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STATE OF ALASKA	)	AA-085787
IBLA 2010-136	)	Recordable Disclaimer of Interest for the Stikine River

MOTION FOR RECONSIDERATION

Introduction

The United States Department of Agriculture Forest Service (Forest Service) respectfully requests that the Board reconsider its December 16, 2010 decision in this matter. In its decision, reported at 180 IBLA 243 (Dec. 16, 2010) (Decision), the Board set aside the Bureau of Land Management's (BLM) decision to reject the State of Alaska's (State) application for a recordable disclaimer of interest for certain submerged lands underlying the Stikine River and its interconnecting sloughs, and remanded the matter back to the BLM for further analysis. The Board may reconsider its decision when extraordinary circumstances exist. Such circumstances do exist in this case and reconsideration is warranted because (1) the Board set forth a standard for the BLM's

review that contradicts its determination that a full adjudication is not required; (2) the Board did not address the jurisdictional limitations on the BLM due to the Quiet Title Act, 28 U.S.C. §2409a, and; (3) the Board relied in part on an incorrect interpretation of *Alaska v. United States*, 546 U.S. 413 (2006).

The Forest Service also requests that the Board stay the effectiveness of its decision pending the outcome of this motion.

Legal Standard

The regulations at 43 C.F.R. §4.403(c) – (f) state that a party may, within 60 days after the date of a decision, request that the Board reconsider its decision. The Board may reconsider its decision if extraordinary circumstances exist. Any request must specifically describe the extraordinary circumstances that warrant reconsideration. Although the regulations provide examples of extraordinary circumstances that may warrant reconsideration, the regulations also specifically state that the list is not exclusive.

The regulations also permit a party to request that the Board stay the effectiveness of its decision. 43 C.F.R. §4.403(b)(2).

Background

On February 17, 2005, the State applied for a recordable disclaimer of interest pursuant to section 315 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §1745, for certain lands underlying the Stikine River within the exterior boundaries of the Tongass National Forest, including interconnecting sloughs. The State alleged that title to the lands passed to the State on the date of statehood by virtue of the Equal Footing Doctrine. Subsequently, the State alleged further entitlement pursuant to

the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, and any other legally cognizable reason.

In August 2007, the BLM prepared a draft summary report concluding, among other things, that the Stikine River had been used as a highway of commerce on the date of statehood and that the lands underlying the Stikine River within the Tongass National Forest were not reserved by the United States at the time of statehood. On October 22, 2007, the Forest Service objected to the BLM's conclusions and requested that the BLM dismiss the State's application. On May 30, 2008, the State responded to the Forest Service's objections with additional evidence and arguments. The BLM denied the State's application on April 2, 2010, and the State appealed. On December 16, 2010, this Board issued its decision finding fault with the BLM's decision and remanding the matter back to the BLM for further analysis.

Circumstances warranting reconsideration

I. Required analysis

Although section 315 of FLPMA gives the Secretary of Interior authority to issue a recordable disclaimer of interest, such authority is discretionary. 43 U.S.C. §1745(a). The disclaimer is intended as a convenient mechanism for resolving clouds on title "in those cases where the United States asserts no ownership or interest and would thus result in a saving of time and money for both the Government and private parties." S. Rpt. 94-583 (94th Cong. 1st Sess.), p. 51. Pursuant to the implementing regulations, the

> BLM will not issue a recordable disclaimer of interest over the valid objection of another land managing agency having administrative jurisdiction over the affected lands. A valid objection must present a sustainable rationale that the objecting agency claims United States title for the lands for which a recordable disclaimer is sought.

43 C.F.R. §1864.1-4.

The Board correctly held that the BLM is not obligated to conduct a full adjudication and conclusively determine whether the United States has title to the lands. 180 IBLA at 257. However, the Board then states, "BLM must at a minimum assess the conflicting evidence and arguments and provide a reasoned analysis explaining the basis for its determination that, despite the contravening evidence, the agency's objection is sustainable." *Id.* Effectively, this requires the BLM to conduct a full adjudication despite the Board's earlier statement to the contrary. The result of this analysis would not merely be a decision about whether the land managing agency's objection is sustainable, but instead, a determination about who legally holds title to the disputed lands.

