United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Alaska State Office
222 West Seventh Avenue, #13
Anchorage, Alaska 99513-7599
http://www.ak.blm.gov

JUN 21 2005

AA-85446 (1864)
(932)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	AA-85446
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Tom Irwin, Commissioner	:	Application –
550 West Seventh Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3579	:	Kasilof River

ADMINISTRATIVE WAIVER GRANTED
APPLICATION APPROVED

On May 12, 2004, the State of Alaska (State) filed an application for a recordable disclaimer of interest (AA-85446), under the provisions of Sec. 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 Kasilof River. The State has made this application on the grounds that either 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 title passed to the State, as the upland owner, under state riparian law. On June 8, 2005, the State amended its application to include entitlement under the Submerged Lands Act of 1988 (P.L. 100-395) or any other legally cognizable reason.

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 the 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.

The State applied for all submerged lands within the bed of approximately thirteen (13) river miles of the Kasilof River between the lines of ordinary high water, including all named and unnamed interconnecting sloughs, from the boundary of the present-day Kenai National Wildlife Refuge downstream to its mouth at Cook Inlet.

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 bodies is not needed to adjudicate the State of Alaska 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.

In support of its application, the State submitted three Bureau of Land Management (BLM) memoranda all containing statements to the effect that Kasilof River is navigable: August 19, 1980 (Tps. 1 – 4 N., R. 12 W. and T. 3 N., R. 11 W., Seward Meridian [SM]); July 12, 1984 (to and including Tustumena Lake [45 miles]); and April 8, 1986 (T. 2 N., R. 11 W., SM). The BLM issued these memoranda in support of land conveyances to the Native corporations and the State of Alaska under the Alaska Native Claims Settlement Act and the Alaska Statehood Act, respectively.

Notice of the State's application, including the grounds for supporting it, was published in the *Federal Register* on March 3, 2005. On March 2 and 3, 2005, BLM sent copies of its draft navigability report for the Kasilof River to the following: the United States Fish & Wildlife Service (USFWS), State of Alaska (Departments of Natural Resources and Fish and Game), Cook Inlet Region, Inc., a Regional Native corporation, Village Native corporations (Salamatoff Native Association, Inc.; Ninilchik Natives Association, Inc.; Kenai Natives Association, Inc.), Tribal Governments (Ninilchik Taditional Council; Kenaitze Indian Tribe [IRA]; Village of Salamatoff), and the Kenai Peninsula Borough, inviting their review and comments and offering them an opportunity to provide additional information. On March 3, 2005, the draft navigability report was also posted on the BLM-Alaska website.

Public notice of the State's application, and the availability of the draft navigability report, was published in the *Anchorage Daily News* (April 12, 19, and 26, 2005) and the *Peninsula Clarion* (April 12, 19, and 26, 2005). On Friday, March 4, 2005, Mike Mason, KBBI, Public Radio, Homer, Alaska interviewed BLM staff regarding the Kasilof River application.

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[1] 72 Stat. 339, 343

During the published comment period, the BLM received only one comment on the Draft Navigability Report, dated April 18, 2005, provided by the State of Alaska Department of Fish and Game. The comment requested clarification of a portion of the conclusions section of the report; no factual evidence to support or contradict a finding of navigability was provided. The BLM responded to the State in a letter dated May 13, 2005. The BLM also received one comment on the State's application, dated June 1, 2005, from the USFWS. The memorandum addressed the State's assertion of entitlement under state riparian law and the issue of "interconnecting sloughs." The BLM agrees with the USFWS; however the issue of ownership entitlement was rendered moot when the State filed an amendment to their application, citing the Submerged Lands Act of 1988 as an authority. The BLM also agrees with the USFWS regarding the issue of "interconnecting sloughs," which is addressed in this decision.

