

STATE OF ALASKA

IBLA 2001-387

Decided December 2, 2005

Appeal from decision of the Alaska State Office, Bureau of Land Management, approving lands for conveyance to Native regional corporation. AA-8104-1 and AA-8104-2.

Set aside and remanded.

1. Alaska: Generally--Alaska: Alaska Native Claims Settlement Act--Alaska: Navigable Waters--Alaska: Statehood Act--Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances--Alaska Native Claims Settlement Act: Conveyances: Native Land Selections: Regional Selections: Generally

On the date of Alaska Statehood (January 3, 1959), the State received title to submerged lands forming the bed of navigable rivers within its borders pursuant to the Equal Footing Doctrine, as codified in the Submerged Lands Act of 1953, 43 U.S.C. § 1301 (2000). Lands situated in beds of navigable waterways in the State were not available for selection by regional corporations, pursuant to the Alaska Native Claims Settlement Act. Nevertheless, the State could not receive title to a river “island” that was in existence at the time of Statehood, as it was not then part of the bed of the navigable waterway. The question of whether land was an “island” in 1996 is not controlling, as an “island” that emerged from the riverbed after Statehood in 1959 would belong to the State.

## 2. Alaska: Navigable Waters--Words and Phrases

“Island.” Through the evolution of American common law, the term “island” for purposes of surveying river boundaries has become defined as an upland area that is surrounded by water when the river is at a stage known as the ordinary high water mark (OHWM). Because the definition of OHWM itself has become involved, an island may be redefined as land that is surrounded by a line marked by the action of the water upon the soil of the island, such that the upland (woody types) vegetation is removed by the constant action and presence of water over longer periods of time, and the character of the soil is altered as well. However, if an OHWM can be discerned around a questioned gravel or sand bar (by means of woody vegetation present or other marks on the soil), the supposed bar must then be an island; a bare rock protruding well above a reasonable ordinary high water mark might thus be an island even without vegetation.

## 3. Alaska: Generally--Alaska: Alaska Native Claims Settlement Act--Alaska: Navigable Waters--Alaska: Statehood Act--Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances--Alaska Native Claims Settlement Act: Conveyances: Native Land Selections: Regional Selections: Generally

A BLM decision implicitly determining that lands within the Copper River were an “island” (and thus were situated above the ordinary high water mark at the time of Alaska Statehood on January 3, 1959) will be set aside where the record does not contain evidence or analysis supporting that determination.

APPEARANCES: John T. Baker, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for appellant; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Patrick B. Gilmore, Esq., Anchorage, Alaska, for Ahtna, Inc.

## OPINION BY ADMINISTRATIVE JUDGE HUGHES

The State of Alaska (State) has appealed a portion of the July 26, 2001, decision (hereafter “decision”) of the Alaska State Office, Bureau of Land Management (BLM), approving for conveyance to Native regional corporation Ahtna, Inc. (Ahtna), a portion of lands it selected pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1611(c) (2000). Included in the lands conveyed to Ahtna was land in the Copper River shown on the completion plat of survey officially filed June 17, 1996, as Lot 7, sec. 19, T. 1 S., R. 3 E., Copper River Meridian.<sup>1/</sup> (Decision at 3.) For simplicity, we shall refer to that land, as well as Lots 8 and 9, sec. 18, T. 1 S., R. 3 E., Copper River Meridian, as the “islet,” without attaching any legal significance to that term.

On July 24, 1974, and July 29, 1975, respectively, Ahtna filed regional selection applications AA-8104-1 and AA-8104-2 pursuant to section 12(c) of ANCSA,

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<sup>1/</sup> The State’s notice of appeal did not identify what lands its appeal concerns. On Dec. 14, 2001, the State clarified that it was appealing BLM’s decision insofar as it concerned the conveyance of Lots 8 and 9, sec. 18, and Lot 7, sec. 19, T. 1 S., R. 3 E., Copper River Meridian. Reference to the plat of completion survey shows that the State’s description refers to a single parcel of land situated in the Copper River (referred to herein as the “islet”), encompassing a total of 67.58 acres. Our review is accordingly limited to considering whether BLM’s decision to convey to Ahtna the single islet described as Lots 8 and 9, sec. 18, and Lot 7, sec. 19, T. 1 S., R. 3 E., Copper River Meridian, was correct.

