



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
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In Reply Refer to:
1864 (AK9410)

August 17, 2016

Memorandum

To: File FF-094614

From: Jack Frost, Navigable Waters Specialist (AK9410) /s/ J. Frost

Subject: Summary Report for the Navigability of the Nabesna River within the Tanana River Region

The State of Alaska (State) filed an application, dated October 3, 2005, for a recordable disclaimer of interest (RDI) for lands underlying the Nabesna River “between the ordinary high water lines of the left and right banks from its origins at the Nabesna Glacier within Township (T.) 5 North (N.), Ranges (Rs.)13 and 14 East (E.), Copper River Meridian (CRM), Alaska, downstream to its confluence with the Tanana River in Township 15 North, Range 19 East, CRM.”¹ The State identified the location of its application on two maps entitled “Nabesna River Recordable Disclaimer of Interest Application,” dated October 3, 2005. The maps were submitted with the State’s application.

The State filed an amended RDI application for the Nabesna River, dated September 16, 2015, “to include only the submerged lands underlying the Nabesna River from its mouth to the Black Hills (Sec. 25, T11N, R17E, CRM). The State withdraws its request for an RDI on the submerged lands underlying the Nabesna River from Sec. 25, T11N, R17E, CRM and the river’s source at the Nabesna Glacier.”² Clarifying their letter from September 16, 2015, the State submitted an email on October 16, 2015 stating that “the State withdraws its request for an RDI on the submerged lands underlying the Nabesna River from its confluence with the Cheslina River in Section 35, T. 12N., R. 17E., CRM upstream to the river’s source at the Nabesna Glacier.”³

The State’s application for a disclaimer of interest is based on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, and any other legally cognizable reason. The Bureau of Land Management (BLM) may

¹ Tom Irwin to Henri Bisson, BLM, October 3, 2005, file FF-094614 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in this file.

² James Walker to Angela Nichols, BLM, September 16, 2015, file FF-094614 (1864), Alaska State Office, BLM records. The reference document is also available in this file.

³ Kevin L. Sorensen to Jack Frost, BLM, October 16, 2015, file FF-094614 (1864), Alaska State Office, BLM records. The reference document is also available in this file.

disclaim interest in the submerged lands on any of the grounds that apply. Consideration is also given to whether or not the State's application for lands underlying the subject water bodies meets the regulatory requirements (43 CFR Subpart 1864).

In support of its application, the State submitted the following documents: three BLM memos addressing the Nabesna River's navigability dated October 16, 1975, March 16, 1979, and March 28, 1980; an April 1975 Grumman Ecosystems Corporation report; two Alaska Department of Natural Resources (DNR) historical reports dated May 1979 and March 2, 1979; a 2004 National Park Service commercial transporter's activity report; a 1979 Arctic Environmental Information and Data Center report; and five DNR "Waterbody Use and Observation Questionnaire" documents detailing recreational use on the Nabesna River.⁴ The State summarized two other sources of information in support of its application: an article in the *Fairbanks Daily Times* dated September 9, 1913, which reported miners poling a boat up the Nabesna River, and a reference to Sepp Weber's book, The Wild Rivers of Alaska, of a 1969 float trip down the Nabesna River from the Nabesna Road to its mouth.

The Nabesna River heads at the Nabesna Glacier terminus, in T. 5 N., R. 14 E., CRM, and flows northerly 85.4 miles, joining the Chisana River to form the Tanana River, in T. 15 N., R. 19 E., CRM, northwest of Northway Junction.⁵ None of the riparian lands was reserved at the time of statehood.

Except for those lands within T. 13 N., R. 18 E., CRM, which are still in federal ownership, the riparian lands along the Nabesna River from its mouth upstream to the south boundary of T. 13 N., R. 17 E., CRM, have been conveyed out of federal ownership. The remaining riparian lands are located in either the Tetlin National Wildlife Refuge or the Wrangell-St. Elias National Park and Preserve, both established under the Alaska National Interest Conservation Act (ANILCA) (P.L. 96-487) on December 2, 1980. The State does not have any riparian land along the Nabesna River.

Most riparian lands in private ownership were conveyed by Interim Conveyance (IC) Nos. 364, 365, 714, 964, 965, 1227, 1228, 1377, 1378, and 2405 through 2410 to Northway Natives, Inc. a village corporation, and Doyon, Ltd., a regional corporation, created under the Alaska Native Claims Settlement Act (ANCSA). There are also six certificated Native allotments, conveyed under the Native Allotment Act.

On August 5, 1981, the Alaska Native Claims Appeal Board (ANCAB) issued its decision, 6 ANCAB 1, in the appeal filed by Northway Natives, Inc. of a BLM decision of June 26, 1978 (F-14912). The State of Alaska and Doyon, Ltd. were also appellants. The ANCAB decision was final for the Department (43 CFR 4.1 (b) (5) (1980)). The ANCAB adopted the BLM Review and Basis for Navigability Determinations, filed March 28, 1980, regarding the Nabesna River, finding that, *inter alia*, the Nabesna River was navigable throughout the contested conveyance area (the Northway selection area) and that the Nabesna River bed be excluded from the interim conveyance to the Native corporations. The parties had stipulated to the accuracy of the determination.

⁴ *Ibid.*

⁵ River miles were obtained from STORET USGS quadrangle maps located in the BLM State Office, Cadastral Survey, Navigability Section, Anchorage, Alaska.

In addition, the State and Doyon, Ltd. appealed the BLM decisions of June 23, 1978 and June 26, 1978 (F-19155-20) which held, *inter alia*, that the Nabesna River was non-navigable above Nabesna Village. BLM filed with ANCAB the same Review and Basis for Navigability Determinations of March 28, 1980 referred to above. ANCAB held that the Nabesna River is navigable through the selection area. 6 ANCAB 138 (1981).

The Review and Basis for Navigability Determinations found that the Nabesna River was navigable as far as the Black Hills and non-navigable above that point. This determination was the basis for IC No. 714 issued pursuant to the decision of August 4, 1983 to Doyon, Ltd. This decision was not appealed. The Submerged Lands Act of 1988, 102 Stat. 979, which amended section 901 of the Alaska National Interest Lands Act (ANILCA), provides that “[t]he execution of an interim conveyance or patent, as appropriate, by the Bureau of Land Management which conveys an area of land, selected by a Native or Native Corporation which includes, surrounds, or abuts a lake, river, or stream, *or any portion thereof, shall be the final agency action* with respect to a decision of the Secretary of the Interior *that such lake, river, or stream, is or is not navigable.*” 43 U.S.C. § 1631 (c) (1) [emphasis added].

The BLM Review and Basis for Navigability Determinations of March 28, 1980 on page 3 found that the “Nabesna River as far as the Black Hills affords a route of water travel.” The Nabesna River flows through the Black Hills from approximately river mile 25 to 30. The confluence of the Cheslina River with the Nabesna River is at river mile 25.1. Therefore, we have determined that the confluence with the Cheslina River is the appropriate location of the head of navigation on the Nabesna River.

Conclusions and Recommendations

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. 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*”).

Since the adoption of the Review and Basis for Navigability Determinations by the ANCAB in 1981, as described above, BLM determinations have been consistent with that report. Therefore, the following is recommended:

The Nabesna River from its mouth to the confluence with the Cheslina River (river miles 0-25.1) is navigable; therefore, the State's application for recordable disclaimer of interest for the submerged lands should be granted. The navigability was decided previously with finality for the Department. 6 ANCAB 1 and 43 U.S.C. § 1631(c) (1).

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