

DANIEL S. SULLIVAN
ATTORNEY GENERAL
STATE OF ALASKA

J. Anne Nelson
Assistant Attorney General
Office of the Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 269-5232
FAX (907)279-2834

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
801 North Quincy Street, Suite 300
Arlington, VA 22203

IBLA-2010-0136) AA-085787
)
STATE OF ALASKA)
)
) Recordable Disclaimer of Interest
) Stikine River

STATEMENT OF REASONS

I. INTRODUCTION

The State of Alaska (“State” or “Alaska”) appeals the April 2, 2010 decision of the Bureau of Land Management, Alaska State Office (“BLM”), rejecting the State’s application for a recordable disclaimer of interest (“RDI”)¹ to the bed of the Stikine River. The Stikine River is a large river that runs less than 30 miles from the

¹ Recordable disclaimers of interest are authorized by section 315 of the Federal Land Policy and Management Act of October 21, 1976 (FLPMA), 43 U.S.C. § 1745. The implementing regulations are at 43 CFR Subpart 1864.

Canada-United States border through the Tongass National Forest in Southeast Alaska before entering the sea. Much of it is below mean high tide.

BLM rejected the State's application² because the United States Forest Service ("USFS" or "Forest Service") objected, after BLM had issued its draft determination that the Stikine was navigable and title to its bed had passed to the State at statehood. The USFS asserted that the 1909 pre-statehood Presidential Proclamation that enlarged the Tongass to include the Stikine River within its exterior boundaries operated to defeat the State's title under the equal footing doctrine and the Submerged Lands Act of 1953.³ Despite the preponderance of law and evidence establishing the State's claim, BLM retreated from its determination that the 1909 proclamation had not retained title in the United States and sided with the Forest Service. In so doing, BLM failed to perform a meaningful analysis of either the State's claim or the Forest Service's objection. BLM instead stated that the Forest Service, by merely disagreeing with the State, had provided a "sustainable rationale" that State title to the bed of the Stikine River had been defeated.

In denying the State's application, BLM also failed to specify the portions of the river to which it applied the Forest Service's objection. While the State's RDI

² Ex. 1, Letter from Thomas E. Irwin, Commissioner, Alaska Dept. Natural Resources to Henri Bisson, Director, Alaska State Office, Bureau of Land Management (Feb. 17, 2005) (hereinafter "State's Application"). The attachments to the State's Application are not included in this exhibit as they are voluminous, presumed to be in the agency record that has been provided the Board, and pertain mostly to navigability, which is not at issue in this appeal.

³ 43 U.S.C. § 1311(a). The USFS did not challenge BLM's conclusion the Stikine River is navigable: "[t]he Forest Service does not contest the navigability of the Stikine River." Ex. 2, Letter from Dennis Bschor, Regional Forester to Craig Frichtl, BLM Alaska State Office (Oct. 22, 2007) at 3 n.4 (hereinafter "Forest Service Objection").

application was pending, the United States, in proceedings in the United States Supreme Court, disclaimed any title interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest.⁴ This disclaimer effectively limited the scope of the State's application to the lands underlying the Stikine River below mean high tide.⁵ The uncontroverted evidence presented by the State and BLM was that the U.S. Army Corps of Engineers reported in 2003 that the tide extends up the Stikine River "for a distance of 20 miles from the [river] mouth."⁶ BLM thus should at least have determined the extent to which tidal waters extend upstream within the Stikine River and approved the State's application to that part of the river.

Because BLM provided no analysis determining the actual validity of the USFS objection, the State requests that the Board set aside BLM's April 2, 2010 decision and remand this matter, with guidance on the proper application of the law, to the agency for determination of whether the Forest Service's objection truly presents a sustainable rationale that the State's title to the bed of the Stikine River has been defeated. Because the United States already has disclaimed interest in the marine submerged lands within the boundaries of the Tongass National Forest, the State also requests that the Board

⁴ *Alaska v. United States*, 546 U.S. 413, 415 (2006) (hereinafter "*Glacier Bay Decree*").

⁵ *Id.* at 415-17; Ex. 3, Letter from Thomas Irwin, Commissioner, Alaska Dept. of Natural Resources to Thomas Lonnie, State Director, BLM (Mar. 21, 2008) at 1-2; Ex. 4, Letter from Thomas E. Irwin, Commissioner, Alaska Department of Natural Resources, to Thomas P. Lonnie, State Director, BLM (May 30, 2008), transmitting letter from Dick Mylius, Division Director, Alaska Department of Natural Resources, to Thomas P. Lonnie, State Director, BLM (May 30, 2008) at 1-2 (hereinafter "State's Response").

⁶ Ex. 5, Memorandum to File AA-085787 (1864), Navigability of Stikine River, Southeast Alaska at 4-5 (hereinafter "Draft Determination").

remand this matter to BLM for a determination that the State’s application is approved at least to the point tidal waters extend up the Stikine River, as the State also requested.⁷ Finally, the State requests that the Board remand this matter for a determination that Shakes Lake and Shakes Slough were navigable at statehood and that title to the beds of these bodies of water has vested in the State.⁸

II. BACKGROUND

Under the equal footing doctrine, new states enter the Union “on an ‘equal footing’ with the original 13 Colonies and succeed to the United States’ title to the beds of navigable waters within their boundaries.”⁹ The Submerged Lands Act of 1953 grants and confirms the states’ “equal footing” title to the land beneath inland navigable waters, and vests the right and power to manage and administer that submerged land in accordance with state law.¹⁰ The Submerged Lands Act also vests the States with

⁷ Ex. 3, Letter from Thomas Irwin, Commissioner, Alaska Dept. of Natural Resources to Thomas Lonnie, State Director, Bureau of Land Management (Mar. 21, 2008) at 1-2. According to *Alaska v. United States*, 546 U.S. at 413, 415-16 (2006) (hereinafter “Glacier Bay Decree”), “all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide” belong to Alaska. That Disclaimer expressly applies to the U.S. Department of Agriculture, including the Forest Service, and estops them from claiming otherwise. *Id.* at 416-17.

⁸ The State’s Application included Shakes Lake and Shakes Slough by name. Shakes Lake drains into Shakes Slough, which enters the Stikine River approximately midway between the Canadian border and the mouth of the Stikine. Ex. 4, State’s Response at 17 & Attachment 12.

⁹ *Alaska v. United States* (hereinafter “*Glacier Bay*”), 545 U.S. 75, 78-79 (2005) (citing *United States v. Alaska* (hereinafter “*Arctic Coast*”), 521 U.S. 1, 5 (1997) (in turn citing *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987) (hereinafter “*Utah Lake*”).

¹⁰ 43 U.S.C. § 1311(a).

ownership of land submerged under tidal waters between the line of mean high tide and seaward to three geographical miles from the coast line of the state, together with ownership of the natural resources “within such lands and waters” as may have previously been in Federal ownership, and the right and power to manage, administer and use all such lands, waters and natural resources in accordance with state law.¹¹ Section 6(m) of the Alaska Statehood Act explicitly applies the Submerged Lands Act to Alaska.¹²

The Federal Government may defeat a future state’s title to the beds of navigable waters by reserving them before statehood in a manner that unequivocally demonstrates both the intent to include submerged lands in the reservation and the intent to defeat the future state’s title.¹³ The intent to retain title must be “definitely declared or otherwise made very plain.”¹⁴ Merely including submerged lands within the reservation is not sufficient to defeat a state’s title to them.¹⁵

Section 315(a) of FLPMA vests the Secretary of Interior with the authority to issue recordable disclaimers of interest (“RDIs”) after consulting with affected federal agencies. Section 315(a) provides:

(a) After consulting with any affected Federal agency, the Secretary [of Interior] is authorized to issue a document of

¹¹ 43 U.S.C. § 1311(a); *United States v. California*, 436 U.S. 32, 33-37 (1978).

¹² Pub. L. No. 85-508 § 6(m); *State of Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401, 1403-04, 1406 (9th Cir. 1989).

¹³ *Utah Lake*, 482 U.S. at 202, *Glacier Bay*, 545 U.S. at 79; *California*, 436 U.S. at 38-41; *Ahtna, Inc.*, 891 F.2d at 1406.

¹⁴ *Glacier Bay*, 545 U.S. at 79 (quoting *Arctic Coast*, 521 U.S. 1, 34 (1997), in turn quoting *Utah Lake*).

¹⁵ *Id.*

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 (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; . . .¹⁶

Nothing in FLPMA provides that “consulting” with other federal agencies means “deferring” to them. Instead, under FLPMA, RDIs are intended to be issued by the Department of Interior where that Department determines, based on its own evaluation, that “a record interest has terminated by operation of law or is otherwise invalid.” Recordable disclaimers “have the same effect as a quit-claim deed from the United States.”¹⁷

The statute requires that BLM consider any objections made by other affected federal agencies. However, 43 C.F.R. § 1864.1-4, first promulgated in 2003 at the request of the Forest Service,¹⁸ provides:

BLM will not issue a recordable disclaimer of interest over the *valid objection* of another land managing agency having administrative jurisdiction over the affected lands. *A valid objection must present a sustainable rationale* that the objecting agency claims United States title to the lands for which a recordable disclaimer is sought.

The Alaska State Office of BLM adopted an Instruction Memorandum (“IM”) in 2004 that set out the agency’s procedures for processing RDI applications. That IM made no mention of 43 C.F.R. § 1864.1-4. But a decision by the Department of Interior in 2004 addressing that regulation interpreted it as still placing responsibility for

¹⁶ 43 U.S.C. § 1745(a).

¹⁷ 43 U.S.C. § 1745(c).

¹⁸ 68 Fed. Reg. 494, 499 (2003).

the determination of whether another federal agency's objection to the application was substantively correct with the Department of Interior – rather than deferring to another federal agency's mere claim.¹⁹

However, BLM changed its interpretation in a recent new IM, issued the day before BLM rejected the State's application for the Stikine. In the new IM, BLM revises its statutory duty:

As a general rule, BLM will consider disputes over legal questions as constituting a valid objection. An objection that identified a controlling legal precedent would be valid. Uncertainty of the effects of a prestatehood reservation on submerged land title is another example of what would constitute a valid objection.²⁰

Thus, under the new interpretation, first applied to the RDI application for the Stikine River, a mere “dispute” created by another federal agency's objection will apparently suffice to create a “valid” objection to an RDI application under the regulation. That is not what Congress intended.

