



THE STATE
of **ALASKA**

GOVERNOR MICHAEL J. DUNLEAVY

Department of Natural Resources

DIVISION OF MINING, LAND & WATER
Public Access Assertion & Defense Unit

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May 14, 2019

Mr. Ted Murphy
Acting State Director
Bureau of Land Management
222 West 7th Avenue, #13
Anchorage, Alaska 99513-7504

Subject: Draft recordable disclaimer of interest application for portions of the Delta River.

Dear Mr. Murphy:

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 Delta River.

I. Description of Waterway

This application is submitted for the submerged lands as follows:

- 1) The Delta River: All submerged lands between the ordinary high water lines of the left and right banks of the Delta River beginning at the southern boundary of Fort Greely in Section's 24 and 25, T. 14 S., R. 9 E., F.M. and Section's 19 and 30, T. 14 S., R. 10 E., F.M. upstream to the Tangle River within Section 25, T. 20 S., R. 9 E., F.M;
- 2) Tangle River: All submerged lands between the ordinary high water lines of the left and right banks of the Tangle River beginning within Section 25, T. 20 S., R. 9 E., F.M upstream to the inlet of Tangle Lake within Section 8, T. 22 S., R. 9 E., F.M., including;
- 3) The Tangle Lakes: All submerged lands between the ordinary high water lines of The Tangle Lakes; including Lower Tangle Lake, Long Tangle Lake, Round Tangle Lake, Tangle Lakes and Upper Tangle Lake.

This application includes the submerged lands and beds of all braids, channels, and anabranches that carry water from the navigable river and thus are a part of the navigable river. Maps highlighting the river segments

described above along with a legal description of the townships and ranges underlying each river are enclosed as Exhibit 1.

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; however, if the map and legal description are not sufficient, 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 and known as the Delta River, Tangle River, and The Tangle Lakes including any anabranches, interconnected channels or sloughs. Navigable waterways, such as these rivers, 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 sloughs, 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.¹

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

A. Navigable Waterway

The State's RDI application for the submerged lands of the previously described portions of the Delta River, Tangle River and The Tangle Lakes 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 rivers 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

¹ 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).

[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. A 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 the Navigability of the Delta River and Tangle Lakes.

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

The navigability of the Delta River including Tangle River and The Tangle Lakes (*i.e.* Lower Tangle Lake, Long Tangle Lake, Round Tangle Lake, Tangle Lake, and Upper Tangle Lake) was most recently examined by the BLM in

2018². The 2018 report (Exhibit 2, enclosed) was a reassessment of previous navigability evaluations from February 26, 2010 and August 20, 2010 undertaken by BLM as part of the revision of the 1983 Delta National Wild and Scenic River Management Plan. The 2018 reassessment included a field examination of the Delta River, Tangle River and The Tangle Lakes by BLM staff that took place during August 8-11, 2017. The 2018 reassessment also considered information and data provided to the BLM by the Alaska Department of Natural Resources. The State of Alaska examined the river and lakes during August 21-23, 2017.

The 2018 BLM report concludes that the portions of the Delta River, Tangle River and The Tangle Lakes that are covered by this application are navigable under federal law because there is either convincing evidence of boat traffic, pre- or post-statehood, or they were physically susceptible to travel, trade, and commerce at the time of statehood using customary, regionally available watercraft.

From the Southern boundary of Fort Greely upstream to the confluence with Phelan Creek, the BLM determined that the river channel is continuous and averages three feet deep, which the bureau considers sufficient to support boats that could carry commercial loads and thus could have been used for commercial purposes. From Phelan Creek upstream to Garrett Creek, the BLM concluded that the river was navigable based on documented pre- and post-statehood boat use by miners, prospectors, trappers, and others. From Garrett Creek upstream to the outlet of Lower Tangle Lake, the BLM determined this segment of the river was navigable based on the it's susceptibility for use as a highway of commerce for travel and trade at the time of statehood and that "... the portage around the unusable section of the falls and rapids is of such short duration that it does not defeat the river's overall navigability." Finally, the BLM found the lakes, Lower Tangle Lake, upstream through Round Tangle Lake to Tangle Lake and Upper Tangle Lake, were navigable based on the susceptibility of the water bodies for use as a highway of commerce for travel and trade.

