United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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FF-94263 (1864)
(932)

SEP 30 2005

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DECISION

State of Alaska	:	FF-94263
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Tom Irwin, Commissioner	:	Application
550 West Seventh Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3650	:	Salcha River

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

On May 12, 2004, the State of Alaska (State) filed an application for a recordable disclaimer of interest (FF-94263), 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 Salcha River. 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.

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]

[1] 72 Stat. 339, 343

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 140 miles of the Salcha River between the lines of ordinary high water, including all interconnecting sloughs, from its origins within T. 3 N., R. 19 E., Fairbanks Meridian (FM), Alaska, downstream to its confluence with the Tanana River., located in T. 5 S., R. 4 E., FM.

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 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 Salcha 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 Salcha River.

In support of its application, the State submitted copies of a Bureau of Land Management (BLM) land title report dated February 1, 1980; six BLM navigability-related memoranda dated June 23, 1980, January 27, 1984, April 15, 1988, March 13, 1989, February 6, 1991, and October 15, 2003; and a BLM decision of January 29, 1982 which modified its Decision of November 13, 1963, to exclude the Salcha River from lands tentatively approved for conveyance to the State of Alaska. The BLM issued the memoranda and the decision in support of land conveyances to the State of Alaska and Native allottees under the Alaska Statehood Act and the Native Allotment Act, respectively.

In the following decisions granting tentative approval to the State of Alaska, the BLM determined that the Salcha River was navigable: December 1, 1980 (Tps. 3 S., Rs. 8 to 11 E., and Tps. 4 S., Rs. 8 and 9 E., FM); September 10, 1980 (Tps. 3 S., Rs. 12 to 14 E., FM); January 29, 1982 (T.5 S., R. 7 E., FM); August 9, 1982 (Tps. 5 S., Rs. 5 and 6 E., FM); September 4, 1985 (Tps. 4 S., Rs. 6 and 7 E., FM). The BLM also determined that the river was not navigable in the following decisions granting tentative approval to the State: May 10, 1983 (T. 3 N., R. 19 E., FM); August 12, 1983 (T. 1 N., R. 16 E., FM); May 18, 1984 (Tps. 3 N., Rs. 17 and 18 E., FM); April 9, 1986 (T. 2 N., R. 16 E., FM), September 11, 1986 (T. 3 N., R. 16 E., FM); and September 12, 1986 (T. 3 N., R. 17 E., FM).

Notice of the State's application, including the grounds for supporting it, was published in the *Federal Register* on March 25, 2005. In addition, BLM prepared a draft navigability report

describing riparian land status, previous conveyance actions by the BLM, and the physical character and historical uses of the Salcha River. The report was based upon historical records, including official BLM case files, federal records, newspapers, published documents, oral interviews, and photographs. On March 25, 2005, the BLM sent copies of its draft navigability report to the United States Army, Judge Advocate General's Corps (SJA), and the State of Alaska (Departments of Natural Resources and Fish and Game) inviting their review and comments and affording them an opportunity to provide additional information. The draft report was also posted on the BLM-Alaska website.

On March 30, 2005, a reporter with radio station KUAC, in Fairbanks, Alaska, interviewed BLM staff regarding the Salcha River application. Public notice of the State's application, and the availability of the draft navigability report, was published in the *Anchorage Daily News* and the *Fairbanks Daily News-Miner* (April 7, 14, and 21, 2005). On June 14, 2005, the BLM provided Public Service Announcements to radio stations in the Fairbanks/Salcha area, requesting additional information on the history of the upper Salcha River.

During the published comment period, the BLM received one written comment. By letter dated June 22, 2005, the State of Alaska Department of Natural Resources expressed its concurrence with the finding of the draft navigability report that Salcha River is navigable from its mouth to approximately river mile 90. However, the State disagreed with the finding that BLM lacked sufficient information to determine the navigability of the remainder of the river. The State provided additional evidence of use and referred the BLM to other possible sources of information. The State also disagreed with the BLM's determination that the upper reaches of the river, included in several tentative approvals for conveyance of lands to the State, were non-navigable. Finally, the State expressed concerns over the federal government's interpretation of federal title navigability law.