Pursuant to the regulations at 43 CFR § 1864, the State filed its application for an RDI to the bed of the Stikine River on February 5, 2005.²¹ The State's application cited the equal footing doctrine and requested an RDI for:

¹⁹ Ex. 6, *State of Alaska*, Recordable Disclaimer of Interest Application—Black River, FF-93920 at 3 (hereinafter “*Black River*”) (“BLM, as the agency delegated authority under the regulations to process applications for recordable disclaimers, is the bureau that must determine the sufficiency of any evidence presented to it or that it independently discovers.”)

²⁰ Ex. 7, Instruction Memorandum No. AK-2010-012, Apr. 1, 2010, at 5.

²¹ Ex. 1, State's Application.

[A]ll submerged lands lying within the bed of the Stikine River, and all named and unnamed interconnecting sloughs including Binkleys Slough, Red Slough, Guerin Slough, Knig Slough, Andrew Slough, Hooligan Slough, Shakes Slough, Shakes Lake, North Arm, and Ketili River, between the ordinary high water lines of the left and right banks from the Alaska/Canada International Border in T. 60 S., R. 86 E., Copper River Meridian, Alaska, downstream approximately 27 miles to all points of confluence at its mouth in the Eastern Passage, Dry Strait and Frederick Sound, within T. 60 S., R. 82 E.; T. 61 S., R. 83 E. and T. 61 S., R. 84 E.; and T. 62 S., R. 82, 83 and 84 E., Copper River Meridian, Alaska.²²

The State submitted clarification on June 8, 2005 that it sought ownership of the submerged lands also by virtue of the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, and any other legally cognizable reason.²³ In response to BLM's request, the State submitted, on June 4, 2007, a detailed analysis concluding that the Tongass reservations did not defeat Alaska's title to the land underlying the Stikine River.²⁴

BLM published the Federal Register notice of its Draft Determination on August 22, 2007.²⁵ The Draft Determination found that the Stikine was navigable in fact to the Canadian border at the time of statehood, and that "the lands underlying the Stikine River were not reserved at the time of statehood. Therefore, title to lands underlying the river vested in the State of Alaska at the time of statehood."²⁶ BLM also stated that it had

²² Ex. 1, State's Application at 1, 2.

²³ Ex. 8, Letter from Thomas E. Irwin, Commissioner, Alaska Dept. Natural Resources to Henri Bisson, Director, Alaska State Office, BLM (June 8, 2005).

²⁴ Ex. 4, State's Response, Attachment 1, Letter from Dick Mylius, Alaska Dept. of Natural Resources to Callie Webber, BLM RDI Program (June 4, 2007).

²⁵ Ex. 9, 72 Fed. Reg. 47,067 (Aug. 22, 2007).

²⁶ Ex. 5, Draft Determination at 2-3, 9. BLM determined that title to a 60-foot-wide reservation marking the United States-Canada International Boundary had not passed to

insufficient information specific to the other waterways in the State’s application to make a navigability determination regarding them. However, BLM acknowledged that, to the extent the interconnecting sloughs and unnamed waterways were “an integral part of the river at statehood,” title to the land underlying these bodies of water also passed to Alaska upon statehood.²⁷

On October 22, 2007, the USFS objected to BLM’s draft determination, asserting that the pre-statehood reservations that created the Tongass National Forest manifested Congressional intent to defeat the future State’s title to the lands underlying the Stikine.²⁸ Alaska provided additional information on October 30, 2007, clarifying the interconnectedness with the Stikine of the named and unnamed waterways identified in the State’s application, and supporting the historic navigability of Shake’s Slough and Shake’s Lake.²⁹ On May 30, 2008, Alaska provided a detailed, 17-page legal analysis of the USFS objections, citing controlling legal precedent that rebutted the Forest Service’s objection that the Tongass reservations defeated the State’s title to the bed of the Stikine.³⁰

State. *Id.* at 9. The State does not claim title to the submerged lands within the federal withdrawal for the Canadian border.

²⁷ *Id.* at 9.

²⁸ Ex. 2, Forest Service Objection at 4-7. Despite having access to the State’s application and subsequent correspondence on BLM’s website, the Forest Service did not voice its objection until after BLM issued the Draft Determination.

²⁹ Ex. 4, State’s Response, Attachment 10, Letter from Dick Mylius, Alaska Dept. of Natural Resources to Tom Lonnie, Director, Alaska State Office, BLM (Oct. 30, 2007).

³⁰ Ex. 4, State’s Response. The State supplemented this letter a week later with more legible versions of the same attachments. Ex. 10, Letter from Dick Mylius, Alaska Dept. of Natural Resources to Tom Lonnie, Director, Alaska State Office, Bureau of Land

BLM rejected the State's application on April 2, 2010.³¹ BLM's Decision notes, however, that:

[t]he draft report on the Stikine River was issued before the USFS filed its objection and addressed issues that may not have been addressed after the filing of a valid objection. The draft report was released to interested parties and is part of the administrative record for the State's RDI application for the Stikine River.³²

The Decision, therefore, does not retract nor amend BLM's determination that the Stikine, including the interconnected named and unnamed waterways that are an integral part of the river, was navigable at statehood. The Decision also does not evaluate the legal validity of the Forest Service's objection and the State's 17-page response, nor does it revisit BLM's original determination that title to the bed of the Stikine passed to Alaska at statehood. The Decision merely recounts the Forest Service's objections and concludes that "[u]ncertainty of the effects of a prestatehood reservation on submerged land title is one example of what may constitute a valid objection."³³ Even more troubling, it indicates that, if the USFS had filed its objection beforehand, BLM may not have even addressed the issue.³⁴ Because BLM ignores the analysis provided by both

Management (June 5, 2008). The more legible attachments have been incorporated into Ex. 4, State's Response.

³¹ Ex. 11, Decision, AA-085787 Recordable Disclaimer of Interest Application, Stikine River (hereinafter "Decision").

³² *Id.* at 3 n.6.

³³ *Id.* at 5.

³⁴ *Id.* at 3 n.6.

parties and wholly fails to evaluate the controlling legal precedent cited by the State,³⁵ the Board should set aside BLM's Decision and remand this matter back to the agency for a meaningful determination of the validity of the Forest Service's objections.

III. STATEMENT OF STANDING

Alaska has standing under 43 C.F.R. § 4.410(b) because it is the object of BLM's Decision declining to issue a recordable disclaimer of interest to the land underlying the Stikine River, and because the State participated in the process leading to this appeal by filing the application for a recordable disclaimer and submitting supporting documentation and analysis. The State applied to BLM for a recordable disclaimer on the grounds that Alaska acquired title at statehood by operation of the equal footing doctrine and the Submerged Lands Act. BLM rejected the State's application on April 2, 2010. The Decision was received by fax by the Alaska Department of Natural Resources on April 6, 2010. Alaska timely filed its notice of appeal on May 5, 2010.

IV. ARGUMENT

A. BLM Erred by Failing To Assess the Validity of the USFS Objection.

The Board reviews BLM decisions de novo.³⁶ However, BLM must articulate the reasons for its decisions:

³⁵ BLM's Decision states that "[a]n objection that identifies a controlling legal precedent would be valid," yet BLM fails to acknowledge the controlling legal precedent cited by the State in its May 30, 2008 letter that defeats the Forest Service's arguments.

³⁶ *State of Alaska*, 132 IBLA 197, 205 (Mar. 29, 1995).

BLM operates under the general requirement, imposed by well-established precedent, that its decision must contain a reasoned and factual explanation providing a basis for understanding and accepting the decision, or alternatively, for appealing and disputing it before this Board. *Kanawha & Hocking Coal & Coke Co.*, 112 IBLA 365, 368 (1990); *Roger K. Ogden*, 77 IBLA 4 (1983); *Petrovest, Inc.*, 71 IBLA 250 (1983).³⁷

BLM's Decision does not do this.

BLM's Draft Determination considered whether the Tongass reservations defeated State title and concluded they did not:

After reviewing the IBLA's reasoning [in *Katalla River*, 102 IBLA 357 (1988), reinstated, IBLA 85-768 (1994), order, decision reinstated, stay lifted] and the facts, we conclude that the Presidential Proclamation of February 16, 1909, which enlarged the Tongass National Forest and included the Stikine River drainage area, did not defeat the State's title to the bed of the navigable Stikine River."³⁸

The Forest Service challenged BLM's determination, arguing that the federal reservations that added the land surrounding the Stikine to the Tongass National Forest included the land underlying the Stikine, and that section 5 of the Alaska Statehood Act demonstrated Congressional intent to defeat the State's title.³⁹ In response, the State provided 17 pages of legal analysis specifically rebutting the Forest Service's objection.⁴⁰ BLM's Decision, however, performs no analysis of either the Forest Service's objection or the State's rebuttal. Instead, BLM simply observes that the Forest Service claims that the Tongass

³⁷ *Id.* at 205 (citing *Southern Utah Wilderness Alliance*, 131 IBLA 293, 294-95 (1994)).

³⁸ Ex. 5, Draft Determination at 3.

³⁹ Ex. 2, Forest Service Objection at 3-6.

⁴⁰ Ex. 4, State's Response.

reservations did defeat State title, and then deems the objection “valid,” apparently simply because it was made.⁴¹

BLM’s Decision, and its current IM on processing RDIs in Alaska, cites a June 28, 2004 letter from the Department of Interior Assistant Secretary for Land and Minerals Management to Senator Joseph Lieberman.⁴² The Assistant Secretary’s letter responds to concerns raised by Senator Lieberman regarding the Assistant Secretary’s decision to issue an RDI for portions of the Black River, in northern Alaska.⁴³ The Assistant Secretary’s letter states that, in addition to factual evidence negating navigability, “an assertion based on a court decision that title to the lands underlying the water body remained in the United States at statehood would also be considered a ‘valid objection.’”⁴⁴

⁴¹ Ex. 11, Decision at 4-5.

⁴² Ex. 12. Letter from Rebecca W. Watson, Assistant Secretary, Land and Minerals Management, to Sen. Joseph Lieberman (June 28, 2004).

