



STATE OF ALASKA

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Decided December 16, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
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STATE OF ALASKA

IBLA 2010-136

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Appeal from a decision of the State Director, Alaska State Office, Bureau of Land Management, rejecting an application for a recordable disclaimer of interest for lands underlying the Stikine River and its interconnecting sloughs within the Tongass National Forest. AA-085787.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Disclaimers of Interest

Section 315 of FLPMA, 43 U.S.C. § 1745 (2006), authorizes the Secretary of the Interior to issue a recordable disclaimer of interest in any lands where the disclaimer will help remove a cloud on title to such lands and where he determines, *inter alia*, that a record interest of the United States in the lands has terminated by operation of law or is otherwise invalid. In accordance with 43 C.F.R. § 1864.1-4, BLM will not issue a recordable disclaimer of interest over a valid objection of the land management agency having administrative jurisdiction over the affected lands. To constitute a valid objection, the objection must present a sustainable rationale that the objecting agency claims United States title to the lands subject to the disclaimer application.

2. Federal Land Policy and Management Act of 1976: Disclaimers of Interest

When the land management agency having administrative jurisdiction over the lands subject to an application for a recordable disclaimer of interest objects to the issuance of the disclaimer and the party requesting the disclaimer provides significant information challenging the validity

of the objection, BLM must evaluate the evidence and arguments both supporting and refuting the sustainability of the agency's claim of United States' title and must provide a reasoned analysis explaining the basis for its conclusion that the agency has or has not presented a valid objection as defined by the regulations. While BLM's evaluation is not an adjudication designed to definitively establish whether the United States unequivocally has title to the lands, the evaluation must explain why, despite the contravening evidence, the agency's objection is nevertheless sustainable. A BLM decision finding that an agency has presented a valid objection despite contradictory evidence will be set aside and remanded where the decision contains no analysis of how or why BLM reached that conclusion.

APPEARANCES: J. Anne Nelson, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Senior Attorney, Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Dawn M. Collinsworth, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for intervenor, U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE GREENBERG

The State of Alaska (State) has appealed the April 2, 2010, decision of the State Director, Alaska State Office, Bureau of Land Management (BLM), rejecting the State's application for a recordable disclaimer of interest pursuant to section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1745 (2006), and its implementing regulations in 43 C.F.R. Subpart 1864, for the lands underlying the Stikine River and its interconnecting sloughs located within the Tongass National Forest in southeast Alaska. BLM rejected the application on the ground that the Forest Service, U.S. Department of Agriculture (Forest Service), had provided a valid objection under 43 C.F.R. § 1864.1-4 that presented a sustainable rationale that the Forest Service claimed United States title to the affected land. The State denies that the Forest Service has established a sustainable rationale for the claimed title and objects to BLM's failure to evaluate the evidence both supporting and refuting the claim of United States title or to explain the basis for its determination that the Forest Service's objection is valid.

In accordance with 43 C.F.R. § 1864.1-4, BLM will not issue a recordable disclaimer of interest over a valid objection of the land management agency having administrative jurisdiction over the affected lands. To qualify as a valid objection

under that regulation the objection must present a sustainable rationale that the objecting agency claims United States title to the lands subject to the disclaimer application. Although the Forest Service objected to the issuance of a recordable disclaimer of interest for the lands underlying the Stikine River and its interconnecting sloughs and provided documents and precedent supporting its claim of title to the land, the State provided countervailing arguments and precedent undermining the claim. In its decision, BLM simply recited the parties' positions and, without any explanation or analysis, concluded that the Forest Service had provided a valid objection that presented a sustainable rationale that the United States had title to the affected land. We conclude that, although BLM need not conduct a formal adjudication designed to determine definitively whether the United States unequivocally has title to the lands, it must evaluate and weigh the conflicting evidence and precedent and explain the basis for its determination that, despite the contravening evidence, the agency's objection is sustainable. Since BLM failed to provide any analysis or justification for its conclusion that the Forest Service had provided a valid objection and therefore that the State's application for a recordable disclaimer of interest had to be rejected, we set aside BLM's decision and remand the matter to BLM for further action.

