

April 5, 2004

The Honorable Gale Norton
Secretary
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Norton:

I am writing regarding implementation of the revised “disclaimer of interest” rule, a rule which allows the Department of the Interior (DOI) to declare that the United States has no legal interest in a piece of property.¹ As you know, in a letter dated July 2, 2003, I expressed concern that the rule would be used to concede Federal title for claims on Federal land (under the repealed Revised Statute 2477) in response to flimsy claims, even when the damage caused to the environment by conceding such title could be profound.² The potential is substantial. For example, in Alaska alone, there are approximately 300,000 section line easement claims blanketing National Wildlife Refuges and 170,995 miles of such claims blanketing National Parks.

I am now writing about the handling of claims under the revised rule for ownership of waterbodies and riverbeds. These ownership decisions are important because they affect not only the riverbed but the adjacent natural resources, including national refuges, parks, wilderness, forests, and other public lands.³ The State of Alaska has already notified the federal government of its claim to the submerged lands beneath about 200 water bodies in the state, including 23 rivers and lakes within the boundaries of National Park units and 65 rivers and lakes within the

¹ 68 Fed. Reg. 494 (January 6, 2003).

² Letter to the Honorable Gale Norton, Secretary of the Interior, from Joseph I. Lieberman, Ranking Member, Governmental Affairs Committee, U.S. Senate, Washington, D.C. July 2, 2003.

³ “If [a] river was navigable at statehood, then the state owns the bed; if not, the federal government owns it.” *Alaska v. United States*, 201 F. 3d 1154, 1156 (9th Cir. 1997).

boundaries of National Wildlife Refuges. These claims affect Denali National Park and Preserve, Katmai National Park, Lake Clark National Park and Preserve, Wrangell-St. Elias National Park and Preserve and the Arctic, Kenai, Kodiak, Togiak, Yukon Delta, and Yukon Flats National Wildlife Refuges.

DOI and the Bureau of Land Management (BLM) have now begun to issue disclaimers of interest for navigable waterways in Alaska. On October 24, 2003, the Assistant Secretary for Land and Minerals Management signed a Recordable Disclaimer of Interest for 375 miles of riverbed for the Black River, Salmon Fork, Grayling Fork, and Bull Creek drainages.⁴ In September, the BLM announced that it is processing an additional four applications for lands underlying eight rivers and nine lakes in Alaska.⁵ On March 9, 2004 BLM announced that Alaska had submitted an application for a recordable disclaimer of interest on the Porcupine River.⁶

The Black River disclaimer was signed despite objections the U.S. Fish and Wildlife Service (FWS) made to the State's assertions that the lower main stem of the Grayling Fork (which lies within the Yukon Flats National Wildlife Refuge boundary) was navigable, and therefore, owned by the State. The Yukon Flats Refuge is the third largest conservation area in the National Wildlife system, covering 9 million acres. It supports the highest density of breeding ducks in Alaska, and includes one of the greatest waterfowl breeding areas in North America: an estimated 1.6 million ducks, 10,000 geese, 11,000 sandhill cranes, and hundreds of thousands of songbirds nest annually in the refuge. The area includes a complex network of lakes, streams, and rivers which benefit not only the waterfowl, but also fish and a wide variety of mammals.

As the FWS Regional Director stated when he submitted his objections, the Black River disclaimer decision is precedent setting.⁷ Disclaimers of interest can seriously affect land managers' ability to do their job because control of land and water within the boundaries of refuges – and within the boundaries of parks, wilderness areas, and forests as well – is key to

⁴ Office of the Secretary, U.S. Department of the Interior, *Decision: State of Alaska, FF-93920, Recordable Disclaimer of Interest Application–Black River*, October 24, 2003.

⁵ 68 Fed. Reg. 54002 (September 15, 2003). It should be noted that your September 22, 2003 response to my July letter did not reflect the information contained in this Federal Register notice. In fact, DOI's response stated that no claims other than the recordable disclaimer of interest application for Alaska's Black River were currently being processed. Letter to The Honorable Joseph I. Lieberman, Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate from Rebecca W. Watson, Assistant Secretary, Land and Minerals Management, U.S. Department of the Interior, Washington, D.C. , September 22, 2003 (hereinafter "September 22, 2003 letter").

