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DEPARTMENT OF NATURAL RESOURCES

DIVISION OF MINING, LAND AND WATER

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Report on Use and Navigability of the Chuitna River

This information on the history of use and navigability of the Chuitna River is submitted in response to the letter dated January 24, 2008, from Acting State Director Ramona Chinn of the Bureau of Land Management (BLM) to Director Dick Mylius, Division of Mining, Land and Water, State of Alaska Department of Natural Resources (DNR). This report addresses and supplements information contained in the November 2, 2007 BLM Navigability Section's Memorandum entitled "Navigability of the Chuitna River in Interim Conveyance (IC) 1605" which was discussed at the November 9, 2007 meeting mentioned in Ms. Chinn's letter. That Memorandum from the Chief of BLM's Alaska Navigability Section concludes that the Chuitna River is "not navigable in IC 1605, located in Tract A, T. 12 N., R. 11 W., SM."[1] This report supports finding the Chuitna River navigable at least throughout the area of IC 1605 addressed by that Memorandum and to the mouth below.[2] Accordingly, public easements which exist within that area should also remain undisturbed.

Location

The Chuitna River, also known as the Chuit River, is located within the Cook Inlet Region, north of Tyonek.[3] The river originates in Section 33, T. 14 N., R. 14 W., SM, in headwaters many miles above the stretch of river at issue. The Chuitna River flows about 37 miles in a generally southeast direction, until it enters Cook Inlet in Section 30, T. 12 N., R. 10 W., SM. IC 1605, which is the area at issue, is located within T. 12 N., R. 11 W., SM.[4] Only the lower nine miles or so of the

[1] Nov. 2, 2007 BLM Navigability Section Memo. at p. 5.
[2] The State also believes the Chuitna River above IC 1605 is navigable at least for several miles, but the BLM's Memorandum and proposed action only address the area of IC 1605.
[3] USGS Quadrangle, Tyonek (B-5), Tyonek (A-5), Tyonek (A-4), and Tyonek (A-3); 1:63360 Series Topographic; viewed via AllTopo7, Alaska R2 DNR Version.
[4] Nov. 2, 2007 BLM Navigability Section Memo. at p. 1.

Chuitna River flow within that Township and the Township just southeast of it where the Chuitna River enters the sea (T. 12N., R. 10 W., SM). The area of IC 1605 consists of coastal lowlands[5] where the land is relatively flat and of low gradient.

Several tributaries feed into the Chuitna River. Wolverine Fork joins the Chuitna River within Section 20, T. 13 N., R. 13 W., SM, near the headwaters. Chuit Creek empties into the Chuitna River within Section 1, T. 12 N., R. 13 W., SM, near where the Chuitna flows from the mountains onto lower terrain. Lone Creek enters within Section 19, T. 12 N., R. 11 W., SM, at about river mile 8.5 of the Chuitna River upstream from the sea.[6] Almost all of IC 1605 surrounding the Chuitna River lies below the confluence of Lone Creek and the Chuitna River. Most of the uplands surrounding the Chuitna River above Lone Creek are owned by the State of Alaska or the Alaska Mental Health Trust.

Tyonek is located approximately two miles south of the Chuitna River's mouth along the shore of Cook Inlet, within Section 1, T. 11 N., R. 11 W., SM. The village airstrip is located within Section 31, T. 12 N., R. 10 W., SM, Section 6, T. 11 N., R. 10 W., SM, and Section 1, T. 11 N., R. 11 W., SM.[7] The Superior Airstrip is located north of the Chuitna River within Sections 3 and 10, T. 12 N., R. 11 W., SM.[8] The Beluga Airstrip is located north of the Chuitna River along the coast of Cook Inlet within Section 34, T. 13 N., R. 10 W., SM. Several local roads connect these airstrips to the Chuitna River.

The location of the lower 12 miles or so of the Chuitna River is shown on the accompanying color map. As previously noted, the area in question starts at about river mile 9. According to the U.S. Coast Pilot 1979 the Chuitna River is tidally influenced for about one mile upstream from where it enters the sea.[9]

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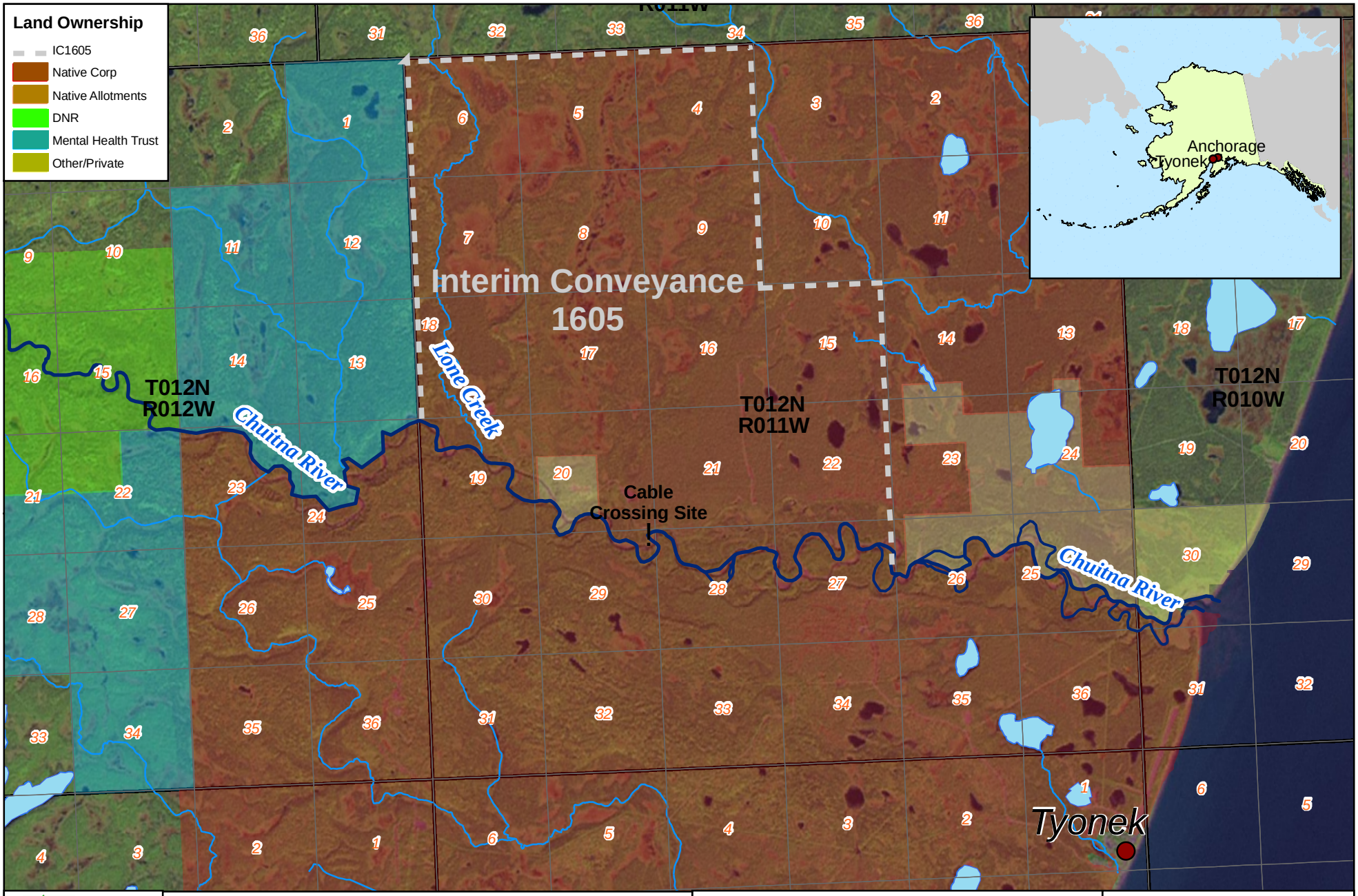
[5] *Ibid.* at p.2 and USGS maps referred to there at p. 2, note 12.
[6] *Ibid.* at p. 2.
[7] Kenai Peninsula Borough GIS, Imagery from the QuickBird satellite, Year 2003. © DigitalGlobe., http://maps.borough.kenai.ak.us/website/development/viewer.htm
[8] Survey of State Land, ADL 35684, December 1967, http://plats.landrecords.info/gis/raster/dnr/surveys/20001005/00021113.pdf
[9] U.S. Coast Pilot 1979.