The decision under appeal actually did not expressly convey Lots 8 and 9 in Section 18. This is apparently because, in October 1981 via interim conveyance No. 442 (IC 442), BLM had already conveyed lands in Section 18 to Ahtna, “excluding the Copper River.” As BLM deemed Lots 8 and 9 in Section 18 to be islands outside the Copper River, it presumably believed that they had already been conveyed by virtue of IC 442, such that they did not need to be expressly addressed in the decision finalizing the conveyance. The record otherwise confirms that BLM considered Lots 8 and 9 in Section 18 to be conveyed to Ahtna, as the draft patent to Ahtna expressly includes them. (By contrast, Section 19 was not included in the IC and Patent No. 50-82-0007 covered only Lots 1 through 6 in Section 19; as a result, BLM’s decision presumably had to expressly address Lots 7 and 8 in Section 19 to clarify that they were being conveyed.) As no basis appears for BLM to treat Lots 8 and 9 in Section 18 any differently than it treated Lot 7 in Section 19, this decision necessarily pertains to all three lots making up the single islet.

We note that it would have been helpful for BLM to explain the mechanics of the conveyance in its decision, and that much confusion would have been avoided if it had done so.

43 U.S.C. § 1611(c) (2000), for lands withdrawn by section 11(a)(1) of ANCSA, 43 U.S.C. § 1610(c) (2000). Regional selection application AA-8104-2 included the township in question. On October 23, 1981, BLM issued IC 442 approving lands “excluding the Copper River” in Section 18 of that township for patent to Ahtna, but not including any lands in Section 19. Lots 1 through 6 in Section 19 (lands forming the south bank of the Copper River) were patented to Ahtna on that date via Patent No. 50-82-0007.

By the July 26, 2001, decision on appeal, BLM determined to convey the islet, among other selected lands, to Ahtna. Thus, the decision approved for conveyance to Ahtna Lot 7, sec. 19, T. 1 S., R. 3 E., Copper River Meridian, “as shown on the completion plat of survey officially filed June 17, 1996.”<sup>2/</sup> (Decision at 2-3.) BLM expressly excluded from the conveyance “the submerged lands, up to the ordinary high water mark [(OHWM)], beneath” the Copper River. *Id.* at 3.<sup>3/</sup> (Decision at 3.) Reference to the completion plat of survey shows that BLM determined that the islet was included in the lands to be patented to Ahtna, and, *a fortiori*, that the islet was not considered “submerged lands, up to the [OHWM], beneath” the Copper River.

In its statement of reasons for appeal (SOR), the State points out that there is nothing in the BLM decision to suggest that BLM considered evidence of the condition of the relevant portion of the Copper River as of January 3, 1959, the date of Alaska Statehood, in its implicit determination that the islet was a Federally-owned “island” that could be conveyed to Ahtna. It submits that it is clear from aerial photography from that time (which it asserts BLM apparently did not consider) that the islet was in fact largely unvegetated gravel bars at that time, rather than permanently vegetated uplands existing above the OHWM. *See* SOR at 4.

Thus, the State asserts that BLM’s 1996 survey indicates only that the islet had emerged by 1996, but did not establish the presence of this land when Alaska obtained Statehood on January 3, 1959. It follows from the State’s view that, since these areas were submerged lands at the time of Alaska Statehood, they have accordingly been owned by the State since January 3, 1959, and are not subject to conveyance to Ahtna.

The State filed an affidavit by a registered surveyor employed as the Statewide Platting Supervisor for the State’s Department of Natural Resources, Division of

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<sup>2/</sup> It also implicitly approved Lots 8 and 9, sec. 18, T. 1 S., R. 3 E., Copper River Meridian. *See* n.1, *supra*.

