Federal Promises: Should They Just be Water Under the Bridge?

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Excluding glaciers, Alaska has 40% of the total U.S. fresh water supply. This large amount of fresh water is distributed in about 3 million lakes and approximately 30,000 rivers, creeks and streams. *The Alaska Constitution* (Article VIII, Section 3) says "Wherever occurring in their natural state, fish, wildlife and waters re-reserved to the people for common use." Section 13 of our Constitution establishes the principal that water rights are created by prior appropriation (first in time = first in priority) for a specified amount and use.

About 60 % of Alaska is in various federal ownerships that range from small sites for federal administrative facilities to large military withdrawals, the vast majority of the total National Park System and National Wildlife Refuge System acreages, and the two largest National Forests in the nation. Under the *Alaska Statehood Act*, Alaska owns all inland waters that are navigable and not expressly reserved by the federal government at the time Alaska became a full and independent member of the Union. For example, the establishment of the Chugach National Forest, even though well before Statehood, did not expressly reserve water for the purposes of the national forest, while the creation of the Kenai National Moose Range (now called the Kenai National Wildlife Refuge) did.

Forty years after Statehood, State ownership of the water column and land between the ordinary high water mark remains essentially unresolved and more often than not is disputed by federal agencies. A good portion of the foot dragging by the federal government directly stems from the fact that a substantial number of State owned waterbodies are now within National Conservation System Units (CSUs) managed by the Bureau of land Management (BLM), Fish and Wildlife Service, Forest Service, and National Park Service. In other cases, such as the Fortymile River, and subsistence fishery management, the federal government has attempted to expand its restricted land management authorities to State owned navigable waters.

Prior to Alaska Statehood, the Congress passed the *McCarran Amendment* (1952, 43 USC 666a) that has bearing on the way the federal government acquires water rights. First, it accepts the basic concept that all states have clear authority to manage water rights, including water on federal lands within a state. These State Rights have been confirmed by the U.S. Supreme Court in at least two cases (U.S. v Eagle county, CO, 401 US 520 in 1971, and U.S. v New Mexico, 438 US 696 in 1978). The McCarran Amendment also recognizes that federal ownership of land creates an implied federal reserved water right. Priority for a federal reserved water right goes to the date the lands were withdrawn from the public domain. As opposed to other water rights acquired under State wa-

ter law, a reserved federal water right cannot be lost by non-use. The quantity of water claimed for a reserved federal water right cannot exceed the minimum amount necessary to fulfill the primary purpose of the withdrawal. Once a federal reserved water right has been granted by a state, it is incorporated into that state's water right system and has no greater rights than any other water right holder. Finally, a federal reserved water right is only implied until such time as there is an application and the application is adjudicated by the state.

The Alaska National Interest Land Conservation Act (*ANILCA*) in December of 1980 created new and expanded CSUs throughout Alaska. The creation of a CSU in 1980, regardless of the Congressional management directions, did not affect State water management and ownership or State ownership of submerged land for either marine and navigable inland waters granted in 1959 by the Alaska Statehood Act. Likewise, the Alaska Statehood Act did not affect express federal water reservations that were in effect at that time. Thus, the 1980 creation of four new National Wildlife Refuges and a unit of the National Park System along the Yukon River did not change the fact that the Yukon River and its interconnected sloughs are navigable and passed to complete State ownership in January of 1959. Yet the State does not have quiet title from the federal government for the Yukon River or its other tributaries such as the Porcupine or Tanana, rivers each with a long and clear documented factual history of use for travel, trade and commerce.

A precedent-setting federal court decision also has significant ramifications on State ownership and management of navigable inland waters. The *Katie John v. Babbit*, 72 F.3d 698 (9th Cir. 1996) decision says that the federal government has the right to manage subsistence fisheries in all navigable waters where the federal government has a reserved water right.

Kandik, Nation, Black Rivers — A Case History:

In determining ownerships for the purpose of conveying land to Alaska Native Corporations, BLM makes a determination on whether a water body in the pending title transfer from the federal government was or was not navigable since the federal government cannot issue title to land it does not own. The Kandik and Nation rivers flow southward from Canada into the Yukon River near Eagle; the Black flows westerly into the Porcupine River upstream from Fort Yukon. BLM determined that the headwaters of the Kandik were navigable as were the Nation and lower two-thirds of the Black River. The BLM decision was appealed and prior to a hearing the representatives of the federal and state government conducted a joint field investigation and agreed that the U.S. Geological Survey would collect scientific hydrologic data that could be used at the hearing. Historic documents also showed that the survey crew marking the boundary of the border between the U.S. and Canada were supplied by a motorized boat moving a ton of hay upstream on the Kandik. The hearing officer concluded the Kandik River was navigable in fact. BLM also

determined that a substantial portion of the Black River and its interconnected sloughs were navigable and therefore the State owned the land between ordinary high water marks. Based on these BLM determinations, the State has requested quiet title from the federal government. Since the Kandik and Nation rivers now flow through a unit of the National Park System, and the Black River flows through a National Wildlife Refuge created in ANILCA in 1980, the federal government has used a variety of stalling tactics to avoid confirming the fact that the State of Alaska got title to all or significant parts of these three rivers in January 1959. The hydrological facts collected by federal scientists for the Kandik River (non-glacial and without significant feeder lakes, total length slightly less than ninety river miles in a drainage basin that is under five miles wide at its widest with numerous shallow gravel bars and sweepers) means that most non-glacial rivers in Alaska are in State ownership. The Black River navigability determination is being stonewalled by the federal government because BLM made a determination that interconnected sloughs were also in State ownership and there is reluctance to apply this same standard to the Yukon, Porcupine, Tana, Kuskokwim, and other large meandering rivers that are in one or more CSUs.

