



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Alaska State Office
222 West Seventh Avenue, #13
Anchorage, Alaska 99513-7504
<http://www.blm.gov/ak>

In Reply Refer to:
AA-085787 (1864)
AK92700

APR - 2 2010

CERTIFIED MAIL
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DECISION

State of Alaska	:	AA-085787
Department of Natural Resources	:	Recordable Disclaimer of Interest
550 W. 7 th Avenue, Suite 1400	:	Application
Anchorage, Alaska 99501	:	
	:	Stikine River

APPLICATION REJECTED

On February 17, 2005, the State of Alaska (State) filed an application for a recordable disclaimer of interest (AA-085787) under the provisions of Section 315 of the Federal Land Policy and 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 Stikine River, located in southeast Alaska.¹ The State also applied for lands underlying “all named and unnamed interconnecting sloughs including Binkleys Slough, Red Slough, Guerin Slough, King [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. . . .”

The State had made this application on the grounds that title passed by operation of law from the United States to the State of Alaska on January 3, 1959, the date of Alaska’s statehood. In its application, the State requested a waiver of survey under 43 CFR 1864.1-2(d). 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. On June 8, 2005, the State amended its application to include 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.

¹ Thomas Irwin to Henri Bisson, February 17, 2005, file AA-085787 (1864), Alaska State Office, BLM records.

BACKGROUND

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 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 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. The Bureau of Land Management (BLM) has been delegated this authority.

The State applied for all submerged lands within the bed of approximately twenty-seven miles of the Stikine River from its mouth to the United States-Canada International Boundary. The Stikine River in Alaska flows through nine townships: Townships 59 South, Ranges 84 and 85 East; Tps. 60 S., Rs. 82 through 86 E.; and Tps. 61 S., Rs. 83 and 84 E., Copper River Meridian (CRM), Alaska. In this distance, the river flows through two federal withdrawals, both extant at the time of statehood: the Tongass National Forest and the United States-Canada International Boundary.

Since the State filed its application on February 17, 2005, the BLM suspended processing the State's application twice. The first time was on April 6, 2005, due to the pendency of *Alaska v. United States, No. 128 (Glacier Bay)*.³ This case involved the marine submerged lands within southeast Alaska, including lands within the Tongass National Forest. After the final decree was issued, both the State and the U.S. Forest Service (USFS) provided additional land status information to the BLM for consideration. Second, on December 27, 2007, the BLM suspended processing the State's application once again, due to pending federal subsistence management litigation (*Katie John*). The State, in its Opening Brief, maintains the Tongass National Forest withdrawals did not include federal reserved water rights; whereas the Forest disagreed.⁴

Notice of the State's application, including the grounds for supporting it, was published in the *Federal Register* on August 22, 2007.⁵ Notice was also published in the *Anchorage Daily News* and the *Fairbanks Daily News-Miner* (September 6, 13, and 20, 2007) and in the *Petersburg Pilot* (September 20 and 27, and October 4, 2007).

The BLM prepared a draft summary report on the Stikine River describing riparian land status, physical character, and its use and status at the time of statehood. In its draft summary report released August 20, 2007, the BLM concluded the Stikine River was used as a highway of commerce on the date of statehood; lands within the International Boundary withdrawal lines

² 72 Stat. 339, 343

³ Henri Bisson to Thomas Irwin, April 6, 2005, file AA-085787 (1864), Alaska State Office, BLM records.

⁴ Thomas Lonnie to Thomas Irwin, DNR, December 27, 2007, file AA-085787 (1864), Alaska State Office, BLM records.

⁵ *Federal Register*, Volume 72, Number 162, page 47067

were reserved at the time of statehood; lands underlying the Stikine River within the Tongass National Forest were not reserved at the time of statehood; there was insufficient information to determine the navigability of the other named waterways; and that although the "interconnected sloughs" were not identified, if they are an integral part of the river they transferred with the river.⁶

The BLM sent copies of its draft summary report to the State, USFS, Sealaska Regional Corporation, Petersburg Indian Association (IRA), Wrangell Corporation Association (IRA), City of Wrangell, and the City of Petersburg inviting their review and comments and affording them an opportunity to provide additional information. The draft report was also posted on the BLM-Alaska website. The BLM received two general comments: a member of the public opposing the granting of the State's application and the United Fishermen of Alaska supporting the granting of the approval of the application.