<sup>3/</sup> BLM had previously determined that the Copper River was “navigable because it has been or could be used in connection with travel, trade and commerce.” *Id.* The navigability of the Copper River is not in dispute in this appeal.

Mining Land and Water, Land Survey Unit. Based on his preliminary review of the decision, plats, and maps, he expressed the opinion that BLM's "decision appears to include islands within the Copper River that were submerged at the time of Alaska Statehood on January 3, 1959, and have emerged from the bed of the river since that date," including the islet. (Petition for Stay, Ex. A at 2.) He stated that he had

compared the survey plat on which the BLM decision is based with 1:63, 500 USGS quadrangle map, Valdez D-3, dated 1958 with minor revisions in 1967. This comparison shows that an island now platted by BLM as lot 8 section 19, T. 1 S., R. 3 E., Copper River Meridian, is nearly identical with the island depicted on the USGS quad sheet as an unvegetated gravel bar, considered part of the bed of the river. An island now platted by BLM as Lot 7, Section 19, T. 1 S., R. 3 E., CRM, appears to be the result of two smaller unvegetated gravel bars merging into one as the result of accretions.

Id.<sup>4/</sup> Jennings opined that, as BLM's decision "contains no analysis of whether the islands were formed by accretions to land that was below ordinary high water as of January 3, 1959 \* \* \* it [would] not be possible for BLM to resolve this matter without further analysis, including the review of aerial photographs of the islands." Id.

BLM asks that the appeal be dismissed as the State lacks standing to challenge the decision. BLM also argues that the appeal should be dismissed because the State is attempting to bring an untimely appeal of the 1996 completion survey, notice of which the State received on June 11, 1996, and which, no objections having been received, was officially filed as accepted by BLM on June 17, 1996. (Answer at 4-5.) BLM asserts that the State's challenge to the survey location of the land as being an island as opposed to a gravel bar is the sort of issue that should have been raised in protest of the survey in 1996. (Answer at 5.)

To have standing to appeal from a BLM decision under 43 CFR 4.410(a), the appellant must be both a party to the case and adversely affected by that decision.

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<sup>4/</sup> It is apparent that Jennings was intentionally referring to two separate parcels, each surrounded by the Copper River, and both located in Section 19. Jennings referred to the islet at issue in this appeal as "Lot 7, Section 19," thus omitting reference to the two small additional Lots 8 and 9 in Section 18 that (along with Lot 7) make up the islet.

Lot 8 in Section 19 is the easternmost one-third of a separate islet located in the Copper River to the west of the islet in question on appeal. That separate islet appears to have been surveyed as comprising various lots in secs. 13 and 14, T. 1 S., R. 2 E., and secs. 18 and 19, T. 1 S., R. 3 E., Copper River Meridian.

Stanley Energy, Inc., 122 IBLA 118, 120 (1992); Storm Master Owners, 103 IBLA 162, 177 (1988). To be a “party to a case” a person must have actively participated in the decision-making process regarding the subject matter of the appeal, as the State has done here. The Wilderness Society, 110 IBLA 67, 70 (1989); Mark S. Altman, 93 IBLA 265, 266 (1986). As to adverse effect, the State has asserted a claim of ownership of submerged lands, which ownership is manifestly affected by the BLM decision to convey lands to Ahtna, rather than by the survey itself. This claim of ownership is sufficient to confer standing. State of Alaska, 167 IBLA 156, 166 (2005); State of Alaska, 78 IBLA 390, 393 (1984).

BLM’s challenge to standing is, in fact, an assertion of untimeliness. BLM characterized the State’s appeal as an untimely attack on part of the 1996 survey. The State points out, however, that it does not object to BLM’s determination as to the existence of the islet as it was in 1996; the State objects to BLM’s assumption that what existed in 1996 would have been fast land in 1959. (Joint Reply of the State of Alaska filed Feb. 5, 2005, at 4-8.) We agree with the State that BLM’s approval of the survey in 1996 did not signal an intention to convey the islet to Ahtna. Although the survey showed the islet as land above the OHWM in 1996, the survey plat included express language that it did not purport to transfer any interest to which the State was entitled under the “Equal Footing Doctrine” and section 6(m) of the Alaska Statehood Act.<sup>5/</sup> We also agree that the disclaimer assured the State that it had no reason to appeal the survey, since BLM had indicated that it was not conveying any lands covered by the Equal Footing Doctrine or the Statehood Act by virtue of approving the survey. That action was not undertaken until the decision at issue. Since the State timely appealed that decision, the matter is properly before us for review. BLM’s motion to dismiss is denied.<sup>6/</sup>

