



United States Department of the Interior



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To: Alaska Executive Team

From: State Director

Subject: Recordable Disclaimers of Interest – Processing of the State of Alaska's Applications for Lands Beneath Navigable Waters

Program Areas: Recordable Disclaimers of Interest, Navigability

Purpose: This Instruction Memorandum sets forth the procedures the Bureau of Land Management (BLM)-Alaska State Office shall follow when processing the State of Alaska's applications for recordable disclaimers of interest for lands beneath navigable waters, including those underlying rivers, streams, and lakes, as well as lands underlying marine or tidal waters.

Policy Action: The Branch of Survey Planning and Preparation, Division of Cadastral Survey, is responsible for administering the RDI Program. The BLM-Alaska State Director has the authority to issue disclaimers in Alaska on behalf of the United States.

Timeframe: Effective Immediately.

Budget Impact: Minimal.

Contacts: If you have questions or comments regarding these procedures, please contact Craig Frichtl, Branch Chief of Survey Planning and Preparation, at (907) 271-4366.

Background

The State of Alaska (State) asserts that certain rivers, streams, and lakes are navigable in fact and in law. By virtue of the Equal Footing Doctrine, the Submerged Lands Acts of 1953, and the Alaska Statehood Act, title to lands underlying navigable waters, unless reserved by the United States, passed to the State on January 3, 1959 upon its entry to the Union. By Section 315 of the Federal Land Policy and Management Act (FLPMA), Congress gave the Secretary of the Interior

authority to issue a recordable disclaimer of interest (RDI) in lands where the United States claims no interest and the disclaimer will help remove a cloud on the title of such lands. The Secretary has delegated this authority to the BLM.

In Alaska, potentially navigable water bodies may be located within the administrative boundaries of federal agencies other than the BLM. Pursuant to FLPMA, the BLM has the authority to determine whether there is a federal interest in the lands underlying these water bodies even when the lands are within an area administered by another federal agency. In consultation with the affected federal agencies, the BLM makes these determinations on the basis of the factual evidence. Where the law and a preponderance of evidence support the State's claim, the BLM will approve an application. However, the BLM will not approve an application over the valid objection of the land-managing agency having administrative jurisdiction over the affected lands (43 CFR 1864.1-4).

Summary of General Process

The State initiates the process by notifying the BLM of its intent to file an RDI application and provides the BLM with its supporting evidence. The State has the burden of proof. The BLM then coordinates the pre-application meetings with the State and affected federal agencies. The primary purpose of these meetings is to discuss the merits of the proposed application. Once the State files an application, the BLM shall prepare a draft summary report analyzing the State's evidence, and publish a Notice of the State's application in the *Federal Register* and local newspapers. These documents (the State's evidence and the BLM's analysis) will be available for public review and comment. After the comments are considered, the BLM shall prepare its final summary report, and the BLM-Alaska State Director shall then issue a decision to accept or reject the State's application, in whole or in part. Occasionally, the BLM may suspend an application if the circumstances warrant such an action. If the State's application is accepted, the BLM will prepare and issue a recordable disclaimer of interest.

The BLM consults with the Department of the Interior Alaska Regional Solicitor's Office on all RDI applications. The Delegation of Authority to issue a decision on an RDI application mandates the Solicitor's consultation. Other affected Department of the Interior agencies may be included in the Solicitor's consultation.

The detailed procedures the BLM will follow, when processing the State of Alaska's RDI applications, are set out below:

I. Information Sharing Meetings

The State of Alaska, Department of Natural Resources, will notify the BLM-Alaska State Director, in writing, of its intent to apply for an RDI for lands underlying specific rivers, streams, lakes, or other waters. The BLM will provide a copy of that notice to the affected federal agencies.

The BLM and the State will meet to discuss the merits of the proposed application. The State should be ready to discuss all relevant topics, including potential sources of information, controversial issues, possible federal interests, and contact information for principal upland owners and known interested parties. Where appropriate, the BLM and the State should also

discuss what, if any, effort should be made to contact those who may have a possible property interest in the submerged lands. In particular, the BLM and the State will consider the need to consult with the appropriate Native village and regional corporations, tribal councils, and individuals knowledgeable about the specific rivers, streams, and lakes and history of use.

II. Pre-Application Meeting

To initiate a Pre-Application Meeting, the State will submit a request to the BLM with its draft application and supporting evidence.¹ The BLM will provide the affected federal agencies with a copy of the draft application and a notice of the meeting (scheduled at least 45 days from the date of the notice). The BLM will request the federal agencies to respond in writing to any issues or concerns raised by the draft application, so that they may be considered before and discussed during the meeting.

The Pre-Application Meeting shall focus on the particulars of each individual case, and discussion will be guided by the State's draft application and supporting evidence. The draft application should include the State's reasons for the application, all documents used to support its application, known adverse claimants or occupants on the lands, and any request for waiver of one or more of these requirements.² Topics of discussions will vary from one application to the next and may include discussion of whether the evidence offered by the State meets its burden of proof and clarification of the reaches or segments of water bodies to be included the application. Affected federal agencies shall be invited to attend the Pre-Application Meeting and encouraged to participate fully in the discussions about the draft application.

III. Application Processing

The BLM will review each application to determine whether it meets the minimum requirements set forth by the regulations (43 CFR 1864.1-2). Each application, at minimum, shall include:

1. \$100 application fee;
2. A clear legal description of the lands for which a disclaimer is sought, including detailed maps of the applied for lands and current land status information;³
3. The applicant's contact information;

¹ The State will provide the BLM with additional copies of the draft application and supporting evidence for distribution to the affected federal agencies.

² 43 CFR § 1864.1.-2(d) provides that the authorized BLM officer may waive any or all of requirements set out in that regulation. The most likely request for a waiver pertains to the requirement for an official public land survey or a metes and bounds survey. There is usually no dispute about the actual, on-the-ground location or dimension of the river, stream, or lake. (Conceivably, if there was a dispute over the location or dimension of a water body--e.g., an unnamed anabranch or an avulsive event or the human modification of a water body-- a survey may be required to ensure certainty over what lands are subject to the application.) Should an RDI be approved, the United States disclaims any interest in the lands underlying the navigable water body up to the ordinary high water mark, the legal boundary of navigable waters. Typically, the line of ordinary high water (OHW) is located at the limit of upland vegetation. This limit is determined by field examination and can change over time as a result of accretion, reliction, or erosion. Public land surveys are rarely conducted for the sole purpose of defining the line of OHW. Once the area is scheduled for survey, the RDI information will be available to the cadastral surveyor.

³ Current land status information includes identification of the affected federal agencies, Native corporations, and other principal upland owners. The BLM will also conduct a review of its land status information as part of the summary report.

4. Contact information for those known or believed to claim a property interest in the lands, or any known adverse claimant or occupant of the lands;
5. All documents supporting the applicant's claim of title to the lands;
6. A statement concerning the nature and extent of the cloud on the title, and the reasons the applicant believes the record title interest of the United States in the applied for lands has terminated by operation of law or is otherwise invalid; and
7. Any available title documents that support the application.

If the application meets the requirements for further processing, the BLM will determine the amount of deposit needed to cover its administrative costs of processing the application and issuing a disclaimer, and, accordingly, issue a decision requesting payment.⁴ After receiving processing fees from the State, the BLM will prepare a draft report summarizing its analysis of the State's application and evidence and its recommendations on the State's application.⁵ The BLM will send a copy of the draft report with a cover letter to the applicant (State) requesting its comments within a specified timeframe. The BLM will also send the draft report to affected federal agencies, and other identified parties (e.g., Native corporations, village councils, and local governmental entities) with a request to provide comments on the contents the draft report and the State's application. This draft report will be available for public review and comments for a minimum of thirty (30) days. If there is a compelling reason, the BLM may extend the comment period.⁶

The State's application is also subject to the formal process of public notice (43 CFR 1864.1-3(c)) which is intended to notify the public of the pending application and the evidence supporting it.⁷ The BLM shall publish notice of the application in the *Federal Register* at least ninety (90) days preceding the issuance of a decision on the application. During this period, and at the direction of the BLM, the State shall publish a notice of its application in a local newspaper(s) once a week, for three consecutive weeks.⁸ The State shall provide the BLM with proof of its publication. The BLM shall notify the State and affected federal agencies when the *Federal Register* notice is published, and when the BLM's draft report will be available for review and comment. Usually, the availability of the draft report will closely coincide with the publication of the notice in the *Federal Register*.

If the BLM receives factual evidence that would significantly alter the draft recommendations, the BLM will share the information with the State and affected federal agencies before issuing its decision on the State's application. If warranted, an additional review and comment period may be allowed by the BLM prior to finalizing the summary report and/or issuing a decision on the application.

⁴ 43 CFR 1864.1-3(c)

⁵ BLM draft summary reports will be reviewed by the Alaska Regional Solicitor's Office prior to distribution.

⁶ These deadlines will serve as a guide, and may be adjusted to accommodate special circumstances.

⁷ 43 CFR 1864.2

⁸ Each notice of application will be published in the *Anchorage Daily News*. The notice shall also be published in a newspaper located in the vicinity of the lands covered by the application.

IV. Valid Objections

The BLM cannot “issue a recordable disclaimer of interest over the valid objection of another [federal] land managing agency having administrative jurisdiction over the affected lands.” (43 CFR 1864.1-4). When a valid objection is made by the federal land managing agency, the BLM will reject the application for that reason. Federal agencies must submit their formal objection to the approval of an RDI application directly to the BLM Alaska State Director.

“A valid objection must present a sustainable rationale that the objecting agency claims United States title to the land for which a recordable disclaimer is sought.” (43 CFR 1864.1-4). While the BLM will generally defer to an objection of the federal land management agency, the objection must provide a clear rationale based on factual evidence or legal arguments. The rationale cannot be frivolous and must be made in good faith. While an objection does not have to be beyond dispute, it must contain more than bare conclusory assertions that BLM’s navigability determination is wrong.⁹

As a general rule, BLM will consider disputes over legal questions as constituting a valid objection. An objection that identified a controlling legal precedent would be valid.¹⁰ Uncertainty of the effects of a prestatehood reservation on submerged land title is another example of what would constitute a valid objection.

Factual objections may involve differences of opinion over the location of the head of navigation; whether sufficient information has been collected for certain topics; whether the State has met its burden of proof; whether the information is sufficient to make a navigability determination; whether the location and extent of lands has been sufficiently and properly identified and so on.¹¹ In consultation with the Regional Solicitor, the BLM will assess factual objections on a case-by-case basis, giving due deference to the party making the objection. An objection that provides evidence that a water body is not navigable under the property clause would be a valid objection.¹²

V. Decisions

Once the notice and comment periods have closed, the BLM shall issue a decision to either accept or reject the State’s RDI application. The decision may include one or more of the following actions:

- Accept – The United States affirms it has no interest in specific lands, and will issue a recordable disclaimer of interest for specific lands.
- Reject – The United States declares it has a property interest in specific lands; the State has not met its burden of proof and there is not enough evidence to accept the State’s claim; an affected federal land managing agency has filed a valid objection; or for another documented reason in accordance with law.

⁹ Letter to Senator Joseph Lieberman from the Assistant Secretary, Land and Minerals Management, Department of the Interior, dated June 28, 2004. Guidance from the Assistant Secretary with programmatic oversight and authority is binding on Interior agencies.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

The BLM will issue the decision to the Commissioner, Alaska Department of Natural Resources. If applicable, the BLM will then issue a recordable disclaimer of interest.¹³

The BLM may suspend an application, or part thereof, for a specified reason for a limited amount of time. The decision will describe the grounds for the suspension, and its timeframe. Once the reason for suspension is completed, or the allotted time has expired, the BLM will continue to adjudicate the application and issue a decision. The BLM will rarely issue a suspension because it creates an unwarranted cloud on title, which defeats the purpose of the RDI as an administrative remedy. However, there may be instances when a suspension may be of benefit.

VI. Appeals

The State, or any claimant adversely affected by the BLM-Alaska State Director's decision, may appeal to the Interior Board of Land Appeals (IBLA) (43 CFR 1864.4). Decisions of the IBLA are final for the Department and may be appealed to the federal courts.

In the event that the State reapplies for lands previously rejected, the BLM will consider the new application on its own merits. As a practical matter, this means the State's application must contain significant information not considered earlier, is based upon recent court action (e.g., clarification of some aspect of title navigability law), or that there is some other compelling legal or equitable reason for re-adjudicating the matter. Otherwise, the BLM must again reject the application.

Signed by:
Thomas Lonnie
Alaska State Director

Authenticated by:
Anita R. Jette
Records Specialist

¹³ Copies of the disclaimer of interest will not be distributed. However, the disclaimer document will be posted on the BLM-Alaska website and noted on the BLM land records. The State shall provide the BLM with a copy of the recorded disclaimer, once it has the appropriate certifications from the State Recorder's Office.