THE STATE of ALASKA
GOVERNOR BILL WALKER

Department of Natural Resources
DIVISION OF MINING, LAND & WATER
PUBLIC ACCESS ASSERTION AND DEFENSE
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January 4, 2018

Ms. Karen Mouritsen
Acting State Director
Bureau of Land Management
222 West 7th Avenue, #13
Anchorage, Alaska 99513-7504

Subject: Amended final recordable disclaimer of interest application for a portion of Eek River[1], Middle Fork Eek River and Ugaklik River.

Dear Ms. Mouritsen:

Pursuant to 43 CFR § 1864, the State of Alaska (State) files this application for a recordable disclaimer of interest (RDI) for the lands underlying the herein-described portions of the Eek River, Middle Fork Eek River and Ugaklik River.

I. Description of Waterway

This application is submitted for the submerged lands as follows:

1) Eek River: All submerged lands between the ordinary high water lines of Eek River beginning at Sec. 15, T. 1 N., R. 72 W., S.M., Alaska to the confluence at Rainy Creek in Sec. 1, T. 2S., R. 64 W., S.M., Alaska.

2) Middle Fork Eek River: All submerged lands between the ordinary high water lines of the left and right banks of the Middle Fork Eek River beginning approximately at river mile .3 near its confluence with the Eek River in Sec. 34, T. 1 N., R. 71 W., S.M., Alaska to Sec. 18, T. 3S., R. 68 W., S.M., Alaska.

[1] Dictionary of Alaska Place Names, Geological Survey Professional Paper 567, Orth, USGS, 1971 with minor Revisions Page 302. Eek River: stream, heads at 59 59' N., 160 05' W, Flows NW 108 mi., joins Eenayarak River to form Eek Channel Kuskokwim River, 45 mi. SW of Bethel, Yukon-Kuskokwim Delta; 60 12' N, 162 15 W; (map 58). Var. Reka Ik. Eskimo name published as "Ik" by Lt. Sarichev (1826, map 3). It has been spelled "Eek" since 1880.

3) Ugaklik River: All submerged lands between the ordinary high water lines of the left and right banks of the Ugaklik River beginning at its confluence with the Eek River in Sec. 3, T. 1 S., R. 72 W., S.M., Alaska to Sec. 3, T. 3 S., R. 70 W., S.M., Alaska.

This application includes the submerged lands and beds of all anabranches, braids and channels that carry water from the river and thus are a part of the navigable river. Maps highlighting the pertinent waterbodies of the Eek River, Middle Fork Eek River and Ugaklik River along with a legal description of the townships and ranges underlying each waterbody are enclosed as Exhibit 1. Those submerged lands adjacent to uplands not owned by the United States are excluded from this application.

II. Waiver Requests

A. Survey Requirements

As previously discussed with the Bureau of Land Management (BLM) Alaska State Director, the State requests a waiver under § 1864.1-2(d) of the requirement of 43 CFR § 1864.1-2 (c)(1) for a description based on a public land survey or certified metes and bounds survey. The map and legal description submitted with this RDI application sufficiently identify the land subject to this application, but if not the recordable disclaimer can be worded appropriately to fit the circumstances without requiring a public land survey. The submerged lands for which this RDI is sought are identified by name or, if unnamed, readily identified as Eek River, Middle Fork Eek River and Ugaklik River. Navigable waterways, such as these, are typically ambulatory, thus making a public survey of them problematic and unnecessary. Such a meander line survey would have to cover a large, long stretch of river system including interconnected channels and anabranches, would be very expensive and time-consuming, and then would only be a representation of a moving boundary. The U.S. Department of the Interior has issued RDIs to the State for the beds of navigable rivers in the past without requiring a public land survey of the river system or any part of it, and judgments, decisions, and decrees of the U.S. District Court, Ninth Circuit Court of Appeals, and U.S. Supreme Court finding title in the State to the beds of navigable waters have not required a public land survey.[2]

III. Basis of the State's Request for a Recordable Disclaimer of Interest

A. Navigable Waterway

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[2] *See, e.g., Alaska v. United States*, 546 U.S. 413, 415-17 (2006): *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989); *Alaska v. United States*, 662 F. Supp. 455 (D. Alaska 1987).

