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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
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IBLA 2010-136	)	AA-085787
	)	
STATE OF ALASKA	)	Recordable Disclaimer of Interest
	)	Stikine River
	)	

MOTION FOR RECONSIDERATION BY THE BUREAU OF LAND MANAGEMENT

I. INTRODUCTION

Pursuant to 43 C.F.R. § 4.403(b) the Bureau of Land Management (BLM) respectfully moves the Board to reconsider the decision reported as *State of Alaska*, 180 IBLA 243 (Dec. 16, 2010) (the Decision or the Stikine Decision). That Decision set aside BLM's rejection of the application of the State of Alaska (Alaska) for a recordable disclaimer of interest (RDI) for the

lands underlying the Stikine River and its interconnecting sloughs, and remanded the matter to BLM for further action. Extraordinary circumstances exist that warrant reconsideration because the Stikine Decision imposes an unworkable standard that does not acknowledge the purpose of the RDI process, and misconstrues the relevant regulations.

II. LEGAL STANDARD FOR REQUESTING RECONSIDERATION

The regulations at 43 C.F.R. § 4.403(c)-(f) set forth the criteria for requesting reconsideration of an IBLA decision.[1] The regulations state that:

> A motion for reconsideration must: (1) Specifically describe the extraordinary circumstances that warrant reconsideration; and (2) Include all arguments and supporting documents.
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> Extraordinary circumstances that may warrant granting reconsideration include, *but are not limited to*: (1) Error in the Board's interpretation of material facts; (2) Recent judicial development; (3) Change in Departmental policy; or (4) Evidence that was not before the Board at the time the Board's decision was issued and that demonstrates error in the decision.

Id. §§ 4.403(c) and (d) (emphasis added).[2] Requests for reconsideration must be filed within 60 days of the date the decision being challenged was issued. *Id.* § 403(b)(1). In evaluating a motion for reconsideration:

> The Board will not grant a motion for reconsideration that: (1) Merely repeats arguments made in the original appeal, except in cases of demonstrable error; or (2) Seeks relief from the legally binding consequences of a statute or regulation.[3]

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[1] Interior Board of Land Appeals and Other Appeals Procedures, 75 Fed. Reg. 64655, 64664-65 (Oct. 20, 2010) (revisions to the Board reconsideration regulations).

[2] If the request relies on newly discovered evidence, it must "explain why the evidence was not provided to the Board during… the original appeal." *Id.* § 4.403(e). This requirement is inapplicable to the present motion.

[3] Care has been taken in this motion for reconsideration to not merely repeat arguments made in the original appeal but the Stikine Decision never refers to the answer of BLM. Where the Stikine Decision addresses a specific issue from the original appeal, like the sufficiency of the analysis in the BLM decision, those issues are not reasserted in this motion except where necessary to help show demonstrable error.

Id. § 403(f). The Stikine Decision was issued on December 16, 2010, and therefore this request is timely, and, as set forth below, there are extraordinary circumstances that warrant the reconsideration of the Decision.

III. BACKGROUND AND ASPECTS OF THE STIKINE DECISION BEING CHALLENGED

Alaska filed its application for an RDI on the portions of the Stikine River that flow through the Tongass National Forest at issue here on February 17, 2005.[4] Alaska asserted title to the lands underlying the Stikine River under the Equal Footing Doctrine and Submerged Lands Act[5] based on allegations that the stretches of river and interconnecting sloughs at issue were navigable at the time of statehood. Public notice of Alaska's application was published in the Federal Register and in the appropriate newspapers on August 22, 2007 and various dates in September 2007, respectively. Concurrently with its notice of the RDI application, BLM issued a draft navigability report concluding that the Stikine Rive was navigable and that the Presidential Proclamation expanding the Tongass National Forest did not defeat the State's Title. *See generally State of Alaska*, 180 IBLA 245-53. The draft navigability report was never finalized or approved by BLM.

In response, on October 22, 2007, the United States Forest Service (USFS) commented on and objected to the Stikine River RDI application and the conclusion in BLM's draft report that the United States had not intended, in expanding the Tongass National Forest, to defeat Alaska's title to the riverbeds at issue here. Alaska responded to the USFS' objections on May

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[4] For a more detailed discussion of the factual background please see the Stikine Decision.

[5] Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.*; Submerged Lands Act of 1988, 43 U.S.C. § 1631 (1988).

