



THE STATE
of **ALASKA**

GOVERNOR MICHAEL J. DUNLEAVY

Department of Natural Resources

DIVISION OF MINING, LAND & WATER
Public Access Assertion & Defense Unit

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February 20, 2019

Mr. Ted Murphy
Acting State Director
Bureau of Land Management
222 West 7th Avenue, #13
Anchorage, Alaska 99513-7504

Subject: Draft/Final recordable disclaimer of interest application for portions of the West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River.

Dear Mr. Murphy:

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 West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River.

I. Description of Waterway

This application is submitted for the submerged lands as follows:

- 1) The West Fork of the Dennison Fork: All submerged lands between the ordinary high water lines of the left and right banks of the West Fork of the Dennison Fork of the Fortymile River beginning in the E $\frac{1}{2}$ of Sec. 16, T. 24 N., R. 16 E., C.R.M., downstream to the confluence with the Dennison Fork of the Fortymile River within Sec. 34, T. 25 N., R. 17 E., C.R.M., Alaska.
- 2) The Dennison Fork of the Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of the Dennison Fork of the Fortymile River beginning at the confluence with the West Fork of the Dennison Fork within Sec. 34, T. 25 N., R. 17 E., C.R.M., Alaska, downstream 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.

This application includes the submerged lands and beds of all anabranches, braids and channels that carry water from the navigable river and thus are a part of the navigable river. Maps highlighting the river segments described above 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; however, if the map and legal description are not sufficient, 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 and known as the West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River. Navigable waterways, such as these rivers, are typically ambulatory, thus making a public survey of them problematic and unnecessary. 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.¹

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 West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River 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

¹ 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).

Footage Doctrine and the Submerged Lands Act. *Alaska v. Ahna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990). The constitutional Equal Footage 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. *Ahna, 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 poststatehood 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 West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River.

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

The West Fork of the Dennison Fork (West Fork) and the Dennison Fork of the Fortymile River (Dennison Fork) were initially included in a basin-wide review of the Fortymile River system completed by the BLM in 1983². The 1983 report, entitled “Navigability Determination for the Fortymile River Basin” specifically discussed the Fortymile River along with the North, South, and Mosquito Forks of the Fortymile. The West Fork and Dennison Fork were not named explicitly in the 1983 BLM report; however, they were included under “all other water bodies within the Fortymile drainage”. At that time, the BLM considered the West Fork and Dennison Fork to be non-navigable due to a lack of historical information on use and the physical characteristics of the water bodies.

The BLM reevaluated the West Fork and Dennison Fork in the summer of 2018. The 2018 evaluation included float trips on the West Fork and Dennison Fork during which BLM staff measured discharge and certain physical attributes of the rivers including channel width and depth. The BLM also examined historical hydrological data that were collected at the Taylor Highway bridge over the West Fork³. The results of these field trips were summarized by the BLM in a report entitled “Reconsideration of the Navigability Report Dated June 29, 1983, Regarding the West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River in the Upper Yukon Region, Alaska” (Exhibit 2, enclosed).

As part of the 2018 reevaluation, the BLM examined current use of the West Fork and Dennison Fork, evidence of historical use, and whether the rivers had the capacity to support travel by boats commonly in use in Alaska at the time of statehood. Current uses documented by the BLM included recreational use of motor boats, canoes, and inflatable rafts. The BLM also noted that poling boats of various sizes were used historically in the Fortymile Region to transport people and supplies to mining camps along the rivers. In their 2018 report, the BLM concluded that such traffic could have occurred on the West Fork and Dennison Fork based on the river’s current physical characteristics.

The 2018 BLM report concludes that the portions of the West Fork and Dennison Fork that are covered by this application are navigable under federal law because “... they were physically susceptible to travel, trade, and commerce at the time of statehood using customary, regionally available watercraft.”.

² Deputy State Director for Conveyance Management (960) to Acting Assistant Deputy State Director for Conveyance Management (960), "Navigability Determination for the Fortymile River Basin," June 29, 1983. On file at Alaska BLM, Anchorage, Alaska.

³ Frost, Jack. October 04, 1983. Reconsideration of the Navigability Report Dated June 29, 1983, Regarding the West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River in the Upper Yukon Region, Alaska. BLM Rpt 2651 (LLAK9410).

In making this determination, the BLM used criteria based on federal case law including: *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012); *Alaska v. Ahna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990) [Gulkana River]; and *Alaska v. United States*, 754 F.2d 851 (9th Cir. 1983), cert. denied, 474 U.S. 968 (1985) [Slopbucket Lake]. The BLM also relied upon the Alaska Native Claims Appeals Board decision on the Kandik and Nation Rivers, *Appeal of Doyon, Ltd.*, Alaska Native Claims Appeal Board RLS 76-2, 86 I.D. 692 (1979); federal statutes including the Submerged Lands Acts of 1953 and 1988, and advice from the Department of the Interior's Office of the Regional Solicitor.

The BLM determination that the West Fork and Dennison Fork are navigable-in-fact is a determination that the United States does not claim an interest in the land underlying those waters where the United States has not reserved those lands before statehood.

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. US Survey 3613 is meandered from the West Fork Dennison Fork Fortymile River. The owner of US Survey 3613 is notified of this application. The United States does not dispute the State's title to the subject submerged lands.

VIII. \$100.00 Application Fee

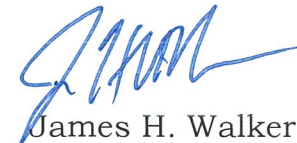
The State will submit the \$100.00 application fee with its final application.

IX. Conclusion

The BLM has determined there is sufficient evidence to conclude the West Fork of the Dennison Fork and the Dennison Fork of the Fortymile River, as described in section I of this application, are navigable waterways. Therefore, the submerged lands and beds underlying these water bodies are 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. 7th 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,



James H. Walker
Natural Resource Manager II

Enclosures: Exhibit 1: Maps and Legal Description
 Exhibit 2: October 4, 2018 BLM Navigability
 Determination on the West Fork of the Dennison and
 The Dennison Fork of the Fortymile River

cc: Doug Vincent-Lang, Commissioner, Alaska Department of Fish and Game
 Bronk Jorgensen, property owner, USS 3613