Background

By application dated February 17, 2005, the State requested that, in accordance with section 315 of FLPMA, 43 U.S.C. § 1745 (2006), and 43 C.F.R. Subpart 1864, BLM issue a recordable disclaimer of interest for the lands underlying the Stikine River and all named and unnamed interconnecting sloughs

between the ordinary high water lines of the left and right banks from the Alaska/Canada International Border in T. 60 S., R. 86 E., Copper River Meridian, Alaska, downstream approximately 27 miles to all points of confluence at its mouth in the Eastern Passage, Dry Strait and Frederick Sound, within T. 60 S., R. 82 E., T. 61 S., R. 83 E. and T. 61 S., R. 84 E.; and T. 62 S., R. 82, 83, and 84 E., Copper River Meridian, Alaska.

Feb. 17, 2005, Application at 1. The State asserted that it had title to the submerged lands, which lie within the exterior boundaries of the Tongass National Forest, by virtue of the Equal Footing Doctrine under which, upon admission into the Union, states created from Federal territories have all the powers of sovereignty and jurisdiction enjoyed by the original states, including title to lands underlying navigable waters within their boundaries. The State claimed that the Stikine River and interconnecting sloughs were navigable and thus that the bed of those waters automatically passed to the State upon statehood. The State asserted that a recordable disclaimer of interest was necessary to lift the cloud on the State's title to

those lands created by the lack of any permanent determination of the ownership of the lands. The State's application included extensive analysis and documentation supporting its claim that the River and sloughs were navigable. The State amended its application on June 8, 2005, to claim ownership based not only on the Equal Footing Doctrine, but also on, *inter alia*, the Submerged Lands Act of 1953, 43 U.S.C. § 1311(a) (2006), and the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (July 7, 1958) (the text of which can be found in the notes at 48 U.S.C. Chapter 2 (2006)).

On June 4, 2007, in response to a BLM request, the State provided justification for its position that the bed of the Stikine River passed to the State at statehood. The State asserted that under the Equal Footing Doctrine and the Submerged Lands Act, there was a strong presumption that tidelands and navigable inland waters passed to a state on statehood as a matter of constitutional and statutory right and that neither the applicable statutory authority pursuant to which the Tongass National Forest was created nor the withdrawals creating the Forest rebutted that presumption. The State noted that, under the two-part test established in *Utah Division of State Lands v. United States*, 482 U.S. 193, 202 (1987) (*Utah Lake*), in order for the United States to overcome the presumption, it had to show (1) that Congress clearly intended to include the submerged lands in the reservation and (2) that Congress affirmatively intended to defeat the State's title to the submerged lands.

The State contended that neither of the two Acts pursuant to which the Tongass National Forest was created, section 24 of the Creative Act of Mar. 3, 1891, 26 Stat. 1103, formerly codified at 16 U.S.C. § 471, and the Organic Administration Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. §§ 473-482 (2006), supported the inclusion of submerged lands within the Forest. To the contrary, the State averred that, in accordance with *United States v. New Mexico*, 438 U.S. 696, 707 n.14 (1978), those Acts limited the establishment of national forests to only two purposes – securing favorable water flows and furnishing a continuous supply of timber – neither of which requires a reservation of submerged lands. The State also pointed out that the Acts provided for the creation of national forests from public lands, which, according to the State, is a term of art referring only to lands subject to sale or disposition under the general land laws, and not to lands under navigable waters held in trust for future states.

The State further maintained that the withdrawals creating and expanding the Tongass National Forest evinced neither a congressional intention to include submerged lands in the Forest nor an intention to defeat a future state's title to those lands. The State asserted that, in accordance with *Montana v. United States*, 450 U.S. 544, 554 (1981), the fact that navigable waters lie within the boundary of a national forest withdrawal does not make the riverbed part of that withdrawal. As further support for its position, the State cited *State of Alaska*, 102 IBLA 357, 361 (1988)

(*Katalla River*), in which the Board of Land Appeals (Board) concluded that neither the Creative and Organic Administration Acts nor the proclamations creating the Chugach National Forest prevented the submerged lands beneath the Katalla River from passing to the State pursuant to the Alaska Statehood Act. The State contended that, since the same Acts and very similar withdrawal proclamations were involved in the creation of the Tongass National Forest, the Board's analysis in *Katalla River*, which was reaffirmed in the January 6, 1994, Board order (IBLA 86-768) reinstating that decision and in *State of Alaska*, 150 IBLA 112, 126 (1999), applied equally to the lands underlying the Stikine River in the Tongass National Forest, and that BLM therefore should issue a recordable disclaimer of interest for the bed of the Stikine River.

