



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

Department of Natural Resources

DIVISION OF MINING, LAND & WATER  
PUBLIC ACCESS ASSERTION & DEFENSE UNIT

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September 1, 2016

Mr. Bud Cribley  
State Director  
Bureau of Land Management  
222 West 7<sup>th</sup> Avenue, #13  
Anchorage, Alaska 99513-7504

Subject: Draft recordable disclaimer of interest application for a portion of the Fortymile River system: including the main stem of the Fortymile River, North Fork of the Fortymile River, and the South Fork of the Fortymile River.

Dear Mr. Cribley:

Pursuant to 43 CFR § 1864, the State of Alaska (State) files this application for a recordable disclaimer of interest (RDI) for the lands underlying the herein-described portions of the Fortymile River system.

I. Description of Waterway

This application is submitted for the submerged lands as follows:

- 1) The Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of the Fortymile River beginning sixty feet upstream of the international border with Canada, upstream to the confluence of the North and South Forks of the Fortymile River within Sec. 10, T. 8 S., R. 30 E., F.M., Alaska.
- 2) South Fork of the Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of South Fork of the Fortymile River beginning at its confluence with the North Fork of the Fortymile River upstream to the confluence of the Mosquito and Dennison Forks of the Fortymile River within Sec. 08, T. 26 N., R. 18 E., C.R.M., Alaska.
- 3) North Fork of the Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of the North Fork of the Fortymile River beginning at its confluence with the South Fork of the Fortymile River upstream “[t]o the dead end slough, which is a remnant of the Kink in Sec. 20, T. 6 S., R 29 E., Fairbanks Meridian”, Alaska.

This application includes the submerged lands and beds of all sloughs, braids and channels that carry water from the navigable river and thus are a part of the navigable river. Maps highlighting the pertinent rivers of the Fortymile River system along with a legal description of the townships and ranges underlying each river are enclosed as Exhibit 1.

## II. Waiver Requests

### A. Survey Requirements

As previously discussed with the Bureau of Land Management (BLM) Alaska State Director, the State requests a waiver under § 1864.1-2(d) of the requirement of 43 CFR § 1864.1-2 (c)(1) for a description based on a public land survey or certified metes and bounds survey. The map and legal description submitted with this RDI application sufficiently identify the land subject to this application, but if not the recordable disclaimer can be worded appropriately to fit the circumstances without requiring a public land survey. The submerged lands for which this RDI is sought are identified by name or, if unnamed, readily identified as the main stem of the Fortymile River, the South Fork of the Fortymile River, and the North Fork of the Fortymile River including any interconnected channels and other portions of the Fortymile River system. Navigable waterways, such as these rivers, are typically ambulatory, thus making a public survey of them problematic and unnecessary. Such a meander line survey would have to cover a large, long stretch of river system including interconnected channels and sloughs, would be very expensive and time-consuming, and then would only be a representation of a moving boundary. The U.S. Department of the Interior has issued RDIs to the State for the beds of navigable rivers in the past without requiring a public land survey of the river system or any part of it, and judgments, decisions, and decrees of the U.S. District Court, Ninth Circuit Court of Appeals, and U.S. Supreme Court finding title in the State to the beds of navigable waters have not required a public land survey.<sup>1</sup>

## III. Basis of the State's Request for a Recordable Disclaimer of Interest

### A. Navigable Waterway

The State's RDI application for the submerged lands of the previously described portions of the Fortymile River system is supported by the Equal Footing Doctrine, the Submerged Lands Act of 1953, the Alaska Statehood Act, the Alaska Right of Way Act of 1898, and other title navigability law. The BLM may disclaim interest in the submerged lands on any or all of those grounds.

Because these rivers were navigable on January 3, 1959, when Alaska became a state, the State of Alaska owns the river beds by virtue of the Equal Footing Doctrine and the Submerged Lands Act. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989), *cert.*

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<sup>1</sup> See, e.g., *Alaska v. United States*, 546 U.S. 413, 415-17 (2006); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989); *Alaska v. United States*, 662 F. Supp. 455 (D. Alaska 1987).