Produced by:
Alaska Department of Natural Resources
Division Mining Land and Water
Public Access Assertion & Defense Unit &
Alaska Department of Fish and Game

Chuitna River

This map is based on the most recent data available; however the actual and/or historical location of the waters involved may differ from that shown on this map due to the changes in the waters over time. The State ofalaska makes no expressed or implied warranties (including warranties of merchantability and fitness) with respect to the character, function, or capabilities of this product or its appropriateness for any user's purposes. In no event will the State of Alaska be liable for any incidental, indirect, special, consequential or other damages suffered by the user or any other person or entity whether from the use of this product, any failure thereof or otherwise, and in no event will the State of Alaska's liability to you or anyone else exceed the fee paid for the product.

0 0.5 1 2 3 Miles

1:70,000

WATERBODY DATA: Alaksa Geospatial Data Clearinghouse Alaska Hydrography 1:63,360, Chuitna River: Digitized using Kenai Penninsula Bureau Parcel data, 1:24,000 scale, and 1:63,360 USGS topographic map.
LAND OWNERSHIP DATA: Kenai Penninsula Bureau
MAP PROJECTION: Albers Equal Area North American Datum 1983 Seward Meridian
Date Printed: April 3, 2008

~State of Alaska~

Chuitna River

Land Status and Ownership

Land ownership immediately bordering the Chuitna River and elsewhere in the vicinity of the river is shown on the preceding map. The Townships, Ranges, and Section numbers (Seward Meridian) are listed on that map as location references. The map shows the area of IC 1605 abutting the Chuitna River. The vicinity of the public site easement which the BLM is contemplating terminating within IC 1605 is also identified on that map as "Cable Crossing Site". In addition, the Chuit River Easement Descriptions and Chuit River Land Status and Access Map prepared by the State and Tyonek Native Corporation and posted online should be referenced. They may be accessed through the Alaska Department of Fish and Game (ADF&G) website at http://www.sf.adfg.state.ak.us/SARR/access/Chuit/chuitmap.cfm. Those Descriptions and Map describe and show several locations and points of upland access to the Chuitna River, including the location of: (1) the "Mile Seven Cable Crossing" trail and one-half acre public access site easement which the BLM contemplates terminating if it determines the Chuitna River non-navigable through that area; and (2) the location where Lone Creek crosses under the "Pan Am Highway" and enters the Chuitna River.

As has been requested by the BLM in the past, specific sections of land bordering and underlying the Chuitna River, starting from its headwaters to its point of entry into Cook Inlet, are listed below.

Sec. 33, T. 14 N., R 14 W.
Sec. 34, T. 14 N., R 14 W.
Sec. 3, T. 13 N., R 14 W.
Sec. 2, T. 13 N., R 14 W.
Sec. 11, T. 13 N., R 14 W.
Sec. 1, T. 13 N., R 14 W.
Sec. 12, T. 13 N., R 14 W.
Sec. 13, T. 13 N., R 14 W.
Sec. 18, T. 13 N., R 13 W.
Sec. 19, T. 13 N., R 13 W.
Sec. 20, T. 13 N., R 13 W.
Sec. 29, T. 13 N., R 13 W.
Sec. 28, T. 13 N., R 13 W.
Sec. 27, T. 13 N., R 13 W.
Sec. 34, T. 13 N., R 13 W.
Sec. 35, T. 13 N., R 13 W.
Sec. 2, T. 12 N., R 13 W.
Sec. 1, T. 12 N., R 13 W.
Sec. 12, T. 12 N., R 13 W.
Sec. 7, T. 12 N., R 12 W.
Sec. 8, T. 12 N., R 12 W.
Sec. 9, T. 12 N., R 12 W.
Sec. 16, T. 12 N., R 12 W.
Sec. 15, T. 12 N., R 12 W.
Sec. 22, T. 12 N., R 12 W.
Sec. 23, T. 12 N., R 12 W.
Sec. 14, T. 12 N., R 12 W.
Sec. 24, T. 12 N., R 12 W.
Sec. 13, T. 12 N., R 12 W.
Sec. 18, T. 12 N., R 11 W.
Sec. 19, T. 12 N., R 11 W.
Sec. 20, T. 12 N., R 11 W.
Sec. 29, T. 12 N., R 11 W.
Sec. 28, T. 12 N., R 11 W.
Sec. 27, T. 12 N., R 11 W.
Sec. 26, T. 12 N., R 11 W.
Sec. 25, T. 12 N., R 11 W.
Sec. 30, T. 12 N., R 10 W.
Sec. 31, T. 12 N., R 10 W.

As requested by the BLM, current ownership of the uplands immediately adjacent to the Chuitna River has been reviewed and determined to exist as follows.[10]

Beginning at its headwaters in Section 33, T. 14 N., R. 14 W., SM through Section 13, T. 13 N., R. 14 W., SM, the uplands on both sides of the Chuitna River are held by Cook Inlet Region, Inc. The Alaska Mental Health Trust Authority holds the uplands adjacent to the Chuitna River from where it flows into Section 18, T. 13 N., R. 13 W., SM to where it flows across the ¼ Section line between the NW¼ and NE¼ within Section 29, T. 13 N., R. 13 W., SM. From this line the Chuitna River flows through lands held by the State of Alaska, Department of Natural Resources through Section 15, T. 12 N., R. 12 W., SM. The uplands adjacent to the Chuitna River within the NE¼ Section 22, T. 12 N., R. 12 W., SM are held by the Alaska Mental Health Trust Authority; excepting the adjacent lands on the South side of the Chuitna River beginning at Corner No. 2, USS 1865, latitude 61 degrees 07 minutes 17 seconds North longitude 151 degrees 22 minutes 44 seconds West.[11]

From latitude 61 degrees 07 minutes 17 seconds North longitude 151 degrees 22 minutes 44 seconds West, Corner 2 of USS 1865, within Section 22, T. 12 N., R. 12 W., SM to where the Chuitna River enters the Cook Inlet in Sections 30 and 31, T. 12 N., R. 10 W., SM; the adjacent lands on the south side of the Chuitna River are held by the Tyonek Native Corporation.

