United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Alaska State Office
222 West Seventh Avenue
Anchorage, Alaska 99513-7504
http://www.blm.gov/ak

TAKE PRIDE IN AMERICA

In Reply Refer To:
FF-94683
1864 (AK9270)

APR 0 3 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	FF-94683
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Daniel S. Sullivan, Commissioner	:	Application
550 West 7th Avenue, Suite #1400	:	
Anchorage, Alaska 99501-3579	:	Tanana River

ADMINISTRATIVE WAIVER GRANTED
APPLICATION APPROVED

On March 10, 2006, the State of Alaska (State) filed a disclaimer of interest application (FF-94683) to the Bureau of Land Management (BLM) under the provisions of Section 315 of the Federal Land Policy Management Act of October 21, 1976 (FLPMA), 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864, for certain lands underlying the Tanana River, located in Interior Alaska.[1] The State's application included all the submerged lands lying within the bed of the Tanana River between the ordinary high water lines of the left and right banks from its origin at the confluence of the Chisana and Nabesna rivers within Sections 29 and 30, Township 15 North, Range 19 East, Copper River Meridian, Alaska, flowing generally northwesterly to all points of confluence with the Yukon River in Section 23, Township 4 North, Range 22 West, Fairbanks Meridian, Alaska.

Lands underlying the former Tetlin Native Reserve, Executive Order (EO) No. 5365 (June 10, 1930) and the Fort Wainwright Military Reservation, EO No. 8847, 3 CFR 980-981 (1938-1943) (August 8, 1941) were excluded from the application. On October 12, 2011, the State withdrew that segment of the Tanana River within the Dyke's Range Impact Area, EO No. 8020, 3 CFR 437-438 (1938-1943) (December 2, 1938).[2] Accordingly, the status of the bed of the Tanana River within these three areas will not be addressed in this decision.

---

[1] Michael L. Menge, Commissioner, Alaska Department of Natural Resources, to Henri Bisson, BLM-Alaska State Director, March 10, 2006, file FF-94683 (1864), Alaska State Office, BLM records.
[2] David W. Schade, Navigability Subunit Manager, Alaska Division of Mining, Land and Water, to Craig Frichtl, Chief, Branch of Survey Planning and Preparation, Division of Cadastral Survey, October 12, 2011, file FF-94683 (1864), Alaska State Office, BLM records.

The State contends the Tanana River was navigable at the time of statehood and therefore, title to the submerged lands vested in the State upon entry to the Union on January 3, 1959, the date of Alaska's Statehood. The State's application for a disclaimer of interest is based on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988 (P.L. 100-395), or any other legally cognizable reason.

The Submerged Lands Act of 1953, 43 U.S.C. §1311(a), granted and confirmed to the states title to the lands beneath inland navigable waters within the boundaries of the respective states. It also gave the states the right and power to manage, and administer these lands in accordance with state law. Section 6 (m) of the Alaska Statehood Act, July 7, 1958, made the Submerged Lands Act applicable to Alaska.[3] Section 315(a) of FLPMA authorizes the Secretary of the Interior to issue a document of disclaimer of interest(s) 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 a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

BACKGROUND

In support of its application, the State submitted a legal description including the townships and ranges of the lands underlying the Tanana River. Additional supporting information included a summary of navigability determinations issued by the BLM starting in May 13, 1974, and ending on February 15, 2005, and a listing of Tanana River Bibliographic References. The memoranda referenced by the State were issued by the BLM in support of administrative decisions leading to the conveyance of lands to the State of Alaska, Native allottees, and Native corporations. Historic information on boat use on the Tanana River was also referenced in an attached bibliography.

Notice of the State's application was published in the *Federal Register* on April 29, 2010. The BLM prepared a draft navigability report, "Federal Interests in Lands Underlying the Tanana River, Alaska," describing the State's application and supporting evidence, riparian land status, physical character, and historical uses. Public notice of the State's application, and the availability of the draft navigability report, was published in the *Anchorage Daily News* and the *Fairbanks Daily News-Miner* on May 6, 13, and 20, 2010. Information about this application, including the draft navigability report, was also posted on the BLM-Alaska website.