⁶ 69 Fed. Reg. 11037 (March 9, 2004).

⁷ Memorandum from Regional Director, Region 7, Fish and Wildlife Service, to State Director, Bureau of Land Management, U.S. Department of the Interior, *State of Alaska's Recordable Disclaimer of Interest Application for the Black River and Other Water Bodies, Yukon Flats National Wildlife Refuge*, August 27, 2003, at 5.

their effective management. But, the State of Alaska has made it very clear that it wants to obtain title to waterbodies throughout the State so that the State, rather than the Federal land managers, can make decisions regarding their use.⁸ In some cases, state control could lead to significant changes within these areas. For example, mining, especially placer gold mining, is common in Alaska's streams. If the State is the owner of a riverbed within a park or refuge, it might aggressively support mining. Or, it might allow other development – such as oil – in the riverbed.

In Alaska, it appears that there will be a significant number of claims for navigable waterways. DOI declined to provide information or estimates in response to my questions seeking information regarding expected claims.⁹ However, DOI Deputy Secretary Steve Griles gave a speech to the Alaska Resources Development Council in which he said that DOI would give immediate attention to claims for “200 plus” rivers, lakes, and streams, and that plans were being made for processing a remaining “21,000 plus” claims.¹⁰

The issuance of the Black River claim appears, in fact, to be precedent setting. It raises several important questions about how the disclaimer process is working. Accordingly, I am writing to seek answers to questions regarding the role of the affected land managing agencies in the determination of the validity of the claim; the standards to be applied in assessing the evidence supporting a claim; the apparent inability of members of the public to administratively appeal a determination to issue a disclaimer of interest; and the impact on effective public participation of the unavailability of (or difficulty in obtaining) relevant information.

Determinations of navigability

The Federal Government owns all lands within the State of Alaska which have not been granted to others by statute, patent, treaty or other conveyance. Certain underwater lands were

⁸ As one state official said as Alaska began its drive to obtain title to submerged lands: “If we own a water body in the Tongass National Forest, decisions about how that water body can be used can be made by the state rather than the Forest Service.” Herbst, “Officials want control of land beneath navigable waters,” *Morris News Service–Alaska*, March 31, 2003.

⁹ My July 2, 2003 letter included several questions regarding claims in Alaska. However, the September 22, 2003 responses generally tracked the language of the following response to a question referring to the river claims:

. . . It is not clear what “nature and extent” refers to, but Interior can confirm that it is currently processing a recordable disclaimer of interest application for Alaska's Black River. Beyond that, the question asks Interior to speculate about the future. Interior cannot tell what would be processed in the future for claims that may be submitted. . . . (September 11, 2003 letter at 4).

¹⁰ Speech Prepared for Delivery By Deputy Secretary of the Interior Steve Griles, Alaska Resources Development Council, Nov. 22, 2002. The ARDC is a non-profit membership funded organization interested in the development of Alaska's resources and was initially established to obtain a trans-Alaska pipeline.

granted to the State by the Submerged Lands Act¹¹ as applied to Alaska by the Alaska Statehood Act.¹² In addition, the State obtained certain rights to lands beneath navigable waters by virtue of the “equal footing doctrine,” although title to some submerged lands could have been either reserved or retained by the United States.¹³ Title should be considered to be in the United States unless it is expressly found that the land satisfies one of several specific legal tests, including being unreserved land beneath navigable waters. Thus, the determination of “navigability” is key, a determination which must be made taking into account historical facts and the appropriate legal definition. As noted above, navigability as of the date of statehood, which in the case of Alaska was January 3, 1959, determines which government – the State or Federal – owns the riverbed.