The State's RDI application for the submerged lands of the previously described portions of Eek River, Middle Fork Eek River and Ugaklik River is supported by the Equal Footing Doctrine, the Submerged Lands Act of 1953, the Alaska Statehood Act, the Alaska Right of Way Act of 1898, and other title navigability law. The BLM may disclaim interest in the submerged lands on any or all of those grounds.

Because these waterbodies were navigable on January 3, 1959, when Alaska became a state, the State of Alaska owns the river beds by virtue of the Equal Footing Doctrine and the Submerged Lands Act. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990). The constitutional Equal Footing Doctrine "guarantees to newly-admitted States [like Alaska] the same rights enjoyed by the original thirteen States and other previously-admitted States." *Id.* (citing *Utah v. United States*, 482 U.S. 193, 196 (1987)). "One of these rights is title ownership to the lands underlying navigable rivers." *Id.* The Submerged Lands Act of 1953 confirmed and extended "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." *Id.* (citing 43 U.S.C. § 1311(a)). "Congress explicitly provided for this rule to apply to Alaska when Alaska became a State in 1959." *Id.* (citing 48 U.S.C. Chapter 2 ("the Statehood Act") note 6(m) prec. sec. 21 (1982)). The rule includes state ownership of tidelands and the beds of marine waters up to three miles seaward of Alaska's coastline. *Id*; 43 U.S.C. §§ 1301(a), 1311(a); *United States v. California*, 436 U.S. 32, 35 n.7, 37 (1978). In addition, in the Alaska Right of Way Act of May 14, 1898, 30 Stat. 409, 43 U.S.C. §§ 942-1 to 942-9, Congress recognized application of the equal footing doctrine to Alaska. It expressly reserved, as a matter of federal law: "the title of any State that may hereafter be erected out of the Territory of Alaska, or any part thereof, to tidelands and beds of any of its navigable waters, . . . it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory."

IV. Reason for the State's Request for a Recordable Disclaimer of Interest

Title to these lands vested in the State of Alaska at statehood without any particular conveying document. The lack of any title document or judgment creates a cloud on the State's title. An RDI for this land will help lift the cloud on the State's title stemming from the lack of any permanent determination of ownership and correct any conflict and uncertainty in the public's understanding of title and use, without the time, expense and trouble of engaging in quiet title litigation.

V. Determining Navigability of Water Bodies under Current Law

The question of navigability for the purpose of state ownership is decided according to federal law. *Ahtna, Inc.*, 891 F.2d at 1404 (citing *Holt State Bank*,

270 U.S. 49, 55-56 (1926)). The Supreme Court expressed the basic test for navigability in *The Daniel Ball*, 77 U.S. (19 Wall) 557, 563 (1870), as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. This test is applied in multiple situations, including when answering questions of title to river or streambeds under the equal footing doctrine. *See PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012).

Case law subsequent to *The Daniel Ball*, including *Ahtna, Inc.* and the U.S. Department of the Interior's decision in *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692, 698 (ANCAB 1979), explained the meaning of that basic test. The physical character of the waterway, and in particular its capacity to be navigated, is an important factor when considering navigability for title. In the Supreme Court's most recent decision regarding navigability for title, *PPL Montana, LLC v. Montana*, it again emphasized that rivers and streams are not only navigable if they were *used* for commerce, but also if they were *susceptible* of being used as highways of commerce at the time of statehood. 132 S. Ct. at 1233. And, as previously stated by the Ninth Circuit in *Ahtna, Inc.*: "Although the river must be navigable at the time of statehood, . . . *this only means* that, at the time of statehood, *regardless of the actual use of the river*, the river must have been *susceptible* to use as a highway of commerce. * * * [I]t is not even necessary that commerce be in fact conducted . . . 'The extent of existing commerce is not the test.'" 891 F.2d at 1404 (quoting *United States v. Utah*, 283 U.S. 64, 75, 82-83 (1931) (emphasis added)). Rather, it is enough to show:

> the capacity of the rivers in their ordinary condition to meet the needs of commerce as they may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

Utah, 283 U.S. at 83. Present-day recreational use is relevant to determining whether a river was susceptible to commercial use at the time of statehood if: "(1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river's poststatehood condition is not materially different from its physical condition at statehood." *PPL Montana, LLC*, 132 S. Ct. at 1233.