On the North side of the Chuitna River from where it flows into Section 23, T. 12 N., R. 12 W., SM through Section 24, T. 12 N., R. 12 W., SM the adjacent lands are held by the Alaska Mental Health Trust Authority. From the location where the Chuitna River enters Section 19, T. 12 N., R. 11 W., SM to the boundary with USS 4547 within Section 20, T. 12 N., R. 11 W., SM the lands adjacent to the Chuitna River are held by the Tyonek Native Corporation. The North bank of the Chuitna River serves as the southern boundary of USS 4547, a Native Allotment held in trust by the United States, Department of Interior, Bureau of Indian Affairs within Sections 20 and 29, T. 12 N., R. 11 W., SM. From the location where the Chuitna River leaves USS 4547 within Section 20, T. 12 N., R. 11 W., SM through Section 27, and into Section 26, T. 12 N., R. 11 W., SM to Lot 1, USS 9519, the adjacent lands are held by Tyonek Native Corporation. Within Sections 24 and 25, T. 12 N., R. 11 W., SM Lot 1,[12] Lot 3, and Lot 5, USS 9519 are Native Allotments all held in trust by the United States, Department of Interior, Bureau of Indian Affairs. The Chuitna River serves as the southern boundary for these parcels. The property line of Lot 5, USS 9519 is also the section line between Section 25, T. 12 N., R. 11 W., SM and Section 30, T. 12 N., R. 10 W., SM. The Chuitna River flows into Section 30, T. 12 N., R. 10 W., SM from Section 25, T. 12 N., R. 11 W., SM. The Kenai Peninsula Borough holds the first two parcels adjacent to the Chuitna River on the North side; Tract A, T. 12 N., R. 10 W., SM, and Lot 1, USS 4544. The final lot adjacent to the Chuitna River on the North is a privately held parcel, USS 364. The Chuitna River then flows into Cook Inlet.

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[10] Kenai Peninsula Borough, Public Information Parcel Lookup and Geographic Information systems; http://www.borough.kenai.ak.us/

[11] USS 1865, Survey Notes Page 182; http://plats.landrecords.info/gis/raster/blm/uss-notes/20030225/USS001865/AKU005601820.pdf

[12] Certificate of Native Allotment, Document No. 1993-007615-0, Anchorage Recording District.

Public Access to the Chuitna River

As already indicated, some locations provide public access to the Chuitna River.[13] The river is accessible at its mouth from Cook Inlet by boat or on foot below the mean high tide line. The Chuitna River may also be accessed from Lone Creek; with Lone Creek accessed at Mile 9 of the Pan Am Road. At Mile 7 of the Pan Am Road, there is an ANCSA 17(b) trail easement (EIN 50 D9) and a one-half acre site easement (EIN 51 D9) for public access to the river at the former location of a USGS gauging station and cable crossing. A 50-foot section line easement exists on Kenai Peninsula Borough property. This easement runs in a north/south direction and is located on the east side of the section line between Sections 24 and 25, T. 12 N., R. 11 W., SM and Sections 19 and 30, T. 12 N., R. 10 W., SM. It can be accessed at mile 1.2 of the Pan Am Road and provides access to the Chuitna River.

Navigability Criteria

In its November 2, 2007 Memorandum, BLM states that, in assessing the navigability of inland water bodies, it relies upon (1) federal administrative case law, and (2) the advice of the Interior Department Solicitor's Office. However, only two Solicitor's Office memoranda, the "Garner Memorandum" from 1976[14] and the "Allen Memorandum" from 1980,[15] are mentioned. Notably, federal court decisions and Interior Department case decisions establishing and recognizing navigability criteria in Alaska during the past 30 years are not mentioned.

However, the Allen Memorandum addresses one of the key administrative case law decisions of the Department of Interior, *Appeal of Doyon, Ltd*., 86 Interior Dec. 692 (ANCAB 1979). In that decision the Interior appeals board determined the remote Kandik and Nation Rivers in interior Alaska navigable for purposes of State title. Given similarities between those rivers and the Chuitna River, the Allen Memorandum and Doyon decision will be referred to in this memorandum.

Foremost among the court decisions are two federal decisions which determined the Gulkana River navigable for title, as a test case pursued by the State and the United States during the 1980s specifically to establish navigability criteria within Alaska. The Ninth Circuit Court of Appeals' decision in that case was reported as *Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401 (9th Cir. 1989). The federal district court decision it affirmed was reported as *Alaska v. United States*, 662 F.Supp. 455 (D. Alaska 1987). The Ninth Circuit established that present, post-statehood use of the Gulkana River, mostly for sport fishing, with inflatable rafts, canoes and powered boats, including paid guiding trips, "provides ***conclusive evidence*** of [the river's] susceptibility for commerce at statehood" despite characterizations in the case that the nature of that use was "recreational." *Ahtna*, 891 F.2d at 1405 (emphasis added).

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[13] As already noted, these points of access are described and mapped at http://www.sf.adfg.state.ak.us/SARR/access/Chuit/chuit_home.cfm

[14] March 16, 1976 Memorandum from Associate Solicitor Hugh Garner to Alaska State Director BLM re: "Title to submerged lands for purposes of administering ANCSA."

[15] February 25, 1980 Memorandum from Regional Solicitor John Allen to State Director, BLM re "Kandik, Nation Decision on Navigability."

> To deny that this use of the river is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity.

Ibid. The U. S. Supreme Court denied review of the *Ahtna* decision. *Ahtna, Inc. v. Alaska*, 495 U.S. 919 (1990). In addition, in 2000 the Ninth Circuit, in a separate decision affirming the judgment of the United States District Court that the Kandik and Nation Rivers are navigable, reiterated the facts and findings from the 1979 administrative law determination in *Doyon, Ltd.*, which had relied on occasional navigation of those rivers using similar small watercraft. *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000).

The 1980 Allen Memorandum, which revised the Garner Memorandum on the basis of the *Doyon* decision, provides useful guidance. Alaska Regional Solicitor John Allen instructed BLM that the statement in the Garner Memorandum that "water sufficient only for use by small flat bottomed trapping or sport fishing boats or small canoes is not navigable" was no longer valid in light of the *Doyon* decision. Allen Memo. at p. 1. The Allen Memorandum also instructed that the Interior Board's decision in *Doyon* "was a significant departure from BLM's previous practice." Mr. Allen reported that, although "the Kandik and Nation Rivers … during periods of low water may have as little as three inches of water flowing over gravel bars" which boaters often had to drag or portage their boats over, and sweepers and logjams which they had to cut through, those impediments did "not prevent" the rivers' navigability according to the Board. *Ibid*. at 2; *Doyon*, 86 Int. Dec. at 697-698, 706; *Alaska v. U.S.*, 201 F.3d at 1157. The Allen Memorandum observed: "The Board's decision also stressed the fact that susceptibility [to use] – not historical use – would be the main determinant of navigability in Alaska" and that "If 'commercial vessels' [i.e., those the Board characterized as "capable of carrying a commercial load"] have been used on a waterbody for 'private' [recreational] purposes, this indicates that the waterbody is 'susceptible' to use as a highway for commerce, i.e., navigable." Allen Memo. at 2-3. The memorandum concluded that since the small craft commonly used on the Kandik and Nation rivers were capable of carrying 1000 lbs., that would become the new BLM standard for navigability "until the guidelines are further revised." *Ibid*.

