



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>

In Reply Refer To:
AA-086372
1864 (AK927)

APR 18 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	AA-086372
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Daniel Sullivan, Commissioner	:	Application
550 West 7 th Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3579	:	Aniak River and Aniak Lake

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On March 10, 2006, the State of Alaska (State) filed with the Bureau of Land Management (BLM) an application for a recordable disclaimer of interest (AA-086372) 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 the lands underlying the Aniak River (approximately 94 river miles) and Aniak Lake (approximately 960 acres), located in Southwest Alaska.¹ The State's application included the submerged lands comprising the bed of the Aniak River between the ordinary high water lines of its left and right banks from its source in Section 20, Township 3 North, Range 57 West, Seward Meridian, northerly to its confluence with the Kuskokwim River in Section 7, Township 17 North, Range 56 West, Seward Meridian, as well as the submerged lands encompassed by the ordinary high water line of Aniak Lake within Township 5 North, Range 56 West, and Township 4 North, Range 57 West, Seward Meridian, Alaska.

The State contends that Aniak River and Aniak Lake are navigable, and the application for a disclaimer of interest is based upon entitlement under the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988 (P.L. 100-395), or any other legally cognizable reason. As an alternate basis, the State asserts where it owns the uplands on all sides of the water body it would have riparian ownership rights to the submerged lands if the water body was not navigable.

¹ Michael L. Menge, Commissioner, Alaska Department of Natural Resources, to Henri Bisson, BLM-Alaska State Director, March 10, 2006, file AA-086372 (1864), Alaska State Office, BLM records.

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.² 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 information including legal descriptions, information extracted from the BLM's regional report entitled, "Alaska's Kuskokwim River Region: A History" (1985), previous BLM navigability determinations, and additional documentary material and land status records.

On July 29, 2011, Notice of the State's application was published in the *Federal Register*.³ The BLM prepared a draft navigability report, "Federal Interest in Lands Underlying Aniak River and Aniak Lake in the Kuskokwim Subregion, Alaska," describing the State's application and supporting evidence, riparian land status, physical character and historical uses. Notice of the State's application and the availability of the draft navigability report was published in the *Anchorage Daily News* (September 8, 15, and 22, 2011). 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 following: State of Alaska (Departments of Natural Resources and Fish and Game); the United States Fish and Wildlife Service (USFWS); Calista Corporation; Tulkisarmute, Incorporated; The Kuskokwim Corporation (Successor in Interest to Aniak, Limited); Chuathbaluk Traditional Council; City of Chuathbaluk; and the Village of Aniak. The notices invited review and comments and afforded each recipient an opportunity to provide additional information. The comment period ended on October 31, 2011. During the published notice period, the BLM received concurrence with the draft findings from the USFWS and the Alaska Department of Natural Resources.⁴ The BLM then finalized the report on April 4, 2012.

² 72 Stat. 339, 343

³ 76 FR 45604-45605

⁴ In addition, a member of the public requested a copy of the State's application and the BLM's draft summary report. Professor Paul Friesema, Northwestern University, e-mail, dated July 29, 2011. On August 1, 2011, Jack Frost replied to Professor Friesema, letting him know that the State's Application and Draft Summary Report were on BLM-Alaska's website (http://www.blm.gov/ak/st/en/prog/rdi/kuskokwim/aniak_river-lake.html). See also USFWS-Region 7 Regional Director to BLM-Alaska State Director, August 25, 2011; Navigability Subunit Manager, Public Access and Assertion Defense Unit, State of Alaska to Branch Chief, Survey Planning and Preparation, Division of Cadastral Survey, BLM-Alaska, November 10, 2011, file AA-086372, 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 disclaimer is sought must be based on either an official United States public land survey, or a metes and bounds survey tied to the nearest corner of an official public land survey. In its application the State of Alaska requested a waiver of this requirement under 43 CFR 1864.1-2(d). Aniak River and Aniak Lake are easily identifiable on United States Geological Survey (USGS) topographic maps.⁵

The Aniak River has been meandered and segregated from the uplands from its mouth at the Kuskokwim River in T. 17 N., R. 56 W., SM, upstream approximately 56 miles to its confluence with the Salmon River in T. 11 N., R. 56 W., SM, Alaska.⁶ The State of Alaska received title to the riparian lands along the remainder of Aniak River to its headwaters in T. 3 N., R. 57 W., SM, Alaska. The State of Alaska also received title to the riparian lands surrounding Aniak Lake. Where the State of Alaska is the upland owner, it received title to the submerged lands regardless of whether a waterbody was navigable. Therefore, a survey description of the water bodies is not needed to adjudicate the State's application and the waiver is hereby granted.⁷

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

⁵ USGS 1:63,360 Topographic Maps: Bethel A-1, B-1, B-2, C-1, C-2, D-1, D-2; Russian Mission A-1, A-2, B-1, B-2, C-1, C-2; Sleetmute A-8, B-8, C-8; and Taylor Mountains B-8, C-8 and D-8.

⁶ The exception is an approximate three (3) mile segment within Unsurveyed Township, T. 14 N., R. 56 W., SM, Alaska. The Aniak River, however, has been meandered and segregated from two (2) Native allotment applications (F-15693 and AA-51169) in this township. Almost 1.5 miles (108.64 chains) of the right bank of the Aniak River has been meandered (U.S. Survey 9960, Lots 5, 7, and 8). To the south, over one half (1/2) mile (42.35 chains) of the left bank of the Aniak River was meandered (U.S. Survey 9960, Lot 10). See Protraction Diagram, State Selection Survey, Group No. 310, Areas A & B, SM (September 20, 1974); U.S. Survey No. 9960 (August 29, 1991; August 2, 2011); T. 15 N., R. 56 W., SM (August 15, 1992; August 12, 2005; September 16, 2008); T. 16 N., R. 56 W., SM (August 15, 1997); T. 16 N., R. 56 W., SM (August 12, 2005); T. 17 N., R. 56 W., SM (August 15, 1997); T. 16 N., R. 57 W., SM (August 15, 1997); and T. 16 N., R. 57 W., SM (August 12, 2005).

⁷ "Manual of Surveying Instructions 2009," U.S. Department of the Interior, Bureau of Land Management, Sections 3-162 to 3-166, pp. 81-82.

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*”).

The final navigability report, “Federal Interest in Lands Underlying Aniak River and Aniak Lake in the Kuskokwim Bay Subregion, Alaska” (April 4, 2012), concluded that the Aniak River was navigable from its mouth at the Kuskokwim River to the confluence with the Salmon River. The BLM has consistently held this segment of the Aniak River is navigable, that use of the river as a highway of commerce dates back to mining activities in the early 1900’s and continued into the 1970s. The river still supports local interest in recreation and subsistence activities. The State is the riparian land owner for the remaining segments of the Aniak River (from its confluence with Salmon River at river mile 56, to and through Aniak Lake to its headwaters). Therefore, the State has title to these submerged lands whether or not the waterbodies were navigable.

The United States affirms it has no interest in the lands described below because all of the federal interests have passed to the State of Alaska. 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 Aniak River and Aniak Lake. 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 Aniak River and Aniak Lake in the Kuskokwim Bay Subregion, Alaska” (April 4, 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 Aniak River, between the ordinary high water marks on its banks, from its mouth at the Kuskokwim River in Township 17 North, Range 56 West, Seward Meridian (SM), upstream approximately eighty-six (86) river miles to its outlet at Aniak Lake in T. 5 N., R. 56 W., SM, Alaska;
2. The lands underlying Aniak Lake, approximately 960 acres, to its ordinary high water line, located in T. 4 N., R. 57 W. and T. 5 N., R. 56 W., SM, Alaska; and
3. The lands underlying the Aniak River, between the ordinary high water marks on its banks, from its inlet at Aniak Lake in T. 4 N., R. 56 W., SM, upstream approximately eight (8) river miles to its headwaters in Section 20, T. 3 N., R. 57 W., SM, Alaska.

HOW TO APPEAL THIS DECISION


This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. 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;
- (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, Alaska

Enclosure

cc (w/o enclosure):
 David Schade, Navigability Subunit Manager
 Alaska Department of Natural Resources
 Division of Mining, Land and Water
 Public Access and Assertion Defense Unit
 550 West 7th Avenue, Suite 1420
 Anchorage, Alaska 99501-3579

Mark Fink, Access Defense Program Manager
Alaska Department of Fish and Game
333Raspberry Road
Anchorage, Alaska 99518-1565

Geoffrey Haskett, Regional Director
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, Alaska 99503-6199

Bret Christensen, Navigable Waters Specialist
U.S. Fish and Wildlife Service, Region 7
1011 E. Tudor Road
Anchorage, Alaska 99503-6199

Gene Peltola, Refuge Manager
U.S. Fish and Wildlife Service
Yukon Delta National Wildlife Refuge
P.O. Box 346, MS 535
Bethel, Alaska 99559

District Manager, Anchorage