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<sup>5/</sup> That language states: “Acceptance of this survey does not purport to transfer any interest in submerged lands to which the State of Alaska is entitled under the Equal Footing Doctrine and Section 6(m) of the Alaska Statehood Act, P.L. 85-508, notwithstanding the use, location, or absence of meander lines to depict water bodies.” (Completion Survey Plat filed June 17, 1996.)

<sup>6/</sup> BLM also contends that the State expressly rescinded its selection of lands in secs. 18 and 19, T. 1 S., R. 3 E., Copper River Meridian, and avers that the State therefore has no basis for asserting an interest in this location. (Motion to Dismiss at 3.) The Aug. 20, 1981, decision on which this argument is based, however, makes clear that the State’s agreement to rescind its selection excluded the Copper River. See Decision dated Aug. 20, 1981, at 5. Thus, BLM’s own decision demonstrates unequivocally that the State retained its interest in submerged lands in those sections.

On January 3, 2005, Ahtna filed an answer to the State's SOR, asserting that the "State has presented compelling evidence that the lands in question were submerged as of the date of statehood," and that the "lands accordingly were excluded by the express terms of the interim conveyance and decision, and were never within the BLM's power to convey." (Ahtna Answer at 2.) Thus, Ahtna concurs with the State's request that the matter be remanded to BLM with instructions to reconsider the status of the disputed islet. <sup>7/</sup>

[1] There is no dispute that, on the date of Statehood (January 3, 1959), the State received title to submerged lands forming the bed of navigable rivers within its borders pursuant to the Equal Footing Doctrine, as codified in the Submerged Lands Act of 1953, 43 U.S.C. § 1301 (2000). See State of Alaska v. United States, 662 F. Supp. 455, 457 (1987), aff'd sub nom. State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989); State of Alaska, 113 IBLA 80, 84-85 n.6 (1990). Submerged lands situated in beds of navigable waterways in the State were not available for selection by Ahtna, pursuant to ANCSA. Id. That the Copper River is a navigable river is undisputed here, and this conclusion has been documented in numerous BLM decisions in the record before us. See e.g. Decision dated Aug. 20, 1981, at 27. Nevertheless, the State could not receive title to a river "island" that was in existence at the time of Statehood, as it was not then part of the bed of the navigable waterway. Scott v. Lattig, 227 U.S. 229, 242-44 (1913). Thus, the islet belongs to the State (and is therefore not available to be conveyed to Ahtna) if the lands that comprise it were not an "island" on the date of Statehood. <sup>8/</sup> The question of whether the islet was an "island" in 1996 is not controlling, as an "island" that emerged from the riverbed after Statehood in 1959 would belong to the State. Humble Oil & Refining Co. v. Sun Oil Company, 190 F.2d 191, 196 (5th Cir. 1951), rehearing denied, 191 F.2d 705 cert. denied, 342 U.S. 920 (1952); see David A. Provinse, 78 IBLA 85, 90 (1983).

[2] The State proffers the following concerning the proper definition of the term "island": "Through the evolution of American common law, the term 'island' for

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<sup>7/</sup> Alternatively, Ahtna requests that, if the BLM conveyance decision is reversed as to any of these lots, then the acreage should not be charged to it and it should be allowed to substitute acreage elsewhere. Id. at 3. BLM should consider that question following completion of its review of the evidence provided concerning the character of the islet as of Statehood.

