United States Department of the Interior

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FF-93920

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DECISION

State of Alaska Department of Natural Resources Division of Mining, Land and Water Attn: Dick Mylius 550 West Seventh Avenue, Suite 1050A Anchorage, Alaska 99501-3579	: : : : : :	FF-93920 Recordable Disclaimer of Interest Application - Black River

ADMINISTRATIVE WAIVER GRANTED
APPLICATION APPROVED IN-PART
APPLICATION PROCESSING SUSPENDED IN-PART

On February 14, 2003, the State of Alaska, Department of Natural Resources filed an application with the Bureau of Land Management (BLM) Alaska State Office, serial number FF-93920, for a recordable disclaimer of interest from the United States pursuant to Section 315 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1745 (1994) and the regulations contained in 43 CFR part 1864.

BACKGROUND

The Submerged Lands Act of 1953 granted and confirmed to the states title to the lands beneath inland navigable waters within the states. 43 U.S.C. § 1311(a). It also gave the states "the right and power to manage, [and] administer" these lands in accordance with state law. *Id.* Section 6(m) of the Alaska Statehood Act made the Submerged Lands Act applicable to Alaska. 72 Stat. 339, 343.

The State of Alaska has applied for a recordable disclaimer for certain submerged lands beneath inland navigable waters on the grounds that title has passed by operation of law from the United States to the State.

The application includes lands underlying five water bodies described as that portion of the bed of the Black River and Black River Slough, and all interconnecting sloughs, between the ordinary high water marks on its banks from its confluence with the Porcupine River, within

T. 21 N., R. 13 E., Fairbanks Meridian, Alaska, upstream for approximately 280 miles to its confluence with the Wood River within T. 13 N., R. 27 E., Fairbanks Meridian; the Salmon Fork to the International Boundary; the Grayling Fork to the International Boundary; Bull Creek to Section 5, T. 13 N., R. 31 E., Fairbanks Meridian. A map was also attached to the application as Exhibit A.

Pursuant to 43 CFR 1864.1-2 (c)(1), 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. The State of Alaska asked for a waiver of this requirement in its application. The undersigned has determined that a survey description of the subject water bodies is not needed to adjudicate the State's application, provided the term "interconnecting slough" is not contained in the legal description of the recordable disclaimer of interest document. Use of the term "interconnecting slough" is too ambiguous and imprecise without a more definite legal description. Accordingly, pursuant to 43 CFR 1864.1-2 (d), the requirement for a survey description is administratively waived subject to the condition that the description will not include "interconnecting sloughs."

In addition to the application, the State has submitted a nonrefundable fee of $100, a map, a deposit in the amount of $ 7,714 to cover the administrative costs of processing the application and issuing a disclaimer, copies of two BLM administrative navigability determinations affecting the subject water bodies dated March 28, 1980, and July 22, 1983, a copy of the decision of the United States Court of Appeals for the Ninth Circuit, *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 1997), proof of publication that notice of the application was published in the specified newspapers once a week for three consecutive weeks, and a State of Alaska water body use and observation questionnaire that documents the results of a May 2, 2003 interview with Mr. John Thomas concerning his knowledge about historic uses of the Black River, Grayling Fork, and Bull Creek from the 1930's to present.

Notice of the State's application and the grounds supporting it was published in the Federal Register on May 8, 2003. All interested parties were given 90 days from this date to submit comments to the BLM Alaska State Office. During the public comment period, the BLM received written comments from the Chalkyitsik Village Council, the Gwichyaa Zhee Gwich'in Tribal Government, the Tanana Chiefs Conference, Trustees for Alaska, the Chalkyitsik Native Corporation, and nineteen individual Native allottees. The BLM Alaska State Office has acknowledged these comment letters and provided individual responses. A copy of this decision will be served on everyone who submitted comments.

In general, the comments received pertain to process, potential impacts to property rights, or land and resource management issues. None of the comments provided any new information concerning navigability of the subject waterbodies. Only comments presenting evidence on whether the rivers at issue are navigable are relevant to BLM's action on the application because such comments go to the question of whether title to the lands has transferred to the State of Alaska by operation of law. Comments opposing the grant of the application for a disclaimer on the grounds, for example, that the United States would make a better custodian of the subject lands are not relevant, however. In any event, the disclaimer does not constitute a change of ownership and therefore no change in land management should occur as a result of the

disclaimer. Such a disclaimer merely acknowledges that a record interest of the United States in land has *already* "terminated by operation of law or is otherwise invalid." 43 U.S.C. § 1745 (a). The disclaimer is issued to "help remove a cloud on the title of such lands." *Id.* As the implementing regulations emphasize, "[t]he objective of the disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts no ownership or record interest." 43 CFR 1864.0-2(a). A disclaimer does not transfer subject lands from federal control, *id.*, but merely removes a cloud on title.

