



# United States Department of the Interior



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## Memorandum

To: File FF-97215

From: Jack Frost, Navigable Waters Specialist (LLAK9410)

Subject: Summary Report on Federal Interest in Lands underlying the Fortymile River System in Alaska

On Sept. 7, 2016, the State of Alaska filed a draft application for a recordable disclaimer of interest (RDI) with the Bureau of Land Management (BLM) for the lands underlying a portion of the Fortymile River System. The State converted their draft application into a "final" application on May 11, 2017. The application includes 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 listed the Main Stem of the Fortymile River's coverage area on the U.S. Geological Survey (USGS) 1:63,360 series topographic maps as follows: 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). The South Fork of the Fortymile River shown on the Eagle A-2 (1956) quadrangle. The precise location may (also) be within other townships due to the ambulatory nature of water bodies.

The State's application for a disclaimer of interest based on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, or any other legally cognizable reason. The BLM may disclaim federal interest in the submerged lands on any of the grounds that apply. The State's application for lands underlying the subject water body must also meet the regulatory requirements (43 CFR Subpart 1864).

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.

This summary report reviews the merits of the State's RDI application, summarizes the history of land status actions, BLM navigability determinations and conveyance actions, and reviews the evidence of commerce, subsistence, mining and recreational use.

### **Location**

The Fortymile River system is located in the upper Yukon sub region of Alaska, approximately 180 miles easterly of Fairbanks, Alaska. The eastern portion of the drainage is located in the Canadian Yukon Territory where it empties into the Yukon River about midway between the riverside communities of Dawson in the Yukon and Eagle in Alaska. The Fortymile system drains approximately 6,562 square miles, of which about ninety-five percent of the watershed is on the Alaska side of the border.<sup>1</sup>

Multiple-named waterbodies drain into the main stem of the Fortymile River. The major tributaries are the North Fork, Middle Fork, Mosquito Fork, West Fork, Dennison Fork and Walker Fork. Numerous smaller named and unnamed tributaries add to the system. There are no lakes in the watershed.

### **Land Status and BLM Navigability Determinations**

On Dec. 2, 1980, Congress designated the Fortymile River main stem and several of its tributaries as components of the National Wild and Scenic River System upon the passage of the Alaska National Lands Conservation Act (ANILCA).<sup>2</sup> Accordingly, an approximately one-half-mile wide corridor<sup>3</sup> encompassed the core portions of the Fortymile River system,

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<sup>1</sup> Navigability Report for the Fortymile River, Jan. 13, 1983, BLM District Manager.

<sup>2</sup> P.L. 96-487 (94 Stat. 2371).

<sup>3</sup> ANILCA (P.L. 96-487, Dec. 2, 1980) provided for the river corridors to average 640 acres per river mile.

including the three river segments described-above.<sup>4</sup> Proclamation No. 810<sup>5</sup> reserved a 60-foot strip of land along the international boundary between Alaska and Yukon Territory, Canada, to the United States, on June 15, 1908. The State's RDI application properly excluded the portion of the riverbed of the Fortymile River affected by the reservation.<sup>6</sup> No other pre-statehood withdrawals were in effect in this area at the date of statehood.<sup>7</sup> Numerous unpatented mining claims exist throughout the Fortymile River system, however; the United States retains title to all the uplands adjacent to the State's applied-for submerged lands.

The BLM determined the Fortymile River (main stem), South Fork and North Fork (to the dead-end slough, that is a remnant of the Kink in section 20, township 6 south, range 29 east, Fairbanks Meridian, Alaska) as navigable on June 29, 1983.<sup>8</sup> On Mar. 30, 1984, the agency affirmed its determination for the Fortymile River main stem when it began adjudicating land selections by Doyon, Limited located in or near the Fortymile Drainage Area.<sup>9</sup>

### **Background Information**

Although Native use of the Fortymile River System was likely, the region's rich mining history is what made the Fortymile River an important highway of commerce, particularly during the Klondike/Fortymile stampede. Along with the nearby Klondike River country in Canada's Yukon, miners flooded into the region during the closing years of the nineteenth century. The discovery of gold in 1886 on Franklin's Bar on the Fortymile River touched off interior Alaska's first gold rush.<sup>10</sup> Miners ascended the Fortymile River as far as the Mosquito Fork River tributary (the present site of Chicken, Alaska) in pole boats and freighted supplies in support of their prospecting activities. Pole boats carried cargo as early as 1887 when Henry Davis and four partners poled and tracked their vessels upriver as far as Franklin Creek.<sup>11</sup> After three

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<sup>4</sup> The wild and scenic river corridor includes the following rivers and tributaries: The Fortymile River Main stem (within the State of Alaska); Obrien Creek; South Fork; Napoleon Creek; Franklin Creek; Uhler Creek; Walker Fork (downstream from the confluence of Liberty Creek); Wade Creek; Mosquito Fork (downstream from the vicinity of Kechumstuk); West Fork Dennison Fork (downstream from the confluence of Logging Cabin Creek); Dennison Fork (downstream from the confluence of the West Fork Dennison Fork); Logging Cabin Creek; North Fork; Hutchison Creek; Champion Creek; the Middle Fork downstream from the confluence of Joseph Creek; and Joseph Creek.