Although lengthy portages, or the need to bypass a river segment, may defeat navigability for title for that particular river segment, *id.* at 1231–32, the

presence of rapids, sandbars, and other obstructions, which may make navigation difficult, but not impossible, does not destroy title navigability, *see Utah*, 283 U.S. at 86. In *Utah*, a case addressing navigability for title, the Supreme Court stated "the mere fact of the presence of . . . sandbars causing impediments to navigation does not make a river nonnavigable." 283 U.S. at 86. Although "the presence of sandbars must be taken in connection with other factors making for navigability," the "essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." *Id*; *see also Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982) (relying on the use of the McKenzie River in Oregon for log drives to determine the river navigable for title and stating that the "use of the river need not be without difficulty, extensive, or long and continuous."); *Doyon, Ltd.*, 86 Interior Dec. at 697 ("Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both [the Kandik and Nation Rivers], the evidence shows that these impediments do not prevent navigation.").

Boat use is not the only method for proving a river or stream's ability to serve as a highway for useful commerce. In *Oregon v. Riverfront Protection Association*, the Ninth Circuit considered evidence of the transporting of logs on the McKenzie River relevant to determining the river's potential use for commerce. 672 F.2d at 794–96. The court further found that the seasonal and sometimes difficult nature of these log drives did not destroy navigability. *Id.* at 795–96 (holding that "notwithstanding [the] difficulties, thousands of logs and millions of board feet of timber were driven down the river" and this use was not "occasional" as it occurred over a three-month period for over seventeen years).

Applying these standards to Alaska, the courts and U.S. Department of the Interior have found waterways navigable for title based on their susceptibility to use for navigation by river boats, inflatable rafts, or canoes having a capacity for "commercial" loads of about 1000 lbs. of supplies or recreationists. *Ahtna Inc.*, 891 F.2d 1401 (Gulkana River); *Appeal of Doyon*, 86 Interior Dec. 692 (Kandik and Nation Rivers); Feb. 25, 1980 Memorandum from Regional DOI Solicitor John ("Jack") Allen to BLM Alaska State Director re "Kandik, Nation Decision on Navigability." *See also Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000); August 18, 1983 Recommended Decision by DOI Administrative Law Judge Luoma in *Appeal of Alaska*, Interior Board of Land Appeals No. 82-1133 (recommending that the Matanuska River be determined navigable) & July 19, 1990 Memorandum of BLM Alaska State Director E. Spang (Matanuska River is navigable), BLM Files AA-11153-23, -31; *Appeal of State of Alaska & Collier*, 168 IBLA 334 (2006) (noting navigability standards).

VI. Evidence of Eek River, Middle Fork Eek River and Ugaklik River.

Documentation and reports by the BLM and other federal sources regarding pre- and post-statehood boat use, susceptibility of use as a highway of commerce, historical routes, and activities in Eek River, Middle Fork Eek River and Ugaklik River area confirm and establish that Eek River, Middle Fork Eek River and Ugaklik River named in this document are navigable as described above.[3]

A. Federal Navigability Determinations Demonstrating Navigability, including Use and Susceptibility to Use in Commerce

Eek River: The BLM has made navigability determinations for numerous conveyances on the Eek River.[4] BLM determined Eek River navigable through the conveyance area at river mile 48.6.[5] The BLM found the Eek River navigable to river mile 98.5 (105)[6] in its February 21, 1989 memorandum identifying navigable waters for surveying small tracts.[7]

