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

In Reply Refer To:
AA-086371
1864 (AK94210)

MAY - 3 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	AA-086371
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Daniel S. Sullivan, Commissioner	:	Application
550 West 7th Avenue, Suite #1400	:	
Anchorage, Alaska 99501-3579	:	Kuskokwim River

ADMINISTRATIVE WAIVER GRANTED
APPLICATION APPROVED, IN PART
APPLICATION SUSPENDED, IN PART

On March 10, 2006, the State of Alaska (State) filed a disclaimer of interest application (AA-086371) with the Bureau of Land Management (BLM) under the provisions of Section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §1745, and the regulations contained in 43 C.F.R. Subpart 1864, for lands underlying the Kuskokwim River.[1] The State's application described the lands applied for as being "all submerged lands lying within the Kuskokwim River, between the ordinary high water lines on the left and right banks from its origins at the confluence with the South Fork of Kuskokwim River and North Fork of Kuskokwim River within Township 28 South, Range 22 East, Kateel River Meridian, Alaska downstream to its confluence with the Kuskokwim Bay within Township 2 South, Range 77 West, Seward Meridian, Alaska."

The State contends that the Kuskokwim River was 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 date of Alaska's statehood. The State's application identified the following sources of law as the basis for its request: the equal footing doctrine, the Submerged Lands Act

[1] Michael L. Menge, Commissioner, Alaska Department of Natural Resources, to Henri Bisson, BLM-Alaska State Director, March 10, 2006, file AA-086371 (1864), Alaska State Office, BLM records.

of 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, or "any other legally cognizable reason."[2]

The Submerged Lands Act of 1953, 43 U.S.C. §1311(a), confirmed states' title to the lands beneath inland navigable waters within their boundaries. It also gave the states authority to manage and administer these lands in accordance with state law. Section 6(m) of the Alaska Statehood Act, made the Submerged Lands Act applicable to Alaska.[3]

Section 315(a) of FLPMA authorizes the Secretary of the Interior:

> [T]o issue a document of disclaimer of interest or interests 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 [that] a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

This authority has been delegated to the BLM State Directors.[4]

BACKGROUND

The State submitted information in support of its application, including legal descriptions, maps, previous BLM navigability determinations, information extracted from the BLM's regional report entitled, "Alaska's Kuskokwim River Region: A History" (1985), and additional documentary material and land status records.

Notice of the State's application was published in the *Federal Register* on September 3, 2010.[5] Notice was also published in the *Anchorage Daily News* (October 7, 14, and 21, 2010), the *Tundra Drums* (October 7 and 21, 2010), and on the BLM-Alaska website. The notices invited review and comments and afforded the opportunity to provide additional information. The comment period was initially scheduled to end on December 2, 2010, but was extended until January 31, 2011. Along with the notices, the BLM prepared and circulated a draft summary report, "Federal Interest in Lands Underlying Kuskokwim River in the Kuskokwim Subregion, Alaska," describing the State's application and supporting evidence, history of riparian land status, previous navigability determinations, history of use, and evidence of commerce.

The BLM sent copies of its draft summary report to the following state and federal agencies with interests in the Kuskokwim River area: the State of Alaska (Departments of Natural Resources and Fish and Game); the U.S. Fish and Wildlife Service (USFWS); and the Office of the Staff Judge Advocate (U.S. Army). The BLM also sent copies of the report to the following Regional and Village Corporations with lands adjacent to or near the Kuskokwim River: Calista Corporation; Doyon, Limited; Akiakchak, Limited; Bethel Native Corporation; Iqfijouaq

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[2] The State's application also offers an alternative basis in support of its asserted ownership of submerged lands. The State asserts that if the water body was not navigable, it would have riparian ownership rights to the submerged lands where it owns the uplands on all sides of the water body.
[3] 72 Stat. 339, 343
[4] 209 DM 7; 235 DM 1; BLM Manual MS-1203, App. 1, p. 52.
[5] 75 FR 54176

Company; Kokarmuit Corporation; The Kuskokwim Corporation (Successor in Interest to Aniak Limited); Kwethluk, Incorporated; MTNT, Limited; Napakiak Corporation; Napaskiak, Incorporated; Oscarville Native Corporation; and Tulkisarmute, Incorporated.

The BLM's draft summary report recommended approving the State's application except for those lands withdrawn by Public Land Order (PLO) 255 (December 15, 1944). The BLM report concluded that these lands were reserved at the time of statehood and therefore title did not transfer to the State of Alaska on January 3, 1959. On October 12, 2010, the U.S. Fish and Wildlife Service agreed with the BLM's conclusions.[6]

Several Native corporations that own lands along the Kuskokwim River commented on possible impacts to their communities that they believed could result from the State's application and posed questions about the disclaimer of interest process. The BLM, State, and several Village Corporation representatives met in Bethel on November 15, 2010, to share information about navigability, submerged land title, and disclaimers of interest, policies, impacts, and process.[7] None of the comments received, either at the meeting or in writing, presented significant factual information or evidence to support or negate BLM's draft findings.

On April 28, 2011, the State submitted comments on the BLM's draft summary report. The BLM considered and analyzed the State's comments before finalizing the summary report. Those comments, where appropriate, were addressed in the final report.