In making this determination, the BLM used criteria based on federal case law including: *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990) [Gulkana River]; and *Alaska v. United States*, 754 F.2d 851 (9th Cir. 1983), cert. denied, 474 U.S. 968 (1985) [Slopbucket Lake]. The BLM also relied upon the Alaska Native Claims Appeals Board decision on the Kandik and Nation Rivers, *Appeal of Doyon, Ltd.*, Alaska Native Claims Appeal Board RLS 76-2, 86 I.D. 692 (1979); federal statutes including the Submerged Lands Acts of 1953 and 1988, and advice from the

² Frost, Jack. Feb. 14, 2018. Reassessment of Navigability Reports Dated Feb. 26, 2010 and Aug. 20, 2010 for the Delta River System in the Tanana River System. BLM Rpt. 2651 (LLAK9410)

Department of the Interior's Office of the Regional Solicitor. Where the waterbodies in question may include pre-statehood reservations, the BLM relies on decisions in federal case law pertinent to Alaska including *Alaska v. United States*, 545 U.S. 75 (2005) ("Glacier Bay"); *United States v. Alaska*, 521 U.S. 1 (1997) ("Arctic Coast/Dinkum Sands"); *Utah Division of Lands v. United States*, 482 U.S. 193 (1987) (Utah Lake); *Alaska v. United States*, No. 98-35310 (9th Cir. 2000) [Kukpowruk River]; *Alaska v. United States*, 102 IBLA 357 (1988) (Katalla River); and *United States v. Alaska*, 423 F.2d 764, 1 ERC 1195, (9th Cir. Dec. 21, 1970) (Tustumena Lake).

VII. Other Known Interested Parties

Homesteads in the area of the Denali Highway all meandered from the lakes and rivers, present as interested parties. There are no known adverse claimants or occupants on the subject submerged lands. The United States does not dispute the State's title to the subject submerged lands.

VIII. \$100.00 Application Fee

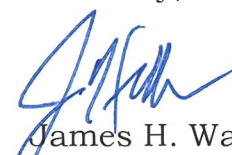
The State will submit the \$100.00 application fee with its final application.

IX. Conclusion

The BLM has determined there is sufficient evidence to conclude the Delta River including Lower Tangle Lake, Long Tangle Lake, Round Tangle Lake, Tangle Lake, Upper Tangle Lake and the Tangle 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 estimate of cost of administration.

Sincerely,



James H. Walker
Natural Resource Manager II

Enclosures: Exhibit 1: Maps and Legal Description
 Exhibit 2: February 14, 2018 BLM Navigability
 Determination on the Delta River System in the Tanana
 River Region, Alaska.

cc: Doug Vincent-Lange, Commissioner, Alaska Department of Fish and
Game

Interested party list:

USS 3660, Portions of Lot's 1 & 2 – Michael L. & Jacqueline K. Tinker,
PO Box 289 Ester, AK 99725 and Donald B. Cameron, PO Box 330 Ester, AK
99725 and Richard W. and Mary Elizabeth Wright, unknown address.