⁴³ Ex. 13, Letter from Sen. Joseph Lieberman to Department of Interior Secretary Gale Norton (Apr. 5, 2004). In the *Black River* decision, the Assistant Secretary overruled U.S. Fish and Wildlife Service (“USFWS”) objections that there was insufficient evidence of navigability of the lower Grayling Fork, which was covered by the State’s RDI application, and that granting the RDI would improperly transfer land management authority from the USFWS. Ex. 14, *State of Alaska, Recordable Disclaimer of Interest Application-Black River*, Ser. No. FF-93920 (Oct. 23, 2003) at 3-4 (hereinafter “*Black River Decision*”). The Assistant Secretary acknowledged that most of the comments received on the State’s application “pertain[ed] to process, potential impacts to property rights, or land and resource management issues,” but confirmed that the issue was not transfer of ownership of lands, but “acknowledge[ment] that the federal government’s record interest in the lands was extinguished by operation of law upon the State’s admission to the union.” *Id.* at 2, 4.

⁴⁴ Ex. 12, Letter from Rebecca W. Watson, Assistant Secretary, Land and Minerals Management, to Sen. Joseph Lieberman (June 28, 2004) at 2.

In its IM, BLM greatly enlarges, without foundation, the Assistant Secretary's lone statement regarding what might constitute a valid legal objection:

While the BLM will generally defer to an objection of the federal land management agency, the objection must provide a clear rationale based on factual evidence or legal arguments

*As a general rule, BLM will consider disputes over legal questions as constituting a valid objection. An objection that identified a controlling legal precedent would be valid. Uncertainty of the effects of a prestatehood reservation on submerged land title is another example of what would constitute a valid objection.*⁴⁵

In support for these statements, the IM cites to the Assistant Secretary's letter, and explains that "[g]uidance from the Assistant Secretary with programmatic oversight and authority is binding on Interior agencies."⁴⁶

The letter from the Assistant Secretary, however, does not provide the guidance that the IM claims it does. Nor does it support BLM's Decision. The Assistant Secretary's letter addresses primarily the *factual* issues inherent in reaching a legal finding of navigability, and BLM's process and authority for investigating and resolving them. The sole statement regarding what might constitute a valid *legal* objection arises in this context:

In addition to the question regarding sufficiency of information, factual evidence that a water body is not navigable may also constitute a "valid objection." For example, an assertion based on a court decision that title to the lands underlying the water body remained in the United

⁴⁵ Ex. 7, Instruction Memorandum No. AK-2010-012, Apr. 1, 2010, at 5 (emphasis added).

⁴⁶ *Id.* at 5 n.9.

*States at statehood would also be considered a “valid objection.”*⁴⁷

The Assistant Secretary’s letter provides no basis for the IM’s statement that “the BLM will generally defer to an objection of the federal land management agency,”⁴⁸ nor does it provide any basis for BLM’s retreat from its Draft Determination and from evaluating the legal merits of the Forest Service’s objection and the State’s rebuttal.

Although BLM provides in its new IM that a federal agency objection which “identifies a controlling legal precedent” on the issue may defeat an RDI application,⁴⁹ BLM’s Decision does not evaluate, and does not determine, whether the Forest Service’s objection does that.⁵⁰ As the State pointed out in its May 30, 2008 Response, the dictionary definition of “valid” in the context of 43 C.F.R. § 1864.1-4 is “[w]ell-grounded; just: *a valid objection*” and “[h]aving legal force; effective or binding: *a valid title*.”⁵¹ The dictionary definition of “sustain” in the context of 43 C.F.R. § 1864.1-4 is “[t]o affirm the validity of” or “[t]o prove or corroborate; confirm.”⁵² The Decision appropriately states that that “[a]n objection that identifies a controlling legal precedent would be valid,”⁵³ yet BLM wholly fails to evaluate whether the Forest Service objection does, in fact, “identify[y] a controlling legal precedent”⁵⁴ that defeats State title.

⁴⁷ *Id.* at 2 (emphasis added).

⁴⁸ *Id.* at 5.

⁴⁹ Ex. 7, Instruction Memorandum No. AK-2010-012, Apr. 1, 2010, at 5.

⁵⁰ Ex. 11, Decision at 5.

⁵¹ The American Heritage College Dictionary (3rd ed. 1993) (emphasis in original).

⁵² *Id.*

⁵³ Ex. 11, Decision at 5.

⁵⁴ Ex. 7, Instruction Memorandum No. AK-2010-012, Apr. 1, 2010, at 5.

In its Decision, BLM correctly recognizes that, “[p]ursuant to FLPMA, the BLM has the authority to determine whether there is a federal interest in the lands underlying these water bodies even when the lands are within an area administered by another federal agency. . . . Where the law and a preponderance of evidence support the State’s claim, the BLM will approve an application.”⁵⁵ However, BLM’s evaluation of the Forest Service’s objection and State’s rebuttal consists of simply restating the positions of the parties, and concluding that “[u]ncertainty of the effects of a prestatehood reservation on submerged land title is one example of what may constitute a valid objection.”⁵⁶ BLM acknowledges that it is authorized to determine whether a federal interest exists in submerged lands, yet it abandons its previous analysis and refuses to make such a determination. In essence, BLM’s Decision changes the stated “valid objection” standard from requiring a “sustainable rationale that the objecting agency claims United States title to the land”⁵⁷ to requiring only that the objecting agency make some plausible objection.

The Board should reverse the action of the BLM. Not only do the Decision and the IM misstate and misapply the contents of the Assistant Secretary’s letter, but they abrogate the responsibility vested in BLM by FLPMA. The statute requires BLM to consult with affected federal agencies.⁵⁸ It does not required blind deference to them. The Board should remand this matter with instructions on what constitutes a valid

⁵⁵ Ex. 11, Decision at 3.

⁵⁶ *Id.* at 5.

⁵⁷ 43 C.F.R. § 1864.1-4.

⁵⁸ 43 U.S.C. § 1745(a).

objection under the regulation and FLPMA and instruct BLM to properly apply the law and determine whether the Forest Service's objection is truly valid.

B. The Stikine River Is Navigable.

The Stikine River's navigability within the State of Alaska is undisputed.⁵⁹ The State's title to the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed at statehood, also is undisputed.⁶⁰ The sole legal issue before the Board is whether BLM properly evaluated the claim by the Forest Service that Congress intended, through the reservations creating the Tongass National Forest and section 5 of the Alaska Statehood Act, to defeat State title to the non-tidal submerged land of the Stikine River.

C. The Forest Service Fails To Present A Sustainable Rationale That The United States Intended To Defeat Alaska's Title to the Bed of the Stikine River.

The power of Congress to defeat a future state's title to submerged lands within its boundaries by reservation or withdrawal, as opposed to conveyance to a third party, was first addressed by the U.S. Supreme Court in *Utah Division of State Lands v. United States* ("Utah Lake").⁶¹ *Utah Lake* held that for a reservation of land to effectively overcome the strong presumption against defeating state title, the United States must "establish that Congress clearly intended to include land under navigable

⁵⁹ Ex. 5, Draft Determination at 9; Ex. 2, Forest Service Objection at 3 n.4; Ex. 1, State's Application; Ex. 4, State's Response at 1.

⁶⁰ *Alaska v. United States*, 546 U.S. 413, 415 (2006).

⁶¹ 482 U.S. 193, 200 (1987) ("we have never decided whether Congress may defeat a State's claim to title by a federal reservation or withdrawal of land under navigable waters").

waters within the federal reservation” and “that Congress affirmatively intended to defeat the future State’s title to such land.”⁶² The Court concluded that even a prestatehood reservoir reservation, which necessarily included the waters of Utah Lake as the reservation’s focus, did not overcome the strong presumption against defeating state title.⁶³

Ten years later, in *Arctic Coast*, the Supreme Court applied this test to Alaska’s claim to the submerged lands beneath the Arctic National Wildlife Refuge.⁶⁴ In that case, the Court found that the intent to include the submerged lands within the area was documented in the application by the federal Bureau of Sport Fisheries and Wildlife to create the Refuge, and that section 6(e) of the Alaska Statehood Act manifested Congressional intent to defeat Alaska’s title.⁶⁵ In 2005, the Supreme Court decided *Glacier Bay*, in which it considered Alaska’s claims to the submerged lands underlying waters of Glacier Bay National Park in Southeast Alaska.⁶⁶ The Court endorsed the

⁶² *Id.* at 202.

⁶³ *Id.* at 199, 203.

⁶⁴ 521 U.S. 1, 51-61 (1997).

⁶⁵ *Id.* at 61-62. Section 6(e) of the Alaska Statehood Act provides:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska . . . shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency:
Provided, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

Pub. L. No. 85-508 § 6(e).

⁶⁶ 545 U.S. 75, 101,109 (2005).

Special Master’s finding that “exclusion of the submerged lands would have undermined at least three of the purposes that led the United States to create, 34 years prior to statehood, Glacier Bay National Monument”⁶⁷ under the Antiquities Act.⁶⁸ As with *Arctic Coast*, the Supreme Court found that the descriptions of the withdrawals that created the Glacier Bay National Monument “clearly included the submerged lands within its boundaries,” and that Section 6(e) of the Alaska Statehood Act operated as Congress’ intent to defeat State ownership of those submerged lands.”⁶⁹

In this case, the USFS objection challenged BLM’s determination on the grounds that *Glacier Bay* and *Arctic Coast* abrogated the *Utah Lake* test in a manner applicable to the Stikine River.⁷⁰ The Forest Service argued that the 1909 Presidential Proclamation that added the Stikine River drainage to the Tongass National Forest encompassed submerged features, indicating intent to include them in the reservation, and that “federal ownership of the submerged lands is important to achieve the purposes for which the Tongass was created.”⁷¹ To bolster this argument, the Forest Service asserted that the 1949 designation by a regional forester of certain land at the mouth of the Stikine as the Stikine Flat Wildlife Area, and the post-statehood revocation and reclassification of a smaller included area as the Stikine Waterfowl Management Area,

⁶⁷ *Id.* at 101-102. Glacier Bay National Monument was designated as part of Glacier Bay National Park and Preserve in 1980. 16 U.S.C. § 410hh-1(1).

⁶⁸ Antiquities Act of 1906, Ch. 3060, 34 Stat. 225, 16 U.S.C. § 431 *et seq.*

⁶⁹ *Glacier Bay*, 545 U.S. at 101, 102.

