



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
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www.blm.gov/alaska

In Reply Refer To:
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DECISION

State of Alaska	:	AA-93210
Department of Natural Resources	:	Recordable Disclaimer of Interest
Division of Mining, Land & Water	:	Application
Public Access Assertion & Defense Unit	:	
550 West Seventh Avenue, Suite 1420	:	Kanektok River including
Anchorage, Alaska 99501-3579	:	Pegati and Kagati lakes

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On Feb. 28, 2012, the State of Alaska (State) filed an application with the Bureau of Land Management (BLM) for a recordable disclaimer of interest (RDI) under the provisions of Section 315 of the Federal Land Policy Management Act of October 21, 1976 (FLPMA), 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864, for certain lands underlying the Kanektok River including Pegati and Kagati lakes, located in Southwestern Alaska. The State's application included the submerged lands and bed up to and including the ordinary high water line of Pegati and Kagati lakes within townships 3-4 south, range 63 west, Seward Meridian, Alaska and for the submerged lands and bed of the Kanektok River lying between the ordinary high water marks of the right and left banks of that river from the outlet of Pegati Lake within township 3 south, range 63 west, Seward Meridian, Alaska, downstream to the location where the river enters the Kuskokwim Bay in township 5 south, range 74 west, Seward Meridian, Alaska.

The State contends the above-described water bodies were navigable at the time of statehood and therefore, title to these submerged lands vested in the State upon the date of statehood of Alaska, January 3, 1959. The State based its application for the RDI on the grounds that title passed by operation of law from the United States to the State on the date of statehood pursuant to the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, Section 6(m) of the Alaska Statehood Act of 1959, the Submerged Lands Act of 1988 (P.L. 100-395), or any other legally cognizable reason.

The Submerged Lands Act of 1953, 43 U.S.C. § 1311(a), granted and confirmed to the states title to the lands beneath inland navigable waters within the boundaries of the respective states. It also gave the states the right and power to manage, and administer these lands in accordance with state law. Section 6 (m) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, made the Submerged Lands Act of 1953, 67 Stat. 29, applicable to Alaska.¹

Section 315(a) of FLPMA, 43 U.S.C. § 1745(a), authorizes the Secretary of the Interior to issue a document of disclaimer of interest in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and to determine whether a record interest of the United States in lands has terminated by operation of law or is otherwise invalid. This authority has been delegated to the BLM State Director.²

BACKGROUND

In support of its application, the State submitted the “Kanektok River System Final Interim Summary Report” dated Oct. 7, 2010 and supporting documentation. This supporting information included the BLM easement and conveyance documents, navigability memoranda, and an excerpt of the BLM’s 1985 Kuskokwim River Regional report, as well as information from other agencies. On Feb. 1, 2017, Warren Keogh, U.S. Fish and Wildlife Service (FWS), provided the BLM with additional evidence for the Kanektok application by email. Attached to the email was a navigability report that the FWS wrote in 1998. This report provided evidence of motorboat use by villagers from Quinhagak.

Notice of the State’s application was published in the *Federal Register* on February 9, 2018.³ The BLM prepared a draft report, “Summary Report on Federal Interest in Lands Underlying the Kanektok River including Pegati and Kagati lakes.” The report detailed supporting evidence, riparian land status, physical character, and historical uses. Public notice of the State’s application, and the availability of the draft navigability summary report, was published in the *Anchorage Daily News* on March 7, 14 and 21, 2018. Information about this application, including the draft navigability report, was also posted on the BLM-Alaska website.⁴

The BLM sent copies of its draft report to the State of Alaska (Departments of Natural Resources and Fish and Game) on March 23, 2018, and the Qanirtuuq, Inc., and the Calista Corporation on March 28, 2018. The notices invited review and comments, to include the opportunity to present additional information. The comment period ended on May 28, 2018. The BLM did not receive any comments during the published notice period.

¹ 72 Stat. 339, 343.S.

² 209 DM 7; 235 DM 1; BLM Manual MS-1203, App. 1, p.52.

³ 83 FR 5802-5803.

⁴ https://www.blm.gov/sites/blm.gov/files/uploads/LandsRealty_Alaska_RDI_Kanektok-River_Summary-Report_12-13-17.pdf.