The BLM sent copies of its draft navigability report to the State of Alaska (Departments of Natural Resources and Fish and Game), the U.S. Fish and Wildlife Service (USFWS), the U.S. Army, Doyon, Ltd. (a regional Native corporation), and the following Native village corporations: Bean Ridge Corporation (Manley Hot Springs), Dot Lake (Dot Lake), Mendas Cha-Ag Native Corporation (Healy Lake), Northway Natives, Inc. (Northway), Tanacross, Inc. (Tanacross), Toghotthele Corporation (Nenana) and Tozitna, Limited (Tanana). Additional copies were also sent to Native village councils and IRAs representing the following villages: Dot Lake, Healy Lake Village, Manley Hot Springs, Nenana, Northway, Tanacross, Tanana and

[3] 72 Stat. 339, 343

Tetlin. The notices invited review and comments and afforded each recipient an opportunity to provide additional information. The comment period ended on July 28, 2010.

During the published notice period, the BLM received one inquiry for additional information from a member of the public.[4] No factual evidence to support or contradict the BLM's public notice and/or draft navigability report was provided. The U.S. Army did not provide formal comments.[5] On July 28, 2010, the USFWS Regional Director, Region 7, concurred with the BLM's draft finding of navigability of the Tanana River.[6]

On July 26, 2010, and again on August 6, 2010, the State requested and was granted an extension to submit comments and provide additional information.[7] On August 16, 2010, the State of Alaska submitted its comments regarding the draft navigability report for the Tanana River.[8] In its letter, the State indicated its agreement with the BLM's determination that the Tanana River is navigable throughout its 582 mile length. However, the State indicated general disagreement with BLM's presumption that federal withdrawals in existence at the time of Statehood defeated the State's title to the submerged lands therein. The State stated its position that while the thirty-one river miles within the former Tetlin Native Reserve and the three river miles within the Tanana Flats Training Area (Fort Wainwright Military Reservation) were "excluded" from its application it does not infer that the State believes title to the Tanana River's submerged lands resides in the Federal Government (United States). The State expressed additional concerns that the BLM addressed these "excluded" stretches in the report. Finally, the State took strong exception to the BLM's analysis of the prestatehood withdrawals affecting the Dyke Range Impact Area (EO No. 8020) and its subsequent recommendation that the State's RDI application for the approximately three miles of riverbed beneath the Tanana River in this withdrawal be rejected.

The BLM considered these comments and modified the report regarding the status of the Tanana River bed within Fort Wainwright and the former Tetlin Native Reserve. As these areas were excluded from the State's RDI application, the status of the riverbed was withdrawn from further discussion. The report also excluded that portion of the Tanana River within Dyke's Range, as a result of the State's withdrawal from its application.

---

[4] Professor Paul Friesma, Northwestern University, email, dated April 30, 2010. On May 12, 2010, the BLM sent a copy of the State's Application and the Draft Navigability Report to Professor Friesma.

[5] On May 20, 2010, the U.S. Army requested clarification as to the withdrawal status for the bed of the Tanana River in the area commonly known as the Dyke Range Impact Area. Email correspondence, B.J. Baker, Environmental Judge Advocate (USARPAC) to BLM dated May 20, 2010. On May 25, 2010, the BLM responded with a brief synopsis of the area's withdrawal history, and a statement of the BLM's draft findings that the lands in question were withdrawn at Statehood.

[6] Gary Edwards, Acting Director, Region 7, USFWS, to Julia Dougan, Acting BLM-Alaska State Director, July 28, 2010, file FF-94683 (1864), Alaska State Office, BLM records. The USFWS also reiterated its position that, consistent with BLM's procedures, the burden of proof for navigability should rest with the applicant.

[7] Marty Parsons, Department of Natural Resources (DNR), to Callie Webber, July 26, 2010, file FF-94683 (1864), Alaska State Office, BLM records.

[8] Thomas E. Irwin, Commissioner, DNR to Julia Dougan, Acting State Director, Alaska State Office, BLM, August 16, 2010, file FF-94683 (1864), Alaska State Office, BLM records.