<sup>8/</sup> Conversely, if the lands in the islet existed as land above the OHWM at the time of Statehood, i.e. if the islet was an "island" in the legal sense of the term, the lands would have remained public lands that may be surveyed and disposed of by the United States. See, e.g., State of South Dakota, 166 IBLA 210, 223 (2005), and cases cited.

purposes of surveying river boundaries has become defined as ‘an upland area that is surrounded by water when the river is at a stage known as the ordinary high water mark (OHWM),’ citing J. Simpson, *River & Lake Boundaries* (1994), at 232, discussing Handly’s Lessee v. Anthony, 18 U.S. 374 (1820). We note that Simpson adds as follows, concerning the importance of finding vegetation in determining whether lands are above the OHWM:

Because the definition of [OHWM] itself has become involved, an island may be redefined as land that is surrounded by a line marked by the action of the water upon the soil of the island, such that the upland (woody types) vegetation is removed by the constant action and presence of water over longer periods of time, and the character of the soil is itself altered as well.

Id. However, Simpson cautions that, “[i]f an OHWM can be discerned around a questioned gravel or sand bar (by means of woody vegetation present or other marks on the soil), the supposed bar must then be an island,” and that a “bare rock protruding well above a reasonable ordinary high water mark would thus be an island by definition even without vegetation.” Id.

The BLM Manual of Surveying Instructions, 3-115 (1973 ed.) relies heavily on the presence or absence of vegetation, defining the high-water mark as “the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation.” When confronted with the task of ascertaining the boundary of an island in terms of the “high-water mark” of the Alaskan river in which the island was situated, the Court in State of Alaska, Department of Natural Resources v. Pankratz, 538 P.2d 984, 988-89 (Alaska 1975), offered the following pertinent summary of Federal law on the subject, establishing a “vegetation test”:

The meaning of the “ordinary high-water mark” under federal law is somewhat unclear. While such a boundary line can be traced by the eye without difficulty, a definition of the phrase is useful when a bona fide dispute arises.

In Oklahoma v. Texas, 260 U.S. 606, 625-40, (1923), the Supreme Court held that the high-water mark is coterminous with the outer limit of the “bed” of the river. The Court defined the bed of the river as land which is “kept practically bare of vegetation by the wash of the waters of the river from year to year, in their onward course, although parts of it are left dry for months at a time . . .” Oklahoma v. Texas, *supra* at 632. In United States v. Claridge, 279 F. Supp. 87, 91 (D.C. Ariz. 1967), *aff’d*, 416 F.2d 933, 934 (9th Cir. 1969), cert. denied, 397 U.S. 961 (1970), the court stated:

“The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow.” (footnote omitted)

The relevance and method of ascertaining the ordinary high-water mark was definitively explained in Borough of Ford City v. United States, 345 F.2d 645, 648-51 (3rd Cir. 1965), cert. denied, 382 U.S. 902 (1965). In that case the court noted that the demarcation of boundaries along navigable streams is generally readily observable. The court went on to explain that the high-water mark usually can be detected by observing the presence of multiple factors, including shelving, a change in the character of the soil, the absence of litter, and the destruction of terrestrial vegetation. When the multiple factors comprising a high-water mark cannot be found in one location, it is permissible to check for them at other sites along the stream.

If these multiple phenomena cannot be found, resort to the so-called “vegetation test” alone is appropriate. Under these circumstances the high-water mark rests at the point below which the value of the soil for agricultural purposes has been destroyed. This does not mean that all vegetation is absent below the mark, but rather that terrestrial vegetation will not grow there. [Emphasis added; footnotes, headnotes, and parallel cites omitted.]

See also Alaska Power Administration, 119 IBLA 301, 307 (1991) (reversed on reconsideration on other grounds, 123 IBLA 109 (1992)).