<sup>5</sup> Presidential Proclamation No. 1196, 3 May 1912. This proclamation modified an earlier one by Theodore Roosevelt withdrawing a 60-foot reservation along the border with Canada; see Presidential Proclamation No. 810, 15 June 1908. Neither of these proclamations along the Canadian border, however, withdrew the 60-foot strip "from the operation of public land laws" as did the 1907 Roosevelt Reservation.

<sup>6</sup> Sections 9 and 16, township 7 south, range 34 east, Fairbanks, Meridian, Alaska.

<sup>7</sup> PLO 3943, dated Mar. 2, 1966, withdrew 80 acres along the South Fork of the Fortymile River (section 6, township 26 north, range 19 east, Copper River Meridian, but was of no effect as to the navigability status of the river.

<sup>8</sup> Memorandum, Deputy State Director for Conveyance Management (960) to Acting Assistant Director for Conveyance Management (960), Navigability Determination for the Fortymile River Basin, BLM Files

<sup>9</sup> Memorandum, Chief, Branch of Conveyance Services (962) to Chief, Branch of ANCSA Adjudication (961), Final Navigability Determination for Doyon, Limited Selections Located In or Near the Fortymile Drainage Area, BLM Files.

<sup>10</sup> <https://www.rivers.gov/rivers/fortymile.php>.

<sup>11</sup> Franklin Creek drains into the South Fork approximately 15 miles downstream of Chicken, Alaska.

weeks of working their diggings, the men safely descended the river.<sup>12</sup> Basil Austin recalled seeing miners in 1899 boating down the Mosquito Fork, the South Fork and finally the main stem of the Fortymile River.<sup>13</sup> After constructing a seventeen-foot boat at Chicken, Austin himself allegedly traveled “several times” in his craft through the length of the Fortymile River to the Yukon River and back. Miner Johannes Peterson and three companions boated up the Fortymile in 1898 and staked their mining claims at a bend in the North Fork of the Fortymile River known as “the Kink.” A couple years later, they repeated the trip in a steamboat that drafted twenty-one inches of water.<sup>14</sup> Upon reaching Steele Creek,<sup>15</sup> the swift current forced them to dismantle the vessel and reconstruct a smaller one. On subsequent trips up to the Kink, they reportedly hauled up to 8,000 pounds of freight.<sup>16</sup>

According to miners James Geoghegan, Alfred H. Brooks and Louis M. Prindle of the USGS,<sup>17</sup> prospectors and diggers continued to transport supplies up the Fortymile River as far as Chicken through the early part of the twentieth century. Long-time resident Arthur Purdy recounted that he boated up to Chicken in 1918. He recalled, “a fair amount of freight and commerce (was) going up and down the South Fork.” James Geoghegan recollected that during the rush from Dawson to the Tanana poling boats could be hired to bring supplies from Fortymile to Chicken at the rate of fifteen dollars a ton.<sup>18</sup>

After the 1930s, the advent of air travel, the Second World War and possibly the declining price of gold<sup>19</sup> contributed to the diminished frequency of boat travel on the Fortymile River system. However, by the 1970s miners, dredgers and floaters (recreationalists) used the Fortymile River system in increasing numbers in pursuit of their activities. With the passage of the ANILCA in 1980, Congress conferred National Wild and Scenic River status on much of the Fortymile River system. According to the 1973 publication for the proposed: “Fortymile National Wild and Scenic River, Alaska: A Study,” produced by the Alaska Planning Group, for the Department of the Interior, estimated that the river and its forks received about 1,000 visitor-days of use each summer.<sup>20</sup> In recent times, the BLM’s Recreation Management Information System has documented an estimated 90,000 visits per year to the Fortymile Wild and Scenic River.<sup>21</sup>

Recreationalists have a history of accessing the upper reaches of the Fortymile system by airplane and float down in inflatable rafts and kayaks to highway accessible takeout points. 40-Mile pilot Charlie Warbelow stated that he flew people into the Mosquito Flats area of the upper Mosquito Fork River for about thirty years or so. He attributed the region’s popularity to

<sup>12</sup> Ducker, James, H., “Alaska’s Upper Yukon Region: *A History*,” BLM, Anchorage, Alaska, 1983.