After a thorough consideration of the State's comments and evidence, and after conducting additional research, the BLM, on September 29, 2005 issued its final navigability report. The final report incorporated the State's evidence and additional information not included in the draft report. The report's conclusions were also revised as a result of the State's filing of an amended application on June 8, 2005.

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 Salcha River, legal guidance on title navigability, and previous final BLM determinations of navigability/non-navigability, the BLM affirms that the Salcha River from its mouth at the Tanana River, located in T. 5 S., R. 4 E., FM, upstream approximately 109 river miles to the

mouth of Lost Creek in section 15, T. 1 S., R. 16 E., FM, is navigable and title is in the State of Alaska. For the Salcha River, from the mouth of Lost Creek to the north boundary of the same township, and distance of approximately three [3] river miles, the State has provided insufficient evidence to demonstrate navigability and the BLM has not been able to identify additional evidence; therefore, the BLM cannot, at this time, determine the navigation of this stretch of the Salcha River. The State of Alaska is the upland owner on both sides of the Salcha River in T. 1 N., R. 16 E., upstream to the head of the river, located in T. 3 N., R. 19 E, FM; therefore under the Submerged Lands Act of 1988, title to the submerged lands is in the State of Alaska.

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, IN PART

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 Salcha 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 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 Salcha River, between the ordinary high water marks on its banks, from its mouth at its confluence with the Tanana River, upstream approximately five and one-half [5.5] miles, is hereby found to be navigable, based on the navigability report, "Navigability of Salcha River in the Tanana River Region," dated September 29, 2005. This segment of the Salcha River is presently located in T. 5 S., R. 4 E., FM, Alaska.

2. The lands underlying the Salcha River, between the ordinary high water marks on its banks, from approximately river mile five and one-half [5.5] upstream to approximately river mile ninety-two [92], a distance of approximately eighty-six and one-half [86.5] river miles, was previously determined by the BLM to be navigable in decisions 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 Salcha River is presently located in Tps. 3 S., Rs. 8 to 14 E.; Tps. 4 S., Rs. 6 to 9 E.; and Tps. 5 S., Rs. 5 to 7 E., FM, Alaska.

3. The lands underlying the Salcha River, between the ordinary high water marks on its banks, from river mile ninety-two [92] to its confluence with Lost Creek at approximately river mile 109, a distance of approximately seventeen [17] river miles, is hereby found to be navigable, based on the navigability report, "Navigability of Salcha River in the Tanana River Region," dated September 29, 2005. This segment of the Salcha River is presently located in T. 1 S., R. 16 E. (upstream to Lost Creek, located in Section 15) and Tps. 2 S., Rs. 14 to 16 E., FM, Alaska.

4. The lands underlying the Salcha River, between the ordinary high water marks on its banks, that begin at approximately river mile 112 and continue upstream approximately twenty-eight [28] river miles to the head of the river, located in T. 3 N., R. 19 E., are owned by the State of Alaska, as upland owner pursuant to the Submerged Lands Act of 1988. This section of the Salcha River is presently located in T. 1 N., R. 16 E.; T. 2 N., R. 16 E.; and Tps. 3 N., Rs. 16 to 19 E., FM, Alaska.

APPLICATION SUSPENDED, IN PART

The information submitted by the State in support of its assertion that the following described section of the Salcha River is navigable is insufficient to support a finding of navigability at this time. Accordingly, continued processing for this section is suspended pending receipt of additional information.

> The lands underlying the Salcha River, between the ordinary high water marks on its banks, from the mouth of Lost Creek, at river mile 109, upstream approximately three [3] miles to river mile 112. This section of the Salcha River is presently located in Sections 2, 3, 10, 11, and 15, T. 1 S., R. 16 E., FM, 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 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 Salcha River in the Tanana River Region" (38 pp)

Copy furnished (w/enclosures):

Alaska Department of Natural Resources
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Attn: Tina Cunning
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Copy furnished (w/o enclosures):

Special Assistant to the Secretary for Alaska

DSD, Resources (930)

FM, Northern Field Office (020)

Branch Chief, Lands (932)

Section Chief, Navigability (927)

Regional Solicitor, Alaska