United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Alaska State Office
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Anchorage, Alaska 99513-7599
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AA-85442 (1864)
(932)

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DEC 16 2005

DECISION

State of Alaska	:	AA-85442
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Michael Menge, Commissioner	:	Application
550 West 7th Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3650	:	Chilkoot River & Lake

ADMINISTRATIVE WAIVER GRANTED
APPLICATION APPROVED

On May 12, 2004, the State of Alaska (State) filed an application for a recordable disclaimer of interest (AA-85442), 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, for certain lands underlying the Chilkoot River and Chilkoot Lake. The State had made this application on the grounds that title has passed by operation of law from the United States to the State of Alaska on January 3, 1959, the date of Alaska's statehood. On June 8, 2005, the State amended its application to include 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. On December 8, 2005, the State amended its application to exclude that portion of the application for a recordable disclaimer of interest in the bed of the Chilkoot River in Townships 27 South, Ranges 56 and 57 East, Copper River Meridian (CRM).

BACKGROUND

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 Alaska Statehood Act, July 7, 1958, made the Submerged Lands Act applicable to Alaska.[1]

Section 315(a) of FLPMA authorizes the Secretary of the Interior to 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 she determines a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

On May 12, 2004, the State applied for all submerged lands encompassed by the ordinary high water line of the Chilkoot Lake and all submerged lands lying within the bed of the Chilkoot River, including all interconnecting sloughs, from its origin at Ferebee Glacier, in T. 27 S., R. 57 E., downstream to its confluence with the Lutak Inlet, located in T. 29 S., R. 59 E., CRM, Alaska. On December 8, 2005, the State amended its application for a recordable disclaimer of interest to only include all submerged lands between the ordinary high water line of the Chilkoot River, including all interconnecting sloughs, from Section 6, T. 28 S., R. 57 E., downstream through and including Chilkoot Lake, to its confluence with Lutak Inlet, located in T. 29 S., R. 59 E., CRM.

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. On May 12, 2004, the State of Alaska 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, provided the term, "interconnected sloughs" is not contained in the legal description of the recordable disclaimer of interest. The Bureau of Land Management (BLM) has not been provided with information concerning the location of "interconnecting sloughs." To the extent that "interconnecting sloughs" existed at statehood and the waters of the navigable portions of the Chilkoot River flowed through them and still flow through them, they will be included without mention in a disclaimer of interest in the lands underlying the navigable portion of the Chilkoot River.

In support of its application, the State submitted a copy of a BLM navigability report dated March 25, 1980, and a memorandum of navigability review for State selections from the Acting State Director dated June 3, 1980, both stating the Chilkoot River and Chilkoot Lake are navigable. The BLM issued the memorandum in support of land conveyances to the State under the Alaska Statehood Act. However, based on the previous determination of March 25, 1980 and tidal influence, the Chilkoot River (Tps. 29 S., Rs. 58 and 59 E., CRM) downstream from Chilkoot Lake and Chilkoot Lake (T. 29 S., R. 58 E., CRM) was determined to be navigable, and incorporated into a decision, dated February 4, 1981, granting tentative approval to the State of Alaska. This decision was validly appealed, and on June 23, 1981, the Acting State Director changed the previous determination. On October 13, 1981, the February 4, 1981 decision was modified to the extent that the Chilkoot River, in its entirety, upstream from Chilkoot Lake, was determined to be non-navigable

[1] 72 Stat. 339, 343

Notice of the State's application, including the grounds for supporting it, was published in the *Federal Register* on July 6, 2005. In addition, the BLM prepared a draft navigability report describing riparian land status, previous conveyance actions, and the physical character and historical uses of the Chilkoot River and Chilkoot Lake. The report was based upon historical records, including official BLM case files, federal records, newspapers, published documents, oral interviews, and photographs. The BLM sent copies of its draft navigability report to the State of Alaska (Department of Natural Resources [Division of Mining, Land, and Water and Division of Parks and Outdoor Recreation] and Department of Fish and Game), Sealaska Regional Corporation, Haines Mayor, Sheldon Museum & Cultural Center, Earthjustice, Klukwan, Inc., Chilkoot Indian Association, Chilkat Indian Village (Klukwan) IRA, and the Central Council of Tlingit and Haida Indian Tribes of Alaska, inviting their review and comments and affording them an opportunity to provide additional information.

On July 8, 2005, a reporter with radio station KHNS, in Haines, Alaska, interviewed BLM staff regarding the Chilkoot River and Lake RDI Application. Public notice of the State's application, and the availability of the draft navigability report, was published in the *Anchorage Daily News*, *Juneau Empire*, and the *Chilkat Valley News* (April 11, 18, and 25, 2005).

During the published comment period, the BLM received three written comments. Two of the comments provided clarification of certain factual information. The third comment was submitted by the State of Alaska, Department of Natural Resources, Division of Mining, Land, and Water, Public Assertion and Access Defense Unit. By letter dated October 7, 2005, the State of Alaska expressed its concurrence with the finding of the draft navigability report that Lower Chilkoot River and Chilkoot Lake are navigable, yet expressed concerns over the federal government's interpretation of federal title navigability law and disagreed with the finding that the Upper Chilkoot River above Chilkoot Lake is non-navigable. The State contends the Upper Chilkoot River is navigable, and provided accounts from recent phone interviews with four State employees. The State also cited information from the March 25, 1980 navigability report regarding the use of the river by a local homesteader. This information was found to be in error, and the BLM overturned its determination of navigability for the Upper Chilkoot River in a memorandum signed by the State Director on June 24, 1981.

