



# United States Department of the Interior



BUREAU OF LAND MANAGEMENT  
Alaska State Office  
222 West Seventh Avenue  
Anchorage, Alaska 99513-7504  
<http://www.blm.gov/ak>

In Reply Refer To:  
FF-94672  
1864 (AK927)

March 2, 2012

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

## DECISION

State of Alaska	:	FF-94672
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Daniel S. Sullivan, Commissioner	:	Application
550 West 7 <sup>th</sup> Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3579	:	Scottie Creek

### ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On January 27, 2006, the State of Alaska (State) filed an application for a recordable disclaimer of interest (FF-94672) under the provisions of Section 315 of the Federal Land Policy and 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 Scottie Creek located in the Tanana River Subregion in Interior Alaska.<sup>1</sup> The State made this application based on entitlement under the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988 (P.L. 100-395), or any other legally cognizable reason. As an alternate basis, the State asserts that where it owns the uplands on both sides of Scottie Creek it would have riparian ownership rights to the submerged lands regardless of a determination of navigability.

The State applied for “all submerged lands lying within the bed of Scottie Creek between the ordinary high water lines of the left and right banks, beginning at the west boundary of the 60-foot-wide neutral strip from the United States-Canada International Boundary, presently located in Section 24, Township 10 North, Range 23 East, Copper River Meridian, Alaska, downstream to the confluence with Chisana River in Section 34, Township 11 North, Range 22 East, and

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<sup>1</sup> Michael Menge, Commissioner, Department of Natural Resources, State of Alaska, to Henri Bisson, State Director, BLM-Alaska, January 27, 2006, file FF-94672 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also in this file.

Section 3, Township 10 North, Range 22 East, Copper River Meridian, Alaska.”<sup>2</sup> With the application, the State also submitted a map entitled “Recordable Disclaimer of Interest in Scottie Creek,” showing the location of the applied for water body.

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, July 7, 1958, made the Submerged Lands Act applicable to Alaska.<sup>3</sup> Section 315(a) of FLPMA 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 of title of such lands and where he determines a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

#### ADMINISTRATIVE WAIVER GRANTED

Pursuant to 43 CFR 1864.1-2(c)(1) and (d), unless a waiver is granted, a legal description of the lands for which a disclaimer 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. In its application, the State of Alaska requested a waiver of this requirement under 43 CFR 1864.1-2(d).

It is determined that survey description of the subject water body is not needed to adjudicate the State’s application, and that the waiver is hereby granted. The location of the subject water bodies, is clearly depicted on the U.S. Geological Survey, Nabesna C-1 (1:63,360) Quadrangle map (1955, minor revision 1963), and is not in dispute. The ordinary high water mark of these water bodies is the legal boundary of the submerged lands. Since this is an ambulatory boundary, the location of which may change over time, there is no need for a survey in order to process this application.<sup>4</sup>

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<sup>2</sup> Menge to Bisson, January 27, 2006. The State erroneously described Scottie Creek as flowing through lands withdrawn under PLO 386. See Wyn Menefee to Carolyn Spoon, BLM, April 26, 2006, file FF-94672 (1864), Alaska State Office, BLM records

<sup>3</sup> 72 Stat. 339, 343

<sup>4</sup> “Manual of Surveying Instructions 2009,” U.S. Department of the Interior, Bureau of Land Management, Sections 3-162 to 3-166, pp. 81-82.

## BACKGROUND

In support of its application, the State submitted the following documents: four Bureau of Land Management (BLM) memoranda dated April 15, 1983,<sup>5</sup> June 29, 1994,<sup>6</sup> August 25, 1994,<sup>7</sup> and September 22, 1994;<sup>8</sup> Alaska Department of Natural Resources (DNR) historian's report dated August 1982,<sup>9</sup> that outlined contemporary uses of lakes in the area; and a copy of page 30 in the book by Robert A. McKennan entitled *The Upper Tanana Indians*, that stated that the Natives used a trail from the Upper Tanana River to the Yukon River by way of Scottie Creek and White River for trading trips.