In response to the application, BLM prepared a Draft Summary Report analyzing the issues presented by the application. In the report, BLM concluded that the Stikine River was navigable (although additional information was needed before the navigability of the interconnected sloughs could be determined) and that Presidential Proclamation 846 issued on February 16, 1909, which expanded the Tongass National Forest to include the Stikine River did not defeat the State's title to the bed of that navigable river. In reaching this conclusion, BLM relied on the Board's reasoning in *Katalla River*, including its analysis of the Supreme Court's decision in *Utah Lake*. BLM published notice of the State's recordable disclaimer application and the Draft Summary Report in the *Federal Register* on August 22, 2007, and provided interested parties 60 days to comment on the report. 72 Fed. Reg. 47067 (Aug. 22, 2007).

On October 22, 2007, the Forest Service objected to the issuance of a recordable disclaimer of interest to the State for the submerged lands underlying the Stikine River and interconnecting sloughs. While not disputing the navigability of the Stikine River itself, the Forest Service claimed that the United States had reserved the lands underlying the Stikine River and had intended to defeat state title to those lands at statehood, citing the Tongass Forest withdrawal proclamations' identification of submerged features in their descriptions of the boundaries of the withdrawals as evidence of the intent to include submerged lands within the withdrawals. The Forest Service further asserted that, on December 29, 1949, prior to statehood, the Regional Forester had classified a portion of the submerged lands at issue as part of the Stikine Flat Wildlife Area, although it noted that the Regional Forester had subsequently revoked that classification on May 20, 1964, after statehood, and had designated a smaller area as the Stikine Waterfowl Management Area.

The Forest Service challenged the Draft Summary Report's conclusion that the 1909 Presidential Proclamation did not defeat the State's title to the bed of the navigable Stikine, asserting that this conclusion lacked support and failed to consider subsequent Supreme Court cases clarifying the test set forth in *Utah Lake*. The Forest

Service especially relied on *Alaska v. United States*, 545 U.S. 75 (2005) (*Glacier Bay*), in which the Court upheld the United States' claim that it had retained title to the submerged lands underlying Glacier Bay and other waters when it created Glacier Monument because section 6(e) of the Alaska Statehood Act had expressed Congress' intent to retain the submerged lands in Federal ownership, and *United States v. Alaska*, 521 U.S. 1 (1997) (*Dinkum Sands*), in which the Court held that the United States had retained title to the submerged lands within the National Petroleum Reserve (NPRA) and the Arctic National Wildlife Refuge because the boundaries of the reservations encompassed certain submerged features, retention of the disputed submerged lands was critical to achieve the purposes of the reservations, and the Alaska Statehood Act contained language preventing lands within the reserves from passing to the State. The Forest Service averred that the 1909 Presidential Proclamation expanding the boundary of the Tongass National Forest included references to submerged features and that retention of the submerged lands was necessary to further the Organic Administrative Act's purposes of securing favorable conditions of waterflows and of furnishing a continuous supply of timber because Federal ownership of the submerged lands would prevent State interference with the use of the waterways for transportation of timber, equipment, and Forest Service personnel.

The Forest Service further asserted that the Federal Government's intent to defeat State title could be gleaned from section 5 of the Alaska Statehood Act, which provided that, except as set out in section 6 of the Act, the United States retained title to all property to which it had title, including public lands; from section 6(a) of the Statehood Act, which authorized the State to select lands within National Forests; and from the Regional Forester's administrative withdrawal of the land as a wildlife reserve for the protection of waterfowl. The Forest Service also cited section 6(m) of the Statehood Act, which incorporated the Submerged Lands Act, as indicating Congress' intent to preclude state title to submerged lands when the applicable withdrawal orders required the inclusion of those lands in order to effectuate the purposes of the withdrawal. The Forest Service concluded that it had provided a valid objection that presented a sustainable rationale that it claimed Federal title to the subject lands, as required by 43 C.F.R. § 1864.1-4, and that, therefore, the State's application had to be denied.