There are Native Allotments along the Eek River with the upstream-most at river mile 132.4 (143). BLM found it not navigable within this allotment. BLM described the power boats used to access the area and concluded that the use was for an insufficient time during the open water season which lasts between two and four weeks each year.[8] On the other hand, Dorsey reported numerous sources of boating that occurred upstream to the confluence with Rainy Creek and longer times of boat-ability during the open water season.[9]

Commercial activity is not allowed by the USF&WS, but commercial operators can and do drop off boaters in the upper reaches of the Eek River. The USF&WS stated that the expense of access suppressed the growth of recreational use of the Eek River system.[10] Comments by ADF&G and user

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[3] The exclusion of other portions of Eek River, Middle Fork Eek River and Ugaklik River from this application is not an admission that those submerged lands did not pass to the State at statehood, but merely recognizes that they are not part of this application.

[4] Dorsey, Janine, Eek River System HUC 30502, Zone 2, Kuskokwim River Region, Final Interim Summary Report, September 14, 2011, p. 9-23. Report was written in cooperation between State of Alaska and the Department of Interior. Throughout this report that portion of the Eek River upstream of its confluence with the Middle Fork Eek River is referred to as the North Fork Eek River. It is unclear where this naming convention originated.

[5] Id., p. 14-15, also Attachment 13.

[6] The river mile 98.5 is used by Dorsey and appears on the maps within the report. The river mile 105.5 is the river mile on the maps submitted with this application. A similar notation will be made below when a river mile on the application map is referenced.

[7] Dorsey, Attachment 20, p. 4. In this memorandum BLM does not distinguish the North Fork from the Eek River. The BLM identifies the Eek River as navigable from its mouth "to and through Native Allotment F-15812-C in T. 1 N., R. 67 W., SM." There is no indication that this was intended to be the limits of navigability.

[8] Id., p. 18, Attachment 28.

[9] Id., pp. 65-71, 86-87.

[10] Id., p. 93

groups indicate that the Eek River system has less to offer then other regional rivers.[11]

The BLM has found various portions navigable on two upstream tributaries which will be discussed below. There are also twenty-two Native Allotments in the upstream drainage with no know summer access other than by water.[12] In July 1978 a BLM team traveled by riverboat from Eek Channel to Eek Village then on to the confluence of Eek River and Middle Fork Eek River. In a July 25, 1978 memorandum concerning that BLM field trip, Robert Hiller noted the evidence of medium to heavy boat travel at the confluence.[13]

Middle Fork Eek River: In its February 21, 1989 survey memorandum, the BLM concluded that the Middle Fork Eek River is navigable in fact to T. 3S., R. 68 W., S.M., Alaska.[14] There are seven Native Allotments on this stretch of river and they are accessed by boat. This section of river is reportedly as big as the Eek River above the Middle Fork confluence, but with less gradient.[15] There is no evidence available to show that the determination was considered the limits of navigability.

Ugaklik River: The mouth of the Ugaklik River is at Sec. 3, T. 1 S., R. 72 W., S.M., Alaska. In its navigability determination, the BLM described the Ugaklik River as fifty to sixty feet wide with no impediments or obstructions visible with moderately high banks and no rocks or bars breaking the water surface. The BLM determined the Ugaklik River navigable "to and through the historical site AA-10155 in Sec. 3, T. 1 S., R. 72 W., SM".[16] There is no indication that BLM considered whether or not the waters beyond the historic site were navigable.

The State concurs with the BLM that the Ugaklik River is navigable to at least through historical site AA-10155 in Sec. 3, T. 1 S., R. 72 W., SM. The State notes that the conditions of the Ugaklik River are consistent and change very slowly between Sec. 3, T. 1 S., R. 72 W., S.M., Alaska to Sec. 3, T. 3 S., R. 70 W., S.M., Alaska. Between the mouth and Sec. 3, T. 3 S., R. 70 W., S.M., Alaska the gradient is approximately four feet per mile. The terrain and physical characteristics appear very consistent and the river meanders in a similar pattern. There are no significant tributaries between the mouth of the Ugaklik River and the Ugaklik River at Sec. 3, T. 3 S., R. 70 W., S.M., Alaska.[17]

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[11] Id., p. 94
[12] Id., pp. 56-75, 79.
[13] Id., Attachment 41.
[14] Id., p. 23.
[15] Id., Attachment 20.
[16] Id., Attachment 20, p. 6.
[17] Attached Maps #2 & 5. Also see GoogleEarth.

