

United States Department of the Interior



BUREAU OF LAND MANAGEMENT
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Department of Natural Resources
Division of Mining, Land & Water

OCT 10 2018

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Director's Office
Anchorage

DECISION

State of Alaska	:	AA-94268
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	:	
Anchorage, Alaska 99501-3579	:	Taku River

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On Mar. 4, 2017, 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 and Management Act of Oct. 21, 1976 (FLPMA), 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864, for certain lands underlying the Taku River, located in Southeastern Alaska. The State's application included the submerged lands between the ordinary high water lines of the left and right banks of the Taku River beginning at the 60-foot boundary reserve within sections 10, 11 and 14, township 38 south, range 71 east, Copper River Meridian, Alaska, to the extent of tidal influence, regardless of location. The application included 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.

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, Jan. 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, the Alaska Statehood Act of 1959, the Alaska Right of Way Act of 1898, and other title navigability law.

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 following documents dated May 13, 1974, from the BLM to the Arctic Slope Regional Corporation about navigable water bodies in Alaska; a navigability recommendation dated Feb. 29, 1980; the “Summary Report on the Tulsequah Chief Massive Sulphide Property,” dated Jan. 6, 1989; an article published on July 3, 1997 in the “B.C. Environmental Information Institute,” the Redfern Resources Ltd. “Taku River Barge Activity Report 2007;” and pictures of barges on the Taku River online from <http://www.takuriver.com/REDFERNBARGE.htm>.

Notice of the State’s application was published in the *Federal Register* on June 20, 2018.³ The BLM prepared a draft report, “Summary Report on Federal Interest in Lands underlying the Taku River in Alaska.” The report detailed supporting evidence, riparian land status, physical character, and historical uses. Public notice of the State’s application including the availability of the draft navigability summary report, was published in the *Anchorage Daily News* on August 1, 8, and 13, 2018, and the *Juneau Empire* on August 1, 8, and 13, 2018. Information about this application, including the draft summary 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), the Sealaska Corporation, and Goldbelt, Inc. on June 20, 2018, and the U.S. Forest Service on June 28, 2018. The notices invited review and comments, and offered the opportunity to present additional information. The comment period ended on Sept. 20, 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 Volume, 83, No. 119, FR 28657-28658.

⁴ https://www.blm.gov/sites/blm.gov/files/uploads/LandsandRealty_Alaska_TakuRiver-DraftSummaryReport_06-15-2018.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. In the State's application dated Mar. 14, 2017, the State requested a waiver of this requirement under 43 CFR 1864.1-2(d). The location of the Taku River 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. Dec. 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

⁵ Taku River B-6, C-5, C-6, and Juneau B-1 (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.

for a recordable disclaimer of interest will provide certainty about ownership of the submerged lands underlying the Taku River 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, June 20, 2018, the BLM has determined that title to the bed of the Taku River passed to the State of Alaska at statehood. Although the Taku River is located within the exterior boundaries of the Tongass National Forest in the area withdrawn by Presidential Proclamation No. 846 in 1909, this withdrawal did not defeat the State's title to the bed of the Taku River. When compiling the report, the BLM found that the Taku River was used extensively for trade and travel before and after Alaska's statehood by barges, tugboats, commercial fishing vessels, and recreational boaters.

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 between the ordinary high water mark of the left and right banks of the Taku River, beginning at the 60-foot boundary reserve within sections 10, 11 and 14, township 38 south, range 71 east, Copper River Meridian, Alaska, to the extent of tidal influence, regardless of location.

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 4.400 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.

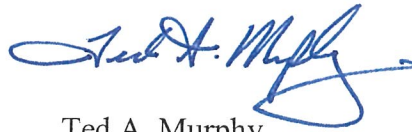
If you wish to file a petition pursuant to regulations contained in 43 CFR 4.21 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient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



Ted A. Murphy
Acting State Director

Enclosures

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