The State responded to the Forest Service's objection on May 30, 2008, providing additional support for its claim that title to the lands underlying the Stikine River system vested in the State upon statehood.¹ The State pointed out that, as expressly decreed by the Supreme Court in *Alaska v. United States*, 546 U.S. 413, 415-16 (2006), the United States, including the Forest Service, had already explicitly

¹ BLM had suspended processing the application on Dec. 27, 2007, but had lifted that suspension on Apr. 22, 2008.

disclaimed all property interest in the submerged lands underlying marine waters within the external boundaries of the Tongass National Forest, *i.e.*, all lands permanently or periodically covered by tidal waters up to but not above the mean high tide line, which encompassed that portion of the State's disclaimer application covering the Stikine River delta and upriver for approximately 16-20 miles from the river's mouth. *See* May 30, 2008, State Response to Forest Service Comments at 2, 3. The State averred that the rationale for the 2006 disclaimer, including the distinction between national forests and some prestatehood wildlife preserves such as Glacier National Park, logically extended to the lands underlying the admittedly navigable waters of the Stikine River upriver of the mean high tide line. *Id.* at 3. The State asserted that, taken together, the Supreme Court decree confirming State ownership of the submerged marine lands within the Tongass National Forest boundaries, the logical extension of the rationale of that decree to the entire navigable Stikine River system and sloughs, and the Board's decision in *Katalla River* addressing the comparable withdrawal of the Chugach National Forest, established the State's entitlement to all the submerged lands covered in its recordable disclaimer application. *Id.* at 3, 4-5.

The State contended that neither *Dinkum Sands* nor *Glacier Bay* changed the strong presumption expressed in *Utah Lake* that title to the beds of navigable waters passed to the states upon statehood or the tough two-part test that had to be met to refute that presumption. Rather, the State asserted that in reaching the conclusion that the United States retained ownership of the lands at issue in those cases, the Supreme Court had applied the *Utah Lake* standards to situations that were readily distinguishable from the situation in this case, as to both the statutory authorities for the reservations and the expressed intent of the proclamations creating the reservations.

Specifically, the State noted that in *Dinkum Sands*, the Court relied first on the critical purpose of the NPRA to secure for national defense needs all petroleum deposits within that area's boundaries and the existence of those deposits in the subsurface formations extending beneath the area's submerged lands, which could be drained and depleted if the subsurface was not retained, in determining that the reservation creating the NPRA necessarily included those submerged lands, and second, on the explicit language of section 11 of the Alaska Statehood Act in finding that Congress had clearly intended that the United States retain ownership of the lands within the NPRA. *See* May 30, 2008, State Response to Forest Service Comments at 6. The State also cited the Court's determinations in that decision (1) that the executive action setting apart 8.9 million acres as a national Arctic Wildlife Refuge undoubtedly included periodically submerged tidelands because the boundary expressly followed named submerged offshore features, and the description of the area included countless lakes, ponds, marshes, river bottoms, and seacoast areas used by waterfowl, polar bears, arctic foxes, and whales; and (2) that

section 6(e) of the Statehood Act explicitly provided that lands withdrawn as Federal refuges for the protection of wildlife would not transfer to the State, thus affirmatively expressing Congress' intent that those submerged lands not pass to the State. *Id.* at 6-7. The State also pointed out that the decision in *Glacier Bay* relied on the articulated purpose of the creation of the Glacier Bay National Monument to preserve and scientifically study all facets of glaciers and their ecosystems, including the entire bay for which the monument was named, as evincing that the reservation inescapably included the lands underlying the bay, and on the language in section 6(e) of the Statehood Act as indicative of Congress' intent to defeat State ownership of those submerged lands because they were withdrawn for the protection of wildlife pursuant to the terms of the proclamations creating the Monument and the Antiquities Act of 1906, 16 U.S.C. § 431 (2006), authorizing that withdrawal.

The State asserted that, in contrast, neither the Creative and Organic Administrative Acts authorizing withdrawals for national forests nor the proclamations creating the Tongass National Forest demonstrated an intent to include submerged lands within the Forest or to deprive the State of ownership of those submerged lands. The State averred that under the Acts, especially the Organic Administrative Act as construed by the Supreme Court in *United States v. New Mexico*, national forests could be reserved for only two purposes – timber protection and favorable water supply, which was dependent upon the preservation of forest conditions – and not for aesthetic, environmental, recreational, or wildlife protection purposes. The State pointed out that the Acts limited national forests to public lands, a term generally referring to uplands subject to disposal under general laws and not to submerged lands under navigable waters. The State therefore argued that the authorizing legislation failed to evince the intent to include submerged lands as a part of a forest reservation or to defeat a state's title to such lands. *See* May 30, 2008, State Response to Forest Service Comments at 7-9, citing, *inter alia*, *Katalla River*. The State also disputed the Forest Service's contention that the Acts necessarily intended to include the submerged land in order to preserve rivers as means of transportation and to prevent State interference with that purpose, noting that, as the Supreme Court held in *Utah Lake*, even if land under navigable waters passed to a state, the Federal Government still had the authority to control, develop, and use the waters for its own purposes due to its dominant power to regulate commerce and navigation as authorized under the "navigable servitude" originating in the Constitution and preserved in the Submerged Lands Act, 43 U.S.C. §§ 1311(d), 1314 (2006). *See* May 30, 2008, State Response to Forest Service Comments at 9-10 n.12.

