



# United States Department of the Interior



BUREAU OF LAND MANAGEMENT  
Alaska State Office  
222 West Seventh Avenue, #13  
Anchorage, Alaska 99513-7504  
<http://www.blm.gov/ak>

In Reply Refer To:  
1864 (927)  
FF-094671

**JUL - 7 2008**

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## DECISION

State of Alaska	:	FF-094671
Department of Natural Resources	:	Recordable Disclaimer of Interest
Attn: Tom Irwin, Commissioner	:	Application
550 West 7 <sup>th</sup> Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3650	:	Little Scottie Creek

### ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On January 27, 2006, the State of Alaska (State) filed an application for a recordable disclaimer of interest (FF-094671), under the provisions of Section 315 of the Federal Land Policy and 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 Little Scottie Creek, the right hand tributary, and two unnamed lakes, located in the Tanana River Subregion in Interior Alaska.<sup>1</sup> The State made this application based on entitlement under 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 State contends these water bodies are navigable; therefore, title to the submerged lands passed by operation of law from the United States to the State of Alaska on January 3, 1959, the date of Alaska's statehood. The State also contends that in instances where it is the upland owner, the State took title either under the Equal Footing Doctrine or under riparian law.

<sup>1</sup> Michael Menge, Commissioner, Department of Natural Resources, State of Alaska, to Henri Bisson, State Director, BLM-Alaska, January 27, 2006, file FF-094671 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also in this file.

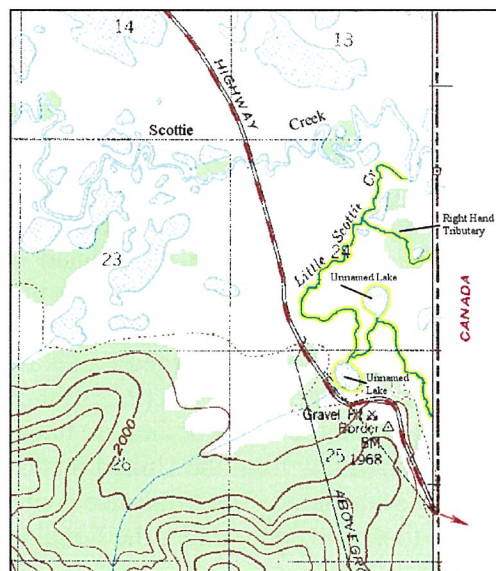
## BACKGROUND

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 Alaska Statehood Act, July 7, 1958, made the Submerged Lands Act applicable to Alaska.<sup>2</sup> Section 315(a) of FLPMA 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 where he determines a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

The State applied for “all submerged lands below the ordinary high water line of the two unnamed lakes and all submerged lands lying within the bed of Little Scottie Creek and the right hand tributary between the ordinary high water lines of the left and right banks, beginning at the 60 foot wide neutral strip at the Alaska/Canada International border at Section 25, Township 10 North, Range 23 East Copper River Meridian, Alaska, downstream to its junction with Scottie Creek within Section 24, Township 10 North, Range 23 East, Copper River Meridian, Alaska.”<sup>3</sup> In a letter dated April 26, 2006, the State amended its application to acknowledge that Little Scottie Creek flowed through lands within Public Land Order (PLO) 386; however, the State did not believe that PLO 386 defeated its title to the submerged lands.<sup>4</sup>

Pursuant to 43 CFR 1864.1-2(c)(1) and (d), unless a waiver is granted, a legal description of the lands for which a disclaimer 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. In its application, the State of Alaska also requested a waiver of this requirement under 43 CFR 1864.1-2(d).

It is determined that a survey description of the subject water body is not needed to adjudicate the State’s application, and the waiver is hereby granted. The location of the subject water bodies, shown to the right, is clearly depicted on the U.S. Geological Survey, Nabesna C-1 Quadrangle map (1955, minor revisions 1963), and is not in dispute. The ordinary high water mark of these water bodies is the legal boundary of the submerged lands. Since this is an ambulatory boundary, the location of



<sup>2</sup> 72 Stat. 339, 343

<sup>3</sup> Menge to Bisson, January 27, 2006.

