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United States Department of the Interior



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In Reply Refer to:
1864 (AK9410)

Memorandum

To: File FF-094615

From: Jack Frost, Navigable Waters Specialist (AK9410)

Subject: Summary Report for the Chisana River and a portion of Mark Creek (Unnamed Channel) in the Tanana River Region, Alaska

The State of Alaska (State) filed an application, dated October 3, 2005, for a recordable disclaimer of interest (RDI) for lands underlying the Chisana River “between the ordinary high water lines of the left and right banks from its origin at the Chisana Glacier within Township 3 North, Range 17 East, Copper River Meridian, Alaska, downstream to its confluence with the Tanana River in T. 15 N., R. 19 E., CRM.”¹ This application also specifically includes an unnamed channel that interconnects the Chisana River and Mark Creek, located in Township (T.) 14 North (N.), Ranges (Rs.) 19 and 20 East (E.), Copper River Meridian (CRM) (herein referred to as “unnamed channel”). The State identified its application on four maps entitled “Chisana 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 Chisana River, dated September 16, 2015, “to include only the submerged lands underlying the Chisana River from its mouth to Scottie Creek. The State withdraws its request for an RDI on the submerged lands underlying that portion of Chisana River from Scottie Creek to its origin at Chisana Glacier.”² On October 8, 2015 the State clarified its amendment of September 16, 2015, to “...please remove Mark Creek and the unnamed connecting channel from the application.”³ The BLM received further clarification regarding the State’s application on November 19, 2015 in which the State indicated

¹ Tom Irwin to Henri Bisson, BLM, October 3, 2005, file FF-094615 (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-094615 (1864), BLM records. The reference document is also available in this file.

³ See Email correspondence, dated October 8, 2015, James Walker to Jack Frost, file FF-094615 (1864), BLM records. The reference document is also available in this file.

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that it intended to include the “unnamed channel that interconnects the Chisana River and Mark Creek” in its amended application.⁴

The State bases its application for a disclaimer of interest on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, or any other legally cognizable reason. The Bureau of Land Management (BLM) may 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 relating to recordable disclaimers of interest in 43 CFR Subpart 1864, including whether or not another land managing agency with jurisdiction over the affected lands submits a valid objection.

In support of its application, the State submitted the following documents: four BLM memos addressing the Chisana’s navigability dated October 16, 1975, March 22, 1979, March 28, 1980, and April 15, 1983; an April 1975 Grumman Ecosystems Corporation report; two Alaska Department of Natural Resources (DNR) historical reports dated May 1979 and March 2, 1979; extracts from United States Geological Survey (USGS) Bulletin no. 630; and five DNR “Waterbody Use and Observation Questionnaire” detailing recreational use on the Chisana River.⁵ In support of its application, the State also provided an article from the *Fairbanks Daily Times* dated May 19, 1914, which stated that the steamer “Mabel” left Johnson City (or Chisana City). This article suggests that steamers ascended the Chisana River as far as Johnson City, located approximately 112 miles upriver. However, the article also stated that “the Mabel wintered on the Chisana River, about sixty miles from its mouth.”

The National Park Service, Alaska Region, provided additional evidence regarding this event.⁶ In an article from the *Fairbanks Daily News-Miner*, also dated May 19, 1914, stated that “the Mabel came down the 400 miles of water that lies between here [Fairbanks] and head of navigation at Gasoline City [near Scottie Creek] without any accidents leaving May 5th.”

The Chisana River heads at the Chisana Glacier terminus, in T. 3 N., R. 18 E., CRM, and flows northerly 116 miles, joining the Nabesna River to form the Tanana River, in T. 15 N., R. 19 E., CRM, northwest of Northway Junction.⁷ None of the riparian lands were reserved at the time of statehood.

The riparian lands along the Chisana River from its mouth upstream to the south boundary of T. 12 N., R. 21 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.

⁴ See Email correspondence, dated November 19, 2015, James Walker to Jack Frost, file FF-094615 (1864), BLM records. The reference document is also available in this file.

⁵ *Ibid.*

⁶ See Email Correspondence, dated February 9, 2006, from Logan Hovis and Geoff Bleakly, Historians, National Park Service, Alaska Region, to Jack Frost, Navigable Waters Specialist, BLM, file FF-094615 (1864), BLM records. The reference document is also available in this file.

⁷ River miles were obtained from STORET USGS quadrangle maps located in the BLM State Office, Cadastral Survey, Navigability Section, Anchorage, Alaska.

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Most riparian lands in private ownership were conveyed by Interim Conveyance (IC) Nos. 364, 365, 664 (50-2013-0133), 665 (50-2013-0134), 964, 965, 2405, 2406 to Northway Natives, Inc., a village corporation, and Doyon, Limited, a regional corporation, under the Alaska Native Claims Settlement Act (ANCSA). There are eleven Native allotments, nine of which are certificated, that have been conveyed pursuant to the Native Allotment Act of 1906. The BLM conveyed to the State, through tentative approval, the remaining riparian lands, from approximately river mile 18 through 36.