⁷⁰ Ex. 2, Forest Service Objection at 3-7.

⁷¹ *Id.* at 5.

demonstrated the intent to include submerged lands in the 1909 reservation.⁷² The Forest Service also argued that section 5 of the Alaska Statehood Act manifests Congressional intent to defeat Alaska's title to submerged lands.⁷³

The Forest Service's objection fails in three material respects. First, and most important, the statutory authority for the federal reservations that created the Tongass National Forest does not include the authority to reserve submerged lands. Therefore, the federal government could not have intended to reserve them, nor could Congress have intended to defeat Alaska's title to them at statehood. In fact, this Board already has ruled that the reservations creating the Chugach National Forest, which were made under the same statutory authority and under virtually identical presidential proclamations as the Tongass, did not defeat Alaska's title to the beds of navigable waters.

Second, contrary to the Forest Service's objection, sections 5 and 6(m) of the Alaska Statehood Act expressly confirm Alaska's title to the submerged lands within the Tongass National Forest. Finally, the United States already has disclaimed interest in the *marine* submerged lands within the Tongass National Forest, which explicitly includes the bed of the Stikine to the extent marine waters occur upstream, and by logical extension, should apply to the non-tidally influenced navigable stretches of the river upstream to the Canadian border.

1. In Accordance With The Board's *Katalla River* Decision, There Could Be No Intent To Reserve The Land Underlying The

⁷² *Id.* at 3, 6.

⁷³ *Id.* at 5-6.

Stikine Because The Statutory Authority For The Tongass Reservations Does Not Include The Authority To Reserve Submerged Lands Or Defeat State Title To The Beds Of Navigable Waters.

The Tongass National Forest, including the area through which the Stikine River flows, was created pursuant to two acts of Congress. The Creative Act of 1891 authorized the President to “set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations.”⁷⁴ Under the authority of this Act, President Cleveland more than doubled the acreage of existing United States forest reserves, including reserving 21 million acres of “generally settled” forest land.⁷⁵ Congress reacted by enacting the Organic Administration Act of June 4, 1897, which constrained the President’s authority under the Creative Act by specifying that forest reservations could be created out of the public lands for two purposes only: conserving water flows and providing a continuous timber supply:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States⁷⁶

⁷⁴ Ex. 15, Creative Act of Mar. 3, 1891, § 24, 26 Stat. 1095, 1103.

⁷⁵ *United States v. New Mexico*, 438 U.S. 696, 706 & n.12 (1978).

⁷⁶ Ex. 16, Organic Administration Act of June 4, 1897, 30 Stat. 11, 35. *United States v. New Mexico*, which addresses the extent of federal reserved water rights in national forests, contains a comprehensive discussion of the history and purposes of the Creative Act of 1891 and the Organic Administration Act of 1897. *See New Mexico*, 438 U.S. at 705-13. *See also* Ex. 4, State’s Response, Attachment 1, Letter from Dick Mylius, Alaska Dept. of Natural Resources to Callie Webber, BLM RDI Program (June 4, 2007) at 2-3.

Neither of these purposes requires, or even contemplates, reservation of submerged lands. Not only does the stated purpose of the authorizing legislation defeat the notion that Congress intended to reserve submerged lands as part of the national forest system, but the statutory language itself establishes that it applied only to “public lands,” a term of art well understood by Congress and the courts to mean land subject to sale or other disposition under the general land laws, and not submerged land held in trust for future states.⁷⁷

The Supreme Court examined the purpose of the Creative Act of 1891 and the Organic Administration Act of 1897 in *United States v. New Mexico*.⁷⁸ In that case, the Court explicitly rejected the federal government’s contention that the Creative Act of 1891 and the Organic Administration Act of 1897 entitled it to minimum instream flows for “aesthetic, recreational, and fish-preservation purposes”⁷⁹ The Court concluded “[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or

⁷⁷ See *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1984); Ex. 4, State’s Response, Attachment 1, Letter from Dick Mylius, Alaska Dept. of Natural Resources to Callie Webber, BLM RDI Program (June 4, 2007) at 2. See also *James v. State*, 950 P.2d 1130, 1138-39 (Alaska 1997) (holding that generally the term “public land” refers to uplands and that is its meaning as used in the February 16, 1909 Tongass proclamation, which “necessarily has the same meaning as ‘public lands’ has in the Organic Administration Act of 1897, and in the act which it limited, the Creative Act of 1891,” otherwise “the proclamation would then have exceeded the authority of the act.”).

⁷⁸ 438 U.S. 696 (1978). *New Mexico* addresses federal reserved water rights, which are not at issue in this case. However, it provides controlling precedent regarding the purposes and the scope of authority granted to the President by the Creative Act of 1891 and the Organic Administration Act of 1897.

⁷⁹ *Id.* at 705.

wildlife-preservation purposes.”⁸⁰ The Court relied on the legislative history of the 1897 Act, which stated:

The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and preservation of forest conditions upon which water conditions and water flow are dependent.⁸¹

In other words, the “favorable conditions of water flow” contemplated by the 1897 Act focused on the forested lands themselves. As further explained by the legislative history of the Act:

[F]orests exert a most important regulating influence upon the flow of rivers, reducing floods and increasing the water supply in the low stages. The importance of their conservation on the mountainous watersheds which collect the scanty supply for the arid regions of North America can hardly be overstated.⁸²

The Supreme Court also noted in its *New Mexico* decision that, in 1913, the Department of Agriculture itself recognized that national forests

are set aside specifically for the protection of water resources and the production of timber The aim of administration is essentially different from that of a national park, in which economic use of material resources comes second to the preservation of natural conditions on aesthetic grounds.⁸³

Thus, unlike *Arctic Coast* and *Glacier Bay*, the Tongass (and Chugach) National Forests were not, and could not have been, reserved pre-statehood for any wildlife

⁸⁰ *Id.* at 708.

⁸¹ *Id.* at 708 (quoting 30 Cong. Rec. 966 (1897) (Cong. McRae)).

⁸² *Id.* at 712 (quoting S. Doc. No. 105, 55th Cong., 1st Sess., 10 (1897)).

⁸³ *Id.* at 708 n.16 (quoting U.S. Dept. of Agriculture, Report of the Forester 10-11 (1913)).

preservation purpose.

The Tongass National Forest came about as the result of several proclamations made pursuant to these Acts. Beginning in 1902, Proclamation 37 “set [] apart and reserve[d]” the “public lands” described as certain islands for the Alexander Archipelago Forest Reserve.⁸⁴ A September 10, 1907 proclamation reserved “public lands” that were “in part covered with timber,” identified as “the tracts of land . . . shown as the Tongass National Forest on the [accompanying] diagram” These tracts of land were “reserved from settlement, entry, or sale”⁸⁵ Executive Order 908, dated July 2, 1908, consolidated the Alexander Archipelago Forest Reserve and the Tongass National Forest under the Tongass name.⁸⁶ On February 16, 1909, Proclamation 846 expanded the Tongass National Forest to include the Stikine River watershed and most of the rest of Southeast Alaska, including lands near Yakutat.⁸⁷ None of these proclamations intimate that reservation of submerged lands was intended. In fact, such intent would have exceeded the authority granted by the legislation authorizing the reservations.⁸⁸

⁸⁴ Ex. 17, Proclamation No. 37, 32 Stat. 2025-26 (Aug. 20, 1902).

⁸⁵ Ex. 18, Proclamation, 35 Stat. 2152 (Sep. 10, 1907).

⁸⁶ Ex. 4, State’s Response, Attachment 3, Exec. Order 908 (July 2, 1908).

⁸⁷ Ex. 4, State’s Response, Attachment 5, Proclamation 846, 35 Stat. 2226 (Feb. 16, 1909).

⁸⁸ *Accord James v. State*, 950 P.2d 1130, 1133-38 (Alaska 1997) (holding, after examining the U.S. Supreme Court decisions in *Utah Lake*, *Arctic Coast* and *New Mexico*, that the 1909 Tongass withdrawal, like the withdrawal in *Utah Lake* and unlike that in *Arctic Coast*, did not require submerged lands for the achievement of its purposes nor defeated state title to those lands).

In a case involving the Katalla River, located in the Chugach National Forest, the Board held that establishment of a national forest prior to statehood did not defeat Alaska's title to the bed of navigable rivers within the national forest.⁸⁹ Like the Tongass, the Chugach National Forest was created by Presidential Proclamations issued under the Creative Act of 1891 and the Organic Administration Act of 1897.⁹⁰ The first proclamation created the Afognak Forest and Fish Culture Reserve in 1892, and cited as its purposes the protection of "salmon and other fisheries, aquatic wildlife, birds, timber and other plant life on the reserved lands, and to establish fish culture stations."⁹¹ A Presidential Proclamation dated July 23, 1907, established the Chugach National Forest as a reservation and included all of Prince William Sound and the lower length of the Copper River.⁹² The Chugach National Forest and Afognak Forest and Fish Culture Reserve were consolidated as a National Forest under the Chugach National Forest name by Executive Order No. 908, dated July 2, 1908.⁹³ The Chugach National Forest was expanded by Presidential Proclamation dated February 23, 1909 (just one week after the Proclamation expanding the Tongass Forest) to include the lands surrounding the Katalla River.⁹⁴ The 1909 proclamation acknowledged the fisheries related purpose of the 1892 Afognak reservation, and stated:

⁸⁹ *State of Alaska*, 102 IBLA 357, 361 (1988) (hereinafter "*Katalla River*") (slip opinion at Ex. 4, States Response, Attachment 2).

⁹⁰ *Id.* at 358.

⁹¹ *Id.*

⁹² *Katalla River*, 102 IBLA at 358.

⁹³ *Id.*; Ex. 4, State's Response, Attachment 3, Exec. Order No. 908 (July 2, 1908).

⁹⁴ *Katalla River*, 102 IBLA at 358; Ex. 4, State's Response, Attachment 4, Proclamation, 35 Stat. 2231, 2232 (Feb. 23, 1909).