Turning to the proclamations creating the Tongass National Forest, specifically the 1909 proclamation that expanded the Forest to include the Stikine River, the State asserted that the proclamation withdrew only the additional upland public timber lands lying within the exterior boundaries described and delineated in the proclamation, and not the beds of navigable waters. The State further denied that

the reference to certain submerged features in the descriptions demonstrated an intent to include those submerged features within the reservation, noting that most of those submerged features underlay the marine waters that already had been disclaimed, lay outside the area at issue, or were simply boundaries of convenience. *Id.* at 10-11. As additional support for its position, the State cited longstanding opinions of both the Department of Agriculture and the Department of the Interior, issued in 1918 and 1950, respectively, in which both Departments concluded that the beds of navigable waters were not part of the reservation of forested public lands within the exterior boundaries of the Tongass National Forest. *Id.* at 11-12.

Finally, the State asserted that Congress did not intend to defeat state title to the bed of the navigable Stikine River and connected waterways. The State denied that section 5 of the Alaska Statehood Act setting forth the general rule that the United States would retain title to all property it held prior to Alaska's admission to the Union, subject to the exceptions in section 6 of the Act, constituted a general expression of the intent of the United States to retain title to submerged lands underlying navigable waters, asserting that such a general retention would conflict with both section 6(m) of the Act, which provided that the Submerged Lands Act applied to the State and granted the State the same rights as existing States, and the first paragraph of the Act, which declared that the State entered the Union on an equal footing with the other States in all respects. The State averred that the Supreme Court had already rejected the Forest Service's argument that a general expression of intent to retain was sufficient to defeat a state's title to submerged lands. *See* May 30, 2008, State Response to Forest Service Comments at 12-13, citing, *inter alia*, *Dinkum Sands*. The State further contended that section 6(a) of the Statehood Act, which authorized the State to select vacant and unappropriated forest lands adjacent to established communities or suitable for prospective community centers and recreational areas, did not defeat state title because that grant was not exclusive but was in addition to the rights provided by section 6(m) and the equal footing doctrine, pursuant to which the beds of navigable waters had vested in the State. *See* May 30, 2008, State Response to Forest Service Comments at 14. The State added that accepting the Forest Service's argument would write section 6(m), the Submerged Lands Act, and the equal footing doctrine out of the Statehood Act and eliminate Alaska's rights as an equal partner to the Union.² The State therefore denied that the Forest Service had provided a valid objection presenting a sustainable rationale that it claimed Federal title to the subject lands.

² The State also contended that the Regional Forester's recreational use classification did not defeat state title, noting that the lands so classified were part of the submerged marine lands, the title to which had previously been disclaimed by the United States, and that, in any event, classification of forest land for recreational use was not allowed under the authority of the Creative and Organic Administration Acts. *See* May 30, 2008, State Response to Forest Service Comments at 15.

On April 1, 2010, the Alaska State Office issued Instruction Memorandum (IM) No. AK-2010-012, setting out the procedures that office would follow when processing applications for recordable disclaimers of interest for lands beneath navigable waters. The IM discussed, *inter alia*, the procedures for dealing with the question of whether the land management agency with administrative jurisdiction over the land at issue had presented a valid objection to the issuance of the disclaimer. After citing the provisions of 43 C.F.R. § 1864.1-4, the IM stated that, while BLM would generally defer to an objection of the Federal land management agency, the objection had to provide a clear rationale that was not frivolous, was made in good faith, and was based on factual evidence or legal arguments. The IM added that, although the objection did not have to be beyond dispute, it had to contain more than bare conclusory assertions. The IM further indicated that “[a]s a general rule, BLM will consider disputes over legal questions as constituting a valid objection. An objection that identified controlling legal precedent would be valid. Uncertainty of the effects of a prestatehood reservation on submerged land title is another example of what would constitute a valid objection.” IM No. AK-2010-012 at 5 (footnote omitted). The IM also set out examples of factual objections that would qualify as valid objections.³

The State Director issued his decision on April 2, 2010. After briefly summarizing the Forest Service’s and the State’s respective positions, the State Director determined that the Forest Service’s objection to the issuance of the disclaimer was a valid objection because it presented a sustainable rationale that the Forest Service claimed Federal title to the submerged lands underlying the Stikine River and that, therefore the State’s disclaimer application had to be rejected. In language essentially echoing that of the IM, the State Director explained his decision as follows:

BLM must first consider the [Forest Service] objection to the approval of the State’s application. “A valid objection must present a sustainable rationale that the objecting agency claims United States title to the land for which a recordable disclaimer is sought.” (43 CFR 1864.1-4).

