United States Department of the Interior

BUREAU OF LAND MANAGEMENT
ALASKA STATE OFFICE
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SEP 9 2005

Mr. Chester Druck
Natural Resource Director
Chalkyitsik Tribal Council
Chalkyitsik, Alaska 99788

Dear Mr. Druck:

Thank you for sending us your comments of August 6, 2003 regarding the State of Alaska's application for a recordable disclaimer of interest in the beds of the Black River Slough, Black River and its tributaries, Salmon Fork, Grayling Fork, and Bull Creek, and all interconnecting sloughs. I would like to address your concerns about the State's application. Before I do so, allow me to make a few introductory remarks about title navigability law and how the BLM has administered this law in Alaska.

By the Submerged Lands Act of 1953, the United States granted title to unreserved lands underlying navigable waters to the States at the time of statehood. Thus, when State of Alaska joined the Union on January 3, 1959, ownership of unreserved lands underlying navigable waters automatically passed from the United States to the State.

At the time of statehood, no one knew with certainty, beyond a few obvious cases, what was navigable or non-navigable. Outside of certain federal land reserves and withdrawals, navigability is a question of fact. Was the river or stream used for travel, trade, and commerce at the time of statehood, and, if not, was it susceptible for such use at the time of statehood? The BLM is the most experienced among Interior Department agencies in researching and determining the navigability of Alaska's inland water bodies. Much of this experience has been gained from determining the navigability of water bodies on lands subject to conveyance under the Alaska Native Claims Settlement Act, the Alaska Statehood Act, or the Native Allotment Act. Since the mid 1970s, well over 100 million acres of land in Alaska have been reviewed for navigable and non-navigable waters. This has been done for all Native villages, including Chalkyitsik. If it finds that the waters are navigable, the Bureau excludes the submerged lands from conveyances to the Native corporations and excludes the submerged land acreage from charges against the corporations' acreage entitlements. Similarly, the submerged lands are excluded from conveyances under the Native Allotment Act.

But what about water bodies on lands that will not be conveyed to the State, Native corporations, or Native individuals? Certainly there is a need to know whether submerged lands in these areas are owned by the United States or the State. On January 6, 2003, the Bureau published a final rule amending its disclaimer of interest regulations (68 Fed. Reg. 494; 43 CFR part 1864). The disclaimers of interest rule creates an administrative process for the State to remove clouds on its title to lands underlying navigable waterways. In Alaska, the State has long wanted a legal document affirming its title to these submerged lands. Ordinarily, this is accomplished through real property quiet title actions in the Federal courts. Court action, however, has proved an unsatisfactory method because of the large number of potentially navigable waterways that cross Federal public lands and because of the high cost of litigation. The State has also argued that it is presented with few opportunities to initiate a quiet title action because Federal agencies rarely take an action that adversely affects its claim to submerged lands. Since statehood, the courts have quieted title to a dozen waterways—this in a state that has hundreds of potentially navigable waterways.

On February 14, 2003, the State of Alaska submitted its first application for a recordable disclaimer of interest for lands underlying navigable waters, specifically, the Black River and certain tributaries. On May 8, 2003, the Bureau published a Notice of the State's application in the *Federal Register*. As you know, most of the river and its tributaries, excepting the upper reaches of the Salmon Fork, Grayling Fork, and Bull Creek, are located in the Yukon Flats National Wildlife Refuge. Portions of the Black River are also located in areas conveyed to Chalkyitsik, Inc., or Doyon, Limited, and portions of Grayling Fork, and Bull Creek are located in areas conveyed to Doyon, Limited.

More than twenty years ago, the BLM published a finding that these waterways were navigable. During litigation before the Alaska Native Claims Appeal Board in 1980 over the navigability of Grayling Fork and Bull Creek, the Bureau surveyed the historical record and finally determined that the Black River from the Porcupine River to Wood River, Salmon Fork to the International Boundary, Grayling Fork to the International Boundary, and Bull Creek to Section 5, T. 13 N., R. 31 E., Fairbanks Meridian, were navigable. On July 24, 1981, the ANCAB determined that Grayling Fork and Bull Creek were navigable in three townships (Tps. 15 and 16 N., R. 28 E., and T. 16 N., R. 27 E., Fairbanks Meridian.). Subsequently, the BLM incorporated its determination that the Black River was navigable in several Decisions to convey lands at and in the vicinity of Chalkyitsik to Doyon, Ltd., and the Chalkyitsik Native Corporation. The corporations did not protest the determination that the river was navigable. Six townships of land (excluding Black River lands) were conveyed to Doyon, Limited, by IC Nos. 575 (1982) and 1079 (1985) and two and a half townships (excluding Black River lands) to Chalkyitsik Native Corporation by IC No. 1104 (1985).

