

# TRUSTEES FOR ALASKA

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August 6, 2003

Mike Haskins, Chief  
Branch of Lands and Realty  
BLM Alaska State Office  
222 W. 7<sup>th</sup> Ave., No. 13  
Anchorage, AK 99513-7599

BLM AK SO 952  
ANCHORAGE AK  
2003 AUG - 8 PM 12: 28

*Re: State of Alaska's Application for a Recordable Disclaimer of Interest for Lands Underlying a Portion of the Black River, the Black River Slough, the Salmon Fork, the Grayling Fork, and Bull Creek Located in Northeastern Alaska (BLM Casefile FF-93920)*

Dear Mr. Haskins:

We write on behalf of National Parks Conservation Association, Sierra Club, and The Wilderness Society to submit the following comments on the above-referenced Application for a Recordable Disclaimer of Interest. We have concerns about the authority of the Bureau of Land Management ("BLM") to issue a disclaimer of interest for the subject lands, about the process and standards that are being used in considering the State's application, and about the scope of the application.

## BLM Authority to Issue the Requested Disclaimer

The BLM notice of the above-referenced application does not provide an explanation of the agency's authority to issue disclaimers of interest in lands underlying navigable waters pursuant to Section 315 of the Federal Land Policy & Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1745, and the regulations contained in 43 C.F.R. part 1864.

Title to submerged lands beneath navigable water bodies in Alaska and other states is typically adjudicated in the courts. *See, e.g., United States v. Alaska*, 521 U.S. 1, 6 (1997) ("*Dinkum Sands*"); *Alaska v. United States*, 213 F.3d 1092, 1097 (9<sup>th</sup> Cir. 2000) ("*Kukpowruk River*"); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9<sup>th</sup> Cir. 1989), *cert. den. by Ahtna, Inc. v. Alaska*, 495 U.S. 919 (1990) ("*Gulkana River*"); *Alaska v.*

*United States* (“Slopbucket Lake”), 754 F.2d 851, 854 (9<sup>th</sup> Cir. 1985), *cert. den. by Alaska v. U.S.*, 474 U.S. 968 (1985); *U.S. v. City of Anchorage*, 437 F.2d 1081, 1084 (9<sup>th</sup> Cir. 1971); *United States v. Alaska*, 423 F.2d 764, 766 (9<sup>th</sup> Cir. 1970), *cert. den.* 400 U.S. 967 (1970) (“Tustumena Lake”); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (“Annette Islands”). To our knowledge, this is the first time that the BLM has proposed to issue a disclaimer of interest for lands underlying navigable waters outside the context of a Quiet Title Act action, and it is not at all clear that the BLM possesses the authority to do so under 43 U.S.C. § 1745. We request that the BLM provides such an explanation in its written decision if it decides to issue the requested disclaimer of interest.

In particular, we question the BLM’s authority to issue a recordable disclaimer of interest for lands contained in the Yukon Flats National Wildlife Refuge. Congress made clear in FLPMA that it did not intend for the BLM to have administrative authority over lands in Wildlife Refuges. In particular, FLPMA provides, “The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress, . . . or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976 (16 U.S.C. § 668dd(a)).” The Act of February 27, 1976, to which the above provision refers is the National Wildlife Refuge System Administration Act, which provides that the “National Wildlife Refuge System . . . shall be administered by the Secretary, through the United States Fish and Wildlife Service.” 16 U.S.C. § 668dd (emphasis added).

The United States District Court for the District of Alaska has held that the Secretary of the Interior cannot delegate authority over a wildlife refuge to an agency other than the U.S. Fish and Wildlife Service (“FWS”). See *Trustees for Alaska v. Watt*, 524 F. Supp. 1303 (D. Alaska, 1981), *aff’d* 690 F.2d 1279. In *Trustees*, the court ruled, based on the Refuge Act’s requirement that Refuges be administered by the FWS, that the Secretary of the Interior could not delegate to the U.S. Geological Survey the responsibility to establish guidelines, prepare reports, or approve plans regarding oil and gas exploration in the Arctic National Wildlife Refuge, because Congress had charged the FWS with exclusive administration of that area. *Id.* at 1309. This principle dictates that BLM does not have the authority to issue the disclaimer in question here.

#### Lack of Clear Standards

The BLM’s notice of the Black River application fails to articulate the standards being used to evaluate and make a determination on the State of Alaska’s application for a disclaimer of interest. The courts have developed a complex jurisprudence related to navigability determinations over the course of a century. See, e.g., *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9<sup>th</sup> Cir. 1989), *cert. den. by Ahtna, Inc. v. Alaska*, 495 U.S. 919 (1990) (“Gulkana River”). The BLM’s notice does not state whether the standards developed in these cases will be used or how they will be applied.

If the BLM decides to issue a disclaimer of interest to the State of Alaska for the Black River and ancillary water bodies, it must include in its written notification an explanation of the standards that it used to determine the navigability of the water bodies, the evidence of navigability that it relied on, and its process for applying the standards.

#### Lack of a Clear Process

The notice also fails to provide any information about the procedure that is being used to evaluate the State's application. The BLM regulations require that specific information be included in a disclaimer application. That information includes: a legal description of the lands; all documents demonstrating the State's title to the lands; a complete statement of the nature and extent of the cloud on title and why the State believes the United States' title has terminated by operation of law; any available documents or title evidence; and the names of any known adverse claimants or occupants. 43 C.F.R. § 1864.1-2.

The BLM notice fails to state whether the State submitted all the required information in support of its application. The notice identifies certain documents that the State submitted along with its application, but it does not state whether the BLM considers these documents sufficient evidence, whether the BLM intends to rely on these documents in evaluating the application, or whether it plans to gather fresh information about the navigability of the affected water bodies. In short, the BLM has provided virtually no information to the public about the process or the evidence that is being used to evaluate and make a determination on the State's application.

Should the BLM decide to issue a disclaimer of interest to the State for the lands underlying the Black River and ancillary water bodies, it must provide in its written notification a detailed explanation of the process that was used to reach that decision. It is also critical that BLM inform the public, especially anyone who submits comments on this application, of its decision.

#### Inadequate Public Involvement

Closely related to the above concern is the overly limited opportunity for public participation in the BLM's process of evaluating this disclaimer application. The BLM has not told the public what its process is for considering disclaimer applications, and so we must assume that most of the BLM's analysis of the State's application occurred before it issued its public notice of the application on May 8 and that the BLM would not have published the notice were it not prepared to issue the disclaimer when the 90-day comment period expires. If this is, in fact, the process that is being used, we obviously believe it is inadequate. The public should be invited to submit comments and information about the application during the time when the BLM is actively gathering navigability evidence and considering the merits of the application, so that the public can inform the BLM's decision as to whether the application should even proceed to the step of receiving a public notice.

We are also concerned that specific parts of the public – namely the communities in the vicinity of the water bodies affected by this application – have not been adequately engaged in this process. The public notice provides no information about whether local communities and landowners have been contacted or how much effort the BLM has made to ensure these people are informed of the State’s application. It is critical that local communities be closely involved in the BLM’s administrative process with respect to this disclaimer application.

#### Consultation with the U.S. Fish & Wildlife Service

Under 43 C.F.R. § 1864.1-4, the BLM may not issue a disclaimer of interest over the valid objection of another land managing agency having administrative jurisdiction over the affected lands. The BLM’s notice of application fails to state whether the BLM has consulted the U.S. Fish & Wildlife Service (“FWS”), which manages the Yukon Flats National Wildlife Refuge through which the Black River flows, or what standard will be used to determine whether an agency objection, should there be one, is “valid.”

If the BLM decides to issue a disclaimer of interest to the State of Alaska for the water bodies identified in the application, it must include in its written notification a detailed explanation of how it involved the FWS in its decisionmaking process and how it weighted the FWS’s comments or objections, if any.

#### Scope of the Application

Even assuming that the BLM may issue a disclaimer of interest in lands underlying the Black River and ancillary waters, and that some portion of these waters is actually navigable, we believe that the scope of the State’s application may be too broad. We incorporate by reference a report published by Region 7 of the FWS, entitled Black River Navigability Research Report, written by Mada Hansen and dated February 27, 1996. The information detailed in this report suggests that a navigability determination may not be warranted with respect to all of the waters for which the State has applied.

The State’s application is for the lands underlying a portion of the Black River, the Black River Slough, the Salmon Fork, the Grayling Fork, and Bull Creek. Based on the FWS report, it may be that not all of these waters are navigable as that term is defined and applied by the federal courts. In particular, the upper stretches, tributaries, and sloughs may not be capable of trade and travel in their ordinary condition.

Even the lower stretch of the Black River may not be navigable because of seasonal restrictions on its use. According to the 1996 FWS report, following a period of high water during breakup, the water level becomes very low, and passage is possible only after storm events. The U.S. Supreme Court has held that occasional use during periods of high water is insufficient to render a water body navigable. *See U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899).

For these reasons, we believe that a navigability determination for all or a portion of the waters covered by the State's Black River application may not be warranted.

Conclusion

If the BLM does issue to the State of Alaska a disclaimer of interest with respect to the Black River and/or any of the ancillary water bodies, it must notify the State and "any party adverse to the application" in writing of that decision. 43 C.F.R. § 1864.2(a). We ask that we be considered a party adverse to the application so that we may be notified of the BLM's decision. We also ask that this written notification be published in the Federal Register so that the general public may be informed of the BLM's decision on this important matter.

Thank you for your attention to these comments.

Sincerely,

  
for Rebecca L. Bernard  
Staff Attorney

cc: Eric Jorgensen, Earthjustice

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