



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
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In Reply Refer To:
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DEC 17 2018

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DECISION

State of Alaska	:	FF-97215
Department of Natural Resources	:	Recordable Disclaimer of Interest
Division of Mining, Land & Water	:	Application
Public Access Assertion & Defense Unit	:	
550 West Seventh Avenue, Suite 1070	:	
Anchorage, Alaska 99501-3579	:	Fortymile River System

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On May 11, 2017, the State of Alaska (State) filed an application with the Bureau of Land Management (BLM) for a recordable disclaimer of interest (RDI) under the provisions of Section 315 of the Federal Land Policy and Management Act of Oct. 21, 1976 (FLPMA), 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864, for certain lands underlying the Fortymile River System, located in eastern Alaska. The State's application included the following submerged lands:

- (1) The Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of the Fortymile River beginning 60 feet upstream of the international border with Canada, upstream to the confluence of the North and South Forks of the Fortymile River within section 10, township 8 south, range 30 east, Fairbanks Meridian, Alaska;
- (2) South Fork of the Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of South Fork of the Fortymile River beginning at its confluence with the North Fork of the Fortymile River upstream to the confluence of the Mosquito and Dennison Forks of the Fortymile River within section 8, township 26 north, range 18 east, Copper River Meridian, Alaska;
- (3) North Fork of the Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of the North Fork of the Fortymile River beginning at its confluence with the South Fork of the Fortymile River upstream "[t]o the dead end slough,

which is a remnant of the Kink in section 20, township 6 south, range 29 east, Fairbanks Meridian”, Alaska.

The State contends the above-described water bodies were navigable at the time of statehood and therefore, title to these submerged lands vested in the State upon the date of statehood of Alaska, Jan. 3, 1959. The State based its application for the RDI on the grounds that title passed by operation of law from the United States to the State on the date of statehood pursuant to the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act of 1959, the Alaska Right of Way Act of 1898, and other title navigability law.

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 of July 7, 1958, 72 Stat. 339, made the Submerged Lands Act of 1953, 67 Stat. 29, applicable to Alaska.¹

Section 315(a) of FLPMA, 43 U.S.C. § 1745(a), 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 to determine whether a record interest of the United States in lands has terminated by operation of law or is otherwise invalid. This authority has been delegated to the BLM State Director.²

BACKGROUND

In support of its application, the State submitted a navigability finding prepared by the BLM on June 29, 1983 and a prior-issued BLM memorandum dated Apr. 15, 1983. The memo titled “Fortymile River Navigability Report/Draft Navigability Policy,” contained an attachment detailing supplemental use information for the Fortymile navigability report. Also attached were two maps depicting the applied for portions of the Fortymile River System.

Notice of the State’s application was published in the *Federal Register* on Aug. 20, 2018.³ The BLM prepared a draft report, “Summary Report on Federal Interest in Lands underlying the Fortymile River System in Alaska.” The report detailed supporting evidence, riparian land status, physical character, and historical uses. Public notice of the State’s application including the availability of the draft navigability summary report was published in the *Anchorage Daily News* and the *Fairbanks Daily News* on Sept. 12, 19, and 26, 2018. Information about this application, including the draft summary report, was also posted on the BLM-Alaska website.⁴

The BLM sent copies of its draft report to the Village of Eagle, the Hungwitchin Corporation, Doyon, Ltd, and the Fortymile Miners Association on Aug. 20, 2018, and the State of Alaska

¹72 Stat. 339, 343.S.

² 209 DM 7; 235 DM 1; BLM Manual MS-1203, App. 1, p.52.

³ Volume, 83, No. 161, FR 42138-42139.

⁴https://www.blm.gov/sites/blm.gov/files/uploads/LandsRealty_Alaska_RDI_FortymileRiverSystem_DraftSummary_Report_08-17-18.pdf.

(Departments of Natural Resources and Fish and Game) on Aug. 22, 2018. The notices invited review and comments, and offered the opportunity to present additional information. The comment period ended on Nov. 20, 2018. The BLM did not receive any comments during the published notice period, so the report was finalized on Nov. 21, 2018.