Those BLM guidelines were revised further following the Gulkana River decisions. As the Interior Board of Land Appeals observed just two years ago in *State of Alaska & Collier*, 168 IBLA 334 (2006), a November 13, 1987 BLM memorandum used in that case provided "In general, the BLM considers nontidal water bodies navigable if at the time of Statehood, they were navigable for crafts larger than a one-person kayak." Several other BLM memoranda and navigability actions issued in the late 1980s were to the same effect.[16]

In addition, following a hearing and detailed written decision of a Department of Interior administrative law judge on August 18, 1983, recommending that the upper Matanuska River be

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[16] *See, e.g.*, Memorandum dated Jan. 27, 1988 from BLM Alaska State Office Chief H. Wolverton, Branch of Conveyance Coordination, to Chief, Navigability Section, instructing:

> As a result of recent discussions with attorneys of the Regional Solicitor's office and the Justice Department, we are required . . . to conform all navigability determinations issued after February 11, 1987 . . . . Rivers and streams are navigable if they have the capacity for travel in waterborne crafts larger than a one-person kayak [including] jet-propelled boats, airboats, canoes, and inflatable rafts.

determined navigable in the vicinity of the Matanuska Glacier, the Secretary of the Interior caused that matter to be stayed by Memorandum and Order dated July 27 and August 8, 1984. *See State of Alaska*, IBLA 82-1133, BLM Files AA-11153-23 and AA-11153-31. The Secretary cited the Gulkana River case pending in federal district court as the preferred vehicle for deciding whether "recreational rafting and the use of jet boats and air boats" are "bases for a finding of navigability" as had been found by the administrative law judge in the Matanuska case. *Ibid*. After the U. S. Supreme Court's denial of Ahtna, Inc.'s petition to hear the Gulkana River case on April 30, 1990, and written advice from Alaska Acting Regional Solicitor D. Hopewell on May 31, 1990 and from BLM Navigability Section Chief M. Brown on July 12, 1990, BLM's Alaska State Director E. Spang requested in writing on July 19, 1990, that the Matanuska River case be terminated, because the "ruling in the Gulkana River case lays to rest any doubt that the Matanuska River in the area of the contest is navigable."[17] In his May 31, 1990 Memorandum discussing the Matanuska River, Mr. Hopewell also noted another federal/state dispute being waged then over the navigability of the Gakona River which had been stayed in U.S. District Court "pending the outcome of the Gulkana." The United States subsequently allowed entry of judgment against it and for the State in that case based on small boat and inflatable raft use and the Gulkana River precedent. *Alaska v. United States*, Alaska USDC Case No. 82-200 CIV (Gakona River).

Furthermore, in *State of Alaska v. Collier*, 168 IBLA 334 (2006), the IBLA recently rejected BLM's argument that, where "deemed [by BLM] to be recreational in nature," the BLM may terminate an ANCSA 17(b) easement attendant to a "major waterway" or navigable waterway constituting "publicly owned lands" – much as BLM is now considering doing with respect to the 17(b) easements which presently exist in connection with IC 1605 and the Chuitna River. The Board spurned that argument by BLM as "obscure to us in light of *State of Alaska v. Ahtna, Inc*., 891 F.2d at 1405 [declaring the Gulkana River navigable based on "recreational" uses], as well as the plain language of section 17(b), 43 U.S.C. § 1616(b) (1976)."

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[17] BLM Files AA-11153-23, -31. Mr. Brown's July 12, 1990 memorandum stated in part:

> This is in response to the Regional Solicitor's memo of May 31, 1990, requesting our recommendation regarding the continuation of the Matanuska River case. The Supreme Court's decision of April 30, 1990, let stand the Ninth Circuit Court's ruling on the Gulkana River case, decided by the U.S. District Court on April 16, 1987. The Matanuska River case is similar in facts. At least one company offers raft trips down the river from points upstream of the area in contest. Therefore, I recommend that the Matanuska River in the contested area be considered navigable.

Director Spang's July 19, 1990 memorandum provided:

> The Supreme Court ruling in the Gulkana River case lays to rest any doubt that the Matanuska River in the area of the contest is navigable. At least one company has long used large inflatable rafts to transport paying passengers down the river through the contested area.
>
> Since there is no longer any question of the navigability of the Matanuska River, we request that this case be closed.

As a result, the BLM did not seek to convey the Matanuska River lands and the parties stipulated to dismissing the Matanuska River case as moot. *Ibid*.

This controlling precedent is binding on the BLM in its current examination of the Chuitna River. Applying the correct standards to the Chuitna River's physical characteristics and evidence of use and susceptibility to use as a highway for commerce very similar to and in some regards stronger than the Kandik, Nation and Gulkana Rivers, the Chuitna River is navigable at least throughout IC 1605.

Prior BLM Navigability Determinations

The BLM issued several navigability determinations for the Chuitna River before the November 2, 2007 analysis being addressed by this report. In a 1975 finding, BLM determined the Chuitna non-navigable within Tract B in the general vicinity of IC 1605.[18] However, that early determination was made years before the *Doyon* decision, the Allen Memorandum, and the Gulkana River decisions (and even before the Garner Memorandum). It provides no precedent now, as to a separate conveyance such as IC 1605. *See* Alaska Region Deputy Regional Solicitor Hopewell's August 10, 2007 Memorandum to BLM's State Director entitled "Finality of BLM Navigability Determinations under the Submerged Lands Act of 1988" (advising that under that 1988 Act which amended ANILCA, a prior BLM navigability determination is limited in its effect to the conveyance it addressed and does not impact a new conveyance, which is entitled to a new, independent navigability determination, in part due to corrected navigability standards or new evidence showing that the prior BLM decision was incorrect and should not be applied).

In 1984 BLM also determined that the Chuitna River was non-navigable within a portion of Tract A, also in the general vicinity of IC 1605, based on the river's alleged "restrictive physical character and the lack of evidence of use or susceptibility to use as a highway for travel, trade and commerce."[19] However, that determination was also made prior to the Gulkana River court decisions and with little evident interest in contemporary navigation of the Chuitna River existing even then using small watercraft for purposes which BLM deemed "recreational" but which were found sufficient in the Gulkana River, Matanuska River, and other cases. In 1989 a BLM law examiner again reviewed the status of the Chuitna River following the Gulkana River decisions and revised BLM guidelines and determined that the river was in fact navigable. In its November 2, 2007 Memorandum, BLM justifies ignoring this well-reasoned 1989 determination because it was not "incorporated into a [conveyance] decision,"[20] but that should be irrelevant to whether the determination is well-reasoned and warrants present consideration.

Use and Susceptibility of Use

The evidence demonstrates that the Chuitna River is navigable in fact throughout at least the area in question. It is not only susceptible to commercial use using some of the customary modes of trade and travel in Alaska, but is in fact currently being used for commercial, for-hire navigation using such watercraft, primarily in conjunction with the recreational fishing industry, similar to the type of use which conclusively established the Gulkana River's navigability in *Alaska v. Ahtna*. As in the *Ahtna* case, that present use conclusively establishes the Chuitna River's susceptibility to such commercial use on the date of statehood. The physical character of the Chuitna River, which has not changed since statehood, is also similar throughout the area of IC 1605 to the physical condition

[18] Nov. 2, 2007 BLM Navigability Section Memo., at p. 2.
[19] *Ibid*, p. 2.
[20] *Ibid*, p. 5.

of the stretches of the Nation, Kandik, and Gulkana Rivers determined navigable in the *Doyon* and *Ahtna* decisions.

