



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

Department of Natural Resources

DIVISION OF MINING, LAND & WATER  
PUBLIC ACCESS ASSERTION AND DEFENSE

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March 14, 2017

Mr. Bud Cribley  
State Director  
Bureau of Land Management  
222 West 7<sup>th</sup> Avenue, #13  
Anchorage, Alaska 99513-7504

Subject: Final recordable disclaimer of interest application for Taku River,  
AK AA-94268.

Dear Mr. Cribley:

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 Taku River.

I. Description of Waterway

This application is submitted for the submerged lands as follows:

- 1) Taku River: All submerged lands between the ordinary high water lines of the left and right banks of the Taku River beginning at the 60-foot boundary reserve within Sections 10, 11 and 14, Township 38 South, Range 71 East, Copper River Meridian to the extent of tidal influence, regardless of location.

This application includes the submerged lands and beds of all anabranches, braids and channels that carry water from the navigable river and thus are a part of the navigable river. Maps highlighting the pertinent waterbodies of the Taku River along with a legal description of the townships and ranges underlying the waterbody 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, but if not 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 or, if unnamed, readily identified as Taku River. Navigable waterways, such as these, are typically ambulatory, thus making a public survey of them problematic and unnecessary. The U.S. Department of the Interior has issued RDIs to the State for the beds of navigable water bodies in the past without requiring a public land survey of the 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.<sup>1</sup>

### 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 Taku River 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 the waterbody was 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 [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

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<sup>1</sup> 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).

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 post statehood 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 Taku River system.

Documentation and reports by the BLM and other sources regarding pre- and post-statehood boat use, susceptibility of use as a highway of commerce, historical routes, and activities in the Taku River area confirm and establish that the Taku River named in this document is navigable from the 60-foot boundary reserve to and through to tide water as described above.<sup>2</sup>

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

The BLM has evaluated the Taku River that is the subject of this application. The BLM determined the waterbody navigable-for-title as early as January 21, 1976 (Exhibit 2, enclosed). In a determination, dated March 4,

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<sup>2</sup> The exclusion of other portions of the Taku River from this application is not an admission that those submerged lands did not pass to the State at statehood, but merely recognizes that they are not part of this application. Those submerged lands adjacent to uplands not owned by the United States are excluded from this application.

1980 (Exhibit 3, enclosed), the determination was made for conveyance of land to the state of Alaska within T. 38 and 39 S., R. 71 E., C.R.M. The BLM states within the report that the Taku River “appears to be influenced by the tide nearly to the selection or possibly into it”. The determination then continues that the Arctic Environmental Information and Data Center (AEIDC) report, contracted by the BLM, contains 55 references to the Taku River. These references discuss the use of the river “for transporting men and supplies, trading and a route to the interior and Yukon River System.” The recommendation of the report is that “the Taku River be considered administratively navigable to the international border.” Going on the report states that the river is physically navigable beyond the international border to at least Tulsequah. In making this determination, the BLM used criteria found in the "Garner Memorandum", of March 16, 1976 titled “Title to Submerged Lands for Purposes of Administering ANCSA”.

Further pre-statehood use of the Taku River to Tulsequa was located within the British Columbia Ministry of Energy and Mines file search for Minefile no. 104K.<sup>3</sup> Report no. 861404 dated January 6, 1989 submitted by Redfern Resources LTD. describes states that transportation by barge along the Taku Inlet to Juneau,... as was done when the property was in production in the 1950’s (Exhibit 4). The B.C. Environmental Information Institute Members Bulletin dated July 3, 1997 (Exhibit 5) located in the same archives states: “The original mine depended on the Taku River for Barging out concentrates and bringing in supplies. The current proposal has determined that barging is not feasible due to changes in the Taku River and the Volume of material involved. It has also been suggested there would be serious conflict between barges and the commercial fishing fleet during the fishing season.” This information is contradicted by the barging of freight and supplies on the Taku Rive in 2007 and 2008 by Redfern Resources LTD. Redfern published a Taku River Barge Activity Report 2007 (Exhibit 6) documenting pertinent information regarding barge activities. In total 10 loads of equipment were transported up the Taku to the mine exploration area. A table on page 2 of the report gives trip dates and record discharge of the Taku River during the barging operations. The lowest flow trip was made on September 29, and discharge was measured at 259.38 m<sup>3</sup>/s (9,159.9 cfs). Photos of barging activity in 2008 were located on the webpage [www.takuriver.com](http://www.takuriver.com) and are attached (Exhibit 7).