<sup>13</sup> BLM Memo, June 29, 1983.

<sup>14</sup> This is the only known ascent of the Fortymile River by steamboat into American territory (Ducker, Pg. 249).

<sup>15</sup> Steele Creek (now abandoned) was a transportation hub and trading post on the main stem of the Fortymile River, 10 miles upstream from the international boundary.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Ducker, Pg. 251.

<sup>19</sup> <http://www.macrotrends.net/1333/historical-gold-prices-100-year-chart>.

<sup>20</sup> Ducker, Pg. 254.

<sup>21</sup> [https://eplanning.blm.gov/epl-front-office/projects/lup/1100/35161/36611/Summary\\_fortymile\\_final\\_web.pdf](https://eplanning.blm.gov/epl-front-office/projects/lup/1100/35161/36611/Summary_fortymile_final_web.pdf).

the “prime hunting, prospecting, and recreating area.”<sup>22</sup> Nowadays the Fortymile River Wild and Scenic River System has become a draw for outdoor recreationalists and hunters. Mining activity is also still common throughout the river system.

### Transportation

In 1899, the Army established an outpost at Eagle, Alaska, in response to increasing lawlessness among the miners. One year later the completion of the Washington-Alaska Military and Cable System (WAMCATS) linked the territory to the lower-48 states via telegraph communications. The completion of the Valdez-Eagle Trail in 1901 provided a north-south overland route through the heart of the Fortymile country. By 1904, the Valdez Transportation Company began running pack trains and stages over the trail during the winter months. Coincidentally, the Alaska Road Commission came into being about the same time to oversee Alaska’s road and trail system.<sup>23</sup>

In the years between the gold rush and the completion of the Taylor Highway (1951), the region’s trails and frozen river travel accounted for the bulk of freight entering the area. The opening of the Eagle to Chicken postal route (1908) further accelerated the decline of boat traffic on the Fortymile River.<sup>24</sup> Sporadic boat use continued through the twenties and thirties although documented use is thin. One notable exception is the account of John B. Mertie, Jr., who made the following observation: “small launches and small boats are...used on the streams tributary to the Yukon, particularly on the Fortymile, where supplies are freighted from the mouth of the Fortymile to Steele Creek.”<sup>25</sup> Present day transportation in the Fortymile region is mainly by automobile and airplane. Airstrips are located at Joseph (on the Joseph Creek tributary to the Middle Fork), Chicken (on the Mosquito fork tributary to the South Fork), and Eagle, Alaska. Virtually all post-statehood use of the Fortymile River has been for recreation, hunting and prospecting purposes.

### Summary

The Fortymile River system has played host to commercial activity of one form or another over a span of 130 years. Early pioneers prospected the region in locally constructed pole boats using whipsaw lumber native from the region.<sup>26</sup> The river system, along with an established trail network provided routes of travel for miners to supply their operations, often in boats carrying loads well in excess of 1000 pounds. The documented evidence of historical use by miners on the Fortymile River system during the stampede days 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.

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<sup>22</sup> Memorandum, To Central Files, From Navigable Waters Specialist (961), Interview Report for Mosquito Fork Fortymile River Navigability Determination, May 10, 1991, BLM files.

<sup>23</sup> [http://www.newsminer.com/features/sundays/sketches\\_of\\_alaska/valdez-fairbanks-trail-a-lifeline-for-early-alaska-residents/article\\_601a1ec0-01dc-5fc8-8fb4-5e0570954c68.html](http://www.newsminer.com/features/sundays/sketches_of_alaska/valdez-fairbanks-trail-a-lifeline-for-early-alaska-residents/article_601a1ec0-01dc-5fc8-8fb4-5e0570954c68.html).

<sup>24</sup> Ducker, Pg. 252.

<sup>25</sup> Ibid.

<sup>26</sup> BLM Brochure (BLM/AK/GI-89/026+8354+080) Rev. 2016, Fortymile Wild and Scenic River, *National Conservation Lands*.

## Conclusions

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. Ahna, Inc.*, 891 F.2d 1401 (9<sup>th</sup> Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) [Gulkana River]; *Alaska v. United States*, 754 F.2d 851 (9<sup>th</sup> 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 (9<sup>th</sup> 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, (9<sup>th</sup> Cir. Dec. 21, 1970) (Tustumena Lake).

After reviewing the evidence of historical and contemporary use and applying the aforementioned standards, we affirm the findings in the June 29, 1983, navigability report that the Main Stem, South Fork and North Fork of the Fortymile River was used as highways for commerce prior to the date of statehood.

Accordingly, we recommend that the BLM grant the State’s application for a recordable disclaimer of interest for the submerged lands therein.