



# United States Department of the Interior



BUREAU OF LAND MANAGEMENT  
Alaska State Office  
222 West Seventh Avenue, #13  
Anchorage, Alaska 99513-7504  
<http://www.blm.gov>

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In Reply Refer To:  
FF-094615  
1864 (LLAK9420)

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## DECISION

State of Alaska	:	FF-094615
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	:	Chisana River, and a portion of Mark
Anchorage, Alaska 99501-3579	:	Creek (Unnamed Channel)

### ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On October 3, 2005, the State of Alaska (State) filed with the Bureau of Land Management (BLM) an application for a recordable disclaimer of interest (FF-094615) under the provisions of Section 315 of the Federal Land Policy 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 the Chisana River located within the Tanana River Region, Alaska located in southeastern interior Alaska.<sup>1</sup> The State's application included the submerged lands "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 (CRM), Alaska, downstream to its confluence with the Tanana River in T. 15 N., R. 19 E., CRM". 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 the Chisana River from Scottie Creek to its origin at Chisana Glacier."<sup>2</sup> 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."<sup>3</sup> The State clarified again on

<sup>1</sup>Tom Irwin, Commissioner, Alaska-Department of Natural Resources, to Henri Bisson, BLM-Alaska State Director, October 3, 2005, file FF-094615 (1864), Alaska State Office, BLM records.

<sup>2</sup>James Walker to Angela Nichols, BLM, September 16, 2015, file FF-094615 (1864), BLM records.

<sup>3</sup>Email correspondence, dated October 8, 2015, James Walker to Jack Frost, file FF-094615 (1864), BLM records.

November 19, 2015 that the State intended to include the “unnamed channel that interconnects the Chisana River and Mark Creek” in its amended application.<sup>4</sup>

The State contends that Chisana River is navigable, and the application for a disclaimer of interest is 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.

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.<sup>5</sup> Section 315(a) of FLPMA authorizes the Secretary of the Interior to issue a document of disclaimer of interest(s) in any lands in any form suitable for recordation where the disclaimer will help remove a cloud on the 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 BLM memos addressing the Chisana’s navigability; an April 1975 Grumman Ecosystems Corporation report; State of Alaska Department of Natural Resource (DNR) historical reports; extracts from United States Geological Survey (USGS) Bulletin 630; and waterbody use and observation questionnaire’s detailing use on the Chisana River. In support of the 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 Mable wintered on the Chisana River, about sixty miles from its mouth.”

On May 17, 2006, Notice of the State’s application was published in the *Federal Register*.<sup>6</sup> The BLM prepared a draft navigability report, “Summary Report for the Chisana River and a portion of Mark Creek (Unnamed Channel) in the Tanana River Region,” describing the State’s application and supporting evidence, riparian land status, physical character and historical uses.

On July 24, 2006, the State of Alaska requested the BLM suspend all further processing on the Chisana River RDI application for at least one month. On August 23, 2013, the State of Alaska requested the Chisana River application be moved from suspended status to active status. The State stated it would provide the BLM with a supplemental revised application for these water bodies as soon as additional information could be compiled. On September 16, 2015, the State of Alaska modified its application for the Chisana River.

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<sup>4</sup> Email correspondence, dated November 19, 2015, James Walker to Jack Frost, file FF-094615 (1864), BLM records.

<sup>5</sup> 72 Stat. 339, 343

<sup>6</sup> 71 FR 28705-28706

Notice of the State's application and the availability of the draft navigability report were published in the *Alaska Dispatch News* (March 23, 30 and April 6, 2016). Information about this application, including the draft navigability report, was also posted on the BLM-Alaska website.

The BLM sent copies of its draft navigability report to the following: State of Alaska (Departments of Natural Resources and Fish and Game); the United States Fish and Wildlife Service (USFWS); United States National Park Service (NPS); Doyon, Limited; Ahtna, Inc., Northway Village Council (NVC); Northway Natives, Inc; Tanana Chiefs Conference; and National Park Conservation Association (NPCA). The notices invited review and comments and afforded each recipient an opportunity to provide additional information. The comment period ended on May 30, 2016. During the published notice period the NPS provided additional evidence regarding this event.

During the published notice period, the BLM received several comments from affected Alaska Native entities in the area. No other comments were received. On March 2, 2016, the Northway Natives, Inc. submitted a response on behalf of its 212 shareholders and its hundreds of descendants. They requested a "government to government" consultation to discuss this matter and the process and protections to the waterway and adjacent privately owned Alaska Native lands. On March 3, 2016 the Tanana Chiefs Conference commented by correcting the number of allotments affected by the recordable disclaimer, and said that legal precedence suggests that the recordable disclaimer process should not advance until all Alaska Native allotment claims are brought to completion. They also had concerns on management issues relating to subsistence resources and other potential user conflicts, and how the State of Alaska would work with the Northway community over the management of the Chisana River. On March 8, 2016 the Northway Village Council (NVC) commented again on behalf of their tribal members and community members. The comments were about the rich history of the Chisana, and the overuse issues that have occurred in the area. They requested information from the BLM. On April 14, 2016, the Northway Village Council commented stating it is opposed to the issuance of an RDI for the unnamed channel, that interconnects the Chisana and Mark Creek, located in T. 14 N., Rs. 19 and 20 E., CRM, being called navigable and asked that it be revoked in the recordable disclaimer of interest. These comments did not provide evidence disputing the navigability of the Chisana River at the time of statehood, and therefore were not addressed in the final report.

In response to the comments and the request that the BLM consult with the affected Alaska Native entities, the BLM did so on April 12, 2016 in Northway, Alaska. At this consultation, Lorraine Titus, a member of the NVC, explained various factors influencing the Chisana River application and the part of the application they opposed. The BLM also met on April 13, 2016 with Nichol Rallo, NVC council member. Ms. Rallo provided the BLM with a file (named the "Mark Creek" file) which contained evidence of dynamiting the Chisana River in the 1960's in the same location as the "Unnamed Channel" that the State applied for, letters, documents, and maps to and from various State agencies, the U.S. Fish and Wildlife Service, and state legislators about Northway's situation regarding the Chisana River. The BLM copied the file and mailed it back to Ms. Rallo. Although the file included good historical information about the Chisana River and the unnamed creek, there was nothing in the file to suggest that at the time of statehood the Chisana River was not navigable. Therefore, this information did not influence the conclusions set forth in the BLM's final report.

On July 7, 2016, following the consultation, the Northway Natives, Inc. sent a letter to BLM stating that it intends to appeal the RDI decision if the “unnamed channel” is included in the application. Northway contends that the BLM’s navigability determination may be erroneous if the Alaska Native Claims Appeal Board’s (ANCAB) decision regarding navigability failed to account for the artificial blasting that transformed the river by reversing the flow regime within the channel. For this reason, Northway believes that the “unnamed channel,” even though previously determined to be navigable, should be withdrawn from the RDI because the previous navigability determination appears to be based on the condition of the channel after statehood. The ANCAB decision which Northway Natives, Inc. referenced in their letter is final for the Department of the Interior.<sup>7</sup> We have no legal authority to change the ANCAB decision, thus the comment did not change the conclusions of the BLM’s final report.

#### 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 Chisana River is easily identifiable on United States Geological Survey (USGS) topographic maps.<sup>8</sup>

#### APPLICATION APPROVED IN PART

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*, 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*”).

The final navigability report, “Summary Report for the Chisana River and a portion of Mark Creek (Unnamed Channel) in the Tanana River Region” (dated August 23, 2016), concluded that the Chisana River was navigable at the time of statehood from its mouth to the confluence with Scottie Creek (river mile 53.50); including the “unnamed channel” that interconnects the Chisana River and Mark Creek, located in T. 14 N., Rs. 19 and 20 E., CRM.

<sup>7</sup> 6 ANCAB 1, dated August 5, 1981.

<sup>8</sup> USGS 1:63,360 Topographic Maps: Nabesna C-1, D-1, D-2; Tanacross A-2.

The United States affirms it has no interest in the lands described below because all of the federal interests have passed to the State of Alaska. 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 Chisana River and the (unnamed channel). 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, in particular the final navigability report, "Summary Report for the Chisana River and a portion of Mark Creek (Unnamed Channel) in the Tanana River Region" (August 23, 2016), 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 Chisana River from its mouth to the confluence with Scottie Creek (river miles 0-53.50), to include the "unnamed channel" that interconnects the Chisana River and Mark Creek, located in T. 14 N., Rs. 19 and 20 E., CRM.

#### 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 (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 must 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.



Bud C. Cribley  
State Director

cc (w/o enclosure):

James Walker  
Alaska Department of Natural Resources  
Division of Mining, Land and Water  
550 West 7<sup>th</sup> Avenue, Suite 1420  
Anchorage, Alaska 99501-3579

Mark Fink, Access Defense Program Manager  
Alaska Department of Fish and Game  
333 Raspberry Road  
Anchorage, Alaska 99518-1565

Karen Clark, Acting Regional Director  
U.S. Fish and Wildlife Service  
1011 East Tudor Road  
Anchorage, Alaska 99503-6199

John Trawicki, Branch Chief  
U.S. Fish and Wildlife Service, Region 7  
1011 E. Tudor Road  
Anchorage, Alaska 99503-6199

Kenneth Stahlnecker, Refuge Manager  
U.S. Fish and Wildlife Service  
Yukon Delta National Wildlife Refuge  
P.O. Box 346, MS 535  
Bethel, Alaska 99559

Northway Village Council  
Howard Sam, President  
P.O. Box 516  
Northway, Alaska 99764

Northway Natives, Inc.  
Lorraine Titus, President  
P.O. Box 401  
Northway, Alaska 99764

Tanana Chiefs Conference  
Paul Mayo, Director Natural and  
Cultural Resources  
122 First Avenue, Suite 600  
Fairbanks, Alaska 99701-4897

District Manager, Anchorage