³ The IM noted that the factors identified in its discussion of valid objections were gleaned from a June 28, 2004, letter from the Assistant Secretary, Land and Minerals Management, to Senator Joseph Lieberman, and that, since the guidance in that letter was issued by the Assistant Secretary with programmatic oversight and authority, it was binding on BLM. *See id.* at 5, n.9. While BLM considers the letter binding, we need not decide that question here because, regardless of BLM’s interpretation of the binding nature of that letter, which is itself questionable, it is clear that an IM cannot conflict with applicable regulations. *See discussion, infra.*

The rationale must be based on factual evidence or legal arguments. The rationale cannot be frivolous and must be made in good faith. While the objection does not have to be beyond dispute, it must contain more than bare conclusory assertions that BLM's navigability determination is wrong. An objection that identifies a controlling legal precedent would be valid.

Uncertainty of the effects of a prestatehood reservation on submerged land title is one example of what may constitute a valid objection. The BLM has determined the [Forest Service] has met the criteria for a valid objection and provided a sustainable rationale for its objection to the State's application for a recordable disclaimer to the lands underlying the Stikine River.

Therefore, the State's application for the lands underlying the Stikine River, and all named and unnamed interconnecting sloughs, . . . must be, and is hereby, rejected due to the valid objection of the [Forest Service].

Decision at 5.

Discussion

On appeal the State argues that BLM erred by failing both to perform any analysis of the Forest Service's objection and the State's rebuttal and to provide a reasoned explanation for its conclusion that, despite the countervailing evidence and argument, the Forest Service's objection was nevertheless valid. The State also reiterates its arguments challenging the validity of the objection, asserting that the Forest Service has failed to present a sustainable rationale that the United States intended to retain title to the submerged lands and to defeat the State's title to those lands. The State requests that the Board set aside the decision and remand the matter to BLM for a proper evaluation of whether the Forest Service's objection truly presents a sustainable rationale that the State's title to the bed of the Stikine River has been defeated. BLM and the Forest Service contend that BLM's analysis is adequate and that its determination that the objection is valid must be affirmed.

We conclude that, although BLM need not conduct a formal adjudication designed to determine definitively whether the United States unequivocally has title to the lands, it must evaluate and weigh the conflicting evidence and precedent and explain the basis for its determination that, despite the contravening evidence, the agency's objection is sustainable. Since BLM failed to provide any analysis or justification for its conclusion that the Forest Service had provided a valid objection and therefore that the State's application for a recordable disclaimer of interest had

to be rejected, we set aside BLM's decision and remand the matter to BLM for further action.⁴

Statutory and Regulatory Framework

[1] Section 315(a) of FLPMA, 43 U.S.C. § 1745(a) (2006), authorizes the Secretary of the Interior, after consultation with any affected Federal agency, to issue a recordable disclaimer of interest in any lands “where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in land has terminated by operation of law or is otherwise invalid.”⁵ Although, in accordance with the provisions of 43 U.S.C. § 1745(c) and 43 C.F.R. § 1864.0-2(b), a disclaimer has the same effect as a quitclaim deed, a disclaimer “does not grant, convey, transfer, remise, quitclaim, release or renounce any title or interest in lands.” 43 C.F.R. § 1864.0-2(b); *see* 68 Fed. Reg. 494 (Jan. 6, 2003); *Brooks Land & Cattle Co., LLC*, 171 IBLA 149, 151 (2007); *James D. & Joyce J. Brunk*, 158 IBLA 284, 290-91 (2003).

As directed by 43 C.F.R. § 1864.1-4, “BLM will not issue a recordable disclaimer of interest over the valid objection of another land managing agency having administrative jurisdiction over the affected lands.” To constitute a valid objection under 43 C.F.R. § 1864.1-4, the objection “must present a sustainable rationale that the objecting agency claims United States title to the lands for which a recordable disclaimer is sought.”