ADMINISTRATIVE WAIVER GRANTED

Pursuant to 43 CFR 1864.1-2 (c) (1) and (d), a legal description of the lands for which a waiver is sought must be based on either an official United States public land survey, or a metes and bounds survey tied to the nearest corner of an official public land survey, unless a waiver is granted. On Feb. 28, 2012, the State requested a waiver of this requirement under 43 CFR 1864.1-2(d). The location of the Kanektok River including Pegati and Kagati lakes is clearly depicted on the U.S. Geological Survey quadrangle maps and is not in dispute.⁵ The ordinary high water mark of these water bodies is the legal boundary of the submerged lands. Since the boundaries of these water bodies are ambulatory, the location may change over time. The BLM therefore determines that a survey description of the subject water body is not needed to adjudicate the State's application.⁶ The waiver is hereby granted.

APPLICATION APPROVED

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). There, the U.S. Supreme Court stated: "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."

In assessing the navigability of inland water bodies, the BLM relies upon this test as well as Federal statutes, Federal case law, and the advice of the Department of the Interior's Office of the Solicitor. Relevant Federal statutes include the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988. The Supreme Court's most recent decision on title navigability, *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), summarizes and explains the proper interpretation of *The Daniel Ball* criteria. Additional guidance is provided in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) [Gulkana River]; *Alaska v. United States*, 754 F.2d 851 (9th Cir. 1983), *cert denied*, 474 U.S. 968 (1985) [Slopbucket Lake]; and *Appeal of Doyon, Ltd.*, Alaska Native Claims Appeal Board RLS 76-2, 86 I.D. 692 (1979) [Kandik and Nation Rivers].

In cases concerning pre-statehood reservations, the BLM uses the established criteria set out and applied in Alaska cases including *Alaska v. United States*, 545 U.S. 75 (2005) ("*Glacier Bay*"); *United States v. Alaska*, 521 U.S. 1 (1997) ("*Arctic Coast/Dinkum Sands*"); *Utah Division of Lands v. United States*, 482 U.S. 193 (1987) (Utah Lake); *Alaska v. United States*, No. 98-35310 (9th Cir. 2000) [Kukpowruk River]; *Alaska v. United States*, 102 IBLA 357 (1988) (Katalla River); and *United States v. Alaska*, 423 F.2d 764, 1 ERC 1195, (9th Cir. December 21, 1970) (Tustumena Lake).

The United States affirms it has no interest in the lands described below because the federal interests passed to the State of Alaska at the time of statehood. Approving the State's application for a recordable disclaimer of interest will provide certainty about ownership of the submerged

⁵ Goodnews Bay C-5, C-6, C-7, C-8, D-3, D-4, D-5, D-6, D-7, and D-8, (USGS 1:63, 360 Topographic Maps).

⁶ "Manual of Survey Instructions 2009," U.S. Department of the Interior, Bureau of Land Management, Sections 3-158, 3-160, page 81.

lands underlying the Kanektok River including Pegati and Kagati lakes and remove a cloud on the title.

Based upon the conclusions set forth in the summary report, released on the date of the *Federal Register* Notice, February 9, 2018, the BLM has determined that title to the bed of the Kanektok River including Pegati and Kagati lakes passed to the State of Alaska at statehood. The report concluded that the Kanektok River along its entire length to include Kagati and Pegati lakes was navigable based on a well-documented history of use by boaters and susceptibility for use as a highway for travel, trade and commerce.

Accordingly, based on the foregoing and the documentation contained in the case record, I have determined that the State's application for a recordable disclaimer of interest is legally sufficient within the provisions of Section 315 of FLPMA and the regulations contained in 43 CFR Subpart 1864. The State's application for a recordable disclaimer of interest is hereby approved as follows:

The submerged lands and bed up to and including the ordinary high water line of Pegati and Kagati lakes within townships 3-4 south, range 63 west, Seward Meridian, Alaska, and for the submerged lands and bed of the Kanektok River lying between the ordinary high water marks of the right and left banks of the river from the outlet of Pegati Lake within township 3 south, range 63 west, Seward Meridian, Alaska, downstream to the location where the river enters the Kuskokwim Bay in township 5 south, range 74 west, Seward Meridian, Alaska.

HOW TO APPEAL THIS DECISION

A Federal agency, the State of Alaska, or any party claiming an interest in this decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (either at the above address or the e-mail address set forth on Form 1842-1) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulations contained in 43 CFR 4.21 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below.

Copies of the notice of appeal and petition for a stay, if any, must be submitted to each party named in this decision, the Interior Board of Land Appeals, and to the appropriate Office of the Solicitor (see 43 CFR 4.413 and Form 1842-1) at the same time the original documents are filed with this office.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- (4) Whether the public interest favors granting the stay.


Karen E. Mouritsen
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