<sup>4</sup> Wyn Menefee, Chief of Operations, State of Alaska, Department of Natural Resources, to Carolyn Spoon, Chief, Branch of Lands, BLM, April 26, 2006, file FF-094671 (1864), Alaska State Office, BLM records.

which may change over time, there is no need for a survey in order to process this application.<sup>5</sup>

In support of its application, the State submitted four Bureau of Land Management (BLM) memorandums (June 29, 1994,<sup>6</sup> August 25, 1994,<sup>7</sup> September 20, 1994, and September 22, 1994<sup>8</sup>). Only the September 22, 1994 memorandum contained a final navigability determination. In it, the BLM recommended Little Scottie Creek, the right hand tributary, and the two unnamed lakes to be determined navigable in Sections 24 and 25, T. 10 N., R. 23 E., CRM. This determination was incorporated in a decision granting tentative approval to convey certain lands in Section 24 to the State of Alaska.

Most of the riparian lands in Section 24, including most lands underlying Little Scottie Creek, all of the right hand tributary, and one unnamed lake, have been conveyed to the State,<sup>9</sup> excepting those reserved lands lying within the sixty-foot-wide strip between the United States and the Dominion of Canada.<sup>10</sup> Although Little Scottie Creek and the right hand tributary flow through these reserved lands, the State did not include that portion in its application.

The BLM manages the remaining riparian lands in Section 24 and all in Section 25 which includes Little Scottie Creek and the other unnamed lake. These lands are located within the boundaries of PLO 5180 and PLO 386. The PLO 5180, dated March 9, 1972, withdrew the lands for classification and protection for public interest, while the PLO 386, dated July 31, 1947, segregated the lands for classification and survey purposes.

Notice of the State's application was published in the *Federal Register* on August 22, 2007. The BLM prepared a draft report, "Navigability of Little Scottie Creek, Right Hand Tributary, and Two Unnamed Lakes in the Tanana River Subregion, Alaska," which described the State's application and supporting evidence, riparian land status, physical character, and historical uses. The BLM sent copies of its draft report to the State of Alaska (Departments of Natural Resources and Fish and Game), Doyon, Ltd. (a regional Native corporation), Northway Natives (a village Native corporation), Northway Village Council, Northway Traditional Council, Tanana Chiefs Conference, and the U.S. Fish and Wildlife Service, inviting their review and comments and affording them an opportunity to provide additional information. Public notice of the State's application, and the availability of the draft navigability report, was published in the *Anchorage*

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<sup>5</sup> "Manual of Survey Instructions 1973," U.S. Department of the Interior, Bureau of Land Management, Sections 3-115, 3-116, pages 93-96.

<sup>6</sup> Dot Tideman, subject: "Navigability Report: Little Scottie Creek, Window 1212; Group Surveys 117 and 242," June 29, 1994, attachment to Chief, Navigability Section (924) to Chief, Branch of Survey Preparation and Contracts (923), subject: "Navigable Waters in Survey Window 1212 (Group Surveys 117 and 242)," June 24, 1994, File FF-088517, BLM records.

<sup>7</sup> Dot Tideman and Jack Frost, Navigable Water Specialists (924) to File FF-088517 (2620), subject: "Additional Navigable Waters in Survey Window 1212 (Group Surveys 117 and 242) (Report dated June 24, 1994)," August 25, 1994, BLM records.

<sup>8</sup> C. Michael Brown, Chief, Navigability Section (924) to Chief, Branch of Survey Preparation and Contracts (923), subject: "Additional Navigable Waters in Survey Window 1212 (Group Surveys 117 and 242)," September 22, 1994, FF-088517, BLM records. The State makes reference to a September 20, 1994 BLM memorandum in their application as a separate document. This memorandum is actually part of the September 22, 1994 memorandum.

<sup>9</sup> Sharon E. Fleek, Chief, Branch of Northern Adjudication, Decision, December 19, 1994, F-88517, BLM Records.

<sup>10</sup> The 60-foot-wide neutral strip was withdrawn and reserved under Proclamation 810 (June 15, 1908) and Proclamation 1196 (May 3, 1912).

*Daily News* and the *Fairbanks Daily News-Miner* on September 6, 13, and 20, 2007. Information about this application, including the draft navigability report, was posted on the BLM-Alaska website.

During the published notice period, the BLM received a total of five comments: The State of Alaska concurred with the draft findings; the U.S. Fish and Wildlife Service noted the applied for waterbodies were outside their jurisdictional boundary; a member of the general public voiced concern over the perceived disposal of federal lands to the State of Alaska; a representative from Doyon, Ltd., requested copies of source materials referenced in the draft report; and the United Fisherman of Alaska went on record supporting the State's assertion that Little Scottie Creek was navigable and unreserved at the time of statehood. None of the comments presented factual information or evidence to support or negate the BLM's draft findings. On June 24, 2008, the BLM issued its final report, entitled, "Federal Interests in Lands Underlying Little Scottie Creek, the right hand tributary, and two unnamed lakes in the Tanana River Subregion, Alaska."