On January 5, 1976, the BLM issued a memorandum entitled, “Navigability determinations on Northway selection areas and Doyon selection areas.”⁸ In this memorandum, the BLM

concludes that the Chisana River is navigable to its confluence with Scottie Creek and that a section of Mark Creek is navigable. This includes the “unnamed channel” the State refers to in its application.

The BLM’s determination was incorporated into a decision, dated June 26, 1978, to convey lands under ANCSA to Northway Natives, Inc., and Doyon, Ltd.⁹ Although this decision was appealed to the Alaska Native Claims Appeal Board (ANCAB), the navigability determination for the Chisana River was not in question.¹⁰ 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]. This means that the BLM now has no authority to change that navigability determination.

On March 22, 1979, the BLM issued a memorandum entitled, “Navigable and Non-Navigable Water Bodies in the Northway Area, Eastern Alaska.” The navigability report was prepared in support of ANCSA conveyances, in response to the State of Alaska, Water Body Delineation Maps submitted to the BLM (April 13, 1973). The memorandum confirmed the previous determination that the Chisana River is navigable from its mouth up to Scottie Creek and non-navigable from Scottie Creek upstream to its head.¹¹

In response to the Northway Natives, Inc., appeal of the June 26, 1978 decision, ANCAB ordered BLM to prepare a Review and Basis for Navigability Determinations, which was completed and filed on March 28, 1980. The memorandum, entitled “Navigable and Non-

⁸ Patrick C. Beckley, Realty Specialist to files F-14912 and F-19155, “Navigability determinations on Northway selection areas and Doyon selection areas,” BLM records. The reference document is also available in this file.

⁹ Sue A. Wolf, Chief, Selections and Leasable Minerals Section to Northway Natives Inc, Doyon, Limited, and State of Alaska, “Decision,” June 26, 1978, files F-030188, F-14912-A,B,EE, BLM records. The reference document is also available in this file.

¹⁰ The memorandum also stated that Mark Creek is navigable where it runs “silty water.” This segment of Mark Creek includes the “unnamed channel” which connects to the Chisana River.

¹¹ Chief, Division of Resources to State Director, March 22, 1979, file F-14912A and B, Village selection files, BLM records.

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navigable Waters in the Northway Area, Eastern Alaska,” merely stated that the “Chisana River was determined navigable on March 22, 1979” as BLM’s determination of navigability was not under appeal.

On August 5, 1981, the 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). Appellants also included the State of Alaska and Doyon, Limited. In its decision, the ANCAB adopted the BLM Review and Basis for Navigability Determinations, filed March 28, 1980, regarding the Chisana River, finding that, *inter alia*, the Chisana River and Mark Creek (including the “unnamed channel”) is navigable. The parties had stipulated to the accuracy of the determination.¹²

The determination that the Chisana River is navigable to Scottie Creek was used to support these conveyances on May 19, 1983 for T. 12 N., R., 20 E., CRM,¹³ May 17, 1984 for sections 31-36 in T. 13 N., R., 20 E., CRM,¹⁴ and on October 8, 1985 for T. 12 N., R., 21 E., CRM.¹⁵

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*”).

BLM has consistently held that the Chisana River is navigable to Scottie Creek, and non-navigable above that point. These determinations were used as the basis for conveyance actions under ANCSA and the Alaska Statehood Act, and were not appealed. Therefore, the following is recommended:

¹² ANCAB, Northway Natives, Inc., Appeal from the Decision of the Alaska State Director, Bureau of Land Management F-14912-A and F-14912-B, ANCAB VLS 78-57 (6 ANCAB 1-16), August 5, 1981: Copy is located in file FF-94615, BLM records.

¹³ Chief, Branch of State Adjudication to State of Alaska DNR, May 19, 1983, file F-28671, State selection file, BLM records.

¹⁴ Chief, Branch of State Adjudication to State of Alaska DNR, May 17, 1984, file F-28020, State selection file, BLM records.

¹⁵ Chief, Branch of State Adjudication to State of Alaska DNR, October 8, 1985, file F-28675, State selection file, BLM records.

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1. Applying the aforementioned standards, we conclude that the Chisana River from its mouth to the confluence with Scottie Creek (river mile 53.50) is navigable. Therefore, we recommend that the BLM grant the State's application for a recordable disclaimer of interest for the submerged lands. The navigability was decided previously with finality for the Department, which means that BLM now has no authority to change it. 43 U.S.C. § 1631(c)(1).
2. Similarly, we conclude that the "unnamed channel" that interconnects the Chisana River and Mark Creek, located in T. 14 N., Rs. 19 and 20 E., CRM, is navigable. Therefore, we recommend that the BLM include the unnamed channel in the recordable disclaimer of interest.

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