. Given that length of time, review by that office in practice seems to put SOA RDI applications on permanent hold. As with many things associated with the RDI process, SOA believes that litigation in federal court with all that entails is almost always a quicker way to achieve results than the RDI process.

BLM Navigability Library Project

The last paragraph of this section discusses the much-heralded and long-awaited BLM Navigability Library. This proposal was announced in 2018 but has repeatedly been delayed despite great promises of results. With deadline-after-deadline missed, SOA, to date, has only received three incomplete reports of dubious value to the navigability process. BLM has paid outside experts (Paleo West, Inc. is the name of the only contractor shared with SOA) unknown sums of money for their work. Considering the referral from Senators Murkowski and Sullivan to examine the finances of the Navigability Program, it would seem logical that the costs of this Navigability Library venture would be contained within the report, but such information is not present.

What are the key steps in the judicial process and how often is it used?

Two matters deserve attention in this section.

First, the suggestion that litigation results represent a range of outcomes balanced between SOA and the Federal Government is misleading in that one must

look to a time before the Twenty-First Century to find a substantively favorable decision to the Federal Government. The case cited as an example of a federal win is the Slopbucket Lake decision from 1985. The list of recent state victories, by contrast, is long and getting longer (Gulkana, Mosquito Fork, Stikine, Knik, etc.). As recently as last year in what BLM described as the test case for resolving lingering navigability issues, DOJ disclaimed over eighty percent of what SOA claimed, and the remainder is subject to a pending motion for summary judgment. The ledger of courtroom results, therefore, is far more lopsided than the GAO report suggests. As stated above, this is because the State has adjusted its assertions and litigation positions since the 1985 defeat. We do not feel BLM has, and that this should be acknowledged by BLM.

Second, BLM's citation of the Mosquito Fork case as an example of how expensive litigation can be and how long it takes is inexplicable. In that case, SOA obtained total victory in a timeframe far shorter than what is expected with RDI applications and recovered its attorney's fees and costs from DOJ/BLM due to their bad faith. Having to respond to vexatious and unmerited litigation was, as far as navigability disputes go, a timely bargain for the State.

The point, we believe, that needs to be stressed in this section is that BLM—if it followed existing caselaw, acted objectively and timely, and divorced itself from issues immaterial in adjudicating issues of navigability—could have a vital and meaningful RDI program. This was once the case, but somehow, over time, the RDI program has lost its way and ground practically to a halt. The GAO Report should point that out and guide BLM again to find its way.

What actions have federal agencies taken to clarify land management responsibilities between the federal government and the state?

Best intentions aside, the point needs to be made that, to date, federal agencies—including the working group of which SOA was unaware—have done nothing to clarify responsibilities between the federal government and the State. What some working group, with no track record of performance, intends to do at some unstated date in the future should not be given undue credit in the GAO report that was commissioned to examine problems and recommend concrete answers with policies, practices, and budget administration.

What challenges remain in clarifying land management responsibilities?

The State maintains the real challenge that remains is accepting that these processes do not have to be complicated or contentious in most cases. Management is only relevant following a clear determination of title. Deciding questions of management authority is both irrelevant and illegal if the lands involved are not owned by the entities proposing to manage the same, and prematurely assuming management authority clearly puts the cart before the horse. The only real challenge remaining is hence clarifying who owns what between SOA and the Federal Government with the submerged lands located within state boundaries. Interim management and all of the other considerations listed in this

section represent clouds on SOA's valid title to its submerged land that was conveyed on the date of statehood. Once ownership is clear, then and only then can SOA and the Federal Government work together as adjacent landowners for the public good, and any usurpation of state ownership, management and control by federal land managers through their decisions and actions, regardless of their motivations, are unlawful, presumptuous and represent federal overreach.

Discussion of the merits of "interim" management by federal authorities over state property that, according to the law, was held in trust pre-statehood and conveyed on the date of statehood is beyond the scope of the request made by Senators Murkowski and Sullivan; and is unlawful..

Conclusions and Recommendations

It should be noted in the GAO report that:

- SOA has no interest whatsoever in participating in a mediation process in which SOA plays no role in selecting the mediator which falls entirely within the discretion of federal agencies.
- SOA has no interest in participating in an open-ended mediation without an agreed definite agenda, time constraints and identified possible outcomes.
- SOA does not agree that the input of third parties, not contained within the chain of title, plays any part in resolving and clarifying navigability-for-title issues.
- SOA intends to manage state property as such in perpetuity and believes that collaboration regarding management objectives is only proper following the settlement of ownership questions.
- SOA intends to treat any interim management by federal agencies of state-owned submerged lands that is without its agreement, consent and involvement as a cloud on its title pursuant to the Federal Quiet Title Act.
- SOA does not believe that the proposed recommendations will have a positive effect on navigability issues existing between SOA and the Federal Government without further identification and analysis of the issues in this letter.

* * * * * * * * * *

As was said at the outset of this letter, we are displeased with the GAO Report that was shared with us and believe the comments outlined in this letter should be addressed. We are further hopeful that Senators Murkowski and Sullivan will be equally dissatisfied unless a reconsideration, supplementation, and rewriting of this report is undertaken. To the extent that GAO intends to do the same, we stand ready to assist in any way.