Since the withdrawal made by this proclamation for Forest purposes and the withdrawal made by proclamation dated December twenty-four, eighteen hundred and ninety-two, for the purpose of establishing fish culture stations and for the use of the United States Commissioner of Fish and Fisheries are consistent, both shall be effective upon the land withdrawn, but the withdrawal for fish culture stations and for the use of the United States Commissioner of Fish and Fisheries shall be the dominant one.⁹⁵

In *Katalla River*, BLM argued that these stated purposes demonstrated intent to include the submerged lands in the Chugach reservation and defeat Alaska's statehood title to them.⁹⁶ The Board soundly rejected this argument, finding that under the *Utah Lake* test, "[t]here is no clear and especial language to indicate that Congress intended to defeat the State's title to the Katalla riverbed lands."⁹⁷ The 1897 Organic Act did not permit submerged land in the Chugach National Forest to be reserved for "fish culture stations," but only for conserving water flows and providing a continuous timber supply. The 1897 Organic Act similarly applies to the Proclamation issued one week earlier expanding the Tongass Forest to include the Stikine River.

In 1994, the Board revisited its *Katalla River* decision following issuance of a Solicitor's Opinion that evaluated the effect of certain withdrawals and reservations under Public Land Order 82 on Alaska's title to submerged lands.⁹⁸ The Board

⁹⁵ Ex. 4, State's Response, Attachment 4, Proclamation, 35 Stat. 2232 (Feb. 23, 1909).

⁹⁶ *Katalla River*, 102 IBLA at 359.

⁹⁷ *Id.* at 361.

⁹⁸ *Ownership of Submerged Lands in Northern Alaska In Light of Utah Division of State Lands v. United States*, M-36911 (Supp. I), 100 I.D. 103 (Apr. 20, 1992), 1992 WL 676596 (D.O.I.). The Solicitor's Opinion ultimately declined to address the Chugach National Forest reservations because the Public Land Order 82 withdrawals there had

concluded that its *Katalla River* decision was “in harmony with” the reasoning of the Solicitor’s Opinion, and that reconsideration was not warranted.⁹⁹ The Board concluded:

In the absence of a clear retention of lands [by Congress] similar to what was expressed in section 11(b) in the Alaska Statehood Act in the case of PLO 82 lands, ... we find that in section 6(m) of the Alaska Statehood Act, 72 Stat. 340 [applying the Submerged Lands Act of 1953 to Alaska], Congress expressed an intention for vacant and unappropriated *national forest lands* to be available for conveyance to the State.¹⁰⁰

Five years later, in another case, the Board reiterated: “[t]he Board’s decision in the *Katalla River* appeal constitutes the Department’s position on the effect of the Chugach *National Forest proclamation*.”¹⁰¹

There is no significant difference between the Chugach reservations and the Tongass reservations at issue in this case. The reservation of the land surrounding the Stikine occurred one week prior to the reservation applicable to the Katalla River.¹⁰² The same statute, which authorized reservation of *public lands* and limited the purposes of such reservations to reserving public lands to provide a continuous timber supply and

been revoked in 1946, prior to statehood. Prior to reaching this conclusion, however, the Secretary had directed the Director of the Office of Hearings and Appeals to stay the effect of the *Katalla River* decision pending further guidance.

⁹⁹ *Id.* at 357.

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ *Id.* at 126 (emphasis added). Notably, this pronouncement came two years after the 1997 *Arctic Coast* (aka *Dinkum Sands*) case on which the Forest Service partially relies.

¹⁰² *See* Ex. 4, State’s Response, Attachment 5, Proclamation, 35 Stat. 2226 (Feb. 16, 1909); Ex. 4, State’s Response, Attachment 4, Proclamation, 35 Stat. 2232 (Feb. 23, 1909).

conserve water flows, applied to both reservations.¹⁰³ The two proclamations are nearly identical, with the exception of the geography described.¹⁰⁴

Contemporary Forest Service documents also demonstrate that the Proclamations at issue did not reserve submerged lands. In a 1918 opinion, the Solicitor's Office for the Department of Agriculture answered a Forest Service inquiry as to whether the Forest Service might treat the navigable waters and underlying lands as part of the Tongass and Chugach Forests in order to control the "means of transportation." After listing the limited purposes for which the President "may establish National Forests," the Department of Agriculture Solicitor's Office responded:

Obviously the lands in question and the waters adjacent thereto are not of the character which he [the President] is authorized to set aside for or include within National Forests, and their withdrawal as National Forest lands would not promote any of the objects named in the statute. It is clear, therefore, that the tide lands and adjacent waters may not be included within the National Forests.¹⁰⁵

Likewise, in a Department of Interior Solicitor's Opinion issued on March 16, 1950, the Interior Department found that the federal statute authorizing it to dispose of gravel on "public lands" did not cover lands underlying navigable rivers in Alaska,

¹⁰³ The 1909 Tongass proclamation cites the 1897 Organic Administration Act as its authority, *see* Ex. 4, State's Response, Attachment 5, Proclamation, 35 Stat. 2226 (Feb. 16, 1909), as does the 1909 Chugach proclamation, *see* Ex. 4, State's Response, Attachment 4, Proclamation, 35 Stat. 2231 (23 Feb 1909).

¹⁰⁴ *Compare* Ex. 4, State's Response, Attachment 4, Proclamation, 35 Stat. 2232 (Feb. 23, 1909) *with* Ex. 4, State's Response, Attachment 5, Proclamation, 35 Stat. 2226 (Feb. 16, 1909).

¹⁰⁵ Ex. 19, Solicitor's Office Opinion, U.S. Dept. of Agriculture, at 2 (July 1, 1918).

such as the Stikine River, again because the term “public lands” does not apply to those submerged lands.¹⁰⁶

Just a few months later, on June 28, 1950, the Office of the Solicitor for the Department of Agriculture responded to a request for advice regarding the beds of navigable waters specifically lying within the exterior boundaries of the Tongass National Forest. The Solicitor determined that: (1) the enabling legislation for national forest proclamations only authorizes the establishment of forest reservation on “public lands;” (2) the beds of navigable waters in a territory are not “public lands” of the United States; (3) such property is instead held in trust for the benefit of the future state which may be formed from the territory; and (4) the National Forest proclamation should be construed as excluding the beds of navigable waters and inoperative with respect to those submerged lands “in compliance with the statutory limitation upon the establishment of forest reservations, and in conformity with settled principles of policy and law with respect to the status of such lands.”¹⁰⁷

Thus, the Forest Service itself clearly understood at the time that the submerged lands within the Tongass had not been reserved.

In its objection, the Forest Service made two arguments that the 1909 Tongass proclamation intended to include the beds of navigable waters.

¹⁰⁶ See Extraction of Gravel from Beds of Navigable Streams in Alaska, M-36024, 60 Interior Dec. 402, 403, 1950 WL 5060 (D.O.I.).

¹⁰⁷ Ex. 4, State’s Response, Attachment 6, Solicitor’s Office Opinion, U.S. Dept. of Agriculture (June 28, 1950).

First, the Forest Service argued that the inclusion of “submerged features” in the 1909 Tongass proclamation, such as mentioning the Alsek River in the boundary description, demonstrated intent to reserve and defeat state title to those features.¹⁰⁸ However, the geographic descriptions and accompanying diagrams for the 1909 Tongass and Chugach reservations both show exterior boundaries extending many miles out into the international oceans from the nearest uplands.¹⁰⁹ The diagrams also both show the additions to the respective national forests as shaded uplands, including the Katalla and Stikine rivers (as well as the Alsek River, which the Forest Service mentions in its comments). The references to submerged features are clearly references of convenience in describing the boundaries of the reservation, and not proof that the President intended to include submerged lands within the reservations.¹¹⁰ The Supreme Court has held that

¹⁰⁸ Ex. 2, Forest Service Objection at 3, 5.

¹⁰⁹ These boundaries extend 25 miles into the Gulf of Alaska in the case of the Chugach southern boundary and 60 miles into the Gulf of Alaska in the case of the Tongass western boundary. At the time, the United States claimed only a 3-mile territorial sea. *See e.g., United States v. California*, 332 U.S. 19, 32-34 (1947). On December 28, 1988, the President announced that the United States would henceforth recognize a territorial sea of 12 nautical miles. Proclamation No. 5928, 54 Fed. R. 777 (Jan. 9, 1980).

¹¹⁰ *See James v. State*, 950 P.2d 1130, 1139 (Alaska 1997). In *James*, the Alaska Supreme Court stated:

[The Tongass Forest boundary] is drawn as it is in order to avoid the difficult task of describing the hundreds of islands and islets which constitute the western Tongass, which extends some 300 miles from Cape Bingham on the north to Cape Munzon on the south. Except as a matter of descriptive convenience, President Roosevelt could have had no conceivable purpose for including, for example, the open ocean 60 miles west of Cape Munzon [sic].

Accord, Glacier Bay Decree, 546 U.S. 413, 415-417 (2006). *See also* Ex. 4, State’s Response, Attachment 4, Proclamation, 35 Stat. 2232 (Feb. 23, 1909), and Attachment 5, Proclamation, 35 Stat. 2226 (Feb. 16, 1909).

it takes something more than inclusion of submerged lands within the limits of a reservation to demonstrate the intent to include them in the reservation and defeat State title.¹¹¹

Second, the Forest Service argued that “federal ownership of the submerged lands within the Tongass National Forest is important to achieve the purposes for which the Tongass was created.”¹¹² As discussed *supra*, however, the limited purposes for which public land could be reserved under the 1897 Organic Administration Act did not allow or even consider the reservation of submerged lands. And the Act certainly did not express a Congressional intent to defeat state title to the beds of its navigable waters.¹¹³ Furthermore, the Board already has determined that even the broader purposes for reserving land under the Creative Act of 1891 do not authorize reservation of submerged land. The 1909 Chugach proclamation specifies that “the withdrawal . . . for the purpose of establishing fish culture stations [under the 1891 Creative Act]. . . shall be the dominant one,” but the Board held in *Katalla River* that “[t]here is no clear and especial language to indicate that Congress intended to defeat the

¹¹¹ “The fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or reserved.” *Arctic Coast*, 521 U.S. 1, 38 (1997) (citing *United States v. Montana*, 450 U.S. 544, 554 (1981) and *Utah Div. of State Lands v. United States*, 482 U.S. 193, 206 (1987)).

¹¹² Ex. 2, Forest Service Objection at 5.

¹¹³ See *supra* nn. 74-104 and accompanying text.