The U.S. Supreme Court defines “navigable waters” as follows:

[Bodies of water] must be regarded as public navigable [water bodies] 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. . . .¹⁴

It is notable that the water must be suitable for commerce. In a memorandum addressing the determination of federal ownership in connection with claims under the Alaskan Native Claims Settlement Act, a former Associate Solicitor provided information regarding the legal requirements which is helpful in making navigability determinations:

Water sufficient only for use by small flat bottom trapping or sport fishing boats or small canoes is not navigable. (citations omitted) Although cases have supported findings of navigability based upon commercial use of frontier craft such as bateaux, these craft were of a commercial size with substantial crew and capable of carrying commercial quantities of goods.¹⁵

There are, of course, additional factors which must be taken into account. To assist in determining navigability, the Associate Solicitor recommended that the BLM collect a wide

¹¹ 43 U.S.C. 1301, *et seq.*

¹² P. L. 85-508, July 7, 1958, 72 Stat. 339, as amended.

¹³ *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *United States v. Alaska*, 423 F. 2d., 764, 766 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970); *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987).

¹⁴ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

¹⁵ Memorandum from Associate Solicitor, Division of Energy and Resources, to Director, Bureau of Land Management, Subject: *Title to submerged lands for purposes of administering ANCSA*, March 16, 1976 at 7.

range of information, including details regarding the physical characteristics of the water.¹⁶

Process for issuing disclaimers of interest under revised regulation

The Black River disclaimer raises the very significant question of the role of the affected Federal land management agencies in decisions to disclaim title. In this case, the manager submitted objections to claims on two stretches of water. BLM decided to seek additional information before making a decision on the navigability of the uppermost reach of the Black River, but, as to the lower Grayling Fork, overrode the objection:

FWS does not claim that the portion of the river at issue is not navigable. It only claims that there *is insufficient evidence of navigability*. BLM, as the agency delegated authority under the regulations to process applications for recordable disclaimers, is the bureau that must determine the sufficiency of any evidence presented to it or that it independently discovers.¹⁷ (Emphasis added)

In his report on navigability, the BLM examiner said:

*Although the evidence of navigability for the Grayling Fork is slim, indirect, and even contradictory in some instances, it is sufficient to support a finding that the stream was navigable to the mouth of Bull Creek if it is considered in light of the history of travel and transportation on the Upper Black and Salmon Fork.*¹⁸ (Emphasis added.)

Thus, it appears that admittedly slim, indirect and contradictory evidence was decided in favor of the claimant over the objections of the affected Federal land management agency – an agency knowledgeable about the waters within its boundaries.

The role of Federal land management agencies was a source of concern when the revised rule on disclaimers was proposed. The U.S. Department of Agriculture’s Forest Service, recognizing the potential impact of the rule on the management of millions of acres of National Forest System lands, specifically requested that the proposal be amended to state that disclaimers of title “will not be issued over the objection of an agency having administrative jurisdiction over

¹⁶ For example, discharge volumes, width and depth, fall per mile, extent of ordinary high water mark, location of obstructions to navigation, and the details of past and present use for commerce to demonstrate its susceptibility of use for commerce in January 3, 1959.

¹⁷ *State of Alaska*, Recordable Disclaimer of Interest Application–Black River, October 23, 2003.

¹⁸ Bureau of Land Management, U.S. Department of the Interior, *Navigability of Black River, Northeast Alaska*, File FF-093920, September 4, 2003 at 26 (hereinafter *Navigability of Black River*).

the affected land.”¹⁹ The Director of the Fish and Wildlife Service prepared similar comments, which did not appear in the record of the proceeding, arguing that the authority given to the BLM was inconsistent with the National Wildlife Refuge System Administration Act of 1966 and suggesting instead that claims involving “any land under the custody and control of a Department of the Interior agency will be referred to that agency for decision.”²⁰

When the final rule was issued, DOI’s BLM indicated it had addressed the land managers’ concerns stating: “BLM will not issue a disclaimer of interest over the valid objections of the surface managing agency having jurisdiction over the affected lands.”²¹ Thus, BLM’s action to issue a disclaimer over the objections of the FWS raises the question of what constitutes a “valid” objection.