30, 2008 with evidence and arguments that it alleged, among other things, demonstrated that the United States had already explicitly disclaimed all property interests in those riverbeds. The BLM denied Alaska's RDI application on April 2, 2010, based on the criteria set out in Instruction Memorandum (IM) No. AK-2010-012, issued on April 1, 2010. The IM instructed BLM to defer to an objection to an RDI application by another federal land management agency that provides a clear rationale, is not frivolous and has been made in good faith. Under the IM, the objection does not have to be beyond dispute. Alaska filed an appeal of the BLM's denial on May 5, 2010. *Id.*

At issue in Alaska's appeal was the criteria applied to determine the sufficiency of the USFS' objection to Alaska's RDI application. As noted above, the USFS objected to Alaska's RDI application for a number of reasons. Most significantly, the USFS asserted that the portions of the Stikine River above the reach of tidal influence were withdrawn and included as part of the Tongass National Forest before Alaska became a state on January 3, 1959. Therefore, even though the USFS did not dispute the navigability of the Stikine River, the USFS claimed the forest reservation prevented the submerged lands from passing to the State under the Equal Footing Doctrine or the Submerged Lands Act. These claims were found sufficient by BLM, which conclusion was overturned by the Board in the Stikine Decision. *Id.*

The Board rejected the BLM's reliance on the criteria set forth in IM AK-2010-012 to find that the objection of the USFS was valid. The Board held that the deference permitted by the IM was inconsistent with the regulations and that the regulations required the BLM to weigh the competing evidence and legal precedent provided by the USFS and Alaska. The main conclusion in the Stikine Decision is that:

> [A]lthough BLM need not conduct a formal adjudication designed to determine definitively whether the United States unequivocally has title to the lands, it must evaluate and weigh the conflicting evidence and precedent and explain the basis for its determination that, despite the contravening evidence, the agency's objection is sustainable. Since BLM failed to provide any analysis or justification for its conclusion that the Forest Service had provided a valid objection and therefore that the State's application for a... [RDI] had to be rejected, we set aside BLM's decision and remand the matter to BLM for further action.

Id. at 245 and 253-54.

As explained below, the standard for evaluating objections by other federal land management agencies to an RDI application announced by the Board is unworkable as it is inconsistent with the purpose of the RDI process, which is to provide a quick and easy remedy where there is *no claim* of a United States title interest. While holding that BLM does not need to make a formal adjudication or definitive determination of the validity of another federal agency's objection, the application of the Stikine Decision's weighing requirement would result in just that kind of finality, as it effectively requires the BLM to pass final judgment on the United States' claim to title in a given area. The Board's Decision also gave undue reliance to weighing the specific evidence before it, and did not consider the underlying legal arguments raised by the Stikine River RDI application. It also misconstrued the meaning of sustainable as it is used in the regulatory definition of "valid objection" – i.e., "capable of being sustained" – to essentially eliminate the "capable" component of that definition. As explained below, these factors warrant reconsideration of the Stikine Decision.

IV. ARGUMENT: EXTRAORDINARY CIRCUMSTANCES WARRANT RECONSIDERATION OF THE STIKINE DECISION

For the reasons set forth below, BLM respectfully submits that the Stikine Decision presents extraordinary circumstances that require reconsideration. The conclusion reached by

the Board was not anticipated, and therefore could not have been briefed in the prior pleadings by the parties.[6]

A. THE BOARD'S "WEIGHING THE EVIDENCE" STANDARD FOR EVALUATING OBJECTIONS BY OTHER LAND MANAGEMENT AGENCIES IS UNWORKABLE AND DOES NOT PROPERLY ACCOUNT FOR THE PURPOSES OF THE RDI PROCESS

Section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretary, "after consulting with any affected Federal agency,... to issue a document of disclaimer of interest or interests in any lands... where the disclaimer will help remove a cloud on the title of such lands." 43 U.S.C. § 1745(a). The issuance of RDIs is not mandatory. The RDI process, as outlined in the statutes and the regulations, is meant to make it quicker and "easier for BLM to clear up clouded titles when the United States has no interest in the lands in dispute." *See* Conveyances, Disclaimers and Correction Documents, 68 Fed. Reg. 494, 498 (Jan. 6, 2003). As the Board correctly noted in the Stikine Decision, "[RDIs] are appropriate only where the United States *does not claim* title to the land, [and that] [i]n cases where the United States *does claim title*, challenges to that title *can only be brought* pursuant to the Quiet Title Act [(QTA)]." *State of Alaska*, 180 IBLA at 254, n. 5 (emphasis added).[7] Consistent with this purpose, 43 C.F.R. § 1864.1-4 makes it clear that "BLM will not issue a...