State's title to the Katalla riverbed lands.”¹¹⁴ The Forest Service attempts to leverage the purpose and authorities of the reservations at issue in *Glacier Bay* and *Arctic Coast* into an argument that the Tongass reservations included submerged lands.¹¹⁵ However, different statutory authorities, and different accompanying Congressional intent, animated the reservations at issue in those cases. *Katalla River* resolves both Forest Service objections that the 1909 Tongass proclamation reserved submerged lands.

In a final, unsupported shot at finding a purpose for federal ownership of the submerged land at issue, the Forest Service states that “[f]ederal ownership of the submerged lands of navigable waters [within the Tongass] would preclude State interference of the use of the waterways for transportation of timber, equipment, and Forest Service personnel.”¹¹⁶ This argument ignores the fact that the navigational servitude doctrine provides the United States dominant authority over navigation: “[E]ven if the land under navigable water passes to the State, the federal government may still control, develop, and use the waters for its own [authorized] purposes.”¹¹⁷

2. *Arctic Coast* and *Glacier Bay* Do Not Provide Authority For Finding Intent To Reserve The Submerged Lands Of the Tongass.

The Forest Service argues that *Arctic Coast* and *Glacier Bay* have abrogated *Utah Lakes* to the extent that federal reservations under the Organic

¹¹⁴ *Katalla River*, 102 IBLA at 361. See also *United States v. New Mexico*, 438 U.S. 696, 705 (1978) (rejecting federal government's claim to reserved water rights for “fish purposes.”)

¹¹⁵ Ex. 2, Forest Service Objection at 5.

¹¹⁶ *Id.*

¹¹⁷ *Utah Lakes*, 482 U.S. 193, 202 (1987); 43 U.S.C. § 1311(d).

Administration Act of June 4, 1891,¹¹⁸ as amended by the Creative Act of March 3, 1897,¹¹⁹ may defeat the State’s title to the bed of the Stikine, and by logical extension, to the submerged lands of all navigable rivers within the Tongass National Forest.¹²⁰ This argument is untenable.

The Forest Service argues that the 1909 Tongass proclamation demonstrates federal intent to reserve submerged land because the Proclamation “by its terms encompassed the submerged features at issue here,” and “expressly included submerged lands in other areas of the Tongass National Forest, such as the bed of the Alsek River, which supports inclusion of the bed of the Stikine River and the sloughs as well.”¹²¹ While it is true that the naming and describing of specific submerged features in the reservations at issue in *Arctic Coast* and *Glacier Bay* factored into the Court’s conclusion that those submerged lands had been reserved, the reservations at issue in those cases were made for entirely different purposes, under different circumstances, and with different terms than the Tongass forest expansion at issue here. The references to water features in this instance, such as locations at sea or a river (and, notably, not the Stikine River) are references of convenience, as boundary descriptions, not central to the purposes of the reservation, which are strictly limited by statute. As earlier noted, “The fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or

¹¹⁸ Ex. 15, Creative Act of Mar. 3, 1891, § 24, 26 Stat. 1095, 1103.

¹¹⁹ Ex. 16, Organic Administration Act of June 4, 1897, 30 Stat. 11, 35.

¹²⁰ Ex. 2, Forest Service Objection at 3-7.

¹²¹ *Id.* at 5.

reserved.”¹²² The Forest Service’s reliance on *Arctic Coast* and *Glacier Bay* is misplaced.

Arctic Coast concerned the effects of a 1957 application by the Bureau of Sport Fisheries and Wildlife to withdraw 8.9 million acres of land “to establish an Arctic Wildlife Range within all or such portion of the described lands as may be finally determined to be necessary for the preservation of the wildlife and wilderness resources of that region of northeastern Alaska.”¹²³ The boundary description of the proposed reservation followed “the line of extreme low water of the Arctic Ocean” at the Canadian border and continued “westerly along the said line of extreme low water, including all offshore bars, reefs, and islands” to Brownlow Point.¹²⁴ The Court noted also that the application for the reservation emphasized the habitat provided by the submerged features, including “[t]he river bottoms with their willow thickets [which] furnish habitat for moose,” and the “seacoast provides habitat for polar bears, Arctic foxes, seals and whales.”¹²⁵ The Court concluded:

[T]he statement of justification accompanying the 1957 Bureau of Sport Fisheries and Wildlife application demonstrated that waters within the boundaries of the Range were an essential part of the habitats of the species the Range was designed to protect, and that retention of lands

¹²² *Arctic Coast*, 521 U.S. 1, 38 (1997) (citing *United States v. Montana*, 450 U.S. 544, 554 (1981) and *Utah Div. of State Lands v. United States*, 482 U.S. 193, 206 (1987)).

¹²³ *Arctic Coast*, 521 U.S. at 46.

¹²⁴ *Id.* at 51.

¹²⁵ *Id.* at 51.

underlying those waters was critical to the Government's goal of preserving these aquatic habitats.¹²⁶

In contrast, the purposes of the 1909 reservation at issue here were statutorily limited to “securing favorable conditions of water flows, and to furnish a continuous supply of timber.”¹²⁷ The 1909 Proclamation itself stated no purpose for the reservation except to enlarge the Tongass National Forest: it simply recites the authority of the Organic Administration Act of 1897 and delineates the boundaries of the reservation.¹²⁸

In *Glacier Bay*, the Supreme Court considered the authority of the Antiquities Act of 1906, under which Glacier Bay National Monument was created in 1925 and expanded to include all of Glacier Bay’s waters in 1939.¹²⁹ The Court noted that the Antiquities Act empowered the President to reserve submerged lands, for the purpose of “conserv[ing] the scenery and the natural and historic objects and the wild life therein and [] provid[ing] for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”¹³⁰ The Court adopted the special master’s finding that reservation of the submerged lands of Glacier Bay was necessary to support at least three of the purposes motivating creation of Glacier Bay National Monument:

Exclusion of the submerged lands would impair scientific study of the majestic tidewater glaciers surrounding the bay.

¹²⁶ *Id.* at 52.

¹²⁷ Ex. 16, Organic Administration Act of June 4, 1897, 30 Stat. 11, 34-35.

¹²⁸ Ex, 4, State’s Response, Attachment 5, Proclamation, 35 Stat. 2226 (Feb. 16, 1909).

¹²⁹ *Glacier Bay*, 545 U.S. 75, 101. The monument was designated as part of Glacier Bay National Park in 1980. *Id.* at 101.

¹³⁰ *Id.* at 103 (quoting the Antiquities Act, 16 U.S.C. § 1).

It would also impair efforts both to study and to preserve the remnants of “interglacial forests,” which can be found both above and below the tideline. Finally, exclusion of the submerged lands would compromise the goal of safeguarding the flora and fauna that thrive in Glacier Bay’s complex and interdependent ecosystem.”¹³¹

The Court noted that “it would require little additional effort to reach a holding that the Antiquities Act itself delegated to the President sufficient power not only to reserve submerged lands, but also to defeat a future state’s title to them.”¹³² Such is not the case here. The purposes for which land may be withdrawn under the Creative Act of 1891 and the Organic Administration Act of 1897 are strictly limited to conserving water flows and providing a continuous timber supply.¹³³ Neither of these purposes requires reservation of submerged lands.

As to the purported purpose of including submerged lands in the reservations at issue here, the Forest Service states only:

Federal ownership of the submerged lands of the Tongass furthers the[] purposes [of the Organic Administration Act of 1897]. With the vast rugged country of southeast Alaska, rivers were important means of transportation, including floating timber or rafts of timber to the ocean to then be transported to a mill. Federal ownership of the submerged lands of navigable waters would preclude State interference of the use of the waterways for transportation of timber, equipment, and Forest Service personnel.¹³⁴

¹³¹ *Id.* at 102 (internal citations omitted).

¹³² *Id.*

¹³³ Ex. 16, Organic Administration Act of 1897, 30 Stat. 11, 35. *See also supra* nn. 74-83 and accompanying text.

¹³⁴ Ex. 2, Forest Service Objection at 5.

This statement directly contradicts the language of the 1897 Act, however. As framed by the Supreme Court:

The water that would be “insured” by preservation of the forest was to “be used for domestic, mining, milling, or irrigation purposes, *under the laws of the State wherein such national forests are situated*, or under the laws of the United States and the rules and regulations established thereunder.”¹³⁵

States, including future states, clearly were the intended beneficiaries and stewards of the water resources of the national forest system. While this analysis of the intent of the Organic Administration Act of 1897 applied directly to the reserved water rights issue before the Court in *United States v. New Mexico*, it provides controlling precedent regarding the federal interests that could be reserved under the Act. Reservation of submerged lands of navigable rivers for the purpose cited by the Forest Service here simply does not fall within the scope of the statute.

3. The Alaska Statehood Act And Submerged Lands Act of 1953 Expressly Confirm Alaska’s Statehood Title To The Land Underlying The Stikine River.

Alaska’s title to the bed of the Stikine may be defeated only by demonstration of Congress’ clear intent to include the land underlying the Stikine River in the Tongass National Forest reservation *and* to affirmatively defeat Alaska’s title to it.¹³⁶ Nevertheless, the Forest Service argues that Section 5 of the Alaska Statehood Act

¹³⁵ *United States v. New Mexico*, 438 U.S. at 712 (quoting the Organic Administration Act of 1897) (emphasis added).

¹³⁶ *Utah Lake*, 482 U.S. 193, 202 (1987); *Glacier Bay*, 545 U.S. 75, 79 (2005)(citing *Arctic Coast*, 521 U.S. 1, 34 (1997)).

demonstrates Congressional intent to defeat Alaska’s title to “expressly retained” submerged lands, which it argues includes the bed of the Stikine River.¹³⁷

The Forest Service’s argument on this score is confusing, but the primary, controlling reason it fails is that the submerged lands of the Stikine were not “expressly retained.” The proclamations reserving the Tongass National Forest do not mention submerged lands generally, let alone the specific lands underlying the Stikine River.¹³⁸ There simply was no intent on the part of Congress to reserve the land underlying the Stikine. Nevertheless, the Forest Service attempts to demonstrate the second prong of the *Utah Lake* test, i.e., “plain” Congressional intent to defeat Alaska’s title, by engaging in a convoluted analysis of the interaction between Sections 5, 6(a) and 6(e) of the Alaska Statehood Act and the Submerged Lands Act.¹³⁹

¹³⁷ Ex. 2, Forest Service Objection at 6. Section 5 of the Alaska Statehood Act states:
The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Pub. L. No. 85-508 § 5.