USS 3298, Tract 1, Lot 1 – Richard Holmstrom, PO Box 670386 Chugiak,
AK 99567

USS 3298, Tract 1, Lots 2 & 3 – Ronald E. Aksamit and Eva Loken, 101
Wolf Drive, Eagle River, AK 99577

USS 3298, Tract 5, Lot 5 – State of Alaska

USS 3298, Tract 5, Lot 6 – Jean E. Turner, 172 Snowy Owl Lane,
Fairbanks, AK 99712

USS 3298, Tract 5, Lot 7 – Jarda Company, C/O Arthur Twogood, PO
Box 60643, Fairbanks, AK 99706

USS 3298, Tract 5, Lot 8 – Donald H. & Claudia A. Piatt, PO Box 70013,
Fairbanks, AK 99707

USS 3712, Lot 2 – Richard Holmstrom, PO Box 670386 Chugiak, AK
99567

Delta River, Tangle River and The Tangle Lakes; including Lower Tangle Lake,
Long Tangle Lake, Round Tangle Lake, Tangle Lakes and Upper Tangle Lake
RDI Application: Legal Description

The Tangle Lakes, Tangle River, and the Delta River within the State of Alaska,
more particularly described as follows:

Delta River:

All submerged lands between ordinary high water lines of the left and right
banks, as determined from Alaska USGS 1:63 360 series topographic map MT.
Hayes C-4, (1950, minor revisions 1967); MT. Hayes B-4, (1954, minor
revisions 1984); MT. Hayes A-4, (1949, minor revisions 1976):

MTRS

F020S009E26	F020S009E25	F020S009E24
F020S009E23	F020S009E14	F020S009E13
F020S010E18	F020S010E17	F020S010E10
F020S010E09	F020S010E08	F020S010E03
F019S010E34	F019S010E27	F019S010E22
F019S010E15	F019S010E11	F019S010E10
F019S010E02	F019S010E01	F018S010E36
F018S010E35	F018S010E25	F018S010E24
F018S010E13	F018S010E12	F018S010E02
F018S010E01	F017S010E36	F017S010E35
F017S010E26	F017S010E23	F017S010E22
F017S010E14	F017S010E15	F017S010E16
F017S010E10	F017S010E09	F017S010E08
F017S010E04	F017S010E05	F016S010E32
F016S010E31	F016S010E30	F016S010E29
F016S010E19	F016S010E20	F016S010E17
F016S010E18	F016S010E07	F016S010E06
F015S010E31	F015S010E30	F015S009E25
F015S009E26	F015S009E23	F015S009E24
F015S010E19	F015S010E18	F015S009E13
F015S009E14	F015S009E11	F015S009E12
F015S009E01	F015S009E02	F014S009E36
F014S010E31	F014S010E30	F014S009E25
F014S010E19	F014S009E24	F014S009E23

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

Tangle River

All submerged lands between the ordinary high water lines of the left and right banks of the Tangle River from the outlet of Tangle Lake to the inlet of Round Tangle Lake as determined from Alaska USGS 1:63 360 series topographic maps MT. Hayes A-4 (1949, minor revisions 1976) and MT. Hayes A-5 (1949, minor revisions 1978):

MTRS

F022S009E04 F021S009E33
F021S009E34

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

The Tangle Lakes (including Lower Tangle Lake, Long Tangle Lake, Round Tangle Lake, Tangle Lakes and Upper Tangle Lake)

All submerged lands below the ordinary high water line of the banks of The Tangle Lakes as determined from Alaska USGS 1:63 360 series topographic maps MT. Hayes A-4 (1949, minor revisions 1976), MT. Hayes A-5 (1949, minor revisions 1978) and Gulkana D-5 (1951m minor revisions 1967):

Upper Tangle Lake:

MTRS

F022S009E29 F022S009E16
F022S009E21 F022S009E17
F022S009E20

Tangle Lake:

MTRS

F022S009E08 F021S009E33
F022S009E05
F022S009E04

Round Tangle Lake:

MTRS

F021S009E35 F021S009E26
F021S009E34
F021S009E27

Long Tangle Lake:

MTRS

F021S009E26	F021S009E14	F021S009E02
F021S009E24	F021S009E13	F020S009E35
F021S009E23	F021S009E11	

Lower Tangle Lake

MTRS

F021S009E02	F020S009E26
F020S009E35	F020S009E25

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