*denied*, 495 U.S. 919 (1990). The constitutional Equal Footing Doctrine “guarantees to newly-admitted States [like Alaska] the same rights enjoyed by the original thirteen States and other previously-admitted States.” *Id.* (citing *Utah v. United States*, 482 U.S. 193, 196 (1987)). “One of these rights is title ownership to the lands underlying navigable rivers.” *Id.* The Submerged Lands Act of 1953 confirmed and extended “title to and ownership of the lands beneath navigable waters within the boundaries of the respective States.” *Id.* (citing 43 U.S.C. § 1311(a)). “Congress explicitly provided for this rule to apply to Alaska when Alaska became a State in 1959.” *Id.* (citing 48 U.S.C. Chapter 2 (“the Statehood Act”) note 6(m) prec. sec. 21 (1982)). The rule includes state ownership of tidelands and the beds of marine waters up to three miles seaward of Alaska’s coastline. *Id.*; 43 U.S.C. §§ 1301(a), 1311(a); *United States v. California*, 436 U.S. 32, 35 n.7, 37 (1978). In addition, in the Alaska Right of Way Act of May 14, 1898, 30 Stat. 409, 43 U.S.C. §§ 942-1 to 942-9, Congress recognized application of the equal footing doctrine to Alaska. It expressly reserved, as a matter of federal law: “the title of any State that may hereafter be erected out of the Territory of Alaska, or any part thereof, to tidelands and beds of any of its navigable waters, . . . it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory.”

#### IV. Reason for the State’s Request for a Recordable Disclaimer of Interest

Title to these lands vested in the State of Alaska at statehood without any particular conveying document. The lack of any title document or judgment creates a cloud on the State’s title. A RDI for this land will help lift the cloud on the State’s title stemming from the lack of any permanent determination of ownership and correct any conflict and uncertainty in the public’s understanding of title and use, without the time, expense and trouble of engaging in quiet title litigation.

#### V. Determining Navigability of Water Bodies under Current Law

The question of navigability for the purpose of state ownership is decided according to federal law. *Ahtna, Inc.*, 891 F.2d at 1404 (citing *Holt State Bank*, 270 U.S. 49, 55-56 (1926)). The Supreme Court expressed the basic test for navigability 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.

*Id.* This test is applied in multiple situations, including when answering questions of title to river or streambeds under the equal footing doctrine. See *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012).

Case law subsequent to *The Daniel Ball*, including *Ahtna, Inc.* and the U.S. Department of the Interior’s decision in *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692, 698 (ANCAB 1979), explained the meaning of that basic test. The physical character of the waterway, and in particular its capacity to be navigated, is an important factor when considering navigability for title. In the Supreme Court’s most recent decision regarding navigability for title, *PPL Montana, LLC v. Montana*, it again emphasized that rivers and streams are not only navigable if they were *used* for commerce, but also if they were *susceptible* of being used as highways of commerce at the time of statehood. 132 S. Ct. at 1233. And, as previously stated by the Ninth Circuit in *Ahtna, Inc.*: “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.’” 891 F.2d at 1404 (quoting *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.

*Utah*, 283 U.S. at 83. Present-day recreational use is relevant to determining whether a river was susceptible to commercial use at the time of statehood if: “(1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river’s post-statehood condition is not materially different from its physical condition at statehood.” *PPL Montana, LLC*, 132 S. Ct. at 1233.

Although lengthy portages, or the need to bypass a river segment, may defeat navigability for title for that particular river segment, *id.* at 1231–32, the presence of rapids, sandbars, and other obstructions, which may make navigation difficult, but not impossible, does not destroy title navigability, see *Utah*, 283 U.S. at 86. In *Utah*, a case addressing navigability for title, the Supreme Court stated “the mere fact of the presence of . . . sandbars causing impediments to navigation does not make a river nonnavigable.” 283 U.S. at 86. Although “the presence of sandbars must be taken in connection with other factors making for navigability,” the “essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce.” *Id.*; see also *Oregon v.*

*Riverfront Protection Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982) (relying on the use of the McKenzie River in Oregon for log drives to determine the river navigable for title and stating that the “use of the river need not be without difficulty, extensive, or long and continuous.”); *Doyon, Ltd.*, 86 Interior Dec. at 697 (“Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both [the Kandik and Nation Rivers], the evidence shows that these impediments do not prevent navigation.”).

Boat use is not the only method for proving a river or stream’s ability to serve as a highway for useful commerce. In *Oregon v. Riverfront Protection Association*, the Ninth Circuit considered evidence of the transporting of logs on the McKenzie River relevant to determining the river’s potential use for commerce. 672 F.2d at 794–96. The court further found that the seasonal and sometimes difficult nature of these log drives did not destroy navigability. *Id.* at 795–96 (holding that “notwithstanding [the] difficulties, thousands of logs and millions of board feet of timber were driven down the river” and this use was not “occasional” as it occurred over a three-month period for over seventeen years).

