



United States Department of the Interior



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Memorandum

To: File AA-94268

From: Jack Frost, Navigable Water Specialist (LLAK9410) *J. Frost*

Subject: Summary Report on Federal Interest in Lands underlying the Taku River in Alaska

On Mar. 14, 2017, the State of Alaska (State) filed an application for a recordable disclaimer of interest (RDI) with the Bureau of Land Management (BLM) for lands underlying the Taku River. Specifically, the State applied for a disclaimer of the United States' interest in "All submerged lands between the ordinary high water lines of the left and right banks of the Taku River beginning at the 60-foot boundary reserve within Sections 10, 11 and 14, Township 38 South, Range 71 East, Copper River Meridian to the extent of tidal influence, regardless of location." This application includes the submerged lands and beds of all anabranches, braids and channels that carry water from the navigable river and thus are a part of the navigable river.¹

The State's application for disclaimer of interest is based on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Alaska Right of Way Act of 1898, and any other title navigability law.² The BLM may disclaim federal interest in the submerged lands on any of the grounds that apply. The State's application for lands underlying the subject water body must also meet the regulatory requirements (43 CFR Subpart 1864).

In support of its application, the State submitted evidence that they believe proves the navigability of the Taku River. Specifically, they provided a letter dated May 13, 1974, from the BLM to the Arctic Slope Regional Corporation about navigable water bodies in Alaska; a navigability recommendation dated Feb. 29, 1980; the "Summary Report on the Tulsequah Chief Massive Sulphide Property," dated Jan. 6, 1989; a July 3, 1997 article published in the "B.C.

¹ Signed by James H. Walker for DNR Commissioner, to Bud Cribley, State Director, Mar. 14, 2017, file AA-094268 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The State's application and supporting documents are also available in this file.

² *Ibid.*, p. 2.

Environmental Information Institute," the Redfern Resources Ltd. "Taku River Barge Activity Report 2007;" and pictures of barges on the Taku River online from <http://www.takuriver.com/REDFERNBARGE.htm>.

This summary report reviews the merits of the State's RDI application, summarizes the history of land status actions, BLM navigability determinations and conveyance actions, and reviews the evidence of commercial navigation and mining.

Location

The Taku River is a large glacial river originating in British Columbia, Canada and flows southwesterly 54 miles to the tidal waters of Taku Inlet in southeast Alaska 18 miles northeast of Juneau.³ The river is characterized by extensive braiding on the main stem (numerous side channels and sloughs), fast moving water in the central portion of the drainage, and slow, meandering tributaries in the upper reaches. Water visibility is extremely poor due to the turbidity of the river.⁴ The Taku River in Alaska can be over a mile wide near Taku Inlet and narrowing to less than 1000 feet wide closer to the international border with Canada.

Land Status and BLM Navigability Determinations

The U.S. Forest Service is the primary upland owner for the majority of Taku River within Alaska. The State of Alaska is the upland owner to the Taku River in sections 27-29 and 31-33, township 38 south, range 71 east, Copper River Meridian, Alaska and in section 6, township 39 south, range 71 east, Copper River Meridian, Alaska. There are numerous private inholdings adjacent to the river conveyed under the homestead entry program.

By Presidential Proclamation 810 dated June 15, 1908, the United States reserved a strip of land, 60 feet wide, along the International Boundary. This reservation included the bed of the Taku River in township 38 south, range 71 east, Copper River Meridian, Alaska. When the State of Alaska entered the Union, the United States retained the bed of the Taku River where it crosses the International Boundary. The reservation continues to be in effect to this date.

The river is located entirely within the exterior boundaries of the Tongass National Forest, administered by the U.S. Forest Service, Department of Agriculture. On Feb. 16, 1909, President Theodore Roosevelt issued a proclamation adding public lands to the Tongass National Forest. The Taku River is located within the withdrawn area.⁵

This raises the question of whether or not the withdrawal of Feb. 16, 1909, defeated the State's title to the bed of the navigable Taku River. Language used in this withdrawal is very similar to that used in a Presidential Proclamation issued only a week later. The Presidential Proclamation of Feb. 23, 1909, enlarged the Chugach National Forest to include the Katalla River drainage

³ Orth, Donald J. *Dictionary of Alaska Place Names*. USGS Professional Paper 567. Washington: GPO, 1967.

⁴ Northwest and Alaska Fisheries Center, NWAFC Processed Report 88-24, "Distribution, Stock Composition, and Location and Habitat Type of Spawning Areas Used by Sockeye Salmon on the Taku River," Oct. 1988.

⁵ President Theodore Roosevelt, Proclamation No. 846—Tongass National Forest, Alaska, Feb. 16, 1909.

area. In 1988, the Interior Board of Land Appeals (IBLA) considered the question whether this proclamation defeated the State's title to the navigable Katalla River. The IBLA concluded that it did not. Under the equal footing doctrine, title to the Katalla's riverbed in the Chugach National Forest passed to the State of Alaska at the time of statehood.

In reaching its decision, the IBLA applied the U.S. Supreme Court's two-pronged test relating to ownership of submerged lands in federal withdrawals and reservations. In *Utah Division of State Lands v. United States* [482 U.S. 193 (1987)], the Court held that there is a "strong presumption" that title to the beds of navigable waters passed to the State. To hold that the beds of navigable water bodies are federally owned, the United States must demonstrate not only that Congress clearly intended to include land under navigable waters with the federal reservation, but also that Congress affirmatively intended to defeat the future State's title to the submerged lands. The IBLA concluded in the Katalla River case that "the facts here . . . do not show that Congress clearly intended to include land under navigable waters within the Chugach National Forest reservation or that Congress affirmatively intended to defeat the future State's title to that land [102 IBLA 357 (1988), reinstated, IBLA 85-768 (1994), order, decision reinstated, stay lifted]."

After reviewing the IBLA's reasoning and the facts, we conclude that the Presidential Proclamation of Feb. 16, 1909, which enlarged the Tongass National Forest and included the Taku River drainage area, did not defeat the State's title to the bed of the navigable Taku River.

The BLM has only made one navigability determination on the Taku River to date. However, in 1974, the BLM sent a letter to the Arctic Slope Regional Corporation about navigability in Alaska and attached a list of water bodies that the BLM considered navigable at that time. This list was not complete and the BLM requested the list be used only as a guide, but the Taku River was one of the rivers listed, and that list also stated that the Taku River was navigable for ten miles.⁶ In 1980, the BLM considered the navigability of water bodies the State selected in the Taku River quadrangle. The Taku River was determined navigable on Feb. 29, 1980, for the State selections located in sections 27-29 and 31-33, township 38 south, range 71 east, Copper River Meridian, Alaska and in section 6, township 39 south, range 71 east, Copper River Meridian, Alaska.⁷

Background Information

During the 18th and early 19th centuries, the Taku Indians controlled the trade routes on the Taku River. The Taku Indians acted as intermediaries between the white settlers and the Natives of the interior. The Hudson Bay Company established a trading post near the mouth of the Taku River in the early 1840's called Fort Durham to take advantage of the trade route.⁸

⁶ Curtis V. McVee, BLM State Director, to Joe Upicksoun, President, Arctic Slope Regional Corporation, May 13, 1974, BLM records.

⁷ Chief, Division of Resources to State Director, "Review of SS Reports- Taku River Quadrangle," Feb. 29, 1980, BLM records.

⁸ Wikipedia contributors. "Taku River." *Wikipedia, The Free Encyclopedia*. May 22, 2017. Web. Sept. 14, 2017, BLM records.