The Ugaklik River is susceptible to use for travel, trade and commerce to Sec. 3, T. 3 S., R. 70 W., S.M., Alaska based on the river conditions described by the BLM in determining a portion of the Ugaklik River navigable and the consistency of those conditions to Sec. 3, T. 3S., R. 70 W., S.M., Alaska.

VII. Other Known Interested Parties

Trustee: Association of Village Council Presidents
PO Box 219
Bethel, AK 99559
Attn: Norman Micheals

Iqfijouaq Company
PO Box 49
Eek, AK 99578
Attn: Nick Carter (President)

Calista Corporation
5045 Business Park Blvd. Suite 3000
Anchorage, AK 99503
Attn: Andrew Guy (President)

VIII. $100.00 Application Fee

The State provided the $100.00 application fee on September 14, 2016.

IX. Conclusion

There is sufficient evidence to conclude the Eek River, Middle Fork Eek River and Ugaklik River, as described in section I of this application are navigable waterways. Therefore, the submerged lands and beds underlying these water bodies are owned by the State of Alaska and should be disclaimed by the BLM on behalf of the federal government.

The State agency responsible for this application is the Alaska Department of Natural Resources, Division of Mining, Land and Water, 550 W. 7th Avenue, Suite 1070, Anchorage, Alaska 99501, Attention: James H. Walker (907) 269-4755. Please start the application process for this river and forward the revised estimate of cost of administration.

Sincerely,

James H. Walker

Public Access Assertion and Defense Unit

Enclosures:
1) Legal Description
2) Eek River System, HUC 30502, Zone 2, Kuskokwim River Region, Final Interim Summary Report, Prepared by Janine Dorsey, Ph.D., Historian I, Office of History and Archaeology, Department of Natural Resources, State of Alaska.
3) Attachments for Eek River System, Final Interim Summary Report, Prepared by Janine Dorsey, Ph.D., Historian I, Office of History and Archaeology, Department of Natural Resources, State of Alaska.

cc: Gregory Siekaniec, Regional Director, U. S. Fish and Wildlife Service
Kenneth Stahlnecker, Refuge Manager, U. S. Fish and Wildlife Service
Susanna Henry, Refuge Manager, U. S. Fish and Wildlife Service
John Trawicki, Chief, Water Resources Branch, U. S. Fish and Wildlife Service
Sam Cotten, Commissioner, Alaska Department of Fish and Game
Andrew Guy, President, Calista Corporation
Nick Carter, President, Iqfijouaq Co

Eek River RDI Application: Legal Description

Eek River (43-156), Middle Fork Eek River (0-62), Ugaklik River (0-38), within the State of Alaska, more particularly described as follows:

Eek River:

All submerged lands between the ordinary high water lines of the left and right banks of Eek River not impacted by final agency action from near river mile 43 to its confluence with Rainy Creek, approximately river mile156, within the Section 1, Township 2 South Range 64 West, Seward Meridian, within the following townships and ranges in the Seward Meridian as determined from Alaska USGS 1:63 360 series topographic map Bethel (A-4) (1954), Bethel (A-5) (1954), Bethel (A-6), (1954), Bethel (A-7), (1954), Bethel (A-8), (1954), Bethel (B-8), (1954), Baird Inlet (B-1), (1954), Baird Inlet (A-1), (1954):