Whether a river is navigable for purposes of state ownership is decided according to federal law. *Ahtna*, 891 F.2d at 1404, citing *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926). As noted in BLM's November 2, 2007 Memorandum, the basic definition for navigability was expressed in *The Daniel Ball*, 77 U.S. (19 Wall) 557, 563 (1870), as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

As the Interior board noted in the *Doyon* decision, at 86 Int. Dec. 698, years later the U. S. Supreme Court used that definition in the *Holt State Bank* case, 270 U.S. at 56, as the basic test for determining those "streams and lakes" which are navigable for state title.

Federal case law following *The Daniel Ball*, including those decisions regarding the Gulkana, Kandik and Nation Rivers, has explained the meaning of that basic definition. An important factor is the physical character of the waterway, and in particular its capacity to be navigated. However, as noted earlier, that does not require "smooth sailing." As the Board observed in the *Doyon* decision, citing U. S. Supreme Court authority:

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

86 Int. Dec. at 697.

As the Ninth Circuit Court also stated, with regard to the Gulkana River: "A river's use 'need not be without difficulty, extensive, or long and continuous' for the river to be a highway for commerce." *Ahtna*, 891 F.2d at 1404 (quoting from *Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982) (finding 32-mile stretch of river navigable in its natural and ordinary condition based on its use for driving logs downstream by the "rough means" of temporarily deepening the channel, using horse teams to move logs over "exposed gravel bars, boulders, and shoals," and breaking up "intractable log jams" with dynamite). As the Ninth Circuit Court in the Gulkana River case emphasized: "Although the river must be navigable at the time of statehood, … this only means that, at the time of statehood, ***regardless of the actual use of the river***, the river

must have been ***susceptible*** to use as a highway of commerce. * * * [I]t is not even necessary that commerce be in fact conducted . . . 'The extent of existing commerce is not the test.'" *Ibid*. (citing and quoting from *United States v. Utah*, 283 U.S. 64, 75, 82-83 (1931) (emphasis added)). Rather, it is enough to show:

> the capacity of the rivers in their ordinary condition to meet the needs of commerce as they may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

United States v. Utah, 283 U.S. at 83.

BLM's November 2, 2007 Memorandum describes the Chuitna River in the vicinity of IC 1605 as a "clear, cold-water stream about two chains [132 feet] wide and one to three feet deep at normal water stages" and also as a "deep stream, swift and encumbered by log jams in places."[21] At seasonal higher than normal water stages the River is four feet deep with 6-8 foot pools,[22] and, as previously mentioned, under the case law the natural and ordinary condition of the river includes its condition during higher than normal flows. *Alaska v. United States*, 201 F.3d at 1157-58; *Doyon*, 86 Int. Dec. at 697, 713, 715; Allen Memo. at 3 (under "Seasonal Variation"). The river bottom is comprised mostly of sand, gravel and stones.[23] The BLM also reports that the Chuitna River is generally "well-defined, single-channel, [and] meandering" with a gradient approximately 30 to 40 feet per mile as spread out over its 37 miles.[24] DNR figures the average channel slope of the river for its entire length, including its higher elevations, at 34 feet per mile, which is much less than the 50 feet per mile maximum BLM has cited in the past. Moreover, the river's gradient is understandably lower than its average, and its water volume the greatest, in the coastal lowlands where IC 1605 is located, after several tributaries have contributed to the river's flow.

By comparison, the Nation and Kandik Rivers in the areas found navigable by the Interior Department Board contained many stretches where the depth of the water was only a few inches deep. *See* Allen Memo. at 2-3 (instructing that "[T]he Kandik and Nation Rivers, which during periods of low water may have as little as three inches flowing over the gravel bars, were held navigable from their junction with the Yukon to the Canadian Border" and that: "The Board's decision noted the fact that the water level in both rivers was subject to fluctuation and that in periods of low water only several inches of water flowed over the gravel bars (p. 21). This was held not a bar to navigation."); *Alaska v. United States*, 201 F.3d at 1157-58 ("The streams vary a great deal, sometimes braided and nearly dry, sometimes flooding, sometimes blocked by logjams, sometimes open and four or five feet deep," causing travelers to deal "with shallows by such means as poling and lining" their small boats and in one instance taking a month to pole and line upstream during shallow conditions and just six hours to get down immediately following a cloudburst that made the water high and swift); *Doyon*, 86 Int. Dec. at 712-13, 715 (including a description of boaters making "channels with shovels through shallow parts of the river"). Likewise, rocky

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[21] *Ibid*, at p. 3.
[22] November 4, 1997 Letter from DNR Division of Land Director Jane Angvik to Gust C. Panos, BLM Alaska State Office Chief, Branch of Mapping Services, at p. 2.
[23] Nov. 2, 2007 BLM Navigability Section Memo., at p. 2.
[24] *Ibid*.

stretches on the Gulkana River "normally a foot and a half deep" which could "drop down to a foot during low water" did not interfere with the courts determining the river navigable through those stretches. *Alaska v. United States*, 662 F. Supp. at 466-67, *affirmed* in *Ahtna*, 891 F.2d at 1402, 1405. The Kandik and Nation Rivers are also about the same width as the Chuitna River. *Doyon*, 86 Int. Dec. at 711-12. Aerial photographs of the Chuitna River in the vicinity of IC 1605 and the cable crossing, and of the Nation River in the area found navigable in the *Doyon* decision, are strikingly similar and can be provided.

Likely use by early inhabitants of the area and more recent documented use also support navigability of the Chuitna River. During the mid-17th century to early 18th century, the Tanaina Indians, which includes the Tyonek tribe, moved into the general area and set up permanent base camps. The Tyonek or Tebughna, which means beach people, are Dena'ina speaking Athabaskans who relied upon subsistence harvesting, and traded with other native tribes for goods, furs, and food stuffs.[25] This trade had been established with the Copper River Athabaskans to the east, before any contact with white traders.[26] Before the gold rush of 1895-96, the Tyonek people had moved their village from its location at Robert's Creek Old Tyonek to a site near the mouth of Tyonek Creek closer to the Chuitna River.[27]

Tyonek residents necessarily used and harvested a variety of wild resources, most of which were probably available a relatively short distance away. They likely used customary modes of watercraft available to them at the time in these endeavors. Although individual accounts are not many given the remoteness and nature of the use, it is known that Alaska Natives, including those in the Cook Inlet region, used various small watercraft, including skin boats, in their subsistence, trapping and trading activities, all of which have previously been treated as commerce or its "functional" equivalent by the federal government in the context of navigability determinations in Alaska.[28]

Testimony regarding such practices is summarized in the *Doyon* decision , including excerpts from a report jointly submitted by the BLM and the State in that case partly based on interviews in August 1978. 86 Int. Dec. at 714-16. As reported there, before and during the early 1900s, in addition to using hand-crafted canoes and later rafts: "The Natives sometimes used skin boats to float down the rivers. Natives used the area of the Upper Kandik for hunting. They hunted and

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[25] Fedorova, S., The Russian Population in Alaska and California, Late 18th Century – 1867, at p. 145.
[26] Soldotna, Alaska Kenai Peninsula Borough, 1988 "Chuitna Area Resource Development Plan", at p. III-1.
[27] Fall, Foster, Stranck, The Use of Fish and Wildlife Resources in Tyonek, AK. Subsistence: Technical Paper N.S Anchorage 1984, at p. 39.
[28] As was testified to in the *Doyon* proceedings regarding the Nation and Kandik rivers:

> BLM distinguishes between recreational use of rivers and use of a river basin as an area where a subsistence lifestyle is pursued. [According to the BLM] [r]ecreational use is nonfunctional in an economic sense. A subsistence lifestyle is extremely functional in an economic sense in that it centers on a search for food. * * * Although few, if any, people lived on either river during the 1950's, others living on the rivers in the 1930's and 1940's, as did the Natives before them, pursued a subsistence lifestyle. Those living a subsistence lifestyle are very much dependent on the rivers."