ADMINISTRATIVE WAIVER GRANTED

Pursuant to 43 C.F.R. § 1864.1-2 (c) (1), an application for a disclaimer must include a legal description of the lands for which a waiver is sought 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 BLM may waive this requirement if it is "not needed to properly adjudicate th[e] application." 43 C.F.R. § 1864.1-2(d). The State requested a waiver of the survey requirement under this provision in its application.

The Kuskokwim River is the second longest river in the State of Alaska. The river is formed by the confluence of the North and South Forks of the Kuskokwim rivers and flows approximately 540 miles to the tidewaters of Kuskokwim Bay. The Kuskokwim River is clearly depicted on U.S. Geological Survey quadrangle maps and its location is not in dispute. The ordinary high water mark of the Kuskokwim River is the legal boundary of the submerged lands. Since this is an ambulatory boundary, the location of which may change over time, it is determined that a survey description of the subject water body is not needed to adjudicate the State's application

[6] Regional Director, USFWS-Region 7, to BLM-Alaska State Director, Oct. 12, 2010. The Office of the Staff Judge Advocate (U.S. Army) did not provide written comments.

[7] The following Village Corporations were represented: Bethel, Akiachak, Eek, Akiak, Kwetheluk, McGrath, Napakiak, Napaskiak, Oscarville, Tuluksak, TKC, Nunapitchuk, Tuntutuliak, Kasigluk, and Atmautlluak. Copies of correspondence can be found in file AA-086371 (1864), Alaska State Office, BLM records, Anchorage. The concerns expressed primarily concerned sloughs and identifying boundaries through survey.

and the waiver is hereby granted. There is no need for a survey description in order to process this application.[8]

APPLICATION APPROVED, IN PART

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). There, 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 Department of the Interior's Office of the Solicitor. Relevant Federal statutes include the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988. The Supreme Court's most recent decision on title navigability, *PPL Montana, LLC v. Montana*, 565 U.S. ___ (2012), summarizes and explains the proper interpretation of *The Daniel Ball* criteria. 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. In cases concerning prestatehood reservations, BLM uses the established criteria set out and applied by the Supreme Court in two Alaska cases, *Alaska v. United States,* 545 U.S. 75 (2005) ("*Glacier Bay*") and *United States v. Alaska*, 521 U.S. 1 (1997) ("*Arctic Coast/Dinkum Sands*").

The Kuskokwim River serves as the main route for trade and travel in southwest Alaska. Several communities are located along the Kuskokwim River and it has a long history of use for travel, trade, and commercial activity, which continues to today. In addition, the BLM has consistently concluded through its regional reports and specific land conveyance actions that the Kuskokwim River is navigable.

The United States affirms it has no interest in the lands described below because all of the federal interest passed to the State of Alaska at the time of statehood. Approving the State's application for a recordable disclaimer of interest will remove a cloud on the State's title by providing certainty about the ownership of submerged lands underlying the Kuskokwim River. Without this certainty, ownership between two sovereigns, the State of Alaska and the United States, is unclear. This lack of clarity of sovereign ownership can complicate the application of natural resource laws and other laws to the submerged lands involved.

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[8] "Manual of Surveying Instructions 2009," U.S. Department of the Interior, Bureau of Land Management, Sections 3-162 to 3-166, pp. 81-82.

Accordingly, based on the foregoing and the documentation contained in the case file, in particular the final summary report, "Federal Interest in Lands Underlying Kuskokwim River in the Kuskokwim Subregion" (May 1, 2013), 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 C.F.R. Subpart 1864.

The State's application for a recordable disclaimer of interest is approved in part for the following described lands:

> The lands underlying the Kuskokwim River, excepting those lands within PLO 255, from its beginning at the confluences of its North and South Forks, presently located in Township 28 South, Range 22 East, Kateel River Meridian, Alaska downstream approximately 540 miles to its confluence with the Kuskokwim Bay presently located within Township 2 South, Range 77 West, Seward Meridian, Alaska.

APPLICATION SUSPENDED, IN PART

The State and BLM continue to discuss how best to address those lands impacted by PLO 255. Accordingly, continued processing for this portion of the State's application is suspended pending conclusion of those discussions and those lands are excepted from this decision. By excepting the lands impacted by PLO 255 from my decision and the disclaimer at this time I am not making a decision on PLO 255's effect, I am merely withholding any decision to allow discussions between the State and BLM to continue.

Processing of the State's application is suspended at this time for the following described lands:

> The lands underlying the Kuskokwim River within PLO 255 described as beginning at the point of intersection of Latitude 62 degrees 55 minutes N., with the center line of the deep water channel of the Kuskokwim River, approximate Longitude 155 degrees 33 minutes W. From the point of beginning: East, 2.25 miles; North, 3 miles; West, 1.12 miles; to the center line of the deep water channel of the Kuskokwim River; Southwesterly, 14.5 miles, downstream along center line of the deep water channel of the Kuskokwim River, to the point of beginning.

HOW TO APPEAL THIS DECISION

This decision may be appealed to the Interior Board of Land Appeals, Office of Hearings and Appeals, in accordance with the regulations contained in 43 C.F.R. 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. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed. 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 C.F.R. § 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 C.F.R. § 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.

Bud C. Cribley
State Director

Enclosure

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