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:
1864 (AK9410)

Memorandum

To: File FF-094614

From: Jack Frost, Navigable Waters Specialist (AK9410)

Subject: Summary Report for the Navigability of the Nabesna River within the Tanana River Region, Alaska

The State of Alaska (State) filed an application, dated October 3, 2005, for a recordable disclaimer of interest (RDI) for lands underlying the Nabesna River "between the ordinary high water lines of the left and right banks from its origins at the Nabesna Glacier within Township 5 North, Ranges 13 and 14 East, Copper River Meridian, Alaska, downstream to its confluence with the Tanana River in Township 15 North, Range 19 East, Copper River Meridian."[1] The State identified the location of its application on two maps entitled "Nabesna River Recordable Disclaimer of Interest Application," dated October 3, 2005. The maps were submitted with the State's application.

The State filed an amended RDI application for the Nabesna River, dated September 16, 2015, "to include only the submerged lands underlying the Nabesna River from its mouth to the Black Hills (Sec. 25, T11N, R17E, and CRM). The State withdraws its request for an RDI on the submerged lands underlying the Nabesna River from Sec. 25, T11N, R17E, CRM and the river's source at the Nabesna Glacier."[2] Clarifying its letter from September 16, 2015, the State submitted an email on October 16, 2015 stating that "the State withdraws its request for an RDI on the submerged lands underlying the Nabesna River from its confluence with the Cheslina River in Section 35, T12N, R17E, CRM upstream to the river's source at the Nabesna Glacier."[3]

The State bases its application for a disclaimer of interest on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, and any other legally cognizable reason. The Bureau of Land Management (BLM) may

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[1] Tom Irwin to Henri Bisson, BLM, October 3, 2005, file FF-094614 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in this file.
[2] James Walker to Angela Nichols, BLM, September 16, 2015, file FF-094614 (1864), Alaska State Office, BLM records. The reference document is also available in this file.
[3] Kevin L. Sorensen to Jack Frost, BLM, October 16, 2015, file FF-094614 (1864), Alaska State Office, BLM records. The reference document is also available in this file.

disclaim interest in the submerged lands on any of the grounds that apply. Consideration is also given to whether or not the State's application for lands underlying the subject water bodies meets the regulatory requirements relating to recordable disclaimers of interest in 43 C.F.R. Subpart 1864.

In support of its application, the State submitted the following documents: three BLM memos addressing the Nabesna River's navigability dated October 16, 1975, March 16, 1979, and March 28, 1980; an April 1975 Grumman Ecosystems Corporation report; two Alaska Department of Natural Resources (DNR) historical reports dated May 1979 and March 2, 1979; a 2004 National Park Service commercial transporter's activity report; a 1979 Arctic Environmental Information and Data Center report; and five DNR "Waterbody Use and Observation Questionnaire" documents detailing recreational use on the Nabesna River.[4] The State summarized two other sources of information in support of its application: an article in the *Fairbanks Daily Times* dated September 9, 1913, which reported miners poling a boat up the Nabesna River, and a reference to Sepp Weber's book, The Wild Rivers of Alaska, of a 1969 float trip down the Nabesna River from the Nabesna Road to its mouth.

The Nabesna River heads at the Nabesna Glacier terminus, in Township (T.) 5 North (N.), Range (R.) 14 East (E.), Copper River Meridian (CRM), and flows northerly 85.4 miles, joining the Chisana River to form the Tanana River, in T. 15 N., R. 19 E., CRM, northwest of Northway Junction.[5] None of the riparian lands was reserved at the time of statehood.

Except for those lands within T. 13 N., R. 18 E., CRM, which are still in federal ownership, the riparian lands along the Nabesna River from its mouth upstream to the south boundary of T. 13 N., R. 17 E., CRM, have been conveyed out of federal ownership. The remaining riparian lands are located in either the Tetlin National Wildlife Refuge or the Wrangell-St. Elias National Park and Preserve, both established under the Alaska National Interest Conservation Act (ANILCA) (P.L. 96-487) on December 2, 1980. The State does not have any riparian land along the Nabesna River.

Most riparian lands in private ownership were conveyed by Interim Conveyance (IC) Nos. 364, 365, 714, 964, 965, 1227, 1228, 1377, 1378, and 2405 through 2410 to Northway Natives, Inc. a village corporation, and Doyon, Ltd., a regional corporation, created under the Alaska Native Claims Settlement Act (ANCSA). There are also six certificated Native allotments, which were conveyed pursuant to the Native Allotment Act of 1906.