Doyon, 86 Int. Dec. at 713 (hearing transcript citations in opinion omitted). Likewise, although the Allen Memorandum, at page 1, represents that the Interior Department Board in *Doyon* did not treat trapping as commerce, in fact the Board in that case specifically listed trapping as commerce. *Ibid.* at 697-98.

floated down in moose skin boats." *Ibid*. at 714. The *Doyon* decision describes a trip in the 1920s related by Mr. Stacy, an elderly Athabaskan identified by Doyon, Ltd., the Alaska Native corporation, starting on the upper Nation River with a partner after trapping beaver. "They descended the river in June in a mooseskin boat, having reached the river from the Kandik River and Ogilvie River country. They had about 40 beaver skins with them when they descended the river [to] the Yukon River." *Ibid*. at 716.

In the Matanuska River litigation, it was also found that the Athabaskan Natives of that area and the "south coast of Alaska" built "birch bark canoes and moose skin river boats" which they used "for descending rivers." Recommended Decision, State of Alaska (Matanuska River), IBLA 82-1133, BLM Files AA-11153-23, -31, at p. 6. As reported in that written decision, John Shaginoff, an Athabaskan Indian in the area, testified in 1981 about:

> . . . his personal experience descending the Matanuska River from Gravel Creek [at the foot of the Matanuska Glacier] to Matanuska Landing as a boy of nine in 1916. Two adult men, Mr. Shaginoff and another boy traveled up the summer trail [which then existed] to Gravel Creek on a hunting trip for moose and sheep. Having been successful, the men sewed three of the moose skins together and stretched them over a birch pole frame. The finished boat was 18 feet in length with paddles for maneuvering. The hunting party then put in at Gravel Creek and began their descent. In several places the water was swift and rippled, scaring the young boys. They were let out to walk the river's edge past the rough portions and then continued home. At Matanuska Landing the hunting party dismantled the moose skin boat, abandoning the frame but saving the skins to be sewn into moccasins and clothing. They continued down river in a wooden row boat since at that time they were living in Cottonwood and Knik [about 30 miles from Tyonek].

Ibid. at pp. 6-7. (hearing transcript page references omitted).[29]

In addition, a BLM historical Report issued in 1985 reported that:

> Tanaina living at the mouth of Alexander Creek [about 20 miles from Tyonek] in the nineteenth century, fished and hunted in the Hiline Lake area. Because their catch included moose and bear too heavy to move easily overland, they commonly built moose skin boats in which they floated the Talachulitna, Skwentna, Yentna, and Susitna back home.[30]

It is reasonable to conclude that the early residents of the Tyonek area used similar customary modes of watercraft to conduct similar activities in their area, including on the Chuitna River, which is the largest clearwater waterway close to Tyonek. Certainly the Chuitna River was, and remains, susceptible to such use. Although there may not exist documented accounts of such use on the Chuitna River, neither would there likely be documented accounts today of such use on the upper Matanuska River or on the upper Nation River (by a witness located in that case by Doyon, Ltd.), had there not been litigation over the navigability of those rivers 25-30 years ago while those

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[29] Copies of the hearing transcripts, including sworn testimony of the witnesses, are available through the State of Alaska, and also perhaps through BLM's Mike Brown, former Navigability Section Chief who attended that hearing.

[30] Ducker, James H., Alaska's Southcentral Region: A History (BLM Anchorage, Alaska 1985), at 102.

witnesses were still living. As the Ninth Circuit Court observed eight years ago in *Alaska v. United States* regarding the Kandik, Nation and Black Rivers:

> There is a serious policy concern in favor of allowing resolution of disputes based on the United States' inchoate claim to everything in Alaska but what it has disclaimed. Eventually all the [prestatehood] witnesses will be dead, reducing the reliability of litigation. Someone who used one of these rivers in 1959 at age 20 is now 60. The population in the area was so sparse . . . a few deaths by old age can remove most or all the knowledgeable witnesses.

201 F.3d at 1160. Mr. Stacy and Mr. Shaginoff would now be over 100 years old.

Accordingly, evidence of the Chuitna River's susceptibility to use for commercial navigation by documented use of that specific river must be by post-statehood use, which, as noted earlier, is entirely permissible and sometimes necessary under the law. In fact and law, the documented use and susceptibility to use previously found in connection with the navigability determinations for the Kandik, Nation, Gulkana, and Matanuska Rivers should be enough to find at least the lower ten miles or so of the Chuitna River navigable, including all of that stretch within the area of IC 1605 – even if the Chuitna River had never been boated – given the criteria for title navigability in Alaska established by those decisions and physical similarities between those waterways and the Chuitna River. However, as even recognized in BLM's November 2, 2007 Memorandum, there is also much documented boat use on the Chuitna River that conclusively establishes the river's navigability, including, in particular, commercial guided use on the river in connection with the growing recreational industry in southcentral Alaska. In addition, as documented and summarized over ten years ago by both BLM researchers and State personnel, that evidence of use is greater, using larger and more varied watercraft, than BLM's recent memorandum reports.

That BLM memorandum states that "While the lower Chuitna has long been a fishing area, there is no evidence of commercial boat use on the Chuitna River either before or after Statehood in the Bureau's records."[31] Yet, the next page of that memorandum states: "Recreational and ***commercial fishing and guiding*** in small rafts and canoes is the only boat use documented, and most of this occurs after Statehood."[32] Then BLM recognizes (1) that at least as early as 1961 the new State's ADF&G reported the popularity of the Chuitna River "as a fly-in fishing spot for anglers," (2) that by the mid-1970s that popularity had become "heavy," and (3) that federal personnel confirmed that heavy use over 20-30 years ago, including use of inflatable watercraft to float the river. BLM admits that at least for the last dozen years or so it has known that a considerable amount of guided fishing by boat for pay has been occurring on the river, "mostly" on "the lower river between the confluence of Lone Creek at mile 8.5 and the mouth" by "[s]everal family lodges operating along this stretch of river," using "small" rafts, canoes, a 15 ½ foot Pelican boat, and a 17 foot Grumman canoe. BLM also notes that "***In addition to guided fishing***, people continued to use the river for ***recreational purposes,***" mostly using rafts and canoes in the same area between Lone Creek and the river mouth.[33]

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[31] Nov. 2, 2007 BLM Navigability Section Memo., at p. 3.
[32] *Ibid*, at p. 4 (emphasis added).
[33] *Ibid*. (emphasis added).

Several observations can be made from those passages in BLM's memorandum. First, by stating there is no evidence of "commercial boat use" on the Chuitna River, yet recognizing that "commercial fishing and guiding" by several lodges exists using watercraft throughout the area of the river in question, the memorandum reveals either a basic misunderstanding of the applicable legal standards for navigability in Alaska established many years ago, or a refusal to apply them. Particularly being ignored is the cardinal directive from the Ninth Circuit Court of Appeals that such "guided fishing and sightseeing trips" using similar "small" watercraft "customary for that time period" for transportation upon the river for profit is not only evidence of the waterway's "susceptibility for commercial use at statehood" but "***conclusive*** evidence" of such susceptibility and of the river's navigability. *Ahtna*, 891 F.2d at 1405 (emphasis added). It certainly does not matter whether that commercial use on the river begins in the 1970s, as in the case of the Gulkana River, or a few years later, as in the case of the Chuitna River. What matters is that the rivers were susceptible to such use on the date of statehood, as conclusively established by the existence of such use in fact after statehood, if not before. That use is "commercial boat use." Any other view is "too narrow a view of commercial activity." *Ibid*.

Second, as long as the watercraft is being used to transport a commercial load "for profit", or is capable of carrying such a load, be it of fishermen, sightseers, furs, or freight, then the size or type of the craft is not determinative. *Ibid*.; *Doyon*, 86 Int. Dec. at 706; Allen Memo. at 2-3.

Third, evidence of persons transporting themselves and gear on the river in watercraft for "private" or "personal" uses, including personal "recreation," that someone else charges or could charge a fee for, is evidence, although maybe not "conclusive" evidence, that the river is susceptible to commercial use, and therefore navigable. *Ahtna*, 891 F.2d at 1402-05; *Doyon*, 86 Int. Dec. at 706 ("The Board notes that if the type of watercraft used for recreation is capable of carrying a commercial load, and is commonly used to do so, then use of such watercraft offers some indication that the waterway is capable of being used for the purpose of useful commerce."); Allen Memo. at 3 (quoting board and instructing BLM: "If [such] 'commercial vessels' have been used on a waterbody for such 'private' purposes, this indicates that the waterbody is 'susceptible' to use as a highway for commerce, i.e., navigable.").

In any event, over several years representatives of both the BLM and the State of Alaska have interviewed and taken statements of people who have boated on the Chuitna River for many years since statehood. This documented use, which includes commercial guiding on the river by boat, is or should be "in the Bureau's records."[34] It includes use of watercraft on the river as large as 12 to 16 foot inflatable rafts, 15 to 19 foot paddle and motorized canoes, and 16 to 20 foot flat-bottom power boats with multi-horsepower motors as large as the watercraft considered by the courts and Interior Board in the Gulkana, Kandik, Nation and Matanuska River decisions and capable of carrying loads in excess of 1000 pounds. This documented use clearly establishes that the Chuitna River is navigable in fact.

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[34] *Ibid*., at p. 3. Before BLM determines the river non-navigable, the State requests permission to review what presently exists in BLM's records regarding any boating on the Chuitna River, whether contained in BLM file AA-6707-EE (75.4) which is cited in BLM's November 2, 2007 Memorandum in conjunction with its "records", or elsewhere, including other BLM files mentioned elsewhere in that memorandum specifically in relation to the navigability of the Chuitna River.

For example, in 1995 BLM Navigable Waters Specialist Earnhardt interviewed numerous people who had actual knowledge of boat use on the Chuitna. Mr. Earnhardt's memoranda and interview notes from July 19, September 27, and October 17, 1995, documented the use by several witnesses of watercraft with over 1000 lb. loads on the Chuitna River up and down stream between at least the Lone Creek confluence and the river's mouth. The people interviewed detailed boating and rafting on the river. They include Richard Faulkner, who used "an eighteen foot aluminum riverboat driven by a thirty-five horsepower motor with a propeller and shaft."[35] Independent State personnel have also documented this information. There are many more reports of people using the river in canoes and rafts. On November 4, 1997, then DNR Director Jane Angvik submitted a four-page letter to the BLM providing additional information about actual use on the Chuitna River supported by both BLM interviews and follow-up interviews and statements of the witnesses obtained by the State.[36] In that letter, Director Angvik summarized documented use of boats going up and down the river carrying upwards of 2500 lbs. of people or gear. While these boats had to be navigated occasionally over or around log jams or boulders, such impediments did not prevent people from using them on the river. That letter and copies of those interviews and statements should also be in the Bureau's records on the Chuitna River. However, another copy of Director Angvik's letter is provided with this report, and the State can provide copies of other materials to BLM on request.

Some of those user statements taken from BLM and State of Alaska interviews are summarized as follows:

Lawrence Heilman from Beluga first navigated the Chuitna River in 1972 and, as a commercial guide, takes his clients in boats from the mouth of the Chuitna River upstream to the Cable Crossing. He estimated the total weight of his load, passengers, 16-foot drift boat, and 15 hp Evinrude prop motor to be over 1000 pounds. Some years logjams occur causing him to drag his boat over them. Mr. Heilman has also observed Dennis Torrey commercially guiding clients on the river several times.[37]

When interviewed, Lou Sudano had navigated up and down the Chuitna River every year from 1979 to 1997. He used a 15 foot Avon inflatable raft with a 50 hp Johnson jet motor. He has navigated that large watercraft from the river's mouth, and also from the Cable Crossing, as far upriver as Lone Creek, for fishing, hunting, and guiding. Mr. Sudano reported carrying a load of four to five people and a moose, which he estimated at 1000 pounds or greater. One of his sons, Thomas Sudano, reported navigating on the Chuitna River, usually between the cable crossing and the river mouth, in a 15 foot inflatable raft with a motor or a 15 foot canoe. He has done so an estimated 60 times between 1979 -1997. Another son, Mark Sudano, had navigated the Chuitna River every year from 1989 to 1997 when last interviewed. He carried two to three individuals and their gear, which he estimated to weigh between 1000 and 1200 pounds. Mark relies on a 16-foot Lowe aluminum boat with 50 hp Johnson outboard motor and an 8-10 foot inflatable raft with a 5 to 15 hp prop motor to boat the river. Each of the Sudanos reported encountering a few logjams and drag areas on the Chuitna River, but those spots did not stop their navigation of the river.[38]

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[35] BLM Navigable Waters Specialist Edgar A. Earnhart's memoranda dated July 19, 1995, at pp. 5-6, and September 27, 1995, at pp. 1-2.
[36] November 4, 1997 Letter from DNR Division of Land Director Jane Angvik to Gust C. Panos, Chief Branch of Mapping Services, Bureau of Land Management, Alaska State Office.
[37] Simmons, Kamie, Phone Interview with Laurence Heilman on September 23, 1997.
[38] Rutzler, Kristiann, phone Interview with Lou Sudano on August 21, 1997.

