

**SEWARD / BEAR CREEK FLOOD SERVICE AREA
WORK SESSION
SEAVIEW PLAZA BUILDING, SUITE 122
Monday 16 May 2011**

The work session convened at 7:00 PM preceding the SBCFSA regular board meeting.

A. ATTENDANCE

BOARD MEMBERS

Chairman Bill Williamson
Vice Chairman Bob White
Tena Morgan
Matt Hall

STAFF

Christina Stauffer
Service Area Coordinator

B. PURPOSE

The purpose of this work session is to discuss future actions by the board regarding the state gravel fees and navigability statutes.

C. SUMMARY

Christina Stauffer introduced the timeline of navigability action taken by the SBCFSA and the borough since the service area's conception in 2004. She went on to remind board members that the SBCFSA board determined to hold off on further action on this issue to allow time for the borough administration to continue with negotiations with the Department of Natural Resources and for the borough legal department to produce suggested language changes to the state statutes. The culmination of the borough's efforts was apparently House Bill 89 which even Representative Seaton's office admits does not apply to the service area goal relieving flood mitigation projects from state fees.

Bill Williamson asked for public comment.

Bob Reisner spoke up about families that have given up trying to maintain their homes in Questa Woods and were selling their homes and leaving. The rising water table and increased dampness that was resulting in mold in homes in addition to the vastly increased threat of flood damage due to not removing gravel from the stream has overwhelmed these people. This is a loss of tax base and good people. The streams need to be dredged.

Glenn Schiff stated that a couple of the people who park their RV's on his property are connected to DNR. He said he spoke to them about the state navigability

**SEWARD / BEAR CREEK FLOOD SERVICE AREA
WORK SESSION
SEAVIEW PLAZA BUILDING, SUITE 122**

determination and its effect on his property title and gravel removal. Glenn said that the folks said they could not say too much but that they would be happy to look into things and get some information for Glenn on the issue. Glenn stated that he questioned a state determination of navigability in what is essentially a wetland.

Bob White started by pointing out that the state's claim to private property is a huge moral issue and unfairly burdens the property owner with the potential of flood damage and the after effects of flood damage as well as clouding their land title. The state, borough and city governments have no concern for the burden on the property owners of flood disasters. They make money from them. When they get a disaster declaration they get money they can spend to expand departments and use as they like which does not come from the tax base. This is why their disaster budgets are so small, only \$5,000 for the borough. The governments benefit but everyone else pays from their own pocket.

Bob went on to quote from several sections of *Putting The Public Trust Doctrine To Work, Second Edition*. He said that, regarding conveyance prior to statehood, property was basically taken off the federal rolls and placed in private holdings. Most of the deeds in the Seward area predate statehood and give the property owners mineral rights, water rights, everything. The only thing withheld is authority to come in and create drainage ditches or levees to protect the general public. Nothing is said about the state having actual ownership of the river bed. In all western streams, a rancher owns the bottom of the stream. One can travel through it as long as no contact is made with the river bank or the bottom of the stream. In general most of them do not have a problem with that. These property rights from original patents cannot be transferred to another owner. Bob quoted other passages that apply to this. He went on to comment on the actual descriptions of navigable land in Alaska state law which refers to waters suitable for public boating or other recreational purposes. Bob said he does not see any stream or river that meets those specifications in Seward. The state stretches these definitions to make it work for them. He cited a history of review by the Supreme Court of transfer of property from trust laws and stated that judicial skepticism is an important part of the process. Home Rule cities in Alaska have some rights to submerged lands although all tidelands are owned by the state. Bob quoted from AK 38.05.820 and other state statutes, saying that DNR picks and chooses which parts of the law they use to basically do what they want. It is not set in stone that they have to charge a fee for gravel. If a project is designated for flood control and it is sanctioned by the Corps of Engineers and other permitting agencies there should be no fees charged for whatever gravel disposal needs to be done. Bob also commented that he has been researching the original Alaska Railroad

**SEWARD / BEAR CREEK FLOOD SERVICE AREA
WORK SESSION
SEAVIEW PLAZA BUILDING, SUITE 122**

Construction history and has not found evidence that they applied for a permit under the Rivers and Harbors Act of 1896. If they did not apply for a permit and altered the streams it would void navigability.

Bill Williamson stated that one thing we are talking about is the flood board's actions regarding navigability. Property owners are being told that their property is not theirs, that it belongs to the state even though they still pay taxes on it. Everyone wanted to work out a compromise. Bill said originally navigability started as a way to make sure that the public could get up and down waterways in the interior for commerce purposes. The state transferred land to Alaska native corporations without retaining these rights. Now they are trying to reinstate them and they believe that if they enforce one part the law they must enforce all of it. They just want to claim everything so they do not have a fight. Talking to Scott Ogan, Bill said, DNR takes the stand that if they do it to one area they have to do it to all.