There is a related question regarding the adequacy and verification of evidence presented by the claimants.²² In the Black River case, among the bits of evidence cited for navigability for the Grayling Fork is information contained in a Waterbody Use and Observation Questionnaire which was prepared in 2003 by the State of Alaska, the very entity asking for the disclaimer of interest.²³ The questionnaire contains notes of an interview by a State of Alaska employee with an individual who states that he traveled by boat on portions of the Black River. However, BLM’s navigability determination does not reflect any independent confirmation of this information. BLM’s determination in this instance may be correct. However, I am troubled that in the face of objections regarding the quality, quantity and adequacy of evidence supporting a finding of navigability from the FWS – the manager of the refuge through which the Grayling Fork runs and the agency to which the law affords great deference in managing the refuge – the decision does

¹⁹ In fact, the Forest Service asserted that it was the “most qualified to defend the Government’s title to disputed National Forest lands.” Letter to the Honorable J. Steven Griles, Deputy Secretary, Department of the Interior from Dale N. Bosworth, Chief, U.S. Forest Service, U.S. Department of Agriculture, Washington, D.C., April 2, 2002 at 2.

²⁰ Memorandum from Director, Fish and Wildlife Service to Director, Bureau of Land Management through Assistant Secretary for Fish and Wildlife and Parks: Subject: *RIN 1004-AD50 – Conveyances, Disclaimers and Correction Documents*, June 6, 2002.

Congressional members of the U.S. Migratory Bird Commission also raised questions about BLM’s authority. They objected to the final rule on the grounds that the authority given to BLM to disclaim Federal property interests in the National Wildlife Refuge System was inconsistent with the Game Range Amendments of 1976 and the Federal Land Policy and Management Act and requested that BLM’s authority be withdrawn as it affected refuges. Letter from Curt Weldon and John D. Dingell, Members, U.S. House of Representatives, to the Honorable Gale A. Norton, Secretary of the Interior, Washington, D.C., July 14, 2003.

²¹ 68 Fed. Reg. 499 (January 6, 2003).

²² Your response to my July 2, 2003 question inquiring about field examinations to verify claims was simply that BLM would determine “the need for any on-the-ground inspections.” September 22, 2003 letter at 9.

²³ Bureau of Land Management, U.S. Department of the Interior, *Navigability of Black River, Northeast Alaska*, File FF-093920, September 4, 2003, at 21-22.

not reflect independent confirmation of information presented by the claiming party.

With the prospect of hundreds, possibly thousands of additional claims being presented under the disclaimer rule, please clarify the following:

Presenting a Valid Claim

1. If questions regarding the adequacy of the factual evidence supporting a claim is not a “valid” objection from a land managing agency, please describe what constitutes a “valid” objection.
2. Is BLM requiring that as part of a “valid” objection that other land managers gather evidence to refute assertions of navigability? As a general matter, with regard to any claims being made under the disclaimer rule, will BLM require the affected land management agency to gather evidence to refute the claims?
3. The disclaimer of interest regulations place the burden of proof of a claim on the applicant.²⁴ The Eighth Circuit Court of Appeals has concluded that the State bears the burden of demonstrating navigability.²⁵ In light of these legal requirements, please explain how DOI and BLM are applying the burden of proof in the case of the Alaska claims and the reasons it is consistent with legal requirements.
4. If BLM will not conduct an on-site inspection when the evidence supporting claims is “slim, indirect and even contradictory,” what are the circumstances under which it will conduct such an inspection?
5. Please explain how authorizing the BLM to disclaim an interest in a refuge managed by the Fish and Wildlife Service is consistent with the Game Range Amendments of 1976, 16 U.S.C. 668dd(a), and related provisions of the Federal Land Policy and Management Act, 43 U.S.C. 1714.

Preclusion of administrative appeals

Concerns that doubts regarding factual evidence supporting claims will be resolved in favor of the claimant rather than the land manager, even in the face of scant or questionable evidence, lead to a second issue: the apparent inability to administratively appeal a decision to

²⁴ 43 CFR Part 1860 (2003).