The Taku River is known as the Southeast Alaska's top salmon producing river for all five species of salmon. Annually, the Alaska Department of Fish and Game estimates that nearly two million wild salmon return to the Taku River. The Taku River also supports other varieties of freshwater fish and in its tidal waters including hooligan, crab, and shrimp. Halibut are harvested near the mouth. The Taku River supports major sport, commercial and subsistence fisheries in Alaska and British Columbia.⁹

Mining and Barge Transportation

Cominco Ltd. operated a mine called the Tulsequah Chief located in northwestern British Columbia, about 35 miles northeast from Juneau, Alaska. The company operated the mine from 1951-1957, closing in 1957 due to low metal prices. The mine transported its goods by barge downstream on the Tulsequah River, a tributary to the Taku River, then downstream on the Taku River to the deep-water port of Juneau a distance of 42 miles.¹⁰ The Tulsequah Chief was purchased by Redfern Resources Ltd. in the mid 1980's. At that time, supplies for the mine were transported upstream on the Taku River by barge from Juneau.¹¹

An example of the current use of the Taku River by barges includes Redfern Resources Ltd. In 2007, Redfern transported 10 loads of equipment to the Tulsequah Chief project in two phases. Each phase consisted of ocean barges being stationed in Taku Inlet where the loads were transferred to a river barge for transport up the Taku River accompanied by tugboats. The ocean barges were noted to be approximately 50 feet wide by 200 feet long. The river barge is described as approximately 36 feet wide by 120 feet in length. The load transported by the barge was described as construction and earth moving equipment and supplies, crew quarters and fuel. The barge and tugs were accompanied by a pilot boat whose captain was a river resident. The pilot boat was responsible for guiding the tugs and barge on the Taku River and communicating with other river users.¹²

Conclusions

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

⁹ *Ibid*, page 2.

¹⁰ Redfern Resources Ltd, "Summary Report on the Tulsequah Chief Massive Sulphide Property," Jan. 6, 1989, BLM records.

¹¹ B.C. Environmental Information Institute, Members Bulletin, "Tulsequah Chief Another Promising New Mine," July 3, 1997, BLM records.

¹² Redfern Resources Ltd, "Taku River Barge Activity Report 2007," Feb. 2008, BLM records.

interpretation of *The Daniel Ball* criteria. Additional guidance is provided in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) [Gulkana River]; *Alaska v. United States*, 754 F.2d 851 (9th Cir. 1983), *cert denied*, 474 U.S. 968 (1985) [Slopbucket Lake]; and *Appeal of Doyon, Ltd.*, Alaska Native Claims Appeal Board RLS 76-2, 86 I.D. 692 (1979) [Kandik and Nation Rivers].

In cases concerning pre-statehood reservations, the BLM uses the established criteria set out and applied in Alaska cases including *Alaska v. United States*, 545 U.S. 75 (2005) (“*Glacier Bay*”); *United States v. Alaska*, 521 U.S. 1 (1997) (“*Arctic Coast/Dinkum Sands*”); *Utah Division of Lands v. United States*, 482 U.S. 193 (1987) (Utah Lake); *Alaska v. United States*, No. 98-35310 (9th Cir. 2000) [Kukpowruk River]; *Alaska v. United States*, 102 IBLA 357 (1988) (Katalla River); and *United States v. Alaska*, 423 F.2d 764, 1 ERC 1195, (9th Cir. Dec. 21, 1970) (Tustumena Lake).

The Taku River is located within the exterior boundaries of the Tongass National Forest expanded by Presidential Proclamation No. 846. This withdrawal did not defeat the State’s title to the bed of the Taku River at statehood.

The BLM previously determined the Taku River navigable on Feb. 29, 1980, for State selections located in sections 27-29 and 31-33, township 38 south, range 71 east, Copper River Meridian, Alaska and in section 6, township 39 south, range 71 east, Copper River Meridian, Alaska. This determination is affirmed.

For the remaining portion of the Taku River in Alaska, excluding the 60-foot-wide withdrawal at the International Boundary as described by Presidential Proclamation 810, evidence exists of substantial commercial use of the river before and after Alaska’s statehood by barges, tugboats, commercial fishing, and recreation. For these reasons, we conclude that the Taku River is navigable as a highway for travel, trade, and commerce.