Sincerely Yours,

Brent Goodrum Deputy Commissioner

Alaska Department of Natural Resources

CC: Cardell Johnson, Director

Casey Brown, Assistant Director

Natural Resources and Environment Section

Endnotes

[1]*See* Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. § 1401 et seq.). Through the Alaska Statehood Act, Congress expressly applied the Submerged Lands Act to Alaska. Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958). While Alaska generally owns the submerged lands beneath navigable waters within state boundaries, the federal government retains ownership of submerged lands that were withdrawn or set aside before statehood in a way that shows federal intent to retain title.

[2]*PPL Mont., LLC v. Montana,* 565 U.S. 576, 591-92 (2012) (quoting *The Daniel Ball*, 77 U.S. 557 (1870)).

[3]The Alaska Native Claims Settlement Act was enacted in 1971 to resolve long-standing aboriginal land claims and to foster economic development for Alaska Natives. Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 et seq.). The act directed that corporations, which were to be the vehicles for conveying about 44 million acres of land to Alaska Natives, be created under Alaska State law. For additional information on Alaska Native Corporations, see GAO, *Regional Alaska Native Corporations: Status 40 Years after Establishment, and Future Considerations*, GAO-13-121 (Washington, D.C.: Dec. 13, 2012). Submerged lands underlying waterways running through uplands conveyed under the act are outside the scope of our review.

[4]*Sturgeon vs. Frost*, 587 U.S. ___, 139 S.Ct. 1066 (2019).

[5]Specifically, under the Federal Land Policy and Management Act of 1976, the Secretary of the Interior is authorized to issue an RDI in lands where the United States claims no interest and the disclaimer will help remove a cloud on the title of such lands. *See* Pub. L. No. 94-579, § 315, 90 Stat. 2743, 2770 (codified at 43 U.S.C. § 1745). BLM issues RDIs using a process specified by regulation. *See* 43 C.F.R. pt. 1860, subpt. 1864.

[6]Pub. L. No. 92-562, § 3(a), 86 Stat. 1176, 1176 (1972) (codified as amended at 28 U.S.C. § 2409a).

[7]During the preapplication meeting, BLM and the State of Alaska also discuss the administrative fees that the state is to submit with the application. Under the Federal Land Policy and Management Act of 1976, no disclaimer is to be issued until, among other procedural requirements, the applicant has paid to Interior the administrative costs of issuing the disclaimer as determined by Interior. 43 U.S.C. § 1745(b). BLM regulations further provide that BLM will, if the application meets the requirements for further processing, determine the amount of deposit that the agency needs to cover the administrative costs of processing the application and issuing a disclaimer. 43 C.F.R. § 1864.1-3(c).

[8]A valid prestatehood withdrawal that defeats a state's title to the submerged lands must (1) be a prestatehood reservation for a specific purpose and (2) have clear intent on the part of the United States to defeat the future state's acquisition of title. *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987). For example, although lands included in the Tongass National Forest were set aside by Congress prior to Alaska statehood, Congress did not clearly intend to reserve submerged lands merely because they were within the Forest's boundaries. See Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title at 280, *Alaska v. United States*, 546 U.S. 413 (2006) (No. 128. Orig.). Accordingly, the federal government disclaimed interest to submerged lands, subject to several categories of exceptions, within the Tongass National Forest. See *Alaska v. United States*, 546 U.S. 413, 415 (2006) (Supreme Court confirmation of United States disclaimer).

[9]43 U.S.C. § 1745(b).

[10]In 2003, BLM amended its RDI regulations, which were first promulgated in 1984, to, among other things, remove a 12-year regulatory filing deadline for state applicants. 68 Fed. Reg. 494 (Jan. 6, 2003); 49 Fed. Reg. 35,296 (Sept. 6, 1984). According to the preamble to the 2003 BLM final rule, the change to exempt states from the 12-year filing deadline was made to conform the recordable disclaimer regulations more closely to the Quiet Title Act. See 68 Fed. Reg. 494 (Jan. 6, 2003) (citing the Quiet Title Act, as amended in 1986, 28 U.S.C. § 2409a(g), which exempts states, in most instances, from the 12-year statute of limitations under the act).

[11]According to BLM officials, in addition to the 36 applications that resulted in a disclaimer, the state withdrew seven applications that did not result in a decision.

[12]BLM has completed a large number of historical navigability assessments as part of the administrative process or in relation to separate processes, such as land conveyance to the state or Alaska Native Corporations.

[13]*Alaska v. United States*, 754 F.2d 851 (9th Cir. 1985).

[14]*Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989).

[15]Office of Management and Budget and the Council on Environmental Quality, *Memorandum on Environmental Collaboration and Conflict Resolution* (Washington, D.C.: Sept. 7, 2012). The memo notes that departments and agencies should give careful consideration to the use of assisted negotiations through Environmental Conflict Resolution when addressing environmental conflicts, using their own Environmental Conflict Resolution (ECR)/Alternative Dispute Resolution (ADR) staffs, the U.S. Institute for Environmental Conflict Resolution, the U.S. Department of Justice (e.g., for litigation matters), or other ECR/ADR organizations, as appropriate. The U.S. Institute for Environmental Conflict Resolution, now known as the John S. McCain III National Center for Environmental Conflict Resolution (National Center), was established as part of the Udall Foundation as directed by Congress in 1998. Pub. L. No. 105-156, § 4(4), 122 Stat. 8, 9 (1998) (codified as amended at 20 U.S.C. § 5604(8)). The National Center assists federal agencies and other entities, including states, with training on conflict resolution and cooperative approaches to resolving environmental disputes. Further, the National Center helps agencies and other entities find professional third-party neutrals with sufficient expertise in complex natural resources and public lands issues, including those involving multiple levels of government, such as federal, state, and tribal governments.