In addition, the BLM has issued certificates to numerous Native allotments along the Black River, Grayling Fork, and the lower reaches of Bull Creek. In all these cases, the Bureau meandered and segregated the lands underlying these waters from public lands and then conveyed the uplands to the Native allottees.

Now, in the present application for a recordable disclaimer, the State asks whether the United States has an interest in the land underlying these waterways. The State claims these lands under title navigability law. The burden of proof is upon the State. Upon receipt of the State's application, the Bureau and other interested Federal agencies (in this case, the Fish and Wildlife Service) review the State's evidence and decide whether, considering the preponderance of evidence, the waterways meet the legal standards of navigability. If the waters are navigable, there is no Federal interest in the submerged lands, title to the lands having vested in the State in 1959. If the waters are not navigable, the riparian landowner holds title to the center of the river or stream.

At this point, let me address your questions and statements. Generally, I will address them in the order that they are presented.

Government to Government Consultation

You noted that the Bureau and the State did not consult with the Gwichyaa Gwich'in Tribal Government and the Chalkyitsik Village Council. As a result, the State did not identify adverse claimants and did not collect sufficient information about navigable water bodies.

First, let me emphasize our belief that local knowledge is critical in developing an understanding of the physical character and history of use of local rivers, streams, and lakes. Oftentimes, local residents are the only sources of information about these water bodies. We have never had (and do not have) any intention of ignoring local knowledge. On the contrary, we believe that this knowledge is absolutely essential.

We have reviewed the statements of many local residents about boating on the Black River and its tributaries, and some of their statements have become the basis of our decisions to approve and not approve different parts of the State's application. In the late 1990's the State filed a lawsuit in Federal court to quiet title to the beds of the Black River and the nearby Kandik and Nation Rivers. In preparation for this litigation, the Fish and Wildlife Service collected a great deal of information from residents of Chalkyitsik and Fort Yukon about the history of the Black River. The Service opened its records to the Bureau's researchers so that they could review this information. In addition, we found and reviewed local residents' statements about the navigability of the river in various BLM casefiles—Doyon, Ltd., and Chalkytsik Native Corporation selection files, Native allotment files, and so on. Of course, we also reviewed such publications as Richard K. Nelson's *Hunters of the Northern Forest*.

The State has the burden of proof that a waterway is navigable. It is possible that the State will undertake additional research on the Upper Black, Grayling Fork, and Bull Creek. If so, the State would probably contact the Tribal governments and local residents for assistance in collecting information. Documentary research, streams surveys, and hydrological studies are other tools that have been used to collect navigability information.

Trust or Restricted Indian Lands and Corporate Lands

You asked if, and how, trust and corporate lands would be impacted by issuance of a recordable disclaimer. A recordable disclaimer of interest would have no impact on restricted Indian lands. Under the regulation 43 CFR 1864.1-3 (b)(2), the Bureau will not approve an application that "pertains to trust or restricted Indian lands." Native allotments are included in this category of lands. Therefore, the disclaimer, if issued, would not involve any changes in the principles of accretion, avulsion and erosion or the incidence of trespassing on restricted Natives lands.

A recordable disclaimer of interest would also have no impact on corporate lands. As noted above, the Bureau determined in 1980 that Black River was a navigable waterway. The lands underlying the Black River were excluded from conveyances under the Alaska Native Claims Settlement Act to the Chalkyitsik Native Corporation and Doyon, Limited.

Impacts on Cultural Resources

You asked about the potential impacts that issuance of a recordable disclaimer would have on cultural resources. Insofar as BLM lands are concerned, I do not forsee any significant impacts. Since 1980 BLM has considered the water bodies under application as navigable and, accordingly, has treated the submerged lands as State lands (since 1959). However, the Bureau is not bound by these determinations. If, in light of new information, it is found that, say, the upper reaches of the streams are not navigable where they cross BLM lands, the BLM will manage the submerged lands as Federal lands—not State lands. It is to be noted, too, that in certain reaches the lands have long been selected by the State under the Statehood Act. In any case, regardless of a disclaimer, Federal agencies would not be relieved of their responsibilities under the National Historic Preservation Act. Neither would the State.

Consultation and Coordination with Indian Tribal

You asked whether the BLM followed its General Procedural Guidance for Native American Consultation (BLM Manual Handbook H-8160-1. On January 6, 2003, the Bureau published a final rule amending its disclaimer of interest regulations (68 Fed.

Reg. 494; 43 CFR part 1864). The Bureau determined that the rule "does not propose significant changes to BLM and that Tribal Governments will not be unduly affected by this rule." See *Federal Register*, January 6, 2003, p. 502.

Please let me know if you have any additional concerns. Thank you for sharing your views and concerns in this matter.

Sincerely,

/s/ Mike Haskins

Michael W. Haskins,
Chief, Branch of Lands and Realty