

“Who Owns Alaska’s Riverbeds and Lakebeds?” An Introduction to The Federal Recordable Disclaimer Of Interest Program In Alaska

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Let me start off by reviewing a few facts.

- The State of Alaska is approximately 365 million acres in size.¹
- The BLM is conveying over 103 million acres of land to the State of Alaska under the Alaska Statehood Act of 1958 and 44 million acres of land to Native corporations under the Alaska Native Claims Settlement Act of 1971. After the State and Native corporations reach final entitlement, the federal government will still manage approximately 60% of lands within Alaska (almost 14 times the State of Virginia).² Much of this land is located in national parks and national wildlife refuges created after the date of Alaska’s statehood (1959).
- The number of waterbodies in Alaska is unknown; however, one estimate is 3,000 rivers and 3 million lakes. The number of streams is unknown.³ A large number of these waterbodies are located within Federal boundaries.

So, “who owns Alaska’s river beds and lake beds” on these lands? When I say “lands,” I mean Federal lands—national park lands, national wildlife refuge lands, BLM public lands, Forest lands, military withdrawals, and so on. I am not referring to non-Federal lands, such as State lands or private lands.

Again, who owns the lands underlying Alaska’s river, streams, and lakes?
Only time will tell.

Traditionally, we have relied upon the federal courts to make final title navigability determinations. In Alaska, this is not possible. Only ten (10) judicial determinations of navigability have been made for unreserved water bodies. I should point out, however, that the courts have ruled several times on specific federal withdrawals and reservations, that is, whether the State’s title to the beds of navigable waters was defeated by the withdrawal or reservation.

What does this mean? After nearly 50 years, since Alaska achieved statehood, few water bodies on the remaining federal lands have been identified as navigable from a legal point of view. The recordable disclaimer of interest program is intended to help answer this question.

So, what is a “Recordable Disclaimer of Interest?” And how does it relate to “Who owns Alaska’s Riverbeds and Lakebeds?”

¹ 2006 Public Lands Statistics, 365 million acres. There is a reference of 12 million water acres, totaling 378 million?

² Alaska (586,000 sq. miles) and Virginia (42,767 sq. miles)

³ State of Alaska Library

A “recordable disclaimer of interest” – RDI – is a document that affirms the United States does not claim an interest in specific lands, and it is prepared in such a way that will meet local requirements so that it may be “recorded.”

The RDI program was born out of necessity. In 1992, the State of Alaska notified the Secretary of the Interior of its intent to quiet title to more than 200 rivers, streams, and lakes. The State subsequently filed on three rivers--the Black, Nation, and Kandik Rivers (located in northeast Alaska).

In 2000, the Ninth Circuit Court ruled it lacked jurisdiction over Black River because there had not yet been a dispute between the United States and Alaska over the riverbed. (The U.S., for example, had not included the riverbed in a conveyance to a private party.)

Unable to rule on the river’s navigability, the Court expressed its sense of urgency in identifying navigable waters in Alaska, writing as follows: “Eventually, all the witnesses will be dead, reducing the reliability of litigation. Someone who used one of these rivers in 1959 at age 20 is now 60. The population in the area was so sparse at all relevant times—probably no more than a couple of hundred people who might have used the three rivers during the relevant time, most too young to have relevant knowledge or too old to have survived the forty years since statehood—that a few deaths by old age can remove all the knowledgeable witnesses.”⁴

This decision helped prompt the Department of the Interior to amend its regulations affecting recordable disclaimers of interest.

The Authority for RDIs begins with the Federal Land Policy and Management Act of 1976, Section 315. The Act provides that the Secretary may issue a disclaimer when:

1. A record interest of the United States has terminated by operation of law or is otherwise invalid;
2. The lands lying between the meander line shown on a plat of survey approved by the Bureau or its predecessors and the actual shoreline of a body of water are not lands of the United States; or
3. Accreted, relicted, or avulsed lands are not lands of the United States.

In our program, we focus on the first one – *A record interest of the United States has terminated by operation of law or is otherwise invalid* – citing the Equal Footing Doctrine, the Submerged Lands Act of 1953, the Alaska Statehood Act, and the Submerged Lands Act of 1988 as the basis. In other words, title to the beds of navigable waters automatically vested in the State of Alaska upon its entry into the Union in 1959.

The Secretary delegated this authority to the Bureau of Land Management. We are the responsible agency for administering this program on behalf of all federal agencies of the United States. The BLM makes the final administrative decision on whether the United States has an interest in the submerged lands.

⁴ Alaska v. USA, case no. 96-36041 (9th Circuit 2000)

In January 2003, the BLM amended its regulations (found in 43 CFR 1864), effectively

- removing the 12-year regulatory filing deadline for states;
- removing the requirement that an applicant be a “present owner of record” to be qualified under the Act;
- allowing any entity claiming title, not just current owners of record, to apply for a disclaimer of interest;
- defining the term “state” as it is used in this rule; and
- clarifying how we will approve disclaimer applications involving another Federal land managing agency.

The result: an administrative tool that can be used to disclaim federal interest in lands underlying navigable waters. Clearly, this tool can be used to avoid unnecessary and expensive litigation over waterbodies that interested parties (United States and the State of Alaska) can agree are navigable, and unreserved, at the time of statehood.

The Recordable Disclaimer of Interest document is important to the State of Alaska because it is a very cost-effective administrative tool, equivalent to bringing Quiet Title Action to a summary judgment in federal court.

The lack of any title document or judgment creates a cloud on the State's title. A recordable disclaimer for submerged lands under navigable waters helps to lift the cloud on its title stemming from the lack of any permanent determinations of ownership.⁵

So, what is the process? Working cooperatively with the State, federal land managers, and the Department’s attorneys, BLM-Alaska developed a policy on how to implement the regulatory requirements, specifically for the State of Alaska’s RDI applications. This policy was implemented in 2004. Before I go through the process with you, I need to point out that the State carries the burden of proving that a river, stream, or lake is navigable, and unreserved, at the time of statehood. Basically –

1. The process usually begins with the State proposing to the BLM certain water bodies as potential candidates for an RDI application. We discuss potential sources of information and what is known about the water body, and advise the State on what is required of a complete application. Once the State believes its draft application and supporting documents are ready for review, the BLM hosts a meeting between the State and affected federal agencies. The State presents its preliminary evidence to support why the State believes title to the submerged lands vested in the State, and the affected federal agencies brings forth information that may support or negate the State’s evidence. As each particular case is unique, discussion is guided by the draft application and the submitted factual information. Discussion also includes reservation or withdrawal information both current and at the time of statehood.

⁵ Email correspondence, October 25 & 26, 2007. Tammas Brown, Navigability Manager, Public Access and Assertion Defense Unit, Alaska Department of Natural Resources.

2. After the State submits its final application, the BLM reviews the evidence and prepares a summary, or navigability, report. This report summarizes relevant factual evidence and may include the BLM's proposed recommendations on the State's application. Copies of the State's application and the BLM draft summary report are sent to identified parties and major upland owners. The Notice of the State's application is published in the Federal Register (and in local newspapers), and is available for public review and comment.
3. After the end of the Notice period, comments are analyzed, and the report is finalized. The BLM may then issue a decision on the State's application. If the application, or a portion thereof, is accepted, the BLM will prepare the "recordable disclaimer of interest."

Although the BLM has the authority to issue decisions on the applications, it will not approve a disclaimer over the valid objection of another federal agency. A valid objection must contain sustainable rationale, which has not yet been defined.

The BLM has successfully used this authority to help confirm State ownership of submerged lands within Alaska. To date, the BLM-Alaska RDI Team has reviewed a total of 47 water bodies and completed actions on ten (10) applications, resulting in disclaimers in lands underlying 889 river miles and 873,000 acres of lakebed.

The State of Alaska has 26 pending applications. Currently under public review are 17 miles of a portage system, 399 river miles, and 2 lakes. The Navigable Waters Specialists are also analyzing the Tanana and Kuskokwim Rivers, which total 940 river miles. Next to the Yukon River, these are the two largest rivers in Alaska.

We have a long way to go and I thank you for your time.