Many of the comments from the individual Native allottees and Native groups expressed concerns over possible impacts to legal or property rights. There are a number of certificated Native allotments along the stretches of river involved. Native allotments are restricted lands. The recordable disclaimer regulations state that an application shall be denied "if...[t]he application pertains to trust or restricted Indian lands." 43 CFR 1864.1-3(a)(3). BLM had surveyed all of these Native allotments prior to conveyance, and based upon BLM's contemporaneous determinations of navigability, segregated submerged lands from the legal descriptions of these allotments using the ordinary high water mark as the allotment boundary. None of the surveys was challenged by an allotee. Accordingly, the granting of the State's application for a recordable disclaimer of interest to the submerged lands underlying the navigable portions of the Black River and its tributaries does not include any restricted lands and is not subject to the prohibition in 43 CFR 1864.1-3(a)(3).

All of the comments received have been analyzed, considered and responded to and the BLM has followed all required procedures. The BLM, as a matter of policy, will work with the State of Alaska in the future to develop outreach plans to improve consultation with interested parties and strengthen coordination of the public process early in the application process. To the extent any of these comments can be considered protests they are dismissed.

The subject application affects submerged lands beneath an estimated 270 miles of Black River basin streams within the external boundaries of the Yukon Flats National Wildlife Refuge. On August 27, 2003, the Fish and Wildlife Service (FWS) provided BLM with its comments on the State's application. The FWS objected to the State's assertion that the uppermost 12.3 miles of the main stem of the Black River, lying within the Yukon Flats refuge boundary, is navigable based on currently available information. Also, FWS believes the State does not provide sufficient evidence to show that the lower Grayling Fork that lies within refuge boundaries is navigable. The BLM has considered these comments and agrees that additional information is required before a decision can be made on the uppermost reach of the Black River above Grayling Fork to the confluence of the Wood River. However, the BLM finds that sufficient evidence does exist to support a finding of navigability for the lower Grayling Fork, as documented on pages 18 to 21 of the report of its Navigable Waters Specialist contained in the administrative record of this matter. FWS does not claim that the portion of the river at issue is not navigable. It only claims that there is insufficient evidence of navigability. BLM, as the agency delegated authority under the regulations to process applications for recordable disclaimers, is the bureau that must determine the sufficiency of any evidence presented to it or that it independently discovers. Consequently, the FWS comments pertaining to the lower Grayling Fork do not constitute a valid objection within the framework of 43 CFR 1864.1-4.

Other comments questioned BLM's authority to grant a recordable disclaimer of lands contained within the Yukon Flats National Wildlife Refuge, citing *Trustees for Alaska v. Watt*, 524 F. Supp. 1303 (D. Alaska 1981) for the principle that the National Wildlife Refuge System Administration Act of 1966 (Refuge Act), 16 U.S.C. § 668dd, prohibits the Secretary of the Interior from delegating authority over a wildlife refuge to an agency other than FWS. The holding of *Trustees* does not limit BLM's authority to issue a recordable disclaimer in this situation. The court in *Trustees* was primarily concerned with vindicating the congressional intent to eliminate joint jurisdiction over refuges. *Id.* at 1309. Granting a recordable disclaimer does not involve BLM management of the refuge. The question of whether to grant a disclaimer does not concern the question addressed by the Refuge Act of what agency has the legal authority to administer refuge lands, but rather concerns the preliminary question of what lands or interests in lands are administered as part of the refuge. BLM's granting of the recordable disclaimer for submerged lands under waters flowing through the Yukon Flats National Wildlife Refuge does not usurp FWS's management authority because FWS never had the authority to administer the interest in lands in question. Under the Submerged Lands Act and the Alaska Statehood Act, the State has "the right and power to manage, [and] administer" submerged lands below inland navigable waters. BLM's role here with respect to navigability determinations is consistent with the agency's expertise that was expressly recognized by Congress in Section 901(b) of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. § 1601 note) and is fundamentally the same as entailed when it makes various decisions under the Alaska Native Claims Settlement Act or the Alaska Statehood Act. The recordable disclaimer issued here does not transfer ownership of the lands, but merely acknowledges that the federal government's record interest in the lands was extinguished by operation of law upon the State's admission to the Union.

The use of the disclaimer here is also consistent with ANILCA and does not limit any authority provided by Congress to FWS to regulate activities within the refuge:

> Only the lands within the boundary of any conservation system unit which are public lands (as such term is identified in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after the date of enactment of this Act, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units....

16 U.S.C. § 3103(c).

Thus to the extent that the submerged lands were conveyed by operation of law to Alaska at statehood, this provision makes clear that the submerged lands were not included "as a portion of" the refuge upon their creation after ANILCA. Since the submerged lands were not a portion of the refuge, there is no question that this disclaimer is consistent with the requirements of 16 U.S.C. § 668dd and the court's holding in *Trustees*.