Information about this application, including the draft report, was posted on the BLM-Alaska website. Notice of the State's application was published in the *Federal Register* on August 22, 2007.<sup>10</sup> The BLM prepared a draft report, "Navigability of Scottie Creek in the Tanana River Subregion, Alaska," which described the State's application and supporting evidence, riparian land status, physical character, and historical uses. The BLM sent copies of its draft report to the State of Alaska (Departments of Natural Resources and Fish and Game), Doyon, Ltd., (a regional Native corporation), Northway Natives (a village Native corporation), Northway Traditional Council, Tanana Chiefs Conference, the U.S. Fish and Wildlife (USFWS) and the record owner of Trade and Manufacturing (T&M) sites.<sup>11</sup> Public notice of the State's application, and the availability of the draft navigability report, was also published in the *Anchorage Daily News* and the *Fairbanks Daily News-Miner* on September 6, 13, and 20, 2007.

During the published notice period, the BLM received formal comments from the following: the State of Alaska concurred with the draft findings; the USFWS expressed concerns regarding the State's application and the lack of survey description; a member of the general public voiced concern over the perceived disposal of federal lands to the State of Alaska; and a representative from Doyon, Ltd. requested copies of source materials referenced in the draft report. None of the comments presented factual information or evidence that specifically supported or negated the BLM's draft findings. The BLM considered all comments, and on February 9, 2012, the

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<sup>5</sup> Robert W. Faithful, Acting Assistant to the State Director for Conveyance Management (913) to Acting Chief, Division of ANCSA and State Conveyances (960), subject: "Final Navigability Determination for State Selections in the Upper Chisana and Ladue River Drainage Areas," April 15, 1983, FF-44624 BLM records.

<sup>6</sup> Dot Tideman, subject: "Navigability Report: Scottie Creek, Window 1212; Group Surveys 117 and 242," June 29, 1994

<sup>7</sup> Navigable Water Specialists (924) to File FF-88517 (2620), subject: "Additional Navigable Waters in Survey Window 1212 (Group Surveys 117 and 242) (Report dated June 24, 1994), "August 25, 1994, BLM Records.

<sup>8</sup> Chief, Navigability Section (924) to Chief, Branch of Survey Preparation and Contracts (923), subject: "Additional Navigable Water in Survey Window 1212 (Group Surveys 117 and 242)," September 22, 1994, F-24675 BLM records.

<sup>9</sup> Dale A. Stirling, Historian, and Gary C. Stein, Supervising Historian, subject: "Contemporary Uses of Lakes in the Northway Region of Alaska," August 1982, Division of Research and Development Policy Research and Land Entitlement, State of Alaska, Department of Natural Resources.

<sup>10</sup> 72 FR 47067

<sup>11</sup> Patents 50-76-0176 and 50-76-0177. On January 3, 2008, the BLM notified the Alaska Center for Land Reform, Inc. (ACLR) by certified letter that the State filed an application for an RDI with the BLM. It provided opportunity for the ACLR to comment about BLM's draft report "Navigability of Scottie Creek in the Tanana River Subregion, Alaska," and included the draft report that recommended a finding of navigability. The certified letter was received on January 8, 2008. No reply from the ACLR has been received to date.

BLM issued its final report, entitled, “Federal Interest in Lands underlying Scottie Creek in the Tanana River Subregion, Alaska.”

With the exception of the sixty-foot-wide neutral strip, riparian lands along Scottie Creek were not reserved at the time of statehood. The majority of the creek is located within the Tetlin National Wildlife Refuge, managed by the USFWS. Along Scottie Creek, there are two certificated Native allotments<sup>12</sup> and two patented T&M sites.<sup>13</sup> The riparian lands above the T&M sites have been conveyed to the State of Alaska.<sup>14</sup> The federal test of navigability is found in *The Daniel Ball*, 77, U.S. (10 Wall.) 557 (1870). 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 Interior Department’s Solicitor’s Office. Relevant federal statutes include the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988. In addition, Associate Solicitor Hugh Garner’s memo of March 16, 1976, (“Title to submerged lands for purposes of administering ANCSA”) and Regional Solicitor John Allen’s memo of February 25, 1980 (“Kandik, Nation Decision on Navigability”) provide valuable guidance on applying title navigability law in Alaska. The BLM also considers the application of the navigability test made in Alaska specific to cases such as *Alaska v. Ahtna*, 891 F.2d 1401 (9<sup>th</sup> Cir. 1989).