In assessing the navigability of inland water bodies, the BLM relies upon federal administrative and case law and the advice of the Interior Department's Solicitor's Office. The classic definition of navigable waters is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Pertinent Department of the Interior Office of the Solicitor's opinions include Associate Solicitor Hugh Garner's memo of March 16, 1976 ("Title to submerged lands for purpose of administering ANCSA) and Regional Solicitor John Allen's memo of February 25, 1980 ("Kandik, Nation Decision on Navigability"). The agency is also guided by the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988.

After reviewing the State's application, land status, the historic record pertaining to Little Scottie Creek, and legal guidance on title navigability, we found no information that would warrant a change in the determination of September 22, 1994 that the subject water bodies are navigable. This determination was also incorporated into a decision to grant tentative approval to convey certain lands in Section 24, T. 10 N., R. 23 E., CRM, to the State of Alaska. A tentative approval has the same force and effect as a patent.

The Submerged Lands Act of 1988 specifically addressed the issue of upland ownership, in Section 101, amending ANILCA Section 907 (b)(1)

Whenever...the Secretary conveys land to a Native, a Native Corporation, or the State of Alaska pursuant to the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or this Act which abuts or surrounds a meanderable lake, river, or stream, all right, title, and interest of the United States, if any, in the land under such lake, river, or stream lying between the uplands and the median line or midpoint, as the case may be, shall vest in and shall not be charged against the acreage entitlement of such Native or Native Corporation or the State.

## APPLICATION APPROVED

The United States affirms it has no interest in the lands described below because all of 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 remove a cloud on the title by providing certainty about the ownership of submerged lands underlying Little Scottie Creek, the right hand tributary, and two unnamed lakes, all located within the Tanana River Subregion. Without this certainty, ownership between the two sovereigns, the State of Alaska and the United States, is unclear. This lack of clarity of sovereign ownership greatly complicates the application of natural resources laws and other laws to the submerged lands involved. Resolving clouds on title between the State of Alaska and the United States is thus of even greater importance than resolving title between a private party and the United States

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 within the provisions of Section 315 of FLPMA and the regulations contained in 43 CFR Subpart 1864. The United States affirms it has no interest in the lands described below. Therefore, the State's application for a recordable disclaimer of interest is hereby approved, as follows:

1. The lands underlying Little Scottie Creek, between the ordinary high water marks on its banks, beginning at the west boundary of the sixty-foot-wide neutral strip at the United States-Canada International Boundary in Section 25, T. 10 N., R. 23 E., CRM, Alaska, downstream to its junction with Scottie Creek within Section 24, T. 10 N., R. 23 E., CRM, Alaska.
2. The lands underlying the right hand tributary of Little Scottie Creek, between the ordinary high water marks on its banks, from the sixty-foot-wide neutral strip to its junction with Little Scottie Creek. The right hand tributary is presently located in the E $\frac{1}{2}$  of Section 24, T. 10 N., R. 23 E., CRM, Alaska.
3. The lands underlying the two unnamed lakes, through which Little Scottie Creek flows, between the ordinary high water marks on its banks. The two unnamed lakes are presently located in SE $\frac{1}{4}$  of Section 24 and in the NE $\frac{1}{4}$  of Section 25, T. 10 N., R. 23 E., CRM, Alaska.

## HOW TO APPEAL THIS DECISION

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 (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

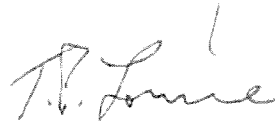
If you wish to file a petition pursuant to regulations contained in 43 CFR 4.21 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board,

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 **must** also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

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.



Thomas P. Lonnie  
State Director

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cc:

Alaska Department of Natural Resources  
Division of Mining, Land and Water  
Public Access Assertion & Defense Unit  
Attn: Scott Ogan  
550 West 7<sup>th</sup> Avenue, Suite 1330  
Anchorage, Alaska 99501

Alaska Department of Fish & Game  
Attn: Ellen Simpson  
333 Raspberry Road  
Anchorage, Alaska 99518

DM (010)