Since this result would render 43 C.F.R. §1864.1-4 unnecessary, the required analysis must be narrower than the Board has articulated—somewhere between simply summarizing the objecting agency's arguments and making a definitive title determination. As it did, if the BLM determines whether the objecting agency had made an objection in a manner analogous to that of making a prima facie case—if the facts asserted by the objecting agency are on their face not frivolous and are made in good faith, and if true would lead to a conclusion that the United States has a title interest to the property at issue—this should suffice as a "valid objection" under the regulations, whether or not the objecting agency's arguments could be overcome by rebuttal. By taking this approach, the BLM can satisfy its obligations under the regulations, but not run afoul of the Quiet Title Act. That arguments and counter-arguments must be weighed is precisely what takes this matter from being one of simply clearing a cloud on the title to a bona fide title dispute.

The Quiet Title Act

The Board acknowledged in a footnote that "[r]ecordable disclaimers of interest are appropriate only where the United States does not claim title to the land. In cases where the United States does claim title, challenges to that title can only be brought pursuant to the Quiet Title Act, 28 U.S.C. §2409a (2006)." *Id.* at 254, n. 5. Despite this acknowledgment, the Board never addresses the Forest Service's jurisdictional arguments that the Department of Interior regulations regarding recordable disclaimers of interest must to be interpreted within the limited scope of section 315 of FLPMA and the Quiet Title Act. The regulations cannot be interpreted so expansively as to cause the BLM to conduct an analysis and reach a decision that properly falls under the jurisdiction of the federal courts. As it stands, the Board has left the determination of whether something is a title dispute or a cloud on a title in the hands of the BLM, without any recourse for the land managing agency if it does not agree with the BLM. If, in this instance, the BLM decides that the State's arguments and evidence overcome those offered by the Forest Service, and issues an RDI, the Forest Service would be precluded from asserting its arguments in any other forum. Conversely, if the BLM denies the State's application, the State not without recourse, as it may bring an action to quiet title in the proper federal judicial forum.

II. Alaska v. United States

The Board erred in its interpretation of the disclaimer in *Alaska v. United States*, 546 U.S. 413 (2006). The Board stated that the BLM's actions were "especially egregious" due to the State's reliance on *Alaska v. United States*, stating that:

> [T]he Court not only held that the United States had disclaimed any interest in the marine submerged lands within the exterior boundaries of

> the Tongass National Forest, but also concluded that the exception to the passage of title to the State for lands expressly retained by the United States when the State entered the Union set out in section 5(a) of the Submerged Lands Act, 43 U.S.C. §1313(a) (2006), did not include the lands withdrawn pursuant to the proclamations creating and expanding the Tongass National Forest.

180 IBLA at 257. The Board suggests that the United States' disclaimer in the *Alaska v. United States* case precludes the Forest Service from making a sustainable claim to *any* submerged lands, marine or otherwise, within the exterior boundaries of the Tongass National Forest. This is not the case. The only submerged lands at issue and disclaimed in *Alaska v. United States* were *marine* submerged lands. The disclaimer in *Alaska v. United States* stated:

> Pursuant to the Quiet Title Act, 28 U.S.C. §2409a(e), and subject to the exceptions set out…the United States disclaims any real property interest in the *marine* submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.

Alaska v. United States, 546 U.S. 413, 415 (emphasis added). The exception and the exception to the exception noted by the Board are exceptions to the United States' disclaimer of marine submerged lands. The Forest Service has never suggested that the submerged lands beneath the tidally influenced sections of the Stikine River were not disclaimed; instead, the Forest Service argued that it would be redundant and improper to make a second disclaimer for lands already disclaimed in *Alaska v. United States.*

Since the Supreme Court's decision and the disclaimer of the United States are limited to the marine submerged lands, any interpretation that *Alaska v. United States* should be applied to non-marine waters is simply an impermissible broadening of the applicability of that case. To the extent that the Board's decision in this matter was influenced by an incorrect interpretation of the disclaimer in *Alaska v. United States*, the decision should be reconsidered.

Conclusion

Due to the Board's conflicting direction to the BLM regarding its analysis of the case, the exclusive jurisdiction of the Quiet Title Act for resolving title disputes, and the Board's incorrect interpretation of the opinion and disclaimer in *Alaska v. United States*, extraordinary circumstances exist that justify reconsideration of the Board's December 16, 2010 decision in this matter. The Forest Service respectfully requests that the Board grant this Motion for Reconsideration.

DATED this 14th day of February, 2011.

UNITED STATES OF AMERICA

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I certify that on this 14th day of February 2011, I caused to be mailed a copy of the foregoing via U.S. Mail, postage prepaid to the following:

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