## VII. Other Known Interested Parties

The State knows of no other claims on the subject submerged lands. The adjacent upland land holders will be notified of the RDI application through the standard public notice process. It is the State’s understanding that the United States does not dispute the State’s title to the subject submerged lands.

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<sup>3</sup> <http://www.empr.gov.bc.ca/Mining/Geoscience/PropertyFile/Pages/default.aspx> accessed 8/25/2016.

VIII. \$100.00 Application Fee

The State submitted the \$100.00 application fee on September 14, 2016 by receipt no. 3658951.

IX. Conclusion

The BLM has determined there is sufficient evidence to conclude the water bodies of the Taku 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. 7<sup>th</sup> 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,

A handwritten signature in blue ink, appearing to read 'J. Walker', with a stylized flourish at the end.

Commissioner

Enclosures:

- Exhibit 1: Map and Legal Description
- Exhibit 2: January 26, 1976 BLM Navigability Determination
- Exhibit 3: March 4, 1980 BLM Navigability Determination
- Exhibit 4: Redfern Resources LTD., Summary Report on the Tulsequah Chief Massive Sulphide Property, January 6, 1989
- Exhibit 5: B.C. Environmental Information Institute, Members Bulletin, July 3, 1997
- Exhibit 6: Redfern Resources LTD., Taku River Barge Activity Report 2007, February 2008
- Exhibit 7: Redfern Barge on the Taku River 2008, <http://www.takuriver.com/REDFERNBARGE.htm> downloaded 8/25/2016

cc: John J. Smith, Alaska Lands Team Leader, United States Forest Service, Alaska Rgion 10, Tongass & Chugach National Forests  
Sam Cotten, Commissioner, Alaska Department of Fish and Game

Anthony Mallott, President, Sealaska Corporation  
Elliott Wimberly, President & CEO, President, Goldbelt, Inc.



## Exhibit 1

### Taku River RDI Application: Legal Description

Taku River from the 60-foot boundary reserve, reserved by Presidential Proclamation No's. 810 and 1196 downstream to the location the river is influenced by the tide within the State of Alaska, more particularly described as follows:

#### Taku River

All Submerged Lands between the Ordinary High Water Lines of the left and right banks of the Taku River from the 60-foot boundary reserve within Sections 10, 11 and 14, Township 38 South, Range 71 East, Copper River Meridian to the extent of tidal influence regardless of location. The Taku River may be located upon Alaska USGS 1:63 360 series topographic maps Taku River B-6, (1951, minor revisions 1971); Taku River C-6 (1995); Taku River C-5, (1960) and Juneau B-1:

#### MTRS

C038S071E10	C038S071E33	C039S070E05	C039S069E12	C040S069E01
C038S071E11	C038S070E33	C039S070E06	C039S069E13	C040S069E02
C038S071E14	C038S070E34	C039S070E07	C039S069E14	C040S069E03
C038S071E15	C038S070E35	C039S070E08	C039S069E23	C040S069E09
C038S071E22	C038S070E36	C039S070E09	C039S069E24	C040S069E10
C038S071E27	C039S071E06	C039S070E11	C039S069E25	C040S069E11
C038S071E28	C039S070E01	C039S070E12	C039S069E26	C040S069E12
C038S071E29	C039S070E02	C039S070E18	C039S069E35	C040S069E15
C038S071E31	C039S070E03	C039S070E31	C039S069E36	C040S069E16
C038S071E32	C039S070E04	C039S069E11	C040S070E06	

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