Tena Morgan said she does not agree and that she thinks there are people out there who would block the streams.

Bill Williamson agreed that this could happen but went on to say that one idea he had was to give this land that the state has claimed back to the borough. The problem is that the borough could turn around and sell it to someone else and do the same thing all over again. Bill said he could not think of any stream in the area that supported any kind of commerce.

Discussion was held regarding access for the public for kayaking and fishing.

Bill Williamson said that every river has its own problems like ice jams and gravel build up. The state refuses to accept any responsibility or liability for damage caused by their claims. They are supposed to be looking out for the citizens' interests. If we sold the gravel we removed for a huge profit that would be one thing and it should be shared with the government but they have made this impossible anyway. They recognize the problems but refuse to do anything about it. Clear Creek residents are going to have to deal with this very soon.

Tena White asked for an explanation of the situation on Clear Creek.

Bill Williamson explained how the increased flow from Kwechak as the season progresses will be impacting Clear Creek. He went on to say that early in the season when some streams did not run at all would be a prime time to get in there and do

**SEWARD / BEAR CREEK FLOOD SERVICE AREA
WORK SESSION
SEAVIEW PLAZA BUILDING, SUITE 122**

projects like the one on Box Canyon but the permitting process was blocking everything. Getting anything done is becoming a nightmare.

Discussion was held regarding the scope of state navigability claims in terms of acreage involved.

Bob White pointed out that the only river in Seward that actually had determined boundaries was the Resurrection River.

Tena Morgan said that she was under the impression that the state did claim where the river was flowing but that they did not claim old stream beds and that this property could be reclaimed by the property owners.

Christina Stauffer quoted from an e-mail between Scott Ogan and Chris Nahorney at DNR in which he suggests that they hold off on selling leases because the state might want to go after more land in Seward. She said that the language in the e-mail makes it clear that whatever suits the state the best is how the law will be interpreted.

Tena Morgan stated that she thinks the board needs to change its approach on navigability. She said what has been done is not working and that the board will not be able to change the state's position on navigability. The state wants fees for the gravel we remove. The board should go the way of demanding specific boundaries for what they are claiming. If they say they own it they should be willing to clarify their claims. Tena said she supported Bill's idea that it should be approached from the point of view that flood control should be exempt from state fees for gravel.

Christina Stauffer commented that the SBCFSA has been requesting exemption from gravel fees for flood control projects since its inception. She said she has a large box of years of communications, letters and e-mails on this subject.

Tena Morgan agreed and said that it shows that we are still right where we started. The board can argue navigability forever and not move the state. We do not have the money to hire an attorney and go up against the state. The borough has made it clear that they will not back us on that. We need to do something different. She said that she has been on the board for two years and has yet to see anything accomplished on this.

Bill Williamson stated he has suggested before that private property owners need to take this into their own hands as far as property rights are concerned. They are going

**SEWARD / BEAR CREEK FLOOD SERVICE AREA
WORK SESSION
SEAVIEW PLAZA BUILDING, SUITE 122**

to need to get together as a group. The SBCFSA will not be allowed to spend board money on attorneys and that is what it is going to take. We can only follow the statues that are put down by the state and the borough.

Tena Morgan said we can still try to change it. We should still approach the state on some language changes just take a different approach. The borough did all the work and then the people they trusted to take it to the legislature for them rewrote it. We could do that ourselves. Tena asked if the state had actually tried to claim any property in Seward.

Bob Reisner explained that the state has come after his property several times. The government does not care about the people. We need a referendum going straight to the governor. Going through the legislature does not work.

Discussion was held regarding imposition of right of way and ownership of streams.

Bob White quoted a communication from Scott Ogan at DNR in which he stated that streams in the Seward area are uncertain. Ordinary high water (OHW) of the streams in the Seward area is uncertain and ambiguous due to the constantly changing alluvial system. How would the state determine the OHW for this system. The OHW mark is based on various factors and can be in different locations on the bank depending on the purposes and criteria used. Boundaries of navigable water bodies are meandered. The entire area of an active alluvial system is generally considered river bed for title purposes. We have almost nothing in Seward that is not an active alluvial stream bed. The state claims they own it. Bob went on to suggest that the board members spend the time between now and the next meeting to try to get more information, write a letter and discuss how that letter will work and submit it at the next meeting.

Bill Williamson called for closing of the work session.

The work session was concluded at 7:40 PM.

Christina Stauffer

Secretary

Work Session Notes Approved: 6 June 2011
Date of Approval