On August 5, 1981, the Alaska Native Claims Appeal Board (ANCAB) issued its decision, 6 ANCAB 1, in the appeal filed by Northway Natives, Inc. of a BLM decision of June 26, 1978 (F-14912). The State of Alaska and Doyon, Ltd. were also appellants. The ANCAB adopted the BLM Review and Basis for Navigability Determinations, filed March 28, 1980, regarding the Nabesna River, finding that, *inter alia*, the Nabesna River is navigable throughout the contested conveyance area (the Northway selection area) and that the Nabesna River bed should be

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[4] *Ibid.*

[5] River miles were obtained from STORET USGS quadrangle maps located in the BLM State Office, Cadastral Survey, Navigability Section, Anchorage, Alaska.

excluded from the interim conveyance to the Native corporations. The parties had stipulated to the accuracy of the determination. The ANCAB decision was final for the Department (43 C.F.R. § 4.1(b)(3) (1980)), which means that the BLM now has no authority to change that navigability determination.

In addition, the State and Doyon, Ltd. appealed the BLM decisions of June 23, 1978 and June 26, 1978 (F-19155-20) which held, *inter alia*, that the Nabesna River is non-navigable above Nabesna Village. BLM filed with ANCAB the same Review and Basis for Navigability Determinations of March 28, 1980 referred to above. ANCAB held that the Nabesna River is navigable through the selection area. 6 ANCAB 138 (1981).

The Review and Basis for Navigability Determinations concluded that the Nabesna River is navigable as far as the Black Hills and non-navigable above that point. This determination was the basis for IC N. 714 issued pursuant to the decision of August 4, 1983 to Doyon, Ltd. This decision was not appealed. The Submerged Lands Act of 1988, 102 Stat. 979, which amended section 901 of the Alaska National Interest Lands Act (ANILCA), provides that "[t]he 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*." 43 U.S.C. § 1631(c)(1) [emphasis added]. This means that the BLM has no authority or jurisdiction to change this decision or redetermine the navigability of the section of the river within the conveyance area.

The BLM Review and Basis for Navigability Determinations of March 28, 1980 on page 3 concluded that the "Nabesna River as far as the Black Hills affords a route of water travel." The Nabesna River flows through the Black Hills from approximately river mile 25 to 30. The confluence of the Cheslina River with the Nabesna River is at river mile 25.1. Therefore, we have determined that the confluence with the Cheslina River is the appropriate location of the head of navigation on the Nabesna River.

Conclusions and Recommendations

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (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. 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*").

Since the adoption of the Review and Basis for Navigability Determinations by the ANCAB in 1981, as described above, BLM determinations have been consistent with that report.

Applying the aforementioned standards, we conclude that the Nabesna River from its mouth to the confluence with the Cheslina River (river mile 25.1) is navigable. Therefore, we recommend that the BLM grant the State's application for recordable disclaimer of interest for the submerged lands. The navigability was decided previously with finality for the Department. 6 ANCAB 1 and 43 U.S.C. § 1631(c)(1).

Bibliography

Bleakley, Geoffrey T. *A History of the Chisana Mining District, Alaska, 1890-1990.* Published Report, NPS/AFARCR/CRR-96/29. Division of Cultural Resources, National Park Service, Anchorage, Alaska, 1996.

Capps, Stephen R. *The Chisana-White River District, Alaska.* U.S. Geological Survey Bulletin 630. Washington: Government Printing Office (GPO), 1916.

Cole, Terrence M. "Historic Use of the Chisana and Nabesna Rivers, Alaska." Unpublished Manuscript, Alaska Department of Natural Resources, 1979.

Grumman Ecosystems Corporation. *Report on Navigability of Streams Tributary to the Tanana River, Alaska.* Vol. 4. Prepared for U.S. Army Engineer District, Alaska. Bethpage, New York: Grumman Ecosystems Corporation, 1975.

Keogh, Warren J. "Chisana River and Selected Tributaries, Navigability Research Report." Unpublished Report, U.S. Fish and Wildlife Service, Region 7, Water Resources Branch, September 1997.

McKennan, Robert A. "Diary of Robert McKennan, September 1929-June 1930," Steffanson Collection, Dartmouth College. (photocopy)

Orth, Donald J. *Dictionary of Alaska Place Names.* U.S. Geological Survey Professional Paper 567. Washington: GPO, 1967.

University of Alaska, Arctic Environmental Information and Data Center. Alaska Water Body Historical Data. Anchorage, Alaska: BLM Alaska State Office, June 10, 1979 [microform].

U.S., Bureau of Land Management, Alaska State Office. Navigability Section Report Files.

U.S. Coast Guard Navigable Waters of the U.S. Within the Seventeenth Coast Guard District (State of Alaska), revised April 2003.