Analysis

In this case, the Forest Service objected to the issuance of a recordable disclaimer of interest to the State for the lands underlying the Stikine River and its interconnecting sloughs and provided arguments and legal precedent which it averred demonstrated that the objection presented a sustainable rationale that the United States claimed title to those lands. The State countered the Forest Service's

⁴ The State has also requested that the Board direct BLM to determine the extent to which the disclaimer of the submerged marine lands within the Tongass National Forest encompasses the bed of Stikine River, *i.e.*, the extent to which the River is tidally influenced, and the navigability of Shakes Lake and Shakes Slough at statehood. On remand, BLM should address these issues only if they prove relevant.

⁵ Recordable disclaimers of interest are appropriate only where the United States does not claim title to the land. In cases where the United States does claim title, challenges to that title can only be brought pursuant to the Quiet Title Act, 28 U.S.C. § 2409a (2006). *See Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 286 (1983); *Alfred Jay Schritter*, 177 IBLA 238, 248-49 (2009).

objection and arguments with arguments and legal precedent, which it asserted fatally undermined the validity of the objection and established that, to the contrary, the affected submerged lands had passed to the State upon statehood and therefore should be disclaimed. Despite the conflicting evidence, argument, and precedent, the State Director's decision contains no analysis or evaluation of the persuasiveness of the parties' positions nor explains how and why, in light of the conflicting evidence, it concluded that the Forest Service's objection was valid. The issue now before us, which is one of first impression, focuses on the proper scope of the analysis BLM must conduct in order to determine whether an agency's objection to the issuance of a recordable disclaimer of interest presents a sustainable rationale that the United States claims title to the affected lands.

[2] Although the Forest Service contends that BLM should defer to an agency that objects to the issuance of a disclaimer, that position finds no support in either the statute or the regulations. Unlike section 316 of FLPMA, 43 U.S.C. § 1746 (2006), which explicitly requires not only consultation with but also the *approval* of the Federal agency administering the affected land before the Secretary may correct a patent, section 315 simply requires consultation with an affected agency prior to the issuance of a recordable disclaimer of interest. 43 U.S.C. § 1745(a) (2006). And, in promulgating the revised 43 C.F.R. Subpart 1864 regulations addressing recordable disclaimers of interest, which were effective February 5, 2003, BLM declined to adopt the Forest Service's suggestion that BLM refuse to approve a recordable disclaimer application over "the objections" of the Forest Service, opting instead to require that, in order to justify rejecting an application, the objection had to be *valid*, see 68 Fed. Reg. at 494, which revised regulation 43 C.F.R. § 1864.1-4 defined as an objection presenting a sustainable rationale that the agency claimed title to the land. Thus, neither the statute nor the regulations support the Forest Service's position that BLM should merely defer to a land management agency's objection to the issuance of a disclaimer.

We recognize that the IM states that BLM will generally defer to the land management agency's objection and thus appears to accept the Forest Service's claim of deference. Several critical flaws both in the guidance provided by the IM and in BLM's application of that guidance, however, undermine BLM's reliance on the IM as justification for its decision to reject the State's disclaimer application. As an initial matter, we note that a BLM IM is not binding on the Board or on the public at large. BLM IMs are not duly promulgated regulations having the force and effect of law; rather, they are designed for internal use by BLM employees, have no legal force, and only serve as a guide for actions of subordinate BLM officials. See *Wyoming Outdoor Council*, 171 IBLA 153, 166 (2007) (citing *Beard Oil Co.*, 111 IBLA 191, 194 (1989)); *The Joyce Foundation*, 102 IBLA 342, 345 (1988), and cases cited. An IM cannot alter the significance of regulatory requirements nor can it amend a regulation. *Wyoming Outdoor Council*, 171 IBLA at 167; *Beard Oil Co.*, 111 IBLA at 194; *The Joyce*

Foundation, 102 IBLA at 345-46. And, regardless of the provisions of an IM, BLM remains bound by its duly promulgated regulations. *Wyoming Outdoor Council*, 171 IBLA at 167; *Beard Oil Co.*, 111 IBLA at 194.