The Fortymile River Story:

ANILCA established the Fortymile River and many of its tributaries as a unit of the National Wild and Scenic Rivers System. However, ANILCA also amended the way the Wild and Scenic Rivers System works in Alaska. First, it doubled the acreage of federal land that could be included within the boundaries of all Alaskan units. Secondly, it expressly prohibits inclusion of State and local government ownerships and prohibits the boundaries from effectively encompassing private land. This means that the navigable portions of the Fortymile and its principal tributaries are not a part of the National Wild and Scenic Rivers System and that no provisions of the Wild and Scenic Rivers Act applies, e.g. this CSU is almost totally comprised only of federal uplands (humorously referred to as wild and scenic bank lands). This same situation also applies to the Delta, Gulkana, Unalakleet rivers and Birch and Beaver creeks CSUs. The Fortymile River is within a mining district with more than a hundred years of almost continuous placer gold production that was recognized in the federal studies that lead to the inclusion of the river in ANILCA. ANILCA also recognized that the upper portions of the Fortymile River contained mineral deposits that could only be developed with road access. Accordingly, ANILCA provided for road access across portions designated as a Wild River Area which was a complete departure from the precedents set for Wild River Areas throughout the Nation. BLM has initially determined that significant parts of the Fortymile were navigable and in State ownership. That early ownership determination does not reflect the fact that it stopped well short of the launching site for BLM river rangers, a site also used by commercial and private recreationists, or that the State has formally asserted additional upstream parts of the Fortymile CSU

are navigable. In the past several years, BLM has consistently attempted to manage (read prohibit) suction dredging on State ownerships. This was done principally through the permitting of upland camps on federal land under BLM jurisdiction. The end result is that rather than having well-screened environmentally sensitive upland camps set back from the river bank, miners on State mining claims in the Wild River "bank lands" Area have been forced to establish and maintain camps on State land below the ordinary high water mark.

Innovative Expansion on the Wild and Scenic Rivers Act:

The National Forest administration in the Tongass Land Management Plan has determined that glaciers qualify as a free flowing river and are eligible for inclusion in the National Wild and Scenic Rivers System. This same concept has been adopted for the Chugach National Forest.

Federal Water Rights:

During the past forty years, the federal government has made no systematic attempt to comply with the McCarran Amendment in either applying for a water right or defining the extent, if any, of reserved federal water rights in Alaska. There are a few exceptions, like for federal hydropower sites and federal administrative sites. BLM has applied to the State for and has been granted an instream flow reservation for the Birch Creek CSU and applied for an instream flow reservation for the Gulkana River CSU. During the past few years the Fish and Wildlife Service has submitted applications to the State for most of the water within the Arctic Coastal Plain part of the Arctic National Wildlife Refuge where there are potential oil and gas deposits and has a systematic program to apply for the waters in other Alaskan refuges.

Promises Broken and Recommendations:

The federal government is loathe to fulfill the commitment of the Alaska Statehood Act on State ownership of navigable waters. The Alaska Legislature should fund an aggressive and systematic program to secure clear, unambiguous title to all navigable waters in Alaska that were granted in 1959. In addition to the Kandik, Nation and Black Rivers, which are types of rivers having wide application throughout Alaska, the State should carefully review the Katie John decision to determine if the underlying federal legal principle for federal subsistence fishery management is navigability. If so, the federal court should be immediately petitioned to quiet title to the State for all water bodies where the federal government asserts subsistence fishery management. This can be done simply on the basis that the federal government has formally determined each water body to be navigable. This petition should also include a request for quiet title to all glaciers based on the Forest Service innovative expansion of the Wild and Scenic Rivers Act. The recent discovery of the remains of a centuries old Indian in British Columbia documents the fact that glaciers from time immemorial have been used, or are susceptible to use for travel, trade and commerce.

No additional units of the National Wild and Scenic Rivers System should be established in Alaska where the federal government only owns the uplands ("bank lands") above ordinary high water. This would adopt the 1998 decision by Secretary Babbit that the Colville River should not designated a CSU because the federal government did not own the river together with the strong objection of the State and Native Corporation land owners along the Colville River.

Water, next to having reasonable access, is the key element for any significant resource development in Alaska. In 1980, ANILCA created a large number of implied, undefined reserved water rights. The federal government should sit down with the State, Native Corporations and resource users to develop a rational and systematic program to adjudicate the amounts and location of reserved federal water rights with priority to areas where resource development are foreseeable in the near future and then all water bodies where federal subsistence fishery management has been asserted.