



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
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In Reply Refer To:
FF-094614
1864 (LLAK9420)

AUG 26 2016

DEPARTMENT OF
NATURAL RESOURCES

AUG 30 2016

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

COMMISSIONER'S OFFICE
ANCHORAGE

DECISION

State of Alaska	:	FF-094614
Department of Natural Resources	:	Recordable Disclaimer of Interest
Division of Mining, Land & Water	:	Application
Public Access Assertion & Defense Unit	:	
550 West Seventh Avenue, Suite 1420	:	
Anchorage, Alaska 99501-3579	:	Nabesna River

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On October 3, 2005, the State of Alaska (State) filed with the Bureau of Land Management (BLM) an application for a recordable disclaimer of interest (FF-094614) 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 Nabesna River located within the Tanana River Region, Alaska located in southeastern interior Alaska.¹ The State's application included the submerged lands "between the ordinary high water lines of the left and right banks from its origins at the Nabesna Glacier within Township 5 North, Ranges 13 and 14 East, Copper River Meridian (CRM), Alaska, downstream to its confluence with the Tanana River in T. 15 N., R. 19 E., Copper River Meridian." The State filed an amended Recordable Disclaimer (RDI) application for the Nabesna River, dated September 16, 2015, "to include only the submerged lands underlying the Nabesna River from its mouth to the Black Hills (Sec. 25, T11N, R17E, and CRM). The State withdraws its request for an RDI on the submerged lands underlying the Nabesna River from Sec. 25, T11N, R17E, CRM and the river's source at the Nabesna Glacier."² Clarifying its letter from September 16, 2015, the State submitted an email on October 16, 2015 stating that "the

¹Tom Irwin, Commissioner, Alaska-Department of Natural Resources, to Henri Bisson, BLM-Alaska State Director, October 3, 2005, file FF-094614 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records).

²James Walker to Angela Nichols, BLM, September 16, 2015, file FF-094614 (1864), Alaska State Office, BLM records.

State withdraws its request for an RDI on the submerged lands underlying the Nabesna River from its confluence with the Cheslina River in Section 35, T12N, R17E, CRM upstream to the river's source at the Nabesna Glacier.”³

The State contends that Nabesna River is 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.

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.⁴ 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 BLM memos addressing the Nabesna's navigability; an April 1975 Grumman Ecosystems Corporation report; State of Alaska Department of Natural Resource (DNR) historical reports; a 2004 National Park Service commercial transporter's activity report; an Arctic Environmental Information and Data Center report; and multiple DNR "Waterbody Use and Observation Questionnaire" documents detailing recreational use on the Nabesna River. In support of the application the State also provided an article from the *Fairbanks Daily Times* dated September 9, 1913, which reported miners poling a boat up the Nabesna River, and a reference to Sepp Weber's book The Wild River of Alaska.

On May 17, 2006, Notice of the State's application was published in the *Federal Register*.⁵ The BLM prepared a draft navigability report, "Summary Report for the Navigability of the Nabesna River within the Tanana River Region, Alaska" describing the State's application and supporting evidence, riparian land status, physical character and historical uses.

On July 24, 2006, the State of Alaska requested the BLM suspend all further processing on the Nabesna River RDI application for at least one month. On August 23, 2013, the State of Alaska requested the Nabesna River application be moved from suspended status to active status. They stated they would provide the BLM with a supplemental revised application for these water bodies as soon as additional information could be compiled. On September 16, 2015, the State of Alaska modified its application for the Nabesna River.

³ Kevin L. Sorensen to Jack Frost, BLM, October 16, 2015, file FF-094614 (1864), Alaska State Office, BLM records.

⁴ 72 Stat. 339, 343

⁵ 71 FR 28705-28706

Notice of the State's application and the availability of the draft navigability report were published in the *Anchorage Daily News* (March 23, 30 and April 6, 2016). 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); United States National Park Service (NPS); Doyon, Limited; Ahtna, Inc., Northway Village Council; Northway Natives, Inc.; Tanana Chiefs Conference; and National Park Conservation Association (NPCA). The notices invited review and comments and afforded each recipient an opportunity to provide additional information. The comment period ended on May 30, 2016.

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). The Nabesna River is easily identifiable on United States Geological Survey (USGS) topographic maps.⁶

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*, 132 S. Ct. 1215 (2012), summarizes and explains the proper interpretation of *The Daniel Ball* criteria. 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, "Summary Report for the Navigability of the Nabesna River within the Tanana River Region, Alaska" (dated August 17, 2016), concluded that the Nabesna River was navigable from its mouth to the confluence with the Cheslina River (river miles 0-25.1). The navigability was decided previously with finality for the Department. 6 ANCAB 1 and 43 U.S.C. § 1631(c)(1).

⁶ USGS 1:63,360 Topographic Maps: Nabesna D-2, D-3; Tanacross A-2.

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 Nabesna 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, "Summary Report for the Navigability of the Nabesna River within the Tanana River Region, Alaska" (dated August 17, 2016), 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:

The Nabesna River from its mouth to the confluence with the Cheslina River (river miles 0-25.1).

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.

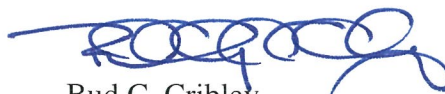
If you wish to file a petition pursuant to regulations contained in 43 CFR 4.21 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient 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
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cc (w/o enclosure):

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