



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>

APR 18 2012

In Reply Refer To:
AA-086375
1864 (AK927)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	AA-086375
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Daniel S. Sullivan, Commissioner	:	Application
550 West Seventh Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3579	:	Whitefish Lake and Outlet

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On March 10, 2006, the State of Alaska (State) filed with the Bureau of Land Management (BLM) an application for a recordable disclaimer of interest (AA-086375) 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 the lands underlying Whitefish Lake (approximately 19,926 acres) and Outlet, located in the Lower Kuskokwim River Subregion in Southwest Alaska.¹ The State made this application based upon 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 where it owns the uplands on all sides of the water body it would have riparian ownership rights to the submerged lands if the waterbody was not navigable.

The State applied for “submerged lands encompassed by the ordinary high water line of Whitefish Lake within the following townships and ranges in the Seward Meridian: Township 14 North, Range 60 West; Township 15 North, Ranges 59-60 West.” The State also included in its application, the submerged lands within the bed of Whitefish Lake Outlet, located within

¹ See Michael L. Menge, Commissioner, Alaska Department of Natural Resources, to Henri Bisson, BLM-Alaska State Director, March 10, 2006, file AA-086375 (1864), Alaska State Office, BLM records.

Townships 15 North, Ranges 60 and 61 West and Township 16 North, Range 61 West, Seward Meridian (SM), Alaska.²

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.³ 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.

BACKGROUND

In support of its application, the State submitted previous BLM memoranda regarding the navigability, information extracted from the BLM's regional report entitled, "Alaska's Kuskokwim River Region: A History" (1985), its physical characteristics, and historic uses of Whitefish Lake and its Outlet. On July 29, 2011, Notice of the State's application was published in the *Federal Register*.⁴ The BLM summarized the information, and prepared the draft navigability report, "Navigability of Whitefish Lake and Outlet in the Lower Kuskokwim Subregion, Alaska" which included an overview of land status, physical characteristics, previous navigability determinations, and evidence of commerce. Notice of the application and the availability of the draft navigability report was published in the *Anchorage Daily News* (September 8, 15, and 22, 2011). Information about this application, including the draft navigability report, was also posted on the BLM-Alaska website.

The BLM sent copies of the draft navigability report to: State of Alaska (Departments of Natural Resources and Fish and Game); U.S. Fish and Wildlife Service (USFWS);⁵ Calista Corporation; The Kuskokwim Corporation; Tulkisarmute, Incorporated; Chuathbaluk Traditional Council; and the City of Chuathbaluk. The notices invited review and comments and afforded each recipient an opportunity to provide additional information. The comment period ended on October 31, 2011. During the published notice period, the BLM received concurrence with the draft findings from the USFWS and the Alaska Department of Natural Resources.⁶ The BLM then finalized the report on April 4, 2012.

² The State amended its application to extend the Whitefish Lake Outlet to its confluence with the Kuskokwim River in T. 16 N., R. 61 W., SM, Alaska. See Thomas E. Irwin, Commissioner, Alaska Department of Natural Resources, to Thomas P. Lonnie, BLM-Alaska State Director, February 11, 2010, file AA-086375 (1864).

³ 72 Stat. 339, 343

⁴ 76 FR 45605-45606

⁵ Copies were sent to the Regional Director (Alaska Region – Region 7), Yukon Delta National Wildlife Refuge Manager, and the Regional Navigable Waters Specialist.

⁶ See USFWS-Region 7 Regional Director to BLM-Alaska State Director, August 25, 2011; See Navigability Subunit Manager, Public Access and Assertion Defense Unit, State of Alaska to Branch Chief, Survey Planning and Preparation, Division of Cadastral Survey, BLM-Alaska, November 10, 2011, file AA-086375.

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).

The lake and its outlet are easily identifiable on the Russian Mission (B-3, B-4) 1952, United States Geologic Survey topographic maps (1:63,360), as well as National Aeronautical and Space Administration (NASA) color infra-red (1:60,000) photos flown in 1980.⁷ Whitefish Lake and its Outlet have been meandered and segregated from the uplands, as shown on the BLM Survey Plats.⁸ Therefore, a survey description of the subject water body is not needed to adjudicate the State's application and 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). 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. The Supreme Court's most recent decision on title navigability, *PPL Montana, LLC v. Montana*, 565 U.S. ___ (2012), summarizes and explains the proper interpretation of *The Daniel Ball* criteria. 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. In cases concerning prestatehood reservations, BLM uses the established criteria set out and applied by the Supreme Court in two Alaska cases, *Alaska v. United States*, 545 U.S. 75 (2005) ("*Glacier Bay*") and *United States v. Alaska*, 521 U.S. 1 (1997) ("*Arctic Coast*" / "*Dinkum Sands*").

The BLM has consistently held that Whitefish Lake and Outlet are navigable. After reviewing the State's application, land status, historical record and legal guidance on title navigability, the BLM issued a final navigability report, "Federal Interests in Lands Underlying Whitefish Lake and Outlet in the Kuskokwim Bay Subregion, Alaska" (April 4, 2012), affirming its previous determinations. Whitefish Lake and its Outlet provided an integral route of access to mining and

⁷ Roll 2911, Frames 6381, 6382, and 6383.

⁸ See Survey Plats T. 14 N., R. 60 W., SM (August 15, 1997); T. 15 N., R. 59 W., SM (August 15, 1997); T. 15 N., R. 60 W., SM (August 15, 1997); T. 15 N., R. 61 W., SM (May 28, 1980); and T. 16 N., R. 61 W., SM (May 28, 1980 and August 2, 2004).

commercial fishing operations. The report concluded that the waterbodies were used, or were susceptible for use, as a highway of commerce at the time of statehood.

The United States affirms it has no interest in the lands described below because title transferred to the State of Alaska on the date of statehood (January 3, 1959). 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 the Whitefish Lake and its Outlet. 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 greatly complicates the application of natural resource laws and other laws to the submerged lands involved.

Accordingly, based on the foregoing and the documentation contained in the case record, particularly the final navigability report, "Federal Interests in Lands Underlying Whitefish Lake and Outlet in the Kuskokwim Bay Subregion, Alaska" (April 4, 2012), 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 recordable disclaimer of interest is hereby approved, as follows:

1. The lands underlying Whitefish Lake, approximately 19,926 acres, between the ordinary high water line, within T. 14 N., R. 60 W., and Tps. 15 N., Rs. 59 and 60 W., Seward Meridian (SM), Alaska; and
2. The lands underlying the Whitefish Lake Outlet, between the ordinary high water marks on its banks, from its outlet at Whitefish Lake in Section 3, T. 15 N., R. 60 W., downstream approximately sixteen (16) miles to its confluence with the Kuskokwim River in Section 16, T. 16 N., R. 61 W., SM, 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.



Bud C. Cribley
State Director, Alaska

Enclosure

cc (w/o enclosure):

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