The Submerged Lands Act of 1988 specifically addressed the issue of upland ownership, in Section 101, amending ANILCA Section 907 (b)(1):

Whenever ... the Secretary conveys land to a Native, a native Corporation or the State of Alaska pursuant to the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or this Act which abuts or surrounds a meanderable lake, river or stream, all right, title, and interest of the United States, if any, in the land under such lake, river, or stream lying between the uplands and the mean line or midpoint, as the case may be, shall vest in and shall not be charged against the acreage entitlement of such Native or Native Corporation or the State.

#### APPLICATION APPROVED

After reviewing the State’s application and supporting materials, comments received, and the associated case file, specifically including the relevant Final Summary Report, dated February 9, 2012 “Federal Interest in Lands Underlying Scottie Creek in the Tanana River Subregion, Alaska” Scottie Creek is determined to be navigable. The Summary Report includes a detailed analysis of the history of use, physical characteristics, previous determinations and land status,

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<sup>12</sup> See files F-13597 (50-97-0345) and FF-93564-A (50-2012-0017), BLM Records.

<sup>13</sup> See files FF-000897 and FF-001025, Trade and Manufacturing Files, BLM Records.

<sup>14</sup> Sharon E. Fleek, Chief, Branch of Northern Adjudication, Decision, December 19, 1994, FF-88517, BLM Records.

and applies the legal guidance on title navigability. The report concluded that the evidence shows Scottie Creek was used as a highway of commerce from its mouth at the Chisana River upstream to its confluence with Desper Creek. Above that, it was susceptible for use as a highway of commerce due to its similarity in physical characteristics. The State received riparian title to the uppermost portion of Scottie Creek within the United States; therefore, title vested in the State regardless of navigability status. Issuance of an RDI for the submerged land in U.S. Survey 5127 is proper because the United States has no interest. The reason the United States has no interest is that the submerged lands either passed to Alaska at the time of statehood or was included in the patents. In either event, the United States has no interest and issuance of the requested RDI for the lands in U.S. Survey 5127 is proper.

Approving the State's application for a recordable disclaimer of interest will remove a cloud on the title by providing certainty about the ownership of submerged lands underlying Scottie Creek, located within the Tanana River Subregion. Without this certainty, ownership between the two sovereigns, the State of Alaska and the United States, is unclear. This lack of clarity of sovereign ownership complicates the application of natural resources law and other laws to the submerged lands involved. Resolving clouds on title between the State of Alaska and the United States is thus of even greater importance resolving than title between a private party and the United States.

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 United States affirms that it has no interest in the lands described below. Therefore, the State's application for a disclaimer of interest is hereby approved, as follows:

The lands underlying Scottie Creek, approximately 20 miles long between the ordinary high water mark on its banks, beginning at the west boundary of the sixty-foot-wide neutral strip at the United States-Canada International Boundary in Section 24, T. 10 N., R. 23 E., Copper River Meridian (CRM), downstream to its junction with the Chisana River within Section 3, T. 10 N., R. 22 E., and Section 34, T. 11 N., R. 22 E., CRM, Alaska.

#### HOW TO APPEAL THIS DECISION

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 (at the above address) within 30 days from receipt of this decision. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed. 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 must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

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 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 the stay.

**/s/Bud C. Cribley**

Bud C. Cribley  
State Director, Alaska

Enclosure

cc (w/o enclosure):

David Schade, Navigability Subunit Manager  
Alaska Department of Natural Resources  
Division of Mining, Land and Water  
550 West 7<sup>th</sup> Avenue, Suite 1420  
Anchorage, Alaska 99501

Mark Fink, Access Defense Program Manager  
Alaska Department of Fish and Game  
333Raspberry Road  
Anchorage, Alaska 99518-1565

Geoffrey Haskett, Regional Director  
U.S. Fish and Wildlife Service  
1011 East Tudor Road  
Anchorage, Alaska 99503-6199

Bret Christensen, Navigable Waters Specialist  
U.S. Fish and Wildlife Service, Region 7  
1011 E. Tudor Road  
Anchorage, Alaska 99503

Ryan Mollnow, Refuge Manager  
U.S. Fish and Wildlife Service  
Tetlin National Wildlife Refuge  
P.O. Box 779, MS 529  
Tok, Alaska 99780

Alaska Center for Land Reform, Inc.  
P.O. Box 91539  
Anchorage, Alaska 99509