Applying these standards to Alaska, the courts and U.S. Department of the Interior have found waterways navigable for title based on their susceptibility to use for navigation by river boats, inflatable rafts, or canoes having a capacity for “commercial” loads of about 1000 lbs. of supplies or recreationists. *Ahtna Inc.*, 891 F.2d 1401 (Gulkana River); *Appeal of Doyon*, 86 Interior Dec. 692 (Kandik and Nation Rivers); Feb. 25, 1980 Memorandum from Regional DOI Solicitor John (“Jack”) Allen to BLM Alaska State Director re “Kandik, Nation Decision on Navigability.” See also *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000); August 18, 1983 Recommended Decision by DOI Administrative Law Judge Luoma in *Appeal of Alaska*, Interior Board of Land Appeals No. 82-1133 (recommending that the Matanuska River be determined navigable) & July 19, 1990 Memorandum of BLM Alaska State Director E. Spang (Matanuska River is navigable), BLM Files AA-11153-23, -31; *Appeal of State of Alaska & Collier*, 168 IBLA 334 (2006) (noting navigability standards).

## VI. Evidence of the Navigability of the Fortymile River system.

Documentation and reports by the BLM regarding pre- and post-statehood boat use, susceptibility of use as a highway of commerce, historical routes, and activities in the Fortymile area confirm and establish that the rivers of the Fortymile River system named in this document are navigable from the U.S.–Canadian border upstream to each river’s confluence and upper extent as described above.<sup>2</sup>

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<sup>2</sup> The exclusion of other portions of the Fortymile River system from this application is not an admission that those submerged lands did not pass to the State at statehood, but merely recognizes that they are not part of this application.

A. Federal Navigability Determinations Demonstrating Navigability, including Use and Susceptibility to Use in Commerce

The BLM has evaluated the portions of the Fortymile River system that are the subject of this application. The BLM determined the full extent of both the main stem and South Fork of the Fortymile River, and the North Fork of the Fortymile River upstream to The Kink (S. 20, T. 6 S., R. 29 E., F.M.) are navigable-for-title. In this determination, dated June 29, 1983 (Exhibit 2, enclosed), the BLM stated the main stem and South Fork served as a highway of commerce until the 1930s and that post-statehood recreational and mining use further substantiated the rivers' status as navigable-for-title. Regarding the North Fork of the Fortymile River, BLM found that the river was used by miners during the early 20<sup>th</sup> century to haul 3,000 to 8,000 pounds of goods and materials upstream and that prospectors and trappers have boated to The Kink indicating the North Fork's susceptibility to use as a highway of commerce.

In making this determination, the BLM used criteria found in the "Garner Memorandum", the regional solicitor's comments on ANCAB's Kandik-Nation decision<sup>3</sup>, and Instruction Memorandum No. AK-81-78, Change 1, all of which are on file with the BLM Alaska Region in Anchorage. The BLM also states in the June 29, 1983 navigability decision that "most of the data which lead to these conclusions are in the Upper Yukon regional report,<sup>4</sup> the Fortymile navigability report prepared by John Cook, and the 'Supplemental Use Information for the Fortymile Navigability Report' dated April 15, 1983".

VII. Other Known Interested Parties

The State knows of no other claims on the subject submerged lands. There are no known adverse claimants or occupants on the subject submerged lands. The United States does not dispute the State's title to the subject submerged lands.

VIII. \$100.00 Application Fee

The State will submit the \$100.00 application fee with its final application.

IX. Conclusion

The BLM has determined there is sufficient evidence to conclude the water bodies of the Fortymile River system, as described in section I of this application, are navigable waterways. Therefore, the submerged lands and beds underlying these water bodies are

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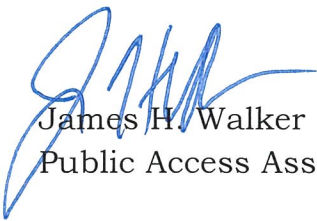
<sup>3</sup> This memo from the regional solicitor is often referred to as the "Allen Memo".

<sup>4</sup> Ducker, James H. 1983. Alaska's Upper Yukon Region: A History. USDI Bureau of Land Management, Anchorage, AK.

owned by the State of Alaska and should be disclaimed by the BLM on behalf of the federal government.