ADMINISTRATIVE WAIVER GRANTED

Pursuant to 43 CFR 1864.1-2 (c) (1) and (d), unless a waiver is granted, a legal description of the lands for which a waiver is sought must be based on either an official United States public land survey, or a metes and bounds survey tied to the nearest corner of an official public land survey. On March 10, 2006, the State requested a waiver of this requirement under 43 CFR 1864.1-2(d).

The Tanana River is the third longest river in the State of Alaska. Formed by the confluence of the Nabesna and Chisana rivers, the Tanana River empties into the Yukon River, one of the most well-known rivers in the United States, with its colorful history and use as the main artery in Interior Alaska. The Tanana River is clearly depicted on U.S. Geological Survey, quadrangle maps and its location is not in dispute.[9] The ordinary high water mark of the Tanana River is the legal boundary of the submerged lands. Since this is an ambulatory boundary, the location of which may change over time, it is determined that a survey description of the subject water body is not needed to adjudicate the State's application and the waiver is hereby granted. There is no need for a survey description in order to process this application.[10]

APPLICATION APPROVED

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). The U.S. Supreme Court stated: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In assessing the navigability of inland water bodies, the BLM relies upon this test as well as Federal statutes, Federal case law, and the advice of the Interior Department's Solicitor's Office. Relevant Federal statutes include the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988. The Supreme Court's most recent decision on title navigability, *PPL Montana, LLC v. Montana*, 565 U.S. ___ (2012), summarizes and explains the proper interpretation of *The Daniel Ball* criteria. Associate Solicitor Hugh Garner's memo of March 16, 1976, ("Title to submerged lands for purposes of administering ANCSA") and Regional Solicitor John Allen's memo of February 25, 1980 ("Kandik, Nation Decision on Navigability") provide valuable guidance on applying title navigability law in Alaska. In cases concerning prestatehood reservations, BLM uses the established criteria set out and applied by the Supreme Court in two Alaska cases, *Alaska v. United States,* 545 U.S. 75 (2005) ("*Glacier Bay*") and *United States v. Alaska*, 521 U.S. 1 (1997) ("*Arctic Coast*"/"*Dinkum Sands*").

---

[9] Mt. Hayes C-2, D-2; Big Delta A2 through A6, B-5, B-6, C-6; Fairbanks B-1, C-1 through C-5, D-1, D-2, D-3, D-5, D-6; Kantishna River D-1 through D-4; and Tanana A-2, A-3, A-4.

[10] "Manual of Surveying Instructions 2009," U.S. Department of the Interior, Bureau of Land Management, Sections 3-162 to 3-166, pp. 81-82.

The final navigability report, "Federal Interest in Lands Underlying the Tanana River, Alaska" (March 26, 2012), established that the Lower River, from all points of confluence with the Yukon River to its confluence with the Chena River was navigable in fact at the time of statehood. The Tanana River, for this segment, has a long history of travel, trade, and commerce, with documentation of steamboats, barges, and riverboats transporting passengers, food, equipment, and other materials to Fairbanks and other communities in Interior Alaska. The report concluded the Upper Tanana River, from the confluence with the Chena River upstream to its head at the confluences with the Nabesna and Chisana Rivers, was susceptible for use as a highway of commerce at the time of statehood. The report documented instances where a steamboat and riverboat transported supplies up the Upper Tanana River to support missionary work, fur traders, and miners seeking wealth during the Chisana Gold Rush. Although the report's findings did not definitively establish continued use of the Upper Tanana River as a highway of commerce, it did demonstrate it was physically capable of navigability and that had the Chisana Gold Rush been more productive, it would have had more use.

The United States affirms it has no interest in the lands described below because all of the federal interests passed to the State of Alaska at the time of statehood. Approving the State's application for a recordable disclaimer of interest will remove a cloud on the title by providing certainty about the ownership of submerged lands underlying the Tanana River. Without this certainty, ownership between the two sovereigns, the State of Alaska and the United States, is unclear. This lack of clarity of sovereign ownership greatly complicates the application of natural resource laws and other laws to the submerged lands involved.