A former resident of Beluga, Don Puckett, has traveled many times by boat between the river's mouth and the cable crossing every year since the early 1980s. He operated a 16-foot river raft and a 20-foot skiff with a 40 hp prop to transport three to four people and gear weighing from 1000 to 2500 pounds during his trips on the river. In addition, Mr. Puckett stated he has no problem with logjams or sandbars while navigating on the river.[39]

Dennis Torrey, a lodge owner on the Chuitna River above the cable crossing site, had numerous conversations with the staff at BLM. During these conversations, Mr. Torrey told them about establishing a guided float fishing business. He named his operation "Chuit River Float Trips" and also used the name "Alaskan Odysseys." His trips have originated on the river from below his lodge or at Lone Creek. His clients have been both instate and out-of-state residents.[40]

Clark Smith Jr. worked for Dennis Torrey. He has taken a number of clients down the Chuitna River in boats, including a six man raft with four people in it. He stated that they went around boulders, or over them when the water was higher. He found his way around the log jams. Mr. Smith was firm that various boats, especially jet boats, can be readily run upon the river.[41]

Michael Sharon was one of Mr. Torrey's clients. For over ten years he went to the Chuitna River to catch King salmon. They used inflatable boats so they could reach good fishing spots on the river which could not be accessed by walking on the riverbank in private ownership. He reported that from breakup into late June or early July the river can be floated with a sizeable load – certainly over a thousand pounds of people and gear per raft.[42]

James Pazsini boated and observed others on the river a couple of times a year from 1971 to 1994, before he was interviewed. He has navigated from the mouth to the cable crossing and as far as Lone Creek. He used several types of boats over the years, including a 14-foot inflatable with a 50 hp Johnson jet motor, a 20-foot flat-bottomed aluminum boat with a 40 hp motor, and a 14-foot flat-bottomed aluminum boat with a 15 hp prop motor. He reported no obstructions to floating or carrying two or three people and gear that weighed an estimated 1000-1200 pounds.[43]

Richard Faulkner was an avid user of the Chuitna River before, he says, residents of Tyonek interfered with his access. Mr. Faulkner normally used an eighteen foot riverboat driven by a thirty five horsepower Evinrude with a propeller and lift. He regularly used the boat up to the cable crossing. He described bringing a moose down river one year. He noted that in the Lone Creek area the main channel was boatable for much of the summer season, but that the narrower northern channel, about 20 feet wide, was only useable by him during high water.[44]

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[39] Simmons, phone interview with Don Puckett on September 23, 1997.
[40] Earnhart's memoranda dated July 19, 1995, at pp. 4-5, and September 27, 1995, at pp. 2, 4 & 6. Some notes made by Mr. Earnhardt use the name Dennis "Correy," but the last name is actually Torrey.
[41] Earnhart's memorandum dated October 17, 1995.
[42] Earnhart's memorandum dated September 27, 1995, at p. 6.
[43] Rutzler, phone interview with James Pazsini on July 29, 1997 & BLM Navigable Waters Specialist Earnhart's memorandum dated September 27, 1995 noting conversation with Jim Pazsint (sic).
[44] Earnhart's memoranda dated July 19, 1995, at pp. 5-6, and September 27, 1995, at pp. 1-2.

Michael Grant has used Coleman canoes from Lone Creek down to the Chuitna River's mouth. He and Mr. Torrey had discussed using Mr. Grant's 16-foot riverboat to take customers up the Chuitna to the Chuit River Lodge. They decided not to do this due to the expense of liability insurance.[45]

When interviewed, Tim Karlovich from Jayhawk Air had no doubt that the river can be navigated to and from Lone Creek during spring waters and also in the summer and fall under favorable water conditions. He reported that under those conditions a properly powered riverboat carrying 3 drums of fuel can be run either way on the river.[46]

These synopses are similar to several of the comments submitted by Alaska Division of Land Director Jane Angvik in her 1997 letter to the BLM. In her letter she also reported many additional users of watercraft on the Chuitna River. They included Mr. Troy Franklin of Beluga, who had "rafted on the river from the headwaters to the Chuit Crossing with a party of four people and two rafts in June of 1977," many miles above Lone Creek and IC 1605.[47] The BLM should review Ms. Angvik's letter for its additional information.

The information also shows that boat use, including guided use, on the Chuitna River by Tyonek residents and other fishermen using rod and reel gear to harvest salmon, rainbow trout and Dolly Varden, generally starts during summer months in mid-June and extends through August. During August, Tyonek area moose hunters travel by boat up and down the Chuitna River.[48]

These uses of the Chuitna River for navigation are significant and increasingly necessary, given private ownership of almost all of the uplands surrounding the lower 12 miles or so of the river and limited public access to the river. In recent years there have been reports of increasing interference with public access to the river – and even with public use of the river itself including fishing from its bed and gravel bars once upon the river – by owners of private uplands in the area, including the Tyonek Native Corporation. Based on such difficulties, availability of the river and its bed as a sovereign resource for public travel and use without trespassing upon adjacent, privately-owned uplands becomes increasingly important and valuable, as does recognition of the waterway's navigability for title in order to protect those public interests. As the United States Supreme Court recognized many years ago, before Alaska became a state or use of the Chuitna River reached its present level or significance:

> 'It is, indeed, the ***susceptibility*** to use as highways of commerce which gives sanction to the public right of control over navigation upon them, ***and consequently to the exclusion of private ownership, either of the waters or the soils under them***.' * * * In view of past conditions, the [federal] government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, ***as the title of a state depends upon the issue***, the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a state of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the state either because the

[45] *Ibid.*
[46] Earnhart's memorandum dated September 27, 1995, at p. 7.
[47] November 4, 1997 Letter from Director Angvik to Gust C. Panos, Chief Branch of Mapping Services, Bureau of Land Management, Alaska State Office, at p. 3.
[48] Stanek and Holen, Update of Wild Rescue Harvest and Use Information for Tyonek and Beluga, Alaska, 2005/2006.

> location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands.

United States v. Utah, 283 U.S. at 82-83 (quoting from *Packer v. Bird*, 137 U.S. 661, 667 (1891) (emphasis added)).

Conclusion

As previously noted, the first mile of the Chuitna River travelling upstream from its mouth at the sea is tidally influenced. Therefore, ownership of that portion of the river is in the State pursuant to the Alaska Statehood Act and federal Submerged Lands Act of 1953, 43 U.S.C. § 1301(a)(2), by which title to and sovereign dominion over the marine submerged lands, waters and natural resources therein were granted and confirmed to the State wherever "permanently or periodically covered by tidal waters up to but not above the line of mean high tide." *Alaska v. United States* Decree and Disclaimer, 546 U.S. 413, 416 (2006); *United States v. California*, 436 U.S. 32, 33-37 (1978).

The Chitna River upstream from its mouth through at least IC 1605 is also clearly used and susceptible to use as a highway for commerce under the legal criteria for title navigability in Alaska binding on the BLM and Department of Interior, and therefore navigable and owned by the State on that basis. *Utah Division of State Lands v. United States*, 482 U.S. 193, 195-198 (1987); *Alaska v. Ahtna, Inc*., 891 F. 2d 1401, 1403-06 (9th Cir. 1989).

Therefore, the BLM should determine the Chuitna River navigable from its mouth up through at least the area of IC 1605 presently being considered by it, and take no action to terminate or vacate any existing public easement to or adjacent to the Chuitna River, provided pursuant to ANCSA § 17(b) or otherwise.