On October 22, 2007, the USFS filed an objection to the approval of the State's application, claiming jurisdiction over the subject lands, and requested the State's application be denied (43 CFR 1864.1-4). At the basis of their objection, the USFS contends that the lands underlying navigable waters within the Tongass National Forest were reserved at the time of statehood and the United States intended to defeat state title. The USFS also objected to the State's request for a waiver of legal description for the claimed lands. They stated that "it is not possible to fully determine what land the State is asking to be disclaimed."⁷

On October 30, 2007, the State of Alaska Interagency Navigability Team provided additional information supporting its claim that the named sloughs are part of the Stikine River and requesting they be included by name in the BLM findings. On May 30, 2008, in a letter to the BLM, the State responded to the USFS objections. The State contends that the submerged lands within the Tongass National Forest were not clearly reserved, and that the United States did not intend to defeat State's title. The State also disagreed with the USFS regarding the approval of the waiver request for survey. The State cited examples used by the BLM and the courts which, in their opinion, describe why finding title to submerged lands do not require a public land survey.

CONCLUSION

In Alaska, potentially navigable water bodies may be located within the administrative boundaries of federal agencies other than the BLM. Pursuant 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. In consultation with the affected federal agencies, the BLM makes these determinations on the basis of the factual evidence. Where the law and a preponderance of evidence support the State's claim, the BLM will approve an application. However, the BLM will not approve an application

⁶ The 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.

⁷ Dennis E. Bschor to Craig Frichtl, BLM, October 22, 2007, file AA-085787 (1864), Alaska State Office, BLM records.

over the valid objection of the land-managing agency having administrative jurisdiction over the affected lands (43 CFR 1864.1-4).

In this case, the USFS filed an objection to the State's application for a recordable disclaimer of interest on the Stikine River on October 22, 2007. That objection asserted the lands underlying the portion of the Stikine River included in the State's application were reserved to the United States at the time of statehood and consequently did not pass to the State of Alaska on its admission as a state on January 3, 1959. The lands around and including the Stikine River were added to the Tongass National Forest on February 16, 1909 by a Presidential Proclamation No. 846.

Based on a review of the history of the federal withdrawals pertaining to the Tongass National Forest and recent Supreme Court decisions, the USFS contends the record shows the United States reserved the lands underlying the Stikine River prior to statehood, and intended to defeat state title to those lands. The USFS provided a history of the proclamations which described the boundaries of the Tongass National Forest, including its reliance on the use of waterbodies in its descriptions. The USFS also provided post-statehood administrative classifications within the delta area of the Stikine made by the Regional Forester. The State disputes this claim, citing the Supreme Court decree in the *Glacier Bay* case, that the United States issued a disclaimer for the lands underlying tidal areas, including the Stikine River delta area.

The USFS asserts that ownership of the submerged lands is "important to achieve the purposes for which the Tongass was created."⁸ The purpose for which a national forest may be established is set out by the Forest Service Organic Administration Act, which provides: "no national forest may be established except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of waterflows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes."⁹ The State disagrees, and contends the United States took a different position in the *Glacier Bay* case. In the State's view, the United States conceded that the Tongass withdrawals did not generally include marine submerged lands. Since the United States filed a disclaimer of interest, with appropriate exceptions, for the marine submerged lands of the area where the Stikine flows, this decision addresses only the inland waters of the Stikine which are up river from the area disclaimed by the United States.

The State also contends that a decision by the Interior Board of Land Appeals in 1988 on the Katalla River, within the Chugach National Forest, has bearing and its "applicability to the Tongass Forest withdrawal are discussed and correctly summarized" and "the circumstances of the Tongass National Forest cannot be distinguished from the circumstances of the Chugach National Forest." The USFS dismissed the comparison of the Tongass withdrawal to the Chugach National Forest on the basis that "this conclusion is flawed because it lacks support and fails to take into consideration subsequent United States Supreme Court cases that clarify the test set forth in *Utah Lake*."

⁸ *Ibid.*

⁹ 16 USC 475.

APPLICATION REJECTED

Although the USFS and the State have both provided the BLM with information to support their respective positions, the BLM must first consider the USFS objection to the approval of the State's application. "A valid objection must present a sustainable rationale that the objecting agency claims United States title to the land for which a recordable disclaimer is sought." (43 CFR 1864.1-4).

The rationale must be based on factual evidence or legal arguments. The rationale cannot be frivolous and must be made in good faith. While an objection does not have to be beyond dispute, it must contain more than bare conclusory assertions that BLM's navigability determination is wrong.¹⁰ An objection that identifies a controlling legal precedent would be valid.¹¹

Uncertainty of the effects of a prestatehood reservation on submerged land title is one example of what may constitute a valid objection. The BLM has determined the USFS met the criteria for a valid objection and provided a sustainable rationale for its objection to the State's application for a recordable disclaimer of interest to the lands underlying the Stikine River.