BLM prepared a comprehensive review of the lands applied for and on June 16, 2005, issued a final navigability report which discussed the land status, previous conveyance actions by the BLM, and the physical character and historical uses of the Kasilof River. After reviewing the State's application, land status, the historic record pertaining to the Kasilof River and legal guidance on title navigability, the BLM affirms the navigability of portions of the Kasilof River.

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 DOI Office of the Solicitor's opinions include 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"). The agency is also guided by the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988

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 Act specifically addressed the issue of upland ownership, in section 101 amending ANILCA section 901(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 charges 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 Kasilof River, 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 other legally cognizable reason.

The State asserts there is a cloud on the title and that by the United States approving the State's application for a recordable disclaimer of interest would provide certainty about the ownership of submerged lands underlying the Kasilof River. 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 Kasilof River, between the lines of ordinary high water marks on its banks, from its mouth at Cook Inlet upstream approximately five (5) miles to the south end of a small unnamed island, is tidally influenced; therefore this reach of the Kasilof River is navigable in law to that point. This reach of the Kasilof River was also not reserved at the time of statehood; therefore all of the federal interests passed to the State of Alaska at the time of statehood. That portion of the Kasilof River is presently located in the following townships: Tps. 3 and 4 N., R. 12 W., SM, Alaska.

2. The lands underlying the Kasilof River, between the lines of ordinary high water marks on its banks, from river mile 5 upstream to the south boundary of Sec. 32, T. 3 N., R. 11 W., SM. This reach of the Kasilof River was navigable, and unreserved, at the time of statehood; therefore all of the federal interests passed to the State of Alaska at the time of statehood. That portion of the Kasilof River is presently located in the following townships: Tps. 3 N., Rs. 11 and 12 W., SM, Alaska.

3. The lands underlying the Kasilof River, between the lines of ordinary high water marks on its banks, which were within the Kenai National Moose Range, originally withdrawn on December 18, 1941 and remained withdrawn on January 3, 1959, the date of statehood, were not available to the State under the Equal Footing Doctrine. However, if the land that was withdrawn was conveyed to the State by the United States, then title to the submerged land transfers to the State pursuant to the Submerged Lands Act of 1988. The lands in T. 2 N., R. 11 W., SM, were conveyed to the State; therefore title to the

submerged lands went to the State upon conveyance. That portion of the Kasilof River is presently located in Secs. 5 and 8, T. 2 N., R. 11 W., SM, Alaska.

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.

Henri R. Bisson
State Director

Enclosures
Form 1842-1 (1 p)
Memo – "Navigability of the Kasilof River in the Cook Inlet Region" (10 pp)

Copy furnished (w/enclosures):

Alaska Department of Natural Resources
Division of Mining, Land and Water
Attn: Dick Mylius
550 West 7th Avenue, Suite 1400
Anchorage, Alaska 99501

Alaska Department of Fish & Game
Attn: Tina Cunning
333 Raspberry Road
Anchorage, Alaska 99518

Cook Inlet Region, Incorporated
Attn: Land Department
P.O. Box 93330
Anchorage, Alaska 99509-3330

Kenai Natives Association, Inc.
215 Fidalgo Street, Suite 203
Kenai, Alaska 99611

Ninilchik Natives Association, Inc.
701 West 41st Avenue, Suite 201
Anchorage, Alaska 99503-6604

Salamatoff Native Association, Inc.
P.O. Box 2682
Kenai, Alaska 99611-2682

Kenaitze Indian Tribe (IRA)
255 N. Ames Road
Kenai, Alaska 99611-0988

Village of Salamatoff
P.O. Box 2682
Kenai, Alaska 99611

Ninilchik Traditional Council
P.O. Box 39070
Ninilchik, Alaska 99639

Copy furnished (w/o enclosures):

Regional Director
U.S. Fish & Wildlife Service, Region 7
1011 East Tudor Road
Anchorage, Alaska 99503-6199

Special Assistant to the Secretary for Alaska

DSD, Resources (930)

FM, Anchorage Field Office (040)

Branch Chief, Lands (932)

Regional Solicitor, Alaska