¹³⁸ The fact that the 1909 Proclamation references geographic features such as river banks, river channels, and bay shores in boundary descriptions does not indicate intent to include in the reservation the submerged lands within the described boundaries. “The fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or reserved.” *Arctic Coast*, 521 U.S. 1, 38 (1997) (citing *United States v. Montana*, 450 U.S. 544, 554 (1981) and *Utah Div. of State Lands v. United States*, 482 U.S. 193, 206 (1987)).

¹³⁹ The Forest Service also appears to argue that section 5 of the Alaska Statehood Act was determinative in the *Arctic Coast* and *Glacier Bay* cases. Ex. 2, Forest Service Objection at 6. However, as previously discussed herein, those cases were decided

The Forest Service argues that Section 5 of the Alaska Statehood Act is a “general expression of congressional intent” to “expressly retain[]” submerged lands pursuant to the exceptions provision of the Submerged Lands Act.¹⁴⁰ This argument, however, would render meaningless the Submerged Lands Act and section 6(m) of the Statehood Act, which explicitly applies the Submerged Lands Act to Alaska. Because section 6(m) makes the Submerged Lands Act, including the exceptions in section 1313, applicable to Alaska, it makes no sense to interpret section 5 of the Statehood Act as accomplishing the same thing. Section 1313 of the Submerged Lands Act, made applicable to Alaska by section 6(m) of the Statehood Act, already expresses Congressional intent to retain submerged lands “expressly retained by . . . the United States” when the State entered the Union.

The Forest Service continues, however, arguing that “[b]ecause section 5 is based upon separate reservations of submerged lands, rather than upon the United States’ paramount title to submerged lands, its general expression of intent satisfies the requirement of the Submerged Lands Act, 43 U.S.C. § 1313(a).”¹⁴¹ Again, the reasoning is circular and unsound. Section 5 of the Alaska Statehood Act doesn’t mention submerged land, and states simply that the United States retains, subject to the provisions of section 6 of the Statehood Act, title to property to which it had title at the time of

primarily on the statutory authorities of the particular reservations at issue in those cases, not on section 5 of the Alaska Statehood Act.

¹⁴⁰ Section 1313 of the Submerged Lands Act excepts from the general confirmatory grant of § 1311 “all lands expressly retained by or ceded to the United States when the State entered the Union . . .”

¹⁴¹ Ex. 2, Forest Service Objection at 6.

statehood. Furthermore, section 6(m) of the Statehood Act makes the Submerged Lands Act, including section 1313, applicable to Alaska. The exception in section 1313(a) of the Submerged Lands Act applies to submerged land “expressly retained” by the United States. Section 5 of the Statehood Act provides no additional indication of Congressional intent (above that in the Submerged Lands Act addressing “lands expressly retained or ceded to the United States”) to defeat Alaska’s title to the bed of the Stikine River.

The Forest Service essentially argues that section 5 of the Statehood Act eliminates Alaska’s entitlement under the Submerged Lands Act to the submerged lands within its boundaries. This cannot be, for at least three important reasons.

First, this interpretation of the Alaska Statehood Act would completely defeat Alaska’s title to any and all submerged lands within its borders because the United States had title to them at the moment of statehood. This cannot be true. Second, the States’ entitlement to land underlying navigable waters within its boundaries originates in the constitutional equal footing doctrine. The Submerged Lands Act simply formalizes this entitlement by confirming and establishing the State’s pre-existing entitlement under the equal footing doctrine to the land underlying navigable waters within the States’ geographic boundaries.¹⁴² Section 6(m) of the Alaska Statehood Act explicitly applies the Submerged Lands Act to Alaska.

¹⁴² See *Arctic Coast*, 521 U.S. 1, 5-6, 34-36 (1997); *Glacier Bay*, 545 U.S. at 79; *Utah Lake*, 482 U.S. at 195-98; *United States v. California*, 436 U.S. 32, 36-41 (1978); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

Third, the Supreme Court already has considered and rejected the theory that a general expression of intent by Congress to retain title to submerged land is sufficient to defeat state title:

Assuming, *arguendo*, that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.¹⁴³

Contrary to the Forest Service's claims, Section 5 of the Alaska Statehood Act simply does not abrogate Alaska's title to the land underlying the Stikine.

The Forest Service also argues that the community selection right in Section 6(a) of the Statehood Act demonstrates Congress' intent to defeat Alaska's title to the bed of the Stikine.¹⁴⁴ Again, to the extent this argument is decipherable, it is untenable. Section 6(a) entitles Alaska to select from within national forests in the state up to 400,000 acres of land that are "vacant and unappropriated at the time of their selection" and that are "adjacent to established communities or suitable for prospective community centers and recreational areas."¹⁴⁵ The Forest Service contends that this grant defeats State title to the submerged lands of the Tongass National Forest (and by logical extension, the Chugach as well) because it is a "limited grant" that does not include

¹⁴³ *Utah Lake*, 482 U.S. at 202; *United States v. California*, 436 U.S. at 36-41.

¹⁴⁴ Ex. 2, Forest Service Objection at 6.

¹⁴⁵ Pub. L. No. 85-508 § 6(a). Alaska's primary statehood land grant is contained in section 6(b) of the Statehood Act, which grants Alaska selection rights to just over 102 million acres "from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection." *Id.* § 6(a).

submerged lands.¹⁴⁶ However, this argument overlooks the fact that states acquire, by operation of law, title at statehood to submerged lands within their boundaries.¹⁴⁷ A new state does not need to “select” the beds of navigable waters because, absent an explicit retention by Congress, the new state already owns them. Furthermore, if the Forest Service were correct that section 6(a) of the Statehood Act defeated Alaska’s title to submerged lands within the Tongass, then it would follow that section 6(m) of the Statehood Act (applying the Submerged Lands Act to Alaska) would not apply within the boundaries of the national forests of Alaska. The Board already has determined that this is not so.¹⁴⁸

In summary, no provision in the Alaska Statehood Act operates to defeat Alaska’s title to the submerged lands of the Stikine River.

D. The United States Already Has Disclaimed Any Real Property Interest In The Marine Submerged Lands Within The Exterior Boundaries Of The Tongass National Forest, Demonstrating The Lack Of Intent To Defeat State Title To The Bed Of The Stikine River.

As part of the *Glacier Bay* litigation, the United States disclaimed “any real property interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.”¹⁴⁹ This disclaimer is important to this appeal for two reasons. First, it indicates *the lack of* intent on the part of the federal government to retain title to the non-marine submerged

¹⁴⁶ Ex. 2, Forest Service Objection at 6.

¹⁴⁷ *Glacier Bay*, 545 U.S. at 78-79 (citing *Arctic Coast*, 521 U.S. at 5 (1997)).

¹⁴⁸ *Katalla River*, 102 IBLA 357, 361 (1988). *See also State of Alaska*, 150 IBLA 112, 126 (1999) (“The Board’s decision in the *Katalla River* appeal constitutes the Department’s position on the effect of the Chugach National Forest proclamation.”)

¹⁴⁹ *Glacier Bay Decree*, 546 U.S. 413, 415 (2006).

lands of the Tongass, including the Stikine River. Second, it defeats the Forest Service’s objection that the pre-statehood administrative withdrawal by a regional forester of land at the mouth of the Stikine River thwarts the State’s title to land underlying the Stikine.¹⁵⁰

The *Glacier Bay* litigation concerned the State’s title to submerged *marine* lands in Southeast Alaska, including the marine submerged lands of the Tongass National Forest.¹⁵¹ The final decree in the case specifically disclaimed any federal interest in the submerged marine land of the Tongass National Forest, stating that the exception in section 1313(a) of the Submerged Lands Act for lands “expressly retained by . . . the United States when the State entered the Union” did not apply to land “under the jurisdiction of the Department of Agriculture” that was withdrawn pursuant to “Presidential Proclamation No. 37, 32 Stat. 2025, which established the Alexander Archipelago Forest Reserve; Presidential Proclamation of Sept. 10, 1907 (35 Stat. 2152), which created the Tongass National Forest; or Presidential Proclamations of Feb. 16, 1909 (35 Stat. 2226), and June 10, 1925 (44 Stat. 2578), which expanded the Tongass National Forest.”¹⁵²

These are the very reservations at issue in this case, and the federal government has disclaimed any intent by these reservations to defeat the State’s title to the marine submerged lands within their boundaries. The reservations themselves make

¹⁵⁰ The *Black River* Decision establishes that refuge status alone, even when that status is Congressionally authorized, does not demonstrate the reservation of submerged lands with intent to defeat statehood title. Ex. 14, *Black River*, Ser. No. FF-93920 (Oct. 23, 2003).

¹⁵¹ *Glacier Bay*, 545 U.S. at 81-83, 96, 99-100; *Glacier Bay Decree*, 546 U.S. at 414, 415.

¹⁵² *Glacier Bay Decree*, 546 U.S. at 416.

no distinction between marine and inland waters. Still, the Forest Service argues that these proclamations defeated Alaska's title to inland navigable waters within the boundaries of the Tongass.¹⁵³ This argument is inconsistent with the federal government's position regarding the marine submerged lands within the boundaries of the same proclamations at issue here.

The *Glacier Bay decree* also reveals a fatal flaw in the Forest Service's objection that the 1909 Proclamation demonstrates federal intent to include submerged lands within the reservation and defeat State title to them, because that Proclamation references submerged features: the marine submerged lands disclaimed by the United States in *Glacier Bay* fall within the boundaries described by the 1909 Proclamation, and much of it falls within the Tongass National Forest. It is inconsistent for the Forest Service to argue that the mere reference to submerged features in describing the boundary of the Tongass reservation demonstrates federal intent to reserve the bed of the Stikine, even though reservation of other unnamed submerged lands within the Tongass has been specifically disclaimed by the United States.

