STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF MINING, LAND AND WATER

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Callie Webber, Realty Specialist
Bureau of Land Management, RDI Program
222 W 7th Avenue, #13
Anchorage, Alaska 99513-7599

Re: Application for Recordable Disclaimer of Interest – Stikine River

Dear ~~Ms. Webber~~ Callie:

You have requested justification from the State regarding the State's position that the bed of the Stikine River passed to the State of Alaska at statehood. It is undisputed that the Stikine River is navigable. In short, under the equal footing doctrine and the Submerged Lands Act, there is a strong presumption that tidelands and navigable inland waters pass to a state upon statehood as a matter of constitutional and statutory right. The applicable statutory authority and the various withdrawals that created the Tongass National Forest do not rebut that presumption.

The courts will not infer intent to defeat a future state's title to the beds of navigable waters unless the intention was "definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). To overcome the presumption of state ownership, the United States carries two burdens. First, it must show that Congress clearly intended to include the particular submerged lands in the reservation. Second, the United States must also establish that Congress affirmatively intended, because of exceptional circumstances, to defeat the State's title to the submerged lands. *Utah Division of State Lands v. United States*, 482 U.S. 193, 202 (1987).

The Tongass National Forest was created pursuant to two acts of Congress. The first, enacted in 1891, granted general authority to create forest reserves:

> [T]he President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the *public lands wholly or in part covered with timber or undergrowth*, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. [Creative Act of Mar. 3, 1891, § 24, 26 Stat. 1103 (codified as amended at 16 U.S.C. § 471 (repealed 1976)) (emphasis added).]

Over the next 6 years, Presidents Harrison and Cleveland created tens of millions of acres of forest reserves, leading Congress to pass the Organic Act in 1897 to constrain the operation of the 1891 Act. The new statute provided that "public lands" reserved as national forests would be created and administered *only* for the limited purposes of conserving water flows and providing for a continuous timber supply:

> No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States .... [Organic Administration Act of June 4, 1897, 30 Stat. 35 (codified at 16 U.S.C. §§ 473, et seq. (1976)).]

The Supreme Court has interpreted this Act to significantly limit the purposes for which forests could be reserved. In *United States v. New Mexico*, 438 U.S. 696 (1978), a case addressing the water rights reserved by the United States in connection with the establishment of a national forest, the Court concluded that "a close examination of the language of [the Act]...reveals that Congress only intended national forests to be established for two purposes." *Id.* at 707 n. 14. Forests might be "created only ... 'for the purpose of securing favorable water flows, and to furnish a continuous supply of timber.'" *Id.* Neither of these purposes require a reservation of submerged lands.

In addition, these acts provided for the creation of national forests only from "public lands," a term of art well understood by Congress and the courts. It refers only to lands subject to sale or other disposition under the general land laws, which did not include lands under navigable waters held in trust for future states. *See Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894). The statutes under which the Tongass was reserved did not contemplate the reservation of submerged lands.

Even if lands underlying inland navigable waters could be included in a forest reserve, the withdrawals creating the Tongass National Forest indicate neither a Congressional intention to include those submerged lands nor an intention to defeat the future state's title. Numerous proclamations and orders established, expanded and reduced the land included in the forest. Beginning in 1902, Proclamation 37 "set[] apart and reserve[d]" the "public lands" described as certain islands for the Alexander Archipelago Forest Reserve. Another presidential proclamation dated September 10, 1907, reserved "public lands" that were "in part covered with timber," identified as "the tracts of land...shown as the Tongass National Forest on the [accompanying] diagram...." These tracts of land were "reserved from settlement, entry, or sale...." Executive Order 908, dated July 2, 1908, consolidated the Alexander Archipelago Forest Reserve and the Tongass National Forest under the name Tongass National Forest.

On February 16, 1909, Proclamation 846, citing the 1897 Organic Act, greatly enlarged the Tongass, again adding forested "public land" to include most of Southeast Alaska in the forest. The forest boundaries enclosed the mainland of Southeast Alaska and the Alexander Archipelago but included only the "public land lying within [the

given] boundaries." The proclamation excluded lands around numerous named communities in Southeast, including Wrangell, and contains no language indicating an intent to withdraw submerged land. The last major expansion of the Tongass, in 1925, added lands primarily in the northwest portion of the forest, excluded certain other lands, and has no language on which to base a claim that submerged lands were included.

In the many proclamations, withdrawals, additions, deletions and transfers affecting the Tongass National Forest, we have found no language supporting an intent to reserve submerged lands in general or the bed of the Stikine River in particular. As the Supreme Court has found "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Montana v. United States*, 450 U.S. 544, 554 (1981). This presumption that submerged lands are held in trust for the future state applies with equal or greater force to withdrawals and reservations.

In a case involving the Katalla River in the Chugach National Forest, established under the same statutes and through similar proclamations and withdrawals, the Interior Board of Land Appeals held that establishment of the national forest prior to statehood did not defeat Alaska's title to the bed of the Katalla River upon statehood. The Board stated:

> None of the establishing documents refers even remotely to lands under navigable waters or manifests a congressional intent regarding disposition of riverbed lands. There is no clear and especial language to indicate that Congress intended to defeat the State's title to the Katalla riverbed lands. [FN 3]
>
> FN 3/ The 1897 Act authorizes the establishment of public forest reservations "for the purpose of securing favorable conditions of water flows." 30 Stat. at 35. However, the Supreme Court noted in *Utah* that "'Congress has never undertaken by general laws to dispose of' land under navigable waters." 107 S.Ct. at 2324. [482 U.S. 203.]

State of Alaska, 102 IBLA 357, 361 (1988). The Board concluded:

> In accordance with *Utah, supra*, we hold that the submerged lands beneath the Katalla River had passed to the State of Alaska pursuant to the Statehood Act and were therefore unavailable for conveyance by BLM.
> See *Cook Inlet Region, Inc. (On Reconsideration)*, 100 IBLA 50 (1987).

In a January 6, 1994, order affirming that decision, the IBLA emphasized "we find that in section 6(m) of the Alaska Statehood Act, 72 Stat. 340 [applying the Submerged Lands Act of 1953 to Alaska], Congress expressed an intention for vacant and unappropriated national forest lands to be available for conveyance to the State." In *State of Alaska*, 150 IBLA 112, 126 (1999), IBLA reiterated that "[t]he Board's decision in the Katalla River appeal constitutes the Department's position on the effect of the Chugach National Forest proclamation."

Those authorities are controlling. The Tongass National Forest cannot be distinguished. Neither the applicable statutes, the purposes of the reservations, or the specific language in the reservations for the Tongass National Forest demonstrate an intent to include submerged lands underlying navigable waters. The United States cannot satisfy even the first part of the *Utah Lake* test and there is no indication anywhere of a Congressional intent to defeat the State's title.

We again request that BLM issue a recordable disclaimer of interest for the bed of the Stikine River.

Sincerely,

Dick Mylius
Director
Division of Mining, Land and Water

cc:

Tom Lonnie, BLM Alaska State Director
Tom Irwin, Commissioner, Department of Natural Resources
Elizabeth Barry, Chief Assistant Attorney General, State of Alaska
Tina Cunning, Special Assistant to the Commissioner, Dept. of Fish & Game
Scott Ogan, Natural Resource Manager, DNR, Public Access, Assertion & Defense