After a thorough consideration of the comments and evidence provided, the BLM, on December 6, 2005, issued its final navigability report. The final report incorporated the factual information presented.

In assessing the navigability of inland water bodies, the BLM relies upon federal administrative and case law and the advice of the Interior Department's Solicitor's Office. The classic definition of navigable waters is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Pertinent Department of the Interior Office of the Solicitor's opinions include Associate Solicitor Hugh Garner's memo of March 16, 1976 ("Title to submerged lands for purpose of administering ANCSA) and Regional Solicitor John Allen's memo of February 25, 1980 ("Kandik, Nation Decision on Navigability"). The agency is also guided by the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988.

After reviewing the State's application, as amended, land status, the historic record pertaining to the Chilkoot River and Chilkoot Lake, legal guidance on title navigability, and previous final BLM determinations of navigability/non-navigability, the BLM finds the following: the Chilkoot River is tidally influenced for approximately 0.5 miles, the Chilkoot River below Chilkoot Lake is navigable, the Chilkoot Lake is navigable, and the Chilkoot River above Chilkoot Lake is not navigable. Therefore under the Equal Footing Doctrine, title to the submerged lands is in the State where the water body is determined navigable or under the Submerged Lands Act of 1988, title to the submerged lands is in the State where the State is an upland owner.

The Submerged Lands Act of 1988, section 101 amending the Alaska National Interest Lands Conservation Act (ANILCA) Section 901(c)(1), provides that:

> The execution of an interim conveyance or patent, as appropriate, by the Bureau of Land Management which conveys an area of land selected by a Native or Native Corporation which includes, surrounds, or abuts a lake, river, or stream, or any portion thereof, shall be the final agency action with respect to a decision of the Secretary of the Interior that such lake, river, or stream, is or is not navigable, unless such a decision was validly appealed to an agency or board of the Department of the Interior on or before December 2, 1980.

The Submerged Lands Act of 1988 specifically addressed the issue of upland ownership, in Section 101 amending ANILCA Section 907(b)(1):

> Whenever...the Secretary conveys land to a Native, a Native Corporation, or the State of Alaska pursuant to the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or this Act which abuts or surrounds a meanderable lake, river, or stream, all right, title, and interest of the United States, if any, in the land under such lake, river, or stream lying between the uplands and the median line or midpoint, as the case may be, shall vest in and shall not be charged against the acreage entitlement of such Native or Native Corporation or the State.

APPLICATION APPROVED

The State of Alaska has made this application on the grounds that title has passed by operation of law from the United States to the State of Alaska on January 3, 1959, the date of Alaska's statehood or that where the State is an upland owner it owns the bed of the Chilkoot River and Chilkoot Lake, regardless of its navigability or that where the State is an upland owner title passed to it pursuant to the Submerged Lands Act of 1988, or if the river is tidally influenced, or for any other legally cognizable reason.

The United States affirms it has no interest in the lands described below; therefore, the State's application for the lands described in this section is hereby approved for reasons listed below. Accordingly, based on the foregoing 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 State's application for a recordable disclaimer of interest is hereby approved, as follows:

1. The lands underlying the Chilkoot River, between the ordinary high water marks on its banks, from its mouth at Lutak Inlet upstream approximately one-half (0.5) mile to the Department of Fish and Game weir site, is tidally influenced; therefore this reach of the Chilkoot River is navigable in law to that point. This segment of the Chilkoot River is presently located in T. 29 S., Rs. 58 E., CRM, Alaska.

2. The lands underlying the Chilkoot River, between the ordinary high water marks on its banks, from the Department of Fish and Game weir site upstream approximately one-half (0.5) mile to the Chilkoot Lake was previously determined by the BLM to be navigable in a decision, as amended, approving conveyance to the State of Alaska. Those determinations were not appealed; therefore under the doctrine of administrative finality those decisions are final for the BLM. This segment of the Chilkoot River is presently located in Tps. 29 S., Rs. 58 and 59 E., CRM, Alaska.

3. The lands underlying Chilkoot Lake, approximately 1,700 acres, between the ordinary high water marks on its banks, was previously determined by the BLM to be navigable in a decision approving conveyance to the State of Alaska. Those determinations were not appealed; therefore under the doctrine of administrative finality those decisions are final for the BLM. Chilkoot Lake is presently located in T. 29 S., R. 58 E., CRM, Alaska.

4. The lands underlying the Chilkoot River, between the ordinary high water marks on its banks, from its confluence with the Chilkoot Lake upstream approximately ten (10) miles to the northern boundary of T. 28 S. R. 57 E., CRM, are owned by the State of Alaska, as upland owner pursuant to the Submerged Lands Act of 1988. This segment of the Chilkoot River is presently located in the following townships: T. 29 S., R. 58 E., and T. 28 S., R. 57 E., CRM, Alaska.
   - Excepting therefrom any submerged lands underlying the Chilkoot River held by the owners of homestead patent number 50-84-0480.

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 document s 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.

Henri R. Bisson
State Director

Enclosures
Form 1842-1 (1 p)
Memo- "Navigability of the Chilkoot Lake and Chilkoot River" (14 pp)

Copy furnished (w/enclosures):

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