The *Glacier Bay decree* also settles the Forest Service's claim that Section 6(e) of the Alaska Statehood Act defeats Alaska's title to submerged land within the area administratively classified in 1949 by a regional forester as the Stikine Flat Wildlife Area.¹⁵⁴ Section 6(e) of the Alaska Statehood Act excludes from transfer to Alaska

¹⁵³ Ex. 2, Forest Service Objection at 5-7.

¹⁵⁴ Ex. 2, Forest Service Objection at 3, 6; Ex. 4, State's Response, Attachment 7, 1949 Stikine Flat Wildlife Area classification order. Post statehood, on May 20, 1964, Regional Forester W.H. Johnson revoked that classification and designated a smaller area

“lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.”¹⁵⁵ However, the classified area lies within the area disclaimed by the United States in the *Glacier Bay decree*.¹⁵⁶ The *Glacier Bay* decree does not except the classified area. It does not even mention it. A comparison of the classification order and the map submitted with the State’s application demonstrates that the classified area falls within the disclaimed area.¹⁵⁷ The classified area is located at the lowest points of the mouth of the Stikine River in the vicinity of Dry Island, Farm Island, and Sergief Island, including the lowest portion of the Stikine’s North Arm and all of Knig Slough (“Middle Arm”) and Binkley’s Slough (a tidewater slough at the south end of Farm Island in the vicinity of “Gut Island” labeled on that classification map).¹⁵⁸ The *Glacier Bay* decree should end the matter.

Not only has the United States already disclaimed title to the submerged land in the classified area, but Regional Forester Heintzleman lacked the authority to create a wildlife refuge subject to section 6(e) of the Alaska Statehood Act. The classification relies on “Regulation U-3,” which permitted classification of national forest

as the Stikine Waterfowl Management Area. Ex. 20, 1964 Stikine Waterfowl Management Area classification order.

¹⁵⁵ Pub. L. No. 85-508 § 6(e).

¹⁵⁶ *Glacier Bay Decree*, 546 U.S. at 415, 416-17.

¹⁵⁷ Compare Ex. 20, 1964 Stikine Waterfowl Management Area classification order with Ex. 4, State’s Response, Attachment 8, Map of Navigable Waters Included in State’s Application.

¹⁵⁸ Ex. 4, State’s Response at 15, Attachment 7, 1964 Stikine Waterfowl Management Area classification order, and Attachment 8, Map of Navigable Waters Included In State’s Application.

lands for management by the Forest Service for “recreation use.”¹⁵⁹ “Recreation” also was the sole purpose listed in the December 29, 1949 classification document.¹⁶⁰ Thus, the purpose of the classification had to have been for “recreation,” such as shooting and perhaps viewing of wildlife and waterfowl, but it could not have been a “refuge[] or reservation[] for the protection of wildlife.”¹⁶¹ The regulation governed only intra-agency administration of the land, and since the Organic Administration Act of 1897, under which the land at issue was reserved, precluded reservation of land for any purpose besides conserving water flows and providing a continuous timber supply, Regional Forester Heintzleman lacked the authority to create, by administrative classification, a wildlife refuge that could possibly defeat Alaska’s title to the submerged lands therein.¹⁶² A regional forester clearly lacked the authority to do what the President could not, and what Congress disallowed, under the Organic Administration Act of 1897.

The federal disclaimer of interest in the marine submerged lands of the Tongass National Forest demonstrates the lack of Congressional intent to reserve the inland submerged waters in the Tongass. It also defeats the Forest Service’s claim that the 1946 administrative designation of the Stikine Flat Wildlife Area retained federal title

¹⁵⁹ Ex. 4, State’s Response, Attachment 9, 4 Fed. Reg. 3994, codified at 36 C.F.R. § 251.22 (1939). In 1946 this regulation was revised. Ex. 21, 11 Fed. Reg. 3416-17 (Apr. 2, 1946).

¹⁶⁰ Ex. 4, State’s Response at 15 and Attachment 7, 1949 Stikine Flat Wildlife Area classification order.

¹⁶¹ Pub. L. No. 85-508 § 6(e).

¹⁶² See *United States v. New Mexico*, 438 U.S. 696, 705 (1978) (rejecting federal government’s claim to reserved water rights for “fish-preservation” or “wildlife preservation” purposes”); *Katalla River*, 102 IBLA at 358, 359-61.

to the beds of those marine submerged lands under section 6(e) of the Alaska Statehood Act.

E. BLM Should Determine The Extent To Which The Stikine River Is Tidally Influenced.

Alaska's RDI application was submitted on February 17, 2005, and called BLM's attention to the federal disclaimer regarding the submerged marine lands within the Tongass National Forest.¹⁶³ BLM published the Federal Register notice of its Draft Determination on August 22, 2007.¹⁶⁴ The Draft Determination does not mention the *Glacier Bay decree*, but it does describe the river's estuary as being "approximately eight miles wide and sixteen miles long."¹⁶⁵ The Draft Determination also notes that tidal influence has been observed 20 miles upriver:

How far up the Stikine River tidewater extends is uncertain. The Army Engineers reported that "tidal effects have been noted for a distance of 20 miles from the mouth." The USGS maps show tidal flats at least as far as up the river as Euchalon Point in Sec. 27, T. 60 S., R. 83 E., CRM. Examining a 1979 color infra-red aerial photo (1:60,000), BLM photo-interpreters saw no indication of the river being tidal beyond its mouth. They "saw tidal vegetation in the area Eastern Passage and Dry Strait, but there was not past the mouth or further up the River."¹⁶⁶

¹⁶³ Ex. 1, State's Application at 1. The *Glacier Bay decree* issued on January 23, 2006. *Glacier Bay Decree*, 546 U.S. 413 (2006).

¹⁶⁴ Ex. 9, 72 Fed. Reg. 47,067 (Aug. 22, 2007); Ex. 5, Draft Determination.

¹⁶⁵ Ex. 5, Draft Determination at 5. Black's Law Dictionary defines "estuary" to mean "[t]hat part of the mouth or lower course of a river flowing into the sea which is subject to tide; especially, an enlargement of a river channel toward its mouth in which the movement of the tide is very prominent." Black's Law Dictionary 552 (6th ed. 1990).

¹⁶⁶ Ex. 5, Draft Determination at 5.

The State provided comments on the Draft Determination on October 30, 2007, which elaborated on the State's title to the named and unnamed sloughs and interconnecting waterways.¹⁶⁷ Because the Draft Determination concluded that the Stikine was navigable and "the Presidential Proclamation of February 16, 1909 . . . did not defeat the State's title to the bed of the navigable Stikine River" in any part,¹⁶⁸ a determination as to what portion of the bed of the Stikine was subject to the *Glacier Bay* disclaimer appeared unnecessary at that time. The State did provide additional information regarding the extent of tidewater in the Stikine in its May 30, 2008 response to the Forest Service's objection.¹⁶⁹

In considering the State's application, BLM at least should have determined the extent to which the United States has already disclaimed title to the bed of the Stikine River. On remand, BLM should make this determination.

F. BLM Should Determine Whether Shakes Lake And Shakes Slough Were Navigable At Statehood

The State also requests that the Board remand this matter for a determination that Shakes Lake and Shakes Slough were navigable at statehood and that

¹⁶⁷ Ex. 4, State's Response, Attachment 10, Letter from Dick Mylius, Alaska Dept. Natural Resources to Tom Lonnie, Director, Alaska State Office, BLM (Oct. 30, 2007).

¹⁶⁸ Ex. 5, Draft Determination at 3, 9.

¹⁶⁹ Ex. 4, State's Response at 2 (noting that the Army Corps of Engineers reported in 2003 that tidal waters extend upriver "for a distance of 20 miles from the mouth," the BLM described the Stikine tidewater delta area as "approximately eight miles wide and sixteen miles long", and USGS maps indicate that the tidewater area includes the Stikine's main channel, or South Arm, as well as North Arm, or Middle Arm, Knig Slough, Binkley's Slough, Hooligan Slough, and Andrew Slough.) *See also DeLorme, Alaska Atlas & Gazetteer*, at p. 24, B2 (2004 ed.).

title to the beds of these bodies of water has vested in the State.¹⁷⁰ The State's Application included Shakes Lake and Shakes Slough by name. The State provided to BLM specific information regarding these waterways, establishing that they were at least susceptible to commercial navigation at statehood, and that they are currently used by individuals for recreational purposes and by local business for commercial travel.¹⁷¹ The Ninth Circuit found such use "conclusive" evidence of navigability.¹⁷²

V. CONCLUSION

The Forest Service's objection to Alaska's application for a recordable disclaimer of interest to the submerged land underlying the Stikine River fails to cite persuasive authority that the federal reservations creating the Tongass National Forest defeat Alaska's statehood title to the bed of the river. Yet, despite the overwhelming controlling legal authority cited by the State, which was initially recognized by BLM in its Draft Determination, BLM rejected the State's application. BLM regulations require that, to defeat issuance of an RDI, an objecting agency must state a "sustainable rationale that the objecting agency claims United States title to the lands for which a recordable disclaimer is sought."¹⁷³ However, BLM addressed the Forest Service's objection in a most cursory fashion, effectively rewriting its own regulations to substitute a "plausibility" standard instead. In so doing, BLM failed to engage in the analysis

¹⁷⁰ Ex. 1, State's Application at 1.

¹⁷¹ Ex. 4, State's Response, Attachment 10, Letter from Dick Mylius, Alaska Dept. Natural Resources to Tom Lonnie, Director, Alaska State Office, BLM (Oct. 30, 2007).

¹⁷² *State of Alaska v. Ahtna*, 891 F.2d 1401, 1405 (9th Cir. 1989).

¹⁷³ 43 C.F.R. § 1864.1-4.

required of it by law and statute. The Board should remand this matter to the agency with directions for proper determination of the State's application.

Respectfully submitted on this ____ day of June, 2010.

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By:

J. Anne Nelson
Assistant Attorney General
Alaska Bar No. 0705023

CERTIFICATE OF SERVICE

This is to certify that on this date a copy of the foregoing has been mailed, Certified U.S. Mail, postage prepaid, to the following Attorneys or parties of record:

Dawn M. Collinsworth
United States Department of Agriculture
Office of the General Counsel
P.O. Box 21628
Juneau, AK 99802-1628

Dennis Hopewell
Office of the Regional Solicitor
US Department of the Interior
4230 University Drive, Suite 300
Anchorage, AK 99508-4626

Angie White Date