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

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AUG 9 2005

AA-85089 (1864)
(932)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	AA-85089
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Tom Irwin, Commissioner	:	Application
550 West Seventh Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3579	:	Wood River and Lakes System

ADMINISTRATIVE WAIVER GRANTED
APPLICATION APPROVED

On July 18, 2003, the State of Alaska (State) filed an application for a recordable disclaimer of interest (AA-85089), 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 Wood River and Lakes System. The State 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. 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 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 Wood River and Lakes System between the lines of ordinary high water, including all named and unnamed interconnecting sloughs, beginning at Kulik Lake downstream through the Wood River and Lakes System to its confluence with the Nushagak River. The system encompasses six lakes (Lake Kulik, Mikchalk Lake, Lake Beverley, Lake Nerka, Little Togiak Lake, and Lake Aleknagik), five rivers (Wind, Peace, Agulukpak, Agulowak, and Wood Rivers), and one stream (outlet of Little Togiak Lake, locally known as Little Togiak River).

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 July 18, 2003, 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 four Bureau of Land Management (BLM) memoranda: 1) a December 31, 1975, memo issued by an Easement and Navigability Task Force finding that Wood River, Agulowak River, Lake Aleknagik, and Lake Nerka are navigable; 2) a decision dated November 29, 1979, approving lands for conveyance to Aleknagik Natives, Limited, and Bristol Bay Native Corporation and stating that Wood River, Agulowak River, Lake Aleknagik, and Lake Nerka are navigable; 3) a memo dated November 25, 1983, stating that in 1963 the BLM had determined Lake Kulik, Lake Nerka, Lake Beverley (including its Silver Horn and Golden Horn), and Peace River to be navigable; and 4) a memo dated December 12, 1983, stating that in 1963 the BLM had determined Lake Beverley, Lake Nerka, Little Togiak Lake and its outlet (Little Togiak River), Lake Nerka's Amakuk Arm, and Agulukpak River to be navigable. 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.

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[1] 72 Stat. 339, 343

Notice of the State's application, including the grounds for supporting it, was published in the Federal Register on September 15, 2003. Public notice of the State's application was published in the *Anchorage Daily News* (September 29, and October 6 and 13, 2003) and the *Bristol Bay Times* (October 2, 9, and 13, 2003). On June 16 and 17, 2005, the BLM sent a copy of its draft navigability report for the Wood River and Lakes system to the following: State of Alaska (Department of Natural Resources [Division of Mining, Land, and Water; Division of Parks and Recreation; Office of History and Archaeology] and Department of Fish and Game), Aleknagik Natives Limited, Choggiung Limited, Bristol Bay Native Corporation, Native Village of Aleknagik, Curyung Tribal Council, Earthjustice, and the National Parks Conservation Association, inviting their review and comments and offering them an opportunity to provide additional information. Interested parties were afforded an additional 30-day comment period, ending July 22, 2005.

The BLM received two formal comments on the State's application and draft navigability report. None included factual evidence to support or contradict a finding of navigability. By letter dated December 15, 2003, the National Parks Conservation Association, Sierra Club, and The Wilderness Society commented upon the BLM's authority to issue disclaimers of interest in unreserved lands underlying navigable waters; the sufficiency of the supporting evidence provided by the State with its application; and the federal legal standards for navigability determinations. By letter dated July 21, 2005, the State of Alaska's Public Access Assertion & Defense Unit expressed its concurrence with the findings of the draft navigability report. However, the State expressed concerns over the BLM's interpretation of federal title navigability law and the amount of time and effort that the agency committed to research and write the draft navigability report. On July 28, 2005, the BLM sent a letter to the State responding to its concerns and comments.

The BLM prepared a comprehensive review of the lands applied for and on August 8, 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 Wood River and Lakes System.

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.

After reviewing the State of Alaska's application, riparian land status, the historic record pertaining to the Wood River System as set forth above, the history of federal land conveyances in the system, and the legal guidance, we conclude that the State of Alaska owns the bed of the Wood River from its mouth on the Nushagak River to and including Lake Aleknagik, Lake Nerka, Little Togiak Lake, Lake Beverley, Lake Mikchalk, Kulik Lake, Agulowak River, Agulukpak River, and Peace River. The BLM determined that these lakes and rivers were navigable and incorporated these determinations into numerous conveyance documents. We found no evidence to overturn

those decisions. The State of Alaska is the sole owner of the riparian lands of Wind River and the Little Togiak River. Therefore, under the Submerged Lands Act of 1988, ownership of the lands underlying these rivers passed to 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 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 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, title passed to it pursuant to the Submerged Lands Act of 1988.

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 following water bodies within the Wood River and Lakes System, between the lines of ordinary high water marks on its banks, was navigable and unreserved at the time of statehood; therefore, all federal interests in the lands passed to

the State of Alaska at the time of statehood. Those water bodies are presently located in the following townships:

- Lake Kulik (approximately 10,080 acres) – Tps. 4 S., Rs. 55 to 57 W., and Tps. 5 S., Rs. 54 to 57 W., Seward Meridian (SM), Alaska
- Mikchalk Lake (approximately 320 acres) – Tps. 5 S., Rs. 56 and 57 W., SM, Alaska
- Peace River (approximately 1.8 miles) – T. 5 S., R. 56 W., SM, Alaska
- Lake Beverley (approximately 22,500 acres) – Tps. 5 S., Rs. 56 and 57 W., Tps. 6 S., Rs. 54 to 57 W., and Tps. 7 S., Rs. 54 and 55 W., SM, Alaska
- Agulukpak River (approximately 1.8 miles) – Tps. 7 S., Rs. 54 and 55 W., SM, Alaska
- Lake Nerka (approximately 49,920 acres) – Tps. 6 S., Rs. 56 to 58 W., Tps. 7 S., Rs. 54 to 58 W., Tps. 8 S., Rs. 55 to 57 W., and Tps. 9 S., Rs. 55 to 57 W., SM, Alaska
- Agulowak River (approximately 4 miles) – T. 9 S., 57 W., SM, Alaska
- Lake Aleknagik (approximately 21,760 acres) – T. 8 S., R. 57 W., Tps. 9 S., Rs. 56 to 58 W., and Tps. 10 S., Rs. 55 to 57 W., SM, Alaska
- Wood River (approximately 19 miles) – Tps. 10 to 13 S., R. 55 W., SM, Alaska
- Little Togiak Lake (approximately 2,560 acres) – Tps. 6 and 7 S., R. 58 W., SM, Alaska

2. The State of Alaska received title to the uplands of the following water bodies, thus receiving title to the submerged lands under the Submerged Lands Act of 1988; therefore all of the federal interests passed to the State of Alaska at the time of conveyance. Those water bodies are presently located in the following townships:
    - Wind River (approximately 2 miles) – Tps. 4 and 5 S., R. 57 W., SM., Alaska
    - Little Togiak River (approximately 0.25 mile) – T. 7 S., R. 58 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 Wood River and Lake System in the Bristol Bay Region" (39 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
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Anchorage, Alaska 99518

Alaska Department of Natural Resources
Division of Mining, Land and Water
Attn: Scott Ogan
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Attn: John Westlund
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Choggiung Limited
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Special Assistant to the Secretary for Alaska

DSD, Resources (930)

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Branch Chief, Lands (932)

Regional Solicitor, Alaska