²⁵ *North Dakota ex re. Bd. of University and School Lands v. United States*, 972 F. 2d 235, 238 (8th Cir. 1992).

issue a disclaimer.²⁶ In the Black River case, the Assistant Secretary for Land and Minerals herself signed the decision, thereby foreclosing any administrative appeals of the decision.

Accordingly, please clarify your plans for handling future claims as follows:

6. Will DOI/BLM process future Alaska navigability claims in this manner? That is, will the Assistant Secretary for Lands and Minerals, the Deputy Secretary, or you sign the Alaska disclaimer decisions thereby foreclosing all administrative appeals? If so, what is the justification for doing so?
7. Will other claims granted under the disclaimer of interest regulation also be processed so as to foreclose administrative appeals?
8. What steps will you take to preserve the ability of members of the public to administratively appeal future disclaimer of interest decisions?

Availability of information to the public

A third problem area demonstrated by the Black River situation is the general lack of availability to the public of important information. In the Black River case, a September 4, 2003 navigability report from the BLM contained key information relating to the support for the decision, including the information from the State's interview noted above. However, the September 4 navigability report and record of the interview were not posted on the Internet until *after* the decision was signed by the Assistant Secretary. Critics are concerned that since BLM does not provide its own assessment of the validity of a claim to the public until after the decision is made, public comment and participation cannot be very effective, particularly in those instances in which the applications filed by the claimant contains very little information. In addition, DOI has said: "Information contained in the BLM case file for the application will be made available for public review *in the appropriate BLM state office.*" (Emphasis added.)²⁷ The BLM State Offices are located in only one city in the applicable state, thus requiring that interested members of the public, whether in-state or out-of-state, travel to that State Office to review the files.

9. What action will you take to make public participation meaningful, for example, by making BLM's assessment of the validity of the claim and the draft decisions available for

²⁶ In your response to my question in the July 2, 2003 letter regarding appeals, DOI stated:
The provisions of the recordable disclaimer of interest rules governing administrative appeals from adverse decisions were not changed during the BLM's most recent rulemaking process. As a result, the rules governing appeals, including who may appeal, have been the same since 1984 including who may appeal, have been the same since 1984 when the rules were first promulgated. September 22, 2003 letter at 8.

²⁷ September 22, 2003 letter at 7.

public review and comment, particularly in those situations in which the information provided by the claimant is weak?

10. What action will you take to make all relevant information such as that contained in the navigability report readily available to the public *during* the decision making process, (i.e. through the Internet or by other means) rather than after the final decision?

* * * *

In conclusion, DOI and BLM must not simply resolve doubts in favor of the claimant, as it is the interests of the United States which you are sworn to protect. I recognize that many claims of navigability will be valid. But, properly made, these determinations often entail difficult factual determinations requiring a careful review of the historic record. Ceding title when the taxpayers' interests are involved is a very serious matter. It should only be done by applying clear standards and criteria that are a matter of public record, with full and complete disclosure to the public in a timely manner allowing for informed public comment and without curtailment of the administrative review process. It should be based upon a clear factual record supported by appropriate field examinations, in particular in those cases in which there is any doubt about a claim. Lack of title affects a land manager's ability to do the job; therefore, any objections of the relevant Federal land management agency must be taken very seriously, especially in those cases in which the evidence is uncertain. Thus, BLM should make every effort to be responsive to objections and to recognize the deference afforded the U.S. Fish and Wildlife Service, by statute, in the management of refuges. Most importantly, DOI must put the **claimant** to the test of its proof—whether administratively or in court.

As you know, last July I raised concerns about the use of the disclaimer process to resolve claims against the United States, in part because it does not provide for the thorough factual and legal determinations appropriate for resolving disputes over title. The handling of the Alaska claims does little to assuage these concerns. Therefore, I look forward to your answers to my questions.

Sincerely yours,

Joseph I. Lieberman
Ranking Member