The State agency responsible for this application is the Alaska Department of Natural Resources, Division of Mining, Land and Water, 550 W. 7<sup>th</sup> Avenue, Suite 1070, Anchorage, Alaska 99501, Attention: James H. Walker (907) 269-4755. Please start the application process for this river and forward the estimate of cost of administration.

Sincerely Yours,



James H. Walker  
Public Access Assertion and Defense Unit

Enclosures:            Exhibit 1: Map and Legal Description  
                              Exhibit 2: June 29, 1983 BLM Navigability Determination

cc:     Mr. Sam Cotten, Commissioner, Alaska Department of Fish and Game

## Fortymile RDI Application: Legal Description

The main stem Fortymile River, the South Fork of the Fortymile River and the North Fork of the Fortymile River to the Kink in Section 20, T., 6 S., R29 E., Fairbanks Meridian within the State of Alaska, more particularly described as follows:

### Fortymile River:

All Submerged Lands below the ordinary high water line of the main stem of the Fortymile River beginning sixty feet upstream of the international border with Canada, upstream to the confluence of the North and South Forks of the Fortymile River within Sections. 2, 3, 10 and 11, T. 8 S., R. 30 E., F.M., Alaska as determined from Alaska USGS 1:63 360 series topographic maps Eagle A-2 (1956), Eagle B-1 (1956), Eagle B-2 (1956):

### MTRS

F007S034E16	F008S033E04	F007S031E23
F007S034E09	F008S033E05	F007S031E22
F007S034E17	F007S033E32	F007S031E21
F007S034E21	F007S033E31	F007S031E20
F007S034E20	F007S033E30	F007S031E19
F007S034E29	F007S032E25	F007S031E30
F007S034E19	F007S032E26	F007S030E25
F007S034E30	F007S032E24	F007S030E36
F007S034E31	F007S032E23	F007S030E26
F007S033E36	F007S032E22	F007S030E35
F008S033E01	F007S032E21	F008S030E02
F008S033E02	F007S032E16	F008S030E11
F007S033E35	F007S032E17	F008S030E03
F008S033E03	F007S032E18	F008S030E10
F007S033E34	F007S032E19	
F007S033E33	F007S031E24	

The precise location may be within other sections and townships due to the ambulatory nature of water bodies.

### North Fork of the Fortymile River:

All submerged lands between the ordinary high water lines of the left and right banks of the North Fork of the Fortymile River beginning at its confluence with the South Fork of the Fortymile River upstream “[t]o the dead end slough, which is a remnant of the Kink in Sec. 20, T. 6 S., R 29 E., Fairbanks Meridian, Alaska as determined from Alaska USGS 1:63 360 series topographic maps Eagle A-2 (1956), Eagle B-2 (1956), Eagle B-3 (1956):



MTRS

F008S030E11	F007S029E36	F007S029E03
F008S030E02	F007S029E25	F007S029E04
F008S030E10	F007S029E26	F006S029E33
F008S030E03	F007S029E27	F006S029E28
F008S030E04	F007S029E22	F006S029E29
F008S030E05	F007S029E23	F006S029E21
F007S030E33	F007S029E15	F006S029E20
F007S030E32	F007S029E16	
F007S030E31	F007S029E10	

The precise location may be within other sections and townships due to the ambulatory nature of water bodies.

South Fork of the Fortymile River:

All submerged lands between the ordinary high water lines of the left and right banks of the South Fork of the Fortymile River beginning at its confluence with the North Fork of the Fortymile River upstream to the confluence of the Mosquito and Dennison Forks of the Fortymile River within Sec. 08, T. 26 N., R. 18 E., C.R.M., Alaska as determined from Alaska USGS 1:63 360 series topographic map Eagle A-2 (1956):

MTRS

F008S030E11	C028N018E36	C027N019E30
F008S030E10	C028N019E31	C027N019E31
F008S030E15	C027N018E01	C026N019E06
F008S030E16	C027N018E12	C026N019E07
F008S030E21	C027N018E24	C026N018E12
F008S030E22	C027N018E25	C026N018E11
F008S030E23	C027N018E36	C026N018E02
F008S030E26	C027N019E06	C026N018E03
F008S030E34	C027N019E07	C026N018E04
F008S030E35	C027N019E18	C026N018E09
	C027N019E19	C026N018E08

The precise location may be within other sections and townships due to the ambulatory nature of water bodies.