ADMINISTRATIVE WAIVER GRANTED

Pursuant to 43 CFR 1864.1-2 (c) (1) and (d), a legal description of the lands for which a waiver 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, unless a waiver is granted. In the State's application dated Sept. 1, 2016, the State requested a waiver of this requirement under 43 CFR 1864.1-2(d). The location of the Fortymile River System is clearly depicted on the U.S. Geological Survey quadrangle maps and is not in dispute.⁵ The ordinary high water mark of these water bodies is the legal boundary of the submerged lands. Since the boundaries of these water bodies are ambulatory, the location may change over time. The BLM therefore determines that a survey description of the subject water body is not needed to adjudicate the State's application.⁶ The waiver is hereby granted.

APPLICATION APPROVED

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). There, 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 Department of the Interior's Office of the Solicitor. 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. Additional guidance is provided in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) [Gulkana River]; *Alaska v. United States*, 754 F.2d 851 (9th Cir. 1983), *cert. denied*, 474 U.S. 968 (1985) [Slopbucket Lake]; and *Appeal of Doyon, Ltd.*, Alaska Native Claims Appeal Board RLS 76-2, 86 I.D. 692 (1979) [Kandik and Nation Rivers].

As set forth in the final navigability report, "Summary Report on the Federal Interest in Lands underlying the Fortymile River System in Alaska," the Fortymile River system has played host to commercial activity of one form or another over a span of 130 years. The documented evidence of historical use by miners on the Fortymile River system during the stampede days

⁵ Eagle A-2 (1956), Eagle B-1 (1956), and Eagle B-2 (1956). For the North Fork of the Fortymile River, the topographic map coverage is Eagle A-2 (1956), Eagle B-2 (1956), and Eagle B-3 (1956).

⁶ "Manual of Survey Instructions 2009," U.S. Department of the Interior, Bureau of Land Management, Sections 3-158, 3-160, page 81.

provides a well-documented record of use to support the conclusion that the Fortymile River system was used as a highway of commerce prior to statehood and is therefore navigable.

Accordingly, I have determined that the State's application for a recordable disclaimer of interest is both legally sufficient to demonstrate the navigability of these water bodies at the time of statehood and in compliance with the applicable provisions and requirements of Section 315 of FLPMA and the regulations contained in 43 CFR Subpart 1864. For that reason, the United States affirms it has no interest in the lands described below because the Federal interests passed to the State of Alaska at the time of statehood. Approving the State's application for a recordable disclaimer of interest will provide certainty about ownership of the submerged lands underlying the Fortymile River System and remove a cloud on the title.

The State's application for a recordable disclaimer of interest is hereby approved as follows:

- (1) The Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of the Fortymile River beginning 60 feet upstream of the international border with Canada, upstream to the confluence of the North and South Forks of the Fortymile River within section 10, township 8 south, range 30 east, Fairbanks Meridian, Alaska;
- (2) South Fork of the Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of South Fork of the Fortymile River beginning at its confluence with the North Fork of the Fortymile River upstream to the confluence of the Mosquito and Dennison Forks of the Fortymile River within section 8, township 26 north, range 18 east, Copper River Meridian, Alaska;
- (3) North Fork of the Fortymile River: All submerged lands between the ordinary high water lines of the left and right banks of the North Fork of the Fortymile River beginning at its confluence with the South Fork of the Fortymile River upstream "[t]o the dead end slough, which is a remnant of the Kink in section 20, township 6 south, range 29 east, Fairbanks Meridian", Alaska.

HOW TO APPEAL THIS DECISION

A Federal agency, the State of Alaska, or any party claiming an interest in 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 4.400 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (either at the above address or the e-mail address set forth on Form 1842-1) within 30 days from receipt of this decision. 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, if any, must be submitted to each party named in this decision, the Interior Board of Land Appeals, and to the appropriate Office of the Solicitor (see 43 CFR 4.413 and Form 1842-1) at the same time the original documents are filed with this office.

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.


Ted A. Murphy
Acting State Director

Enclosures

cc:

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