



United States Department of the Interior



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DECISION

State of Alaska	:	AA-85787
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	:	Interconnecting Sloughs of the Stikine
Anchorage, Alaska 99501-3579	:	River

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED

On Feb. 17, 2005, 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 Stikine River, located in southeastern Alaska. The State's application included "all submerged lands lying within the bed of the Stikine River, and all named and unnamed interconnecting sloughs including Binkleys Slough, Red Slough, Guerin Slough, King Slough, Andrew Slough, Hooligan Slough, Shakes Slough, Shakes Lake, North Arm and Ketili River, between the ordinary high water lines of the left and right banks from the Alaska/Canada International Border in T. 60 S., R. 86 E., Copper River Meridian, Alaska, downstream approximately 27 miles to all points of confluence at its mouth in the Eastern Passage, Dry Strait and Frederick Sound, within T. 60 S., R. 82 E.; T. 61 S., R. 83 E. and T. 61 S., R. 84 E.; and T. 62 S., R. 82, 83 and 84 E., Copper River 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 Submerged Lands Act of 1988 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 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

The State provided evidence that the Stikine River has been used almost consistently as a highway of commerce since before the Purchase of Alaska in 1867. It pointed to the Washington Treaty of May 8, 1871, Article XXVI, which stipulated: “The navigation of the rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the subjects of her Britannic Majesty and to the citizens of the United States, subject to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation.” The State also provided as evidence Historian Robert DeArmond’s list of commercial boats operating on the Stikine River from before the Purchase to well into the 1960’s and Bonnie Demerjian’s recent book, which includes a history of commercial boat operations on the Stikine River.

The draft BLM navigability report, which was published in the *Federal Register* on Aug. 22, 2007, concluded the Stikine River was used for travel, trade, and commerce at the time of statehood. Other than the 60-foot wide reservation at the International Boundary (Proclamation 810 dated June 15, 1908), the lands in fact were not reserved at the time of statehood.

Notice of the State’s application was published in the *Federal Register* on Aug. 22, 2007.³ The BLM prepared a draft report, “Navigability of Stikine River, Southeast 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 *Juneau Empire* on Sept. 6, 13, and 20, 2007. Information about this application, including the draft summary report, was also posted on the BLM-Alaska website.⁴

¹72 Stat. 339, 343

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

³ 72 FR 47067.

⁴https://www.blm.gov/sites/blm.gov/files/uploads/LandsRealty_Alaksa_RDI_StikineRiver_drftnavrpt_08-20-2007.pdf.

The BLM sent copies of its draft report to the State of Alaska, Department of Natural Resources, Sealaska Corporation, Wrangell Cooperative Association (IRA) and the Petersburg Indian Association on Aug. 24, 2007, and the City of Petersburg, City of Wrangell, the BLM District Manager, and the U.S. Forest Service on Aug. 28, 2007. The notices invited review and comments, and offered the opportunity to present additional information. The comment period ended on Oct. 21, 2007. The BLM rejected the State's application on Apr. 2, 2010, after the U.S. Department of Agriculture Forest Service (USDA-FS) filed an objection in which it argued that the bed of the Stikine River was withdrawn by the federal government prior to statehood.

On May 5, 2010, the State of Alaska appealed BLM's decision to reject its application for an RDI on the Stikine River to the Interior Board of Land Appeals (IBLA). The State challenged the BLM's decision to reject its application due to the "valid objections" of the USDA-FS. The State claimed that the BLM should have applied stricter criteria and provided a more analytical explanation of why it found the USDA-FS comments to be sufficient. Answers refuting the State's arguments were filed for the BLM and the USDA-FS. On December 16, 2010, the IBLA set aside the BLM's decision and remanded the case for additional analysis and justification of the conclusion that the USDA-FS objection was valid, and therefore the State's application had to be rejected. Specifically, the IBLA held the BLM must explain why the countervailing arguments of the State were not sufficient to refute the USDA-FS objections. Both federal agencies asked the IBLA to reconsider its decision arguing, among other things, that the effect of the IBLA decision was to require the BLM to adjudicate, in full, the validity of the USDA-FS objection. On April 8, 2011, the IBLA denied the request for reconsideration.

The State of Alaska filed a complaint in District Court on Nov. 11, 2015, arguing that the Stikine River is navigable and that the Presidential Proclamation of Feb. 16, 1909, did not defeat the State's right to the submerged lands of the Stikine River.⁵ The United States agreed. Therefore, on June 17, 2016, the United States disclaimed all interest adverse to the State's complaint in the submerged lands of the Stikine River, between the ordinary high water mark of the left and right banks, from the upper limit of the tidal influence to the 60-foot reservation at the Canadian border.⁶ This disclaimer did not include the interconnecting sloughs that are the subject of this decision.

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 Feb. 17, 2005, the State requested a waiver of this requirement under 43 CFR 1864.1-2(d). The location of the Stikine River is clearly depicted on the U.S. Geological Survey quadrangle maps and is not in dispute.⁷ The ordinary high water

⁵ State of Alaska v. United States of America, "Complaint to Quiet Title," Civil Action NO: 3:15-cv-00226-RRB, Nov. 11, 2015, BLM records.

⁶ State of Alaska v. United States of America, "United States' Amended Quiet Title Act [28 U.S.C. § 2409a(e)] Disclaimer," June 17, 2016, BLM records.

⁷ Bradfield Canal C-6 [1955, Petersburg C1 (1953, minor revisions 1980) and C2 (1997)].

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.⁸ The State's request for a 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, the 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. Dec. 21, 1970) (Tustumena Lake).

Based upon the conclusions set forth in the summary report, released on the date of the *Federal Register* Notice, Aug. 22, 2007, the United States has previously determined that title to the bed of the mainstem Stikine River passed to the State of Alaska at statehood. Although the Stikine River is located within the exterior boundaries of the Tongass National Forest in the area withdrawn by Presidential Proclamation No. 846 in 1909, this withdrawal did not defeat the State's title to the bed of the Stikine River or adjoining sloughs. When compiling the report, the BLM found that the Stikine River was used extensively for trade and travel before and after Alaska's statehood by steamboats, riverboats, and barges.

With regard to the named waterways, sloughs and interconnecting sloughs in which the waters of the Stikine River flow, the BLM has similarly concluded that title to the beds of these bodies

⁸ "Manual of Survey Instructions 2009," U.S. Department of the Interior, Bureau of Land Management, Sections 3-158, 3-160, page 81.

passed to the State of Alaska at statehood. This determination is based on the information set forth in the Aug. 22, 2007, summary report and reiterated in the *Supplemental Report on the Federal Interest in Lands Underlying Portions of the Stikine River, in Southeast Alaska*, dated May 1, 2019.

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 interconnected sloughs of the Stikine River and remove a cloud on the title.

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

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

The submerged lands of the Stikine River, between the ordinary high water mark of the left and right banks, from the upper limit of tidal influence⁹ to the sixty-foot reservation as described by Proclamation 810 at the Canadian border. This includes all named waterways, sloughs and interconnecting sloughs that were not previously disclaimed by Quiet Title Act (28 U.S.C. § 2409a(e)) Disclaimer on April 20, 2016, where the waters of the Stikine River flowed through them.

HOW TO APPEAL THIS DECISION

A Federal agency, the State of Alaska, or any party claiming an interest in this decision may appeal 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.


⁹ The tidally-influenced portion of the Stikine River, along with all the other marine submerged lands in the Tongass National Forest, has already been disclaimed. See *Alaska v. United States*, 546 U.S. 413, 415-16 (2006).

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.


 Chad B. Padgett
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