In this case, the IM's construction of the term "valid objection" conflicts with the definition of that term found in 43 C.F.R. § 1864.1-4. To constitute a valid objection under that regulation, the objection "must present a sustainable rationale that the objecting agency claims United States title to the lands for which a recordable disclaimer is sought." Although the regulations do not define the word "sustainable," the common definition of that word is "capable of being sustained." Webster's Third New International Dictionary (unabridged) (1966). The relevant definitions of "sustain" include "to support as true, legal or just," "to allow or admit as valid," and "to support by adequate proof: establish, corroborate, confirm." *Id.* The IM, in contrast, provides that BLM will generally defer to an objection of a land management agency if the objection provides a "clear" rationale, which is not frivolous, has been made in good faith, and contains more than bare conclusory assertions. This standard for determining whether an objection is valid is much less stringent than the "sustainable rationale" criterion found in the regulation. Because the IM conflicts with the regulation, BLM may not rely on the IM as justification for its rejection of the State's disclaimer application.

Not only does the IM fail to comport with the regulation, but its deference to an agency's objection also finds no support in the Assistant Secretary's June 28, 2004, letter to Senator Lieberman, the implementation of which the IM was purportedly designed to achieve. The letter responded to Senator Lieberman's concerns about various aspects of a BLM navigability determination in a case in which the land management agency questioned the sufficiency of the evidence supporting that determination.⁶ The Assistant Secretary acknowledged that the State had the burden of demonstrating navigability but nevertheless required an objecting agency to provide factual evidence showing that the water body was not navigable. June 28, 2004, Assistant Secretary's letter at 2. Thus the guidance in that letter does not support the presumption of deference to an objecting agency found in the IM.

The Assistant Secretary's letter also does not support the IM's expansive listing of *per se* valid objections, especially its inclusion of disputes over legal questions and uncertainty of the effects of a prestatehood reservation on submerged lands as part of that listing. See IM at 5. The only relevant example of a presumptively valid objection found in the letter is "an assertion based on a court decision that title to the lands underlying the water body remained in the United States at statehood." June 28, 2004, Assistant Secretary's letter at 2. There is no court decision in this case

⁶ The State provided a copy of the Assistant Secretary's letter as Exhibit 12 to its Statement of Reasons.

finding that the United States retained title to the lands underlying the Stikine River at statehood so this provision of the letter does not support BLM's conclusory denial of the State's disclaimer application.

We further find that BLM's application of the IM in this case, specifically its failure to show that it weighed the conflicting evidence and arguments before it reached its decision and its omission of any rationale in the decision for its conclusion that the Forest Service's objection is valid, does not conform to the guidance in the Assistant Secretary's letter. In that letter, the Assistant Secretary advised Senator Lieberman that, after research and consultation, BLM would *weigh* the evidence and arguments and make its decision based on the preponderance of the evidence. June 28, 2004, Assistant Secretary's letter at 1-2. Thus, it is clear that BLM may not simply defer to the agency's objection but must independently evaluate the evidence presented by the objecting agency and any countervailing evidence proffered by the applicant in order to determine whether the objection is, in fact, valid.

While we agree with BLM and the Forest Service that BLM need not conduct a full adjudication and conclusively determine whether the United States has title to the lands, BLM must nevertheless do more than simply summarize the parties' contentions and then state its conclusion, as it did here. BLM must at a minimum assess the conflicting evidence and arguments and provide a reasoned analysis explaining the basis for its determination that, despite the contravening evidence, the agency's objection is sustainable. *See, e.g., Tai Kim*, 180 IBLA 145, 150 (2010); *Larry Brown & Associates*, 133 IBLA 202, 205 (1995) (BLM decisions must be supported by a rational basis which is stated in the decision and demonstrated by the administrative record accompanying the decision).

BLM's failure to conduct the necessary assessment and provide an explanation for its decision is especially egregious in this case given the comprehensiveness of the State's countervailing arguments, including its reliance on the Supreme Court's decree in *Alaska v. United States*, in which the Court not only held that the United States had disclaimed any interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, but also concluded that the exception to the passage of title to the State for lands expressly retained by the United States when the State entered the Union set out in section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (2006), did not include the lands withdrawn pursuant to the proclamations creating and expanding the Tongass National Forest. 546 U.S. at 1015-16. BLM failed to explain why, in light of this decree and the other Supreme Court and Board precedent cited by the State purportedly refuting the Forest Service's claim that the Tongass National Forest withdrawal subsumed the submerged lands underlying the Stikine River, it nevertheless concluded that the Forest Service had presented a sustainable rationale that the United States had title to the submerged lands. Since BLM failed to provide any analysis or justification for its conclusion that

the Forest Service had provided a valid objection and the State's recordable disclaimer application therefore had to be rejected, we set aside the decision and remand the matter to BLM for further action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and remanded for further proceedings consistent with this decision.

_____/s/_____
Sara B. Greenberg
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge