



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/ak>

In Reply Refer To:

SEP - 2 2010

AA-086376
AA-086377
AA-086378
AA-086379
AA-086380
1864 (AK9270)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	AA-086376, AA-086377,
Department of Natural Resources	:	AA-086378, AA-086379,
Attn: Tom Irwin, Commissioner	:	AA-086380
550 West 7 th Avenue, Suite 1400	:	Yukon-Kuskokwim
Anchorage, Alaska 99501-3650	:	Portage Waterbodies

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On March 10, 2006, the State of Alaska (State) filed five separate applications for recordable disclaimers of interest for the lands underlying the water bodies comprising the Yukon-Kuskokwim Portage (Y-K Portage).¹ The State filed these applications under the provisions of Section 315 of the Federal Land Policy and Management Act of October 21, 1976 (FLPMA), 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864. The Y-K Portage consists of nine waterbodies and four land portages. The State applied for the lands underlying the following waterbodies: Mud Creek and Unnamed Lake #1 (AA-086376); Crooked Creek and Johnson River (AA-086377);² Kulik Lake and Unnamed Lake #2 (AA-086378);³ Unnamed

¹ Michael L. Menge, DNR, Commissioner, to Henri Bisson, State Director, BLM, March 10, 2006, files AA-086376, AA-086377, AA-086378, AA-086379, AA-086380 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in these files.

² On November 17, 2006, the State clarified the description of Crooked Creek. Michael L. Menge, DNR, Commissioner, to Julia Dougan, Acting State Director, BLM, AA-086377 (1864), BLM Records.

³ On March 12, 2007, the State clarified the Kulik Lake and Unnamed Lake #2 application to exclude a small unnamed lake from their map, located in section 3, T. 18 N., R. 63 W., SM., and correct the corresponding legal description for Unnamed Lake #2, where the initial application listed the lake in sections 23 and 24, but the map

Lake #3 and Unnamed Lake #4 (AA-086379); and the Talbiksok River, beginning in Section 13, Township 19 North, Range 64 West, Seward Meridian (SM), Alaska, to its confluence with Portage Slough of the Yukon River (AA-086380).

The State contends these water bodies were navigable at the time of statehood and, therefore, title to the submerged lands vested in the State upon entry to the Union on January 3, 1959. The State's applications for disclaimers of interest are based 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 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.⁴ 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.

In support of its applications, the State submitted two Bureau of Land Management (BLM) memoranda addressing the navigability of certain water bodies on the Y-K Portage (November 8, 1984,⁵ and July 8, 1985⁶); the section entitled "Russian Mission Summer Portage" from a BLM report on the Kuskokwim River Region;⁷ and a United States Army Corps of Engineers' (USACE) reconnaissance report on the Y-K Portage, dated January 31, 1971.⁸ The State also supplied reference maps for each application which generally depicts the route of the Y-K Portage. 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 applications, the State of Alaska also requested a waiver of this requirement under 43 CFR 1864.1-2(d).

It is determined that a survey description of the subject water body is not needed to adjudicate the State's application, and the waiver is hereby granted. The location of the subject water bodies, shown below, is depicted on the U.S. Geological Survey, Russian Mission (1:250,000)

shows the lake in sections 22 and 23. Scott Ogan, DNR, Natural Resource Manger to Thomas P. Lonnie, State Director, BLM, March 12, 2007, AA-086378 (1864), BLM records.

⁴ 72 Stat. 339, 343

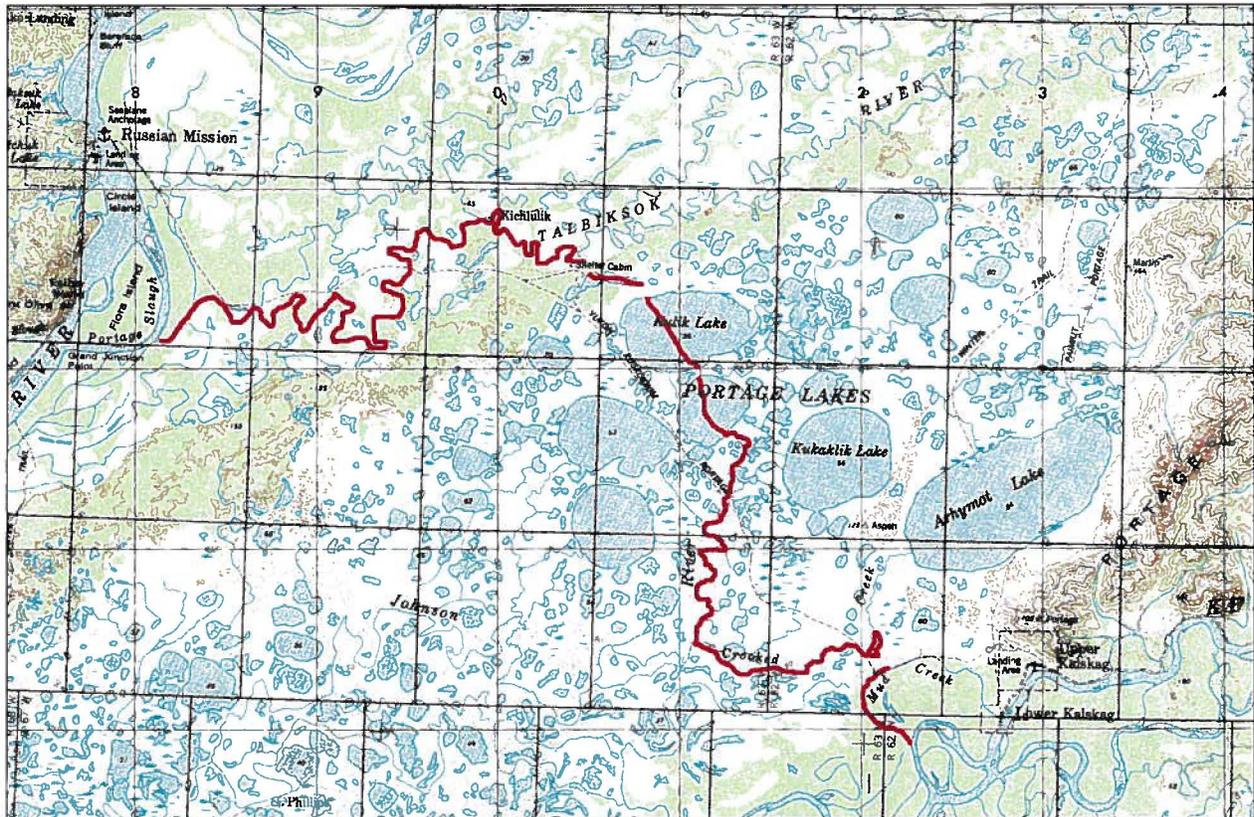
⁵ DSD for Conveyance Management (960) to Chief, Branch of Conveyance Services (962), November 8, 1984, BLM records. The subject of this memo is "Navigable Waters of the Kuskokwim Region, Alaska."

⁶ James Ducker, Historian, to Chief, Navigability Section, subject: "Water Bodies Determined Navigable in Regional Report Process as of July 10, 1985," July 8, 1985, BLM records.

⁷ C. Michael Brown, "Alaska's Kuskokwim River Region: A History." Unpublished manuscript, BLM Alaska State Office, 1985.

⁸ U.S., Department of the Army, Corps of Engineers, Alaska District, "Reconnaissance Report, Section 107 Investigation, Yukon-Kuskokwim Portage, Alaska, January 31, 1971."

Quadrangle map (1980). The ordinary high water mark of these water bodies is the legal boundary of the submerged lands. Since these are ambulatory boundaries, the location of which may change over time, there is no need for a survey in order to process this application.



Location of the Y-K Portage

Notice of the State's application was published in the *Federal Register* on June 25, 2007. The BLM prepared a draft report, "Summary Report for the Navigability of the Water Bodies within the Yukon Kuskokwim Portage in the Lower Kuskokwim Subregion, Alaska" which described the State's applications and supporting evidence, riparian land status, physical character, and historical uses.

The BLM sent copies of its draft report to the following, inviting their review and comments and affording them an opportunity to provide additional information: State of Alaska; Calista Corporation, a regional Native corporation; The Kuskokwim Corporation (Successor in Interest to Upper Kalskag, Incorporated and Lower Kalskag, Incorporated), a village Native corporation; Russian Mission Native Corporation, a village Native corporation; Association of Village Council Presidents; Village of Lower Kalskag; Village of Kalskag; Iqurmiut Traditional Council; and the U.S. Fish and Wildlife Service (USFWS).

Public notice of the State's applications, and the availability of the draft navigability report, was published in the *Anchorage Daily News* (June 29, and July 6 and 13, 2007) and in the *Tundra Drums* (July 5, 12, and 19, 2007). Information about these applications, including the draft report, was also posted on the BLM-Alaska website.⁹

During the published notice period, the BLM received several comments from both the State and the USFWS. No other comments were received. In two separate letters, dated August 24, 2007, the State concurred with the BLM's findings, and offered some minor technical corrections.¹⁰ Those comments, where appropriate, were addressed in the final report. On September 25, 2007, the State requested the BLM to consider all comments prior to issuing a decision on the State's application. The USFWS provided the BLM with three separate memoranda. On August 24, 2007, the USFWS offered the BLM suggestions and minor technical corrections to the draft report.¹¹ Those comments, where appropriate, were also addressed in the final report. On September 21, 2007, the USFWS expressed their disagreement to the State's request for a waiver of survey, urging the BLM to require more precision in describing the land applied for.¹² On October 23, 2007, the USFWS cautioned the BLM to include the federal land managing agencies and others, when considering State's comments, should the State provide additional information.¹³ None of the comments presented significant factual information or evidence to support or negate the BLM's draft findings.

The BLM prepared a comprehensive review of the lands applied for which discussed the land status, previous conveyance actions by the BLM, and the physical character and historical uses of the waterbodies within the Y-K Portage for travel, trade, and commerce. Any alterations to submerged lands were examined to assess whether or not water bodies became navigable because of the alterations. Water bodies deemed to be navigable before any improvements were made will remain navigable regardless of the nature of the improvements. The location of upland land ownership boundaries where natural ambulatory movement (accretion or reliction) has occurred or where drought conditions of water bodies exist follow riparian boundary law. The BLM considered all comments, and on August 26, 2010, the BLM issued its final report, entitled, "Federal Interest in Lands Underlying the Water Bodies within the Yukon-Kuskokwim Portage in the Lower Kuskokwim Subregion, Alaska."

⁹ <http://www.blm.gov/ak/st/en/prog/rdi.html>

¹⁰ August 24, 2007, Tamas Brown, DNR, Natural Resource Manager, to Mike Brown and Jack Frost, and to Callie Webber, AA-086376, AA-086377, AA-086378, AA-086379, AA-086380 (1864), BLM records.

¹¹ Thomas O. Melius, Regional Director, USFWS, to Alaska State Director, BLM, AA-086376, AA-086377, AA-086378, AA-086379, AA-086380 (1864), BLM records.

¹² Acting Regional Director, USFWS, to Alaska State Director, BLM, AA-086376, AA-086377, AA-086378, AA-086379, AA-086380 (1864), BLM records.

¹³ Chief, Division of Realty and Natural Resources, USFWS, to Chief, Branch of Survey Planning and Preparation, BLM, AA-086376, AA-086377, AA-086378, AA-086379, AA-086380 (1864), BLM records.

BACKGROUND

The lands applied for are located entirely within the boundary of the Yukon Delta National Wildlife Refuge, established under the Alaska National Interest Conservation Act (P.L. 96-487) on December 2, 1980. None of these lands were reserved or withdrawn on the date of statehood. Certain riparian lands have been conveyed out of federal ownership under the Alaska Native Claims Settlement Act. There are several Native allotments, conveyed under the Native Allotment Act, located along the Y-K Portage. The State does not have any riparian land along the Y-K Portage.

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. Associate Solicitor Hugh Garner’s memo of March 16, 1976, (“Title to submerged lands for purposes of administering ANCSA”) and Regional Solicitor John Allen’s memo of February 25, 1980 (“Kandik, Nation Decision on Navigability”) provide valuable guidance on applying title navigability law in Alaska.

APPLICATION APPROVED

The United States affirms it has no interest in the lands described below because all of the federal interests passed to the State of Alaska at the time of statehood (January 3, 1959). 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 those nine waterbodies comprising the Y-K Portage, all located within the Lower Kuskokwim Subregion. 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 resources laws and other laws to the submerged lands involved. Resolving clouds on title between the State of Alaska and the United States is thus of even greater importance than resolving title between a private party and the United States.

Accordingly, based on the foregoing, the final navigability report, and the documentation contained in the case record, 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 United States affirms it has no interest in the lands described below. Therefore, the State's application for a recordable disclaimer of interest is hereby approved, as follows:

1. Mud Creek, between the ordinary high water marks on its banks, from the confluence with the Kuskokwim River upstream approximately 4 river miles to the intersection of the overland traverse in the NW ¼ of Sec. 26, T. 17 N., R. 62 W., SM;
2. Unnamed Lake #1, approximately 100 acres, in Sec. 22, T. 17 N., R. 62 W., SM;
3. Crooked Creek, between the ordinary high water marks on its banks, beginning in Sec. 22, T. 17 N., R. 62 W., SM, downstream approximately 8 river miles into T. 17 N., R. 63 W., SM, to its confluence with Johnson River;
4. Johnson River, between the ordinary high water marks on its banks, from the confluence with Crooked Creek in Sec. 22, T. 17 N., R. 63 W., SM, upstream approximately 12 river miles into T. 18 N., R. 63 W., SM, to Unnamed Lake #2;
5. Unnamed Lake #2, approximately 2940 acres, in Secs. 1-4, 9-12, 14-16, and 22-23, T. 18 N., R. 63 W., SM;
6. Kulik Lake, approximately 6400 acres, in T. 18 N., R. 63 W., SM, and T. 19 N., R. 63 W., SM;
7. Unnamed Lake #3, approximately 200 acres, in Secs. 18-20, T. 19 N., R. 63 W., SM;
8. Unnamed Lake #4, approximately 290 acres, in Sec. 19, T. 19 N., R. 63 W., SM and Secs. 13, 23-24, T. 19 N., R. 64 W., SM; and
9. Talbiksok River, between the ordinary high water marks on its banks, beginning in Sec. 13, T. 19 N., R. 64 W., SM, downstream approximately 36 river miles through T. 19 N., R. 65 W., SM, and T. 19 N., R. 66 W., SM, to its confluence with the Portage Slough in Sec. 33, T. 19 N., R. 66 W., SM.

HOW TO APPEAL THIS DECISION

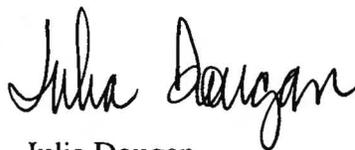
This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from 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 **must** also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

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 shall 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.



Julia Dougan
State Director, Alaska

Enclosure

cc (w/o enclosure):

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