The record contains a copy of memoranda dated December 9, 1986, and May 10, 1993, setting out criteria applicable in Alaska for determining the meander line for gravel, sand, and cobble bars with and without vegetation.<sup>2/</sup> These memoranda are particularly significant because they not only contain standards for determining OHWM by field survey methods, but also by photogrammetric methods. The latter are important where, as here, it is necessary to use aerial photographs from specific points in time to determine the status of lands as of the dates of events such as Statehood. It appears that these standards were applied to determination of meander lines in Survey Group 220 (the survey that was approved in June 1996),

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<sup>2/</sup> The 1993 memorandum supersedes a Mar. 6, 1984, memorandum on the same topic because of technological advances in photogrammetric methods.

among others. Although the standards are too lengthy to set out in their entirety, we would note that they set out a vegetation rule that islands may be shown where supporting 5 percent or more vegetative cover. (1993 Memorandum at 180 ¶ (f).) However, for vegetation cover of 5 to 15 percent, island classification must be verified by field investigation. Id.

BLM must have some standard for determining that lands are or were above OHWM based on review of aerial photographs showing vegetation and other indicia of the level of a river. We note the absence of any reference to such standard in the context of the current decision. It is incumbent upon BLM to identify its rules for deciding the status of lands in terms of their relation to OHWM.

[3] The question presented for review is whether BLM's decision to convey the islet to Ahtna is supported by the record before us. Following our independent review of the record, we conclude that it is not and that it is necessary to remand the matter to BLM for additional consideration, as requested by the State and Ahtna.

BLM's inherent conclusion that the islet was an "island" as of the date of Statehood (and was therefore retained in Federal ownership in 1959 and available for selection by Ahtna) is not supported by the status of the islet as of the 1996 survey. Such survey cannot be expected to establish the status of the islet as of 1959, in view of the changeability of the Copper River in the area in question, which is evident from the case record. <sup>10/</sup>

The case record does not contain adequate information or analysis showing why BLM concluded that the islet was suitable for conveyance to Ahtna. There are no aerial photographs or GS maps from the 1950's in BLM's case record. <sup>11/</sup> There is

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<sup>10/</sup> Comparison of BLM's plats of survey in the record prepared in various years from the 1970s through 2000 reveals shifts in the positions of islands and gravel bars in this portion of the Copper River. The completion plat of survey officially filed June 17, 1996, on which BLM based the disputed portion of the conveyance, shows one island straddling the line between secs. 18 and 19, with the larger portion in Section 19.

Other plats in the record show multiple islets, or none. For example, plat maps dated May 22, 1979, and Nov. 19, 1984, show no island in the Copper River in Section 19. A Copper Center Village selection map evidently written in 1980 suggests numerous islets or gravel bars in this portion of the Copper River. A topographic map dated July 24, 1974, in the record shows one islet near the east edge of Section 19 and shaded areas, presumably gravel bars.

<sup>11/</sup> Although (as discussed below) the State has provided photographs from 1955 and  
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only a memorandum prepared by the BLM surveyor and dated August 24, 2001, after the date of the decision in question (prepared in anticipation of the filing of an appeal by the State), stating:

I was asked to look at two surveyed islands in the Copper River and give my opinion as to whether they existed at Statehood.

The original meanders are taken from 1978 photography and are correctly interpreted. The U.S.G.S. quadrangle map, "VALDEZ (D-3), ALASKA, 1958 edition with minor revisions in 1967," shows what is now Lot[s] 7 and 8, Sec. 19 as substantial sand/gravel islands. The 1958 GS sheet is based on 1955 and 1957 photography. Comparing the 1958 GS sheet with the 1978 photography shows that the lands in question appear in much the same configuration on both sources. There has been some erosion and accretion. Lot 7 is heavily vegetated and Lot 8 meets the photo-interpretation requirements for survey based on vegetation. <sup>[12/1]</sup>

To verify this, I created a transparent overlay from the 1958 GS sheet at plat scale. It is apparent that the islands in question were lands in place just prior to Statehood and in 1978.

(Memorandum dated Aug. 24, 2001, from Cadastral Surveyor to Group 220 File.) The overlay BLM prepared to depict the status of the area in 1955 and 1957 simply shows multiple islets in a braided river. There is no indication whether some or all of those islets were above the OHWM. Further, although those islets are in roughly the same position as the islet at issue on appeal, the fact that the Copper River had "braided" the lands in 1955 and 1957 strongly suggests that the islets were low in the water, possibly below OHWM. Nor do we find any support in the record for the memorandum's apparent conclusion that interpretation of photos contemporary to the date of Statehood showed that any of multiple islets (or any lands located in the islet under consideration in this appeal) met the vegetation test described above, or that any standard was applied showing that the islets were above the OHWM in 1955 and 1957.