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[6] There are other findings in the Stikine Decision that BLM views as erroneous which are not included as extraordinary circumstances in this motion for reconsideration. These include the statement that the purpose of BLM-Alaska IM No. AK-2010-12 was to implement the letter of June 28, 2004 from an Assistant Secretary to Senator Lieberman and the apparent approval of the state's arguments that the Decree in *Alaska v. United States*, 546 U.S. 413, 415-16 (2006), should be extended to include inland submerged lands in the Tongass National Forest. *State of Alaska*, 180 IBLA at 256-57. BLM-Alaska IM No. AK-2010-12 was intended to be consistent with the Assistant Secretary's letter but was not intended to implement that letter. Nothing in the IM or the BLM Answer in this case suggests the IM was intended to implement the Assistant Secretary's letter. Similarly, the disclaimer of interest approved by the Decree in *Alaska v. United States* is limited to marine waters and, as a type of quit claim deed, must be construed narrowly and not broadly to include other submerged lands.

[7] *See also* 43 C.F.R. §1864.0-2(a) (the stated regulatory objective for an RDI "is to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest.").

[RDI] over the valid objection of another land managing agency having jurisdiction over the affected lands."

In recognition of this purpose, the Stikine Decision correctly observes that BLM does not need to determine whether the United States has title to the lands in dispute in response to an objection by another land managing agency. *State of Alaska*, 180 IBLA at 253. However, the standard set forth by the Board for evaluating objections by another agency is at odds with its recognition that "BLM need not conduct a full adjudication and conclusively determine…title," *id.* at 253, because it requires BLM to "weigh the conflicting evidence and precedent and explain the basis for its determination that, despite the contravening evidence, the agency's objection is sustainable [(i.e., valid)]." *Id.* Thus, in finding that BLM was too lenient in deferring to another agency's objection, the Stikine Decision goes too far the other way.

Practically, the standard articulated by the Board, contrary to its assertion in the decision, effectively requires BLM to make the ultimate title determination. For example, what does BLM do after it considers the USFS' objections in light of all of the arguments offered against them by Alaska? Suppose, BLM determines that, in its opinion, the USFS' objection is overcome by the arguments of the RDI applicant, would it still be able to exercise its statutory and regulatory discretion with respect to the ultimate issuance of the RDI? Or, does its assessment of the objection mean that the only thing BLM could do is to find the USFS objection insufficient and approve the RDI application? Approval of the RDI application would constitute the final adjudication and determination of the title question because issuance of an RDI ends federal jurisdiction over the land, regardless of whether a RDI is viewed strictly in the statutory light of having the same effect as a quit claim deed or in the regulatory framework as estopping the U.S.

from challenging title in the future, under either framework the matter is over. Such an outcome would preclude any chance the objecting federal land managing agency has to continue asserting United States title, as that agency cannot bring an action in federal court under the Quiet Title Act.

Such an outcome is also directly at odds with the purpose of the RDI process, which, as the Board observed, is to resolve clouded title "where the United States *does not claim* title to the land." *Id.* at 254 n. 5 (emphasis added). This is plainly not the case here where the USFS has clearly articulated a claim to the title of the lands in question. This situation illustrates one of the major reasons why the RDI process must stop short of a final decision if another land managing agency asserts a valid claim to the lands covered by an RDI application. To require a detailed weighing of the evidence and arguments, as the Board has done here, short-circuits that purpose.

B. The Board's Interpretation Of The Applicable Regulations Misconstrues The Definition Of Key Terms, So As To Require That There Be Absolute Certainty That An Objection Is Valid

The primary basis for the Board's decision in the Stikine case is its conclusion that IM AK-2010-012 does not properly construe the term "valid objection." *Id.* at 255-56. Under the regulations a "valid objection" is one that "presents a sustainable rationale that the objecting agency claims United States title to the lands at issue." 43 C.F.R. § 1864.1-4. As the Board observed, the regulations do not define sustainable, and therefore to aid in its interpretation of the regulations it relied on the common dictionary definition of the term, which is "capable of being

sustained." *Id.* at 256.[8] However, in applying that definition to the regulations, the Board appears to ignore, or at least greatly de-emphasis, the term "capable." The Board's basis for rejecting IM AK-2010-012's direction that BLM defer to any agency objection that provides a clear rationale, is not frivolous and has been made in good faith is that the regulations require a more stringent analysis of whether an objection presents a "sustainable rationale." However, the "weighing the evidence" standard adopted by the Board ignores the fact that a sustainable rationale is only one that it is capable of being sustained, it is not one that has to be sustained under all circumstances. Such a view is consistent with the preamble adopting the regulatory provisions at issue here, which explains that BLM meant to accept the suggestion (by the USFS) that "objections" by other land managing agencies should be sufficient to prevent issuance of an RDI, and that BLM intended to adopt the view that a valid objection had to be capable of being sustained but did not have to be adjudicated and found valid on the merits under 43 C.F.R. § 1864.1-4.[9]

To be capable of being sustained all an objection has to do is raise legal issues that could be sustained by a court as part of an action under the QTA, 28 U.S.C. § 2409(a). The USFS objections are not frivolous, were made in good faith, and are not at odds with any prior court decisions. Therefore, it is possible the USFS would prevail in an action under the QTA with respect to the land at issue here. Yet, by requiring BLM to weigh the conflicting evidence and decide whether an objection can be sustained in the BLM's view, the Board has effectively

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[8] The Board also adopted the dictionary definitions of sustain, which it defined as "to support as true, legal or just," "to allow or admit as valid," or "to support by adequate proof: establish, corroborate, confirm." *State of Alaska*, 180 IBLA 256.

[9] *See* 68 Fed. Reg. at 501 ("As a result of comments BLM added provisions to today's rule stating that if a surface management agency has a valid objection to an application, BLM will reject the application.").

required BLM to adjudicate every objection on the merits, making 43 C.F.R. § 1864.1-4 largely meaningless and foreclosing any other remedy that might be available to another land managing agency, even though a court might reach a different decision on the evidence presented by the agency in a QTA action.

As noted above, if BLM were to apply the Board's standard it might conclude that the USFS' evidence is outweighed by Alaska's evidence and the only thing left to do would be to grant the RDI. After the issuance of the RDI, the United States would be forever precluded from raising its title claims as part of a quiet title action, even though a court might ultimately be persuaded by the evidence and arguments it offered. By going beyond what is required by the regulations, the Board's standard is unworkable. The criteria set forth in IM AK-2010-012 articulated a more limited review of objections, consistent with the underlying purpose of the RDI process, by deferring to non-frivolous, good faith objections.

A good hypothetical illustration of the potential consequences of the test set forth in the Stikine Decision is provided by Glacier Bay. As the Board's decision indicates, Glacier Bay was subject to litigation under the QTA that resulted in the Supreme Court ultimately concluding that beds underneath the bay did not pass to Alaska at the time of statehood. The Supreme Court found that the evidence presented by the United States demonstrated that the lands at issue had been reserved prior to statehood, in spite of countervailing evidence offered by the State. *Alaska v. United States*, 545 U.S. 75 (2007).[10] Suppose instead of a QTA action that Alaska had filed an RDI application for the submerged lands in Glacier Bay. Presumably, the National Park Service

[10] At the time Alaska brought its original suit with respect to Glacier Bay, it was far from certain that the United States' claims would be upheld in light of the Supreme Court's holdings in *Utah Division of State Lands v. United States*,482 U.S. 193 (1987).

(NPS) would have objected and both it and Alaska would have presented evidence to BLM that was later reviewed by the Supreme Court. Under the standard set forth in the Stikine Decision, BLM would have had to weigh that countervailing evidence, and BLM might have decided Alaska's evidence and arguments outweighed the objections of the NPS.

If BLM had then issued an RDI decision approving the application that was not appealed or was affirmed by the Board, NPS would not have been able to assert further United States claims of title to the submerged beds of Glacier Bay, even though we know that a court (in that case the Supreme Court) ultimately found that those beds did not pass to Alaska at the time of statehood. Had an RDI issued, the matter would have never had an opportunity to reach the Supreme Court for review. The strict holding of the Stikine Decision potentially forces just such an outcome here, even though a court could find, based on the evidence offered by the parties that the Tongass National Forest withdrawals included inland submerged lands in such a way as to reserve them to the United States and prevent passage of those lands to Alaska at statehood. These hypotheticals illustrate the reason behind the general rule that: "[RDIs] are appropriate *only where* the United States *does not claim* title to the land," which is not the case here. *See, e.g., State of Alaska*, 180 IBLA at 254, n. 5.

V. CONCLUSION

For the reasons set forth above, the Stikine Decision should be reconsidered. Without reconsideration, the BLM will be left in the untenable position of having to implement a standard that goes beyond the requirements of the regulations and does not align with the overarching purpose of the RDI process or the discretion afforded to the BLM with respect to RDIs. Specifically, the BLM cannot do all of the weighing required by the Board's decision, without

doing something with that weighing. If BLM rejects or approves the RDI application based on the results of deciding the arguments for and against an agency's objection, it has made the final determination of the claim of United States title that cannot be challenged by the objecting agency in a subsequent proceeding (a remedy that is always available to Alaska under the QTA). The RDI process is not intended to provide a final adjudication of title disputes; it is simply a mechanism to clear a clouded title when the United States does not claim an interest. *See State of Alaska*, 180 IBLA at 254 n. 5. The predicament created by the Stikine decision is untenable, because the BLM cannot do all of the analysis required by the decision while respecting the statutory and regulatory purpose of a RDI. Therefore, the criteria for determining whether an objection is valid cannot be as stringent as those set out in the Stikine Decision. The validity of a particular objection should be evaluated under criteria that allow for quick and easy decision making.

Therefore, this motion for reconsideration is respectfully submitted this 14th day of February, 2011.

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Certificate of Service

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