In accordance with 43 U.S.C. 1745(a), the Secretary of the Interior may "issue a document of disclaimer of interest ... 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 [s]he determines ... a record interest of the United States in lands has terminated by operation of law or is otherwise invalid."

In determining whether or not issuance of a recordable disclaimer of interest is appropriate in this case a comprehensive review of land status and navigability was completed. The BLM relied upon Federal administrative and case law and the advice of Interior Department's Solicitor's Office in determining if the water bodies contained in the application are navigable. The starting point was the definition of navigable waters is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Additionally, the BLM prepared a navigability report dated September 4, 2003, which discusses the land status, previous conveyance actions by the BLM, physical character, and historical uses of the respective rivers and streams for travel, trade, and commerce. This report considers all available historical records and includes official BLM casefiles, federal records, newspapers, published documents, oral interviews, and photographs.

APPLICATION APPROVED IN-PART

The United States has no present interest in the lands described below because all of the federal interests passed to the State of Alaska at the time of statehood. Approving the State's application for a recordable disclaimer will remove a cloud on title by providing certainty about the ownership of submerged lands underlying navigable reaches of the Black River and its tributaries. Without this certainty, ownership between the two sovereigns, the State and the United States, is unclear. This lack of clarity of sovereign ownership greatly complicates the application of natural resources, hunting, fishing, subsistence and other laws to the submerged lands involved. Resolving clouds on title between the State and the United States is thus of even greater importance than resolving title between a private party and the United States. Accordingly, the State's application for a recordable disclaimer of interest is hereby approved as follows:

1. The lands beneath the Black River between the lines of the ordinary high water marks on its banks from its confluence with the Black River Slough, within T. 21 N., R. 14 E., Fairbanks Meridian, Alaska, upstream approximately 220 river miles to its confluence with the Grayling Fork in T. 15 N., R. 26 E., Fairbanks Meridian, Alaska.

2. The lands beneath the Black River Slough between the lines of the ordinary high water marks flowing from the Porcupine River, within T. 22 N., R. 14 E., Fairbanks Meridian, downstream approximately 11 river miles and returning to the Porcupine River within T. 21 N., R. 13 E., Fairbanks Meridian.

3. The lands beneath the Salmon Fork between the ordinary high water marks on its banks from its confluence with the Black River in T. 20 N., R. 24 E., Fairbanks Meridian, upstream approximately 74 river miles to the International Boundary.

4. The lands beneath the Grayling Fork between the lines of the ordinary high water marks on its banks from its confluence with the Black River in T. 15 N., R. 26 E., Fairbanks Meridian, upstream approximately 54 river miles to and through T. 16 N., R. 28 E., Fairbanks Meridian.

5. The lands beneath Bull Creek between the lines of the ordinary high water marks on its banks from its confluence with the Grayling Fork in T. 16 N., R. 28 E., Fairbanks Meridian, upstream approximately 16 stream miles to and through T. 15 N., R. 28 E., Fairbanks Meridian.

APPLICATION SUSPENDED IN-PART

The information submitted by the State in support of its assertion that the following described water bodies are navigable is insufficient to support a finding of navigability or non-navigability at this time. Accordingly, continued processing is suspended pending receipt of additional information.

1. The Black River, from the mouth of Grayling Fork in T. 15 N., R. 26 E., Fairbanks Meridian, upstream approximately 46 river miles to its confluence with Wood River in T. 13 N., R. 27 E., Fairbanks Meridian.

2. Grayling Fork in T. 16 N., R. 29 E., Fairbanks Meridian, upstream approximately 32 river miles to the International Boundary.

3. Bull Creek in T. 15 N., R. 29 E., Fairbanks Meridian, upstream approximately 31 river miles to Section 5, T. 13 N., R. 31 E., Fairbanks Meridian.

ADDITIONAL INFORMATION REQUESTED

Additional information on the physical character and historic uses of the above identified suspended water bodies for travel, trade, and commerce, particularly at the time of statehood, is requested to allow further processing to continue.

CONCLUSION

Based on the foregoing, and the documentation contained in the case record, I have determined that the recordable disclaimer of interest is legally sufficient with the provisions of Section 315 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1745 (1994) and the regulations contained in 43 CFR part 1864.

This decision constitutes the final administrative determination of the Department of the Interior.

I hereby instruct the Bureau of Land Management Alaska State Director to issue a recordable disclaimer of interest in accordance with my decision.

APPROVED:

Rebecca W. Watson

Rebecca W. Watson
Assistant Secretary - Land and Minerals Management

October 23, 2003
Date

Enclosure:
1 - Recordable Disclaimer of Interest (2 pp)

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