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<sup>11/</sup> (...continued)

1957, they do not show the existence of vegetation in the area covered by the islet as surveyed in 1996.

<sup>12/</sup> It appears that this statement is reversed. It is Lot 8, Section 19, that appears heavily vegetated. It is Lot 7 that, in order to be considered to be above the OHWM, would have to meet photo-interpretation requirements for survey based on vegetation.

Further, it is apparent that this memorandum was prepared after the fact to justify BLM's July 26, 2001, decision in response to the State's request that the decision be vacated. On the same day the memorandum was issued, BLM determined not to vacate that decision, based upon this memorandum. Although the memorandum was written in response to a question of whether the July 26, 2001, decision could be consistent with the situation on the ground at the time of Statehood, it does not reflect whether BLM actually considered evidence from the 1950's in deriving the 1996 plat of completion. It appears from the December 9, 1986, memorandum regarding photo interpretation for Survey Group 220 that BLM reviewed only aerial photographs taken after 1978, and the Field Instructions for Survey Group 220 direct surveyors to conduct resurveys of lands not surveyed until the 1970's. The 1993 memorandum updating BLM's use of photo interpretation does not address the timing of the photography. It thus appears clear that the 1996 survey related to the status of the lands decades after Statehood.

Although the case record contains numerous plats from different years subsequent to Statehood which show differently shaped islets in different locations in different years in the disputed stretch of the Copper River, those depictions do not specifically consider whether those islets were above the OHWM and thereby qualified as "islands." To the contrary, the varying locations and shapes indicated on the maps, photographs and plats suggest gravel bars shifting position, emerging and submerging, rather than firm islands in fixed positions. Although the shifting positions after Statehood are not conclusive as to the locations of any islands in the river on the date of Statehood, the ongoing pattern of shifting positions lends credence to the State's assertion that what protrudes from the river now was not fast land at the time of Statehood.

More importantly, the State has produced evidence to support its contention that the riverbed in Sections 18 and 19 was quite different in the 1950's and that the islet that BLM lotted as an island in these sections in 1996 did not yet exist at the time of Alaska Statehood in 1959. The State submitted a series of aerial photographs showing the Copper River taken in different years. All of the photographs show the river spreading out abruptly and distinctively near the west boundary of the township as the river crosses into Sections 18 and 19. Unlike the narrower single-channel stretch upstream, the wider river crossing these sections is filled with numerous channels threading through multiple areas of varying density in the aerial photographs. The many channels, gravel bars and islets shift position from year to year. In all years, the densest riverbed zones, shown darker in the 1950's photographs and redder in later infrared photography, were separated from the riverbanks and from each other by water channels. To our admittedly untrained eye, it appears that what little vegetation there is on the many islets in Section 19 in 1955 and 1957 is on lands north of the islet in question (SOR Exs. 7 and 8). Thus, the islet (the area BLM lotted as an island in 1996) is not apparent as a vegetated area in the

photographs taken in the 1950's. Nor is there any indication that the lands could be seen as above the OHWM for any other reason.

We conclude that the evidence in the record does not support BLM's implicit determination that the islet in question was an "island" at the time of Alaska Statehood. Further, the State produced evidence on appeal suggesting that the riverbed in Sections 18 and 19 was quite different in the 1950's; its aerial photography does not verify what BLM lotted in 1996. As the State's affiant observed, it is not apparent that BLM's technical experts had the opportunity to assess this evidence prior to the filing of this appeal. In these circumstances, BLM's decision is properly set aside and the matter remanded for further consideration of the controlling question whether the islet in question was an "island" as of the date of Alaska Statehood on January 3, 1959.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded.

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David L. Hughes  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge