United States Department of the Interior

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In Reply Refer To:
1864 (LLAK9410)

Memorandum

To: File AA-93210

From: Jack Frost, Navigable Water Specialist (LLAK9410)

Subject: Summary Report on Federal Interest in Lands underlying the Kanektok River System (including Pegati and Kagati lakes)

On Feb. 28, 2012, the State of Alaska (State) filed an application for a recordable disclaimer of interest (RDI) with the Bureau of Land Management (BLM) for lands underlying the Kanektok River including Pegati and Kagati lakes. Specifically, the State applied for a disclaimer of the United States' interest in "the submerged lands and bed up to and including the ordinary high water line of Pegati and Kagati lakes within Township 03 & 04 South, Range 63 West, Seward Meridian, Alaska and for the submerged lands and bed of the Kanektok River lying between the ordinary high water marks of the right and left banks of that river from the outlet of Pegati Lake within Township 03 South, Range 63 West, Seward Meridian, Alaska, downstream to the location where the river enters the Kuskokwim Bay in Township 05 South, Range 74 West, Seward Meridian, Alaska." The land description and maps for the Kanektok River and Pegati and Kagati lakes can be found in the State's application.[1]

The State's applications for disclaimers of interest are based on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, or any other legally cognizable reason. The BLM may disclaim federal interest in the submerged lands on any of the grounds that apply. The State's application for lands underlying the subject water bodies must also meet the regulatory requirements (43 CFR Subpart 1864).

[1] Daniel S. Sullivan, Commissioner, to Bud Cribley, State Director, Feb. 28, 2012, file AA-093210 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The State's Application and supporting documents are also available in this file.

In support of its application, the State submitted the "Kanektok River System Final Interim Summary Report" dated Oct. 7, 2010, hereafter referred to as the State's report, and supporting documentation.[2] This supporting information includes BLM easement and conveyance documents, navigability memoranda, and an excerpt of BLM's 1985 Kuskokwim River Regional report, as well as information from other agencies and sources.[3]

The BLM and the State held a monthly RDI coordination meeting on Dec. 8, 2015 where the BLM asked the State to provide more evidence to support its RDI application for the upper portion of the Kanektok River. The State representatives requested that BLM email its request to them.[4]

On Feb. 1, 2017, Warren Keogh, U.S. Fish & Wildlife Service (FWS), provided the BLM with additional evidence for the Kanektok River application by email. Attached to the email was a navigability report that FWS wrote in 1998.[5] This report is very similar to the State's report for content but it does provide new evidence of motorboat use by villagers from Quinhagak not previously reported in the State's report. On Mar. 14, 2017, the State cited in an email to BLM specific evidence documented in the FWS navigability report that they believe proves the navigability of their application, especially in the upper region that BLM had requested earlier.[6] Their email stated that "The State would like to direct your attention to the following information in the USFWS report dated December 1998:"

> J. E. Spurr ascended the Kanektok to Kagati Lake in 1898. (p. 7)
> In 1937, Territorial Department of Mines engineer, J. C. Roehm, reported that the Kanektok River was navigable. (pp. 32, 49-50)
> In the mid-1930s, James Guy and his father ascended the Kanektok to Kagati Lake in a motorized wooden boat. (p. 49)
> There were 23 subsistence sites evenly spaced between RM 20-91 (p. 52)
> The recreational use is heavily documented in the body of the report and the appendices. This information shows that the recreational user are on the Kanektok continuously from the beginning of fishing season in June to the end of fishing season in September. The

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[2] This report, "Kanektok River System" (Phase IIB Final Interim Summary Report), Oct. 7, 2010, is the product of a Navigability Assistance Agreement contract (Cooperative Agreement #LO9AC15466). The research and writing of this report was conducted by the State's Office of History and Archeology staff working under the guidance of an Assistance Agreement Management Team comprised of BLM and State personnel. A copy of this report is also available at the Alaska Resources Library & Information Services (ARLIS) in Anchorage, Alaska. You may contact ARLIS by phone at 907/27-ARLIS or email at reference@arlis.org.

[3] Curtis V. McVee, State Director, to Chief, Division of ANCSA Operations, Oct. 25, 1979, and Decision, Nov. 15, 1979, F-14885-EE (75.4); Interim Conveyed (IC) No. 342, June 25, 1980, and IC No. 978, Dec. 13, 1984, F-14885--A (2651); Robert W. Arndorfer, Deputy State Director for Conveyance Management, to Deputy State Director for Cadastral Survey, Mar. 29, 1988, and Wayne A. Boden, Deputy State Director for Conveyance Management, to Deputy State Director for Cadastral Survey, Feb. 21, 1989, F-14885-EE (75.4); and Alaska's Kuskokwim River Region: A History, 1985, BLM records.

[4] See Email correspondence, dated Dec. 8, 2015, Jack Frost to Jim Walker, *et al*, file AA-93210 (1864), BLM records.

[5] See Email correspondence and attachment, "Kanektok River Navigability Report December 1998," dated Feb. 1, 2017, Warren Keogh to Jack Frost, file AA-93210 (1864), BLM records.

[6] See Email correspondence, dated Mar. 14, 2017, Kevin Sorensen to Jack Frost, file AA-93210 (1864), BLM records.

perceived overuse by boats is a problem the USFWS has tried to manage. (pp. 57-75, Appendix C, D, E and F).

This summary report reviews the merits of the State's RDI application, summarizes the history of land status actions, BLM navigability determinations and conveyance actions, and reviews the evidence of commercial navigation, subsistence, mining, and recreational use.

Location and Physical Character

The Kanektok River is located in southwest Alaska, nearly 400 air miles west of Anchorage and 90 air miles southeast of Bethel.[7] The Kanektok's source is Kagati and Pegati lakes, two four-mile long lakes that are inter-connected in a U shaped pattern that are located in a 1,079-foot-high valley in the Ahklun Mountains.[8] The Kanektok River begins at the northern end of Kagati Lake, the westernmost lake, and flows westerly 94 miles to Kuskokwim Bay. The clear water river drains an estimated 910 square miles of land. The village of Quinhagak, the only year-round settlement in the river drainage, is located near the mouth of the Kanektok. The major tributaries are Paiyun, Amakatatee, Kanuktik, Klak, Nukluk and Takshilik creeks, all along the upper half of the river.[9]

The Kanektok is generally braided, with gravel bars, islands, undercut banks, overhanging brush, and sweepers over much of its course. At its headwaters, the Kanektok is reported to be swift with a shallow channel for about five miles (river miles 94-89), as it flows through a glacial valley surrounded by mountains.[10] Low water conditions require rafters to line or drag their boats through this area. Downstream to Kanuktik Creek (river miles 89-77), a left-bank tributary, the Kanektok is a single channel between 100 and 125 feet wide and some locations as deep as 3.5 feet.[11] Except for a few stretches where it flows through canyons, the river becomes more braided over the next 14 to 15 miles to Klak Creek at river mile 62.5. Farther downstream, and particularly below Nukluk Creek at river mile 50, it becomes heavily braided as it meanders slowly over the broad low coastal tundra plain to about river mile 12.[12] The remainder of the Kanektok River downstream to Quinhagak is slow moving and meandering.

From its headwaters, the Kanektok descends 1,079 feet from Kagati Lake to sea level over its 94-mile length. The upper third is the swiftest portion -- between the lakes and Klak Creek at

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[7] The State's report notes that estimates of the Kanektok River's length vary between 85 and 94 river miles depending upon the source. The National Park Service's 1983 "Draft Wild and Scenic River Study For The Kanektok River, Alaska" noted that the river's length may vary from 90-95 miles due to channels and braids. However, all references to river miles in this memorandum use mileage noted on the maps in the State's Application.

[8] "Kanektok River System," Oct. 7, 2010, pp. 1, 2 and 17, and "Draft Wild and Scenic River Study for the Kanektok River, Alaska," pp. 17 and 18, 1983, AA-093210 (1864), BLM records. Page 8 of the State's Application incorrectly states that the elevation of the Kanektok is 1,039 feet at its source.

[9] "Kanektok River System," Oct. 7, 2010, p. 21, AA-093210 (1864), BLM records.

[10] "Kanektok River System," Oct. 7, 2010, p. 17, and Togiak National Wildlife Refuge Comprehensive Conservation Plan, September 2009, p. 3-7, AA-93210 (1864), BLM records.

[11] All river mile references start from the confluence of the Kanektok River at Kuskokwim Bay.

[12] Togiak National Wildlife Refuge Public Use Management Plan and Environmental Assessment: Final, Feb. 1991, p. 126, and "Kanektok River System," Oct. 7, 2010, p. 17, AA-93210 (1864), BLM records.

river mile 62.5, where the gradient is between 14 and 16 feet per mile.[13] From Klak Creek to Nukluk Creek at river mile 50, the gradient is about 12 feet per mile. Below Nukluk Creek, the gradient is about 7 feet per mile.[14] A contracted BLM cadastral surveyor, Michael Schoder, surveyed Native allotments along the Kanektok River in the summer of 1989 and estimated the depth of the river in the lower 12 miles to be at least 6-10 feet deep.[15] BLM estimates the extent of tidal influence of the lower river to be one and one-half to two miles.[16]

Data from a USGS stream gage in place at river mile 40 between June 13, 1999, and Oct. 15, 2009, shows that the river's discharge is highest during May and June, with average monthly discharges of 4,074 and 4,904 cubic feet per second, respectively. July, September and October exhibited the next highest average discharges at 2,141, 2,631 and 2,946 cubic feet per second, respectively. Water flows in July and September are largely caused by snowmelt while October water levels result from the fall rainy season. Flows are lowest December through April during the time when the river is mostly iced up. The two lowest flows being in February and March at 485 and 423 cubic feet per second. Average annual discharges ranged from a low of 1,490 cubic feet per second in 2004 to the highest average annual discharge in 1999 at 3,000 cubic feet per second.[17]

The Kanektok is described as being suitable for canoes, rafts and kayaks by the U.S. Heritage Conservation and Recreation Service, which classified the upper 25 miles of the river as Whitewater I, the next 30 miles