Therefore, the State's application for the lands underlying the Stikine River, and all named and unnamed interconnecting sloughs, including Binkleys Slough, Red Slough, Guerin Slough, King [Knig] Slough, Andrew Slough, Hooligan Slough, Shakes Slough, Shakes Lake, North Arm, and Ketili River, must be, and is hereby, rejected due to the valid objection of the USFS.

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. The appellant has the burden of showing that the decision appealed from this 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.

¹⁰ Letter to Senator Joseph Lieberman from the Assistant Secretary, Land and Minerals Management, Department of the Interior, dated June 28, 2004. Guidance from the Assistant Secretary with programmatic oversight and authority is binding on Interior agencies.

¹¹ *Ibid.*

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.



Thomas P. Lonnie
State Director

Enclosure

cc:

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

INFORMATION ON TAKING APPEALS TO THE BOARD OF LAND APPEALS

DO NOT APPEAL UNLESS

1. This decision is adverse to you,
AND
2. You believe it is incorrect

IF YOU APPEAL, THE FOLLOWING PROCEDURES MUST BE FOLLOWED

1. NOTICE OF APPEAL Within 30 days file a *Notice of Appeal* in the office which issued this decision (see 43 CFR Secs. 4.411 and 4.413). You may state your reasons for appealing, if you desire.

2. WHERE TO FILE
NOTICE OF APPEAL U.S. Department of the Interior
Bureau of Land Management
Alaska State Office
222 West 7th Avenue, #13
Anchorage, AK 99513-7599

SOLICITOR
ALSO COPY TO Regional Solicitor, Alaska Region
1430 University Drive, Suite 300
Anchorage, AK 99508 - 4626

3. STATEMENT OF REASONS Within 30 days after filing the *Notice of Appeal*, file a complete statement of the reasons why you are appealing. This must be filed with the United States Department of the Interior - Office of the Secretary, Board of Land Appeals, Office of Hearings and Appeals, 801 North Quincy Street, Arlington, VA 22203 (see 43 CFR Sec. 4.412 and 4.413). If you fully stated your reasons for appealing when filing the *Notice of Appeal*, no additional statement is necessary.

SOLICITOR
ALSO COPY TO Regional Solicitor, Alaska Region
1430 University Drive, Suite 300
Anchorage, AK 99508-4626

4. ADVERSE PARTIES Within 15 days after each document is filed, each adverse party named in the decision and the Regional Solicitor or Field Solicitor having jurisdiction over the State in which the appeal arose must be served with a copy of: (a) the *Notice of Appeal*, (b) the Statement of Reasons, and (c) any other documents filed (see 43 CFR Sec. 4.413). Service will be made upon the Associate Solicitor, Division of Energy and Resources, Washington, D.C. 20240, instead of the Field or Regional Solicitor when appeals are taken from decisions of the Director (WO-100).

5. PROOF OF SERVICE Within 15 days after any document is served on an adverse party, file proof of that service with the United States Department of the Interior, Office of the Secretary, Board of Land Appeals, 801 North Quincy Street, Arlington, VA 22203. This may consist of a certified or registered mail "Return Receipt Card" signed by the adverse party (see 43 CFR Sec. 4.401(c)(2)).

Unless these procedures are followed your appeal will be subject to dismissal (see 43 CFR Sec. 4.402). Be certain that all communications are identified by serial number of the case being appealed.

NOTE: *A document is not filed until it is actually received in the proper office (see 43 CFR Sec. 4.401(a))*

SUBPART 1821.2 -- OFFICE HOURS; TIME AND PLACE FOR FILING

Sec. 1821.2-1 *Office hours of State Offices.* (a) State Offices and the Washington Office of the Bureau of Land Management are open to the public for the filing of documents and inspection of records during the hours specified in this paragraph on Monday through Friday of each week, with the exception of those days where the office may be closed because of a national holiday or Presidential or other administrative order.

The hours during which the State Offices and the Washington Office are open to the public for the filing of documents and inspection of records are from 10 a.m. to 4 p.m., standard time or daylight saving time, whichever is in effect at the city in which each office is located.

Sec. 1821.2-2(d) Any document required or permitted to be filed under the regulations of this chapter, which is received in the State Office or the Washington Office, either in the mail or by personal delivery when the office is not open to the public shall be deemed to be filed as of the day and hour the office next opens to the public.

(e) Any document required by law, regulation, or decision to be filed within a stated period; the last day of which falls on a day the State Office or the Washington Office is officially closed, shall be deemed to be timely filed if it is received in the appropriate office on the next day the office is open to the public.

* * * * *

See 43 CFR Sec. 4.21 for appeal general provisions.