



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
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<http://www.blm.gov>

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DECISION

State of Alaska	:	AA-86373
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	:	George River

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On March 10, 2006, 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 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 George River, located in Interior Alaska. The State's application included "all submerged lands lying within the bed of George River, between the ordinary high water lines of the left and right banks beginning at its source in Section 27 of Township 29 North, Range 42 West, Seward Meridian, Alaska, southerly to its confluence with the Kuskokwim River in Section 21 of Township 21 North, Range 46 West, Seward Meridian, Alaska."

The George River flows through the following Townships and Ranges:

Seward Meridian, Alaska

T. 29 N., R. 42 W.

T. 28 N., Rs. 42 and 43 W.

T. 27 N., R. 43 W., unsurveyed.

T. 26 N., Rs. 42 and 43 W., unsurveyed.

T. 25 N., Rs. 43 and 44 W., unsurveyed.

T. 24 N., R. 44 W., partly unsurveyed.

T. 24 N., R. 45 W., unsurveyed.

T. 23 N., Rs. 45 and 46 W.

T. 22 N., Rs. 45 and 46 W.

T. 21 N., R. 46 W.

On September 16, 2015, the State modified its application to include only the submerged lands underlying the portion of the George River from its mouth to Julian Creek in section 4, township 24 north, range 44 west, Seward Meridian, Alaska. This includes the submerged lands and beds of all sloughs, braids and channels that carry water from the navigable George River and thus are part of the navigable river to its confluence with the Kuskokwim River.

The State contends the above-described water bodies were navigable at the time of statehood. As a result, title to the submerged lands vested in the State upon the date of statehood of Alaska, January 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, under Section 6(m) of the Alaska Statehood Act. The State's applications for the disclaimers of interest are based on 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 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 the Federal Lands Policy and Management Act (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

¹ 72 Stat. 339, 343.S.

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

BACKGROUND

In support of its application, the State submitted a legal description and three maps for the George River. Additional supporting information included three navigability memorandums (determinations) issued by the BLM, dated May 6, 1980, November 8, 1984, and July 8, 1985. The 1980 memorandum addressed the navigability of the Kuskokwim River (the George River is a tributary). The 1984 and 1985 memoranda concluded that the George River was navigable on the date of statehood from its mouth at the Kuskokwim River upstream to the confluence of Julian Creek. Also attached to the State's application was an extract of BLM's 1985 regional report, "Alaska's Kuskokwim Region, A History."³

This application was one of seven that the State applied for on March 10, 2006. In the years since the original application the BLM had multiple discussions with the State on what water bodies to prioritize. The State indicated the processing of the George River application was not as high a priority for the State as others. On September 16, 2015, the State modified their March 10, 2006 application to seek an RDI "on only those portions of the waterbodies that BLM has previously determined navigable-in-fact." Once the State prioritized the George River application the BLM moved the application forward in the process.

Notice of the State's application was published in the *Federal Register* on June 5, 2017.⁴ The BLM prepared a draft report, "Summary Report on the Federal Interest in Lands Underlying the George River in the Kuskokwim Subregion, Alaska." The report detailed supporting evidence, riparian land status, physical character, and historical uses. Public notice of the State's application, and the availability of the draft navigability summary report, was published in the *Alaska Dispatch News* on July 5, 12 and 19, 2017. Information about this application, including the draft navigability report, was also posted on the BLM-Alaska website.⁵

The BLM sent copies of its draft report to the State of Alaska (Departments of Natural Resources and Fish and Game), the Georgetown Tribal Council, the Kuskokwim Corporation and Calista Corporation on June 20, 2017. The notices invited review and comments, to include the opportunity to present additional information. The comment period ended on September 5, 2017. The BLM did not receive any comments during the published notice period.

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. On March 10, 2006, the State requested a waiver of this requirement under 43 CFR 1864.1-2(d). The location of the George River is clearly depicted on the U.S. Geological Survey quadrangle maps and is not in dispute.⁶ 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

³ Brown, C Michael, BLM, Alaska State Office.

⁴ 82 FR 25808-25809.

⁵ https://www.blm.gov/sites/blm.gov/files/uploads/LandsRealty_Alaska_RDI_George_River_Draft-Summary-Report_06052017.pdf.

⁶ Iditarod A-3, A-4, B-2, B-3, B-4, C-2, C-3; Sleetmute D-5, D-6, (USGS 1:63, 360 Topographic Maps).

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.⁷ 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].

In cases concerning pre-statehood reservations, BLM uses the established criteria set out and applied in Alaska cases 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. December 21, 1970) (Tustumena Lake).

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 George River and remove a cloud on the title.

Based upon the recommendations and conclusions set forth in the draft summary report, released on the date of the *Federal Register* Notice, June 5, 2017, the BLM has determined that title to the bed of the George River, from its mouth at the Kuskokwim River to the confluence of Julian Creek passed to the State of Alaska at statehood. The report recommended approval of the State's application for an RDI as to the George River.

Accordingly, based on the foregoing and the documentation contained in the case record, I have determined that the State's application for a recordable disclaimer of interest is legally sufficient

⁷ "Manual of Survey Instructions 2009," U.S. Department of the Interior, Bureau of Land Management, Sections 3-158, 3-160, page 81.

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 George River, between the ordinary high water lines of the left and right banks at the time of statehood, from its mouth at the Kuskokwim River upstream to the confluence with Julian Creek (river miles 0-41).

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 Part 4 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.



Karen E. Mouritsen
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cc (w/o enclosure):

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