Accordingly, based on the foregoing and the documentation contained in the case record, in particular the final navigability report, "Federal Interest in Lands Underlying the Tanana River, Alaska" (March 26, 2012) I have determined that the State's application for a recordable disclaimer of interest is legally sufficient within the provisions of Section 315 of FLPMA and the regulations contained in 43 CFR Subpart 1864. The State's application for a recordable disclaimer of interest is hereby approved as follows:

1. The lands underlying the Tanana River, between the ordinary high water marks on its banks from all points of confluence with the Yukon River in T. 4 N., R. 22 W., Fairbanks Meridian (FM), Alaska, upstream approximately 237 river miles through Section 35, T. 1 S., R. 1 W., FM, to the west boundary (northernmost extension) of the Fort Wainwright Military Reservation, EO No. 8847, 3 CFR 980-981 (1938-1943) (August 8, 1941);

2. The lands underlying the Tanana River, between the ordinary high water marks on its banks, from the east boundary (northernmost extension) of the Fort Wainwright Military Reservation, EO No. 8847, 3 CFR 980-981 (1938-1943) (August 8, 1941), located along the line between Sections 32 and 33, T. 1 S., R. 1 E. and Sections 4 and 5, T. 2 S., R. 1 E., FM, Alaska, upstream approximately 263 river miles to the northernmost corner of the former Tetlin Native Reserve, Executive Order (EO)

No. 5365 (June 10, 1930), described as U.S. Survey 2547, located within T. 19 N., R. 14 E., Copper River Meridian (CRM), Alaska.

- Excepting therefrom any lands underlying the Tanana River within the Dyke's Range Impact Area, EO No. 8020, 3 CFR 437-438 (1938-1943) (December 2, 1938), located in the unsurveyed portions of Sections 22, 26, 27 and 35, T. 2 S., R. 2 E. and Section 19, T. 4 S., R. 4 E., FM, Alaska.[11]

3. The lands underlying the Tanana River, between the ordinary high watermarks on its banks outside of the former Tetlin Native Reserve Executive Order (EO) No. 5365 (June 10, 1930), described as U.S. Survey 2547, located in T. 16 N., R. 16 E., CRM, Alaska, upstream approximately 45 river miles to its beginnings at the confluence of the Nabesna and Chisana rivers, located in T.15 N., R.19 E., CRM, Alaska.

HOW TO APPEAL THIS DECISION

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulations contained in 43 CFR 4.21 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied,

(2) The likelihood of the appellant's success on the merits,

[11] These lands were excluded from the State of Alaska's application, see David W. Schade, Navigability Subunit Manager, Alaska Division of Mining, Land and Water, to Craig Frichtl, Chief, Branch of Survey Planning and Preparation, Division of Cadastral Survey, October 12, 2011, file FF-94683 (1864), Alaska State Office, BLM records.

(3) The likelihood of immediate and irreparable harm if the stay is not granted, and

(4) Whether the public interest favors granting the stay.

Bud C. Cribley
State Director

Enclosure

cc (w/o enclosure):

David Schade, Navigability Subunit Manager
Alaska Department of Natural Resources
Division of Mining, Land and Water
550 W. 7th Avenue, Suite #1420
Anchorage, Alaska 99501-3579

Mark Fink, Access Defense Program Manager
Alaska Department of Fish and Game
333 Raspberry Road
Anchorage, Alaska 99518-1599

Director, Region 7
U.S. Fish and Wildlife Service
1011 East Tudor Road, MS 221
Anchorage, Alaska 99503

Bret Christensen, Navigability Specialist
U.S. Fish and Wildlife Service, Region 7
1011 East Tudor Road, MS 221
Anchorage, Alaska 99503

Ryan Mollnow, Refuge Manager
Tetlin National Wildlife Refuge
P.O. Box 779 MS 529
Tok, Alaska 99780

B.J. Baker, Senior Environmental Paralegal
Office of the Staff Judge Advocate
724 Postal Service Loop, #5700
Fort Richardson, Alaska 99505-5700

Deputy State Director, Division of Cadastral Survey (AK920)

Fairbanks District Manager (AKF000)