MTRS

S002S064W01	S001N065W12	S001N067W21	S001N069W20
S001S064W36	S001N065W01	S001N067W28	S001N069W19
S001S064W25	S001N065W02	S001N067W29	S001N070W24
S001S064W24	S001N065W03	S001N067W32	S001N070W13
S001S064W23	S001N065W04	S001N067W31	S001N070W23
S001S064W14	S001N065W05	S001N067W30	S001N070W22
S001S064W13	S001N065W07	S001N068W25	S001N070W27
S001S064W11	S001N065W08	S001N068W26	S001N070W28
S001S064W02	S001N066W14	S001N068W27	S001N070W33
S001N063W33	S001N066W13	S001N068W28	S001N070W32
S001N063W32	S001N066W12	S001N068W21	S001N070W29
S001N063W29	S001N066W11	S001N068W20	S001N070W30
S001N063W20	S001N066W10	S001N068W19	S001N070W31
S001N063W19	S001N066W15	S001N068W18	S001N071W36
S001N063W18	S001N066W22	S001N069W13	S001N071W35
S001N064W13	S001N066W21	S001N069W24	S001N071W34
S001N064W14	S001N066W17	S001N069W23	S001N071W27
S001N064W15	S001N066W16	S001N069W14	S001N071W31
S001N064W10	S001N066W20	S001N069W22	S001N071W30
S001N064W09	S001N066W19	S001N069W15	S001N071W29
S001N064W08	S001N067W24	S001N069W15	S001N071W19
S001N064W07	S001N067W23	S001N069W16	S001N072W15
S001N064W06	S001N067W22	S001N069W21	

The precise location may be within other sections and townships due to the ambulatory nature of water bodies.

Eek River (Middle Fork):

All submerged lands between the ordinary high water lines of the left and right banks of Eek River (Middle Fork), not impacted by final agency action, from near river mile 0 at its confluence with the North Fork within Section 34, Township 1 North, Range 71 West, Seward Meridian to Section 18 Township 3 South Range 68 West, within the following townships and ranges in the Seward Meridian as determined from Alaska USGS 1:63 360 series topographic map, Bethel (A-5) (1954), Goodnews (D-6) (1954), Bethel (A-6) (1954), and Bethel (A-7) (1954):

MTRS

S002S067W09	S003S068W17	S002S069W08	S001S071W24
S002S067W08	S003S068W18	S002S069W05	S001S071W13
S002S067W17	S003S069W13	S002S069W06	S001S071W14
S002S067W18	S003S069W12	S002S070W01	S001S071W10
S002S067W19	S003S069W11	S001S070W36	S001S071W15
S002S068W24	S003S069W02	S001S070W35	S001S071W16
S002S068W25	S002S069W35	S001S070W26	S001S071W09
S002S068W26	S002S069W34	S001S070W27	S001S071W08
S002S068W35	S002S069W27	S001S070W34	S001S071W06
S002S068W34	S002S069W22	S001S070W28	S001S071W07
S003S068W03	S002S069W21	S001S070W33	S001S071W05
S003S068W10	S002S069W16	S001S070W29	S001S072W01
S003S068W09	S002S069W17	S001S070W20	S001N071W34
S003S068W08	S002S069W09	S001S070W19	

The precise location may be within other sections and townships due to the ambulatory nature of water bodies.

Ugaklik River:

All submerged lands between the ordinary high water lines of the left and right banks of the Ugaklik River, not impacted by final agency action, from river mile 0 within Section 3 Township 1 South Range 72 West to Section 3, Township 3 South, Range 70 West, Seward Meridian, within the following townships and ranges in the Seward Meridian as determined from Alaska USGS 1:63 360 series topographic map, Goodnews (D-7) (1954), Bethel (A-7) (1954), and Bethel (A-8) (1954):

MTRS

S001S071W29	S001S072W11	S002S071W04	S002S071W23	S003S070W05
S001S071W30	S001S072W14	S002S071W09	S002S071W24	S003S070W04
S001S071W32	S001S072W23	S002S071W10	S002S071W25	S003S070W03

S001S071W33	S001S072W24	S002S071W14	S002S070W30
S001S072W03	S001S072W25	S002S071W15	S002S070W31
S001S072W10	S002S070W30	S002S071W16	S002S070W32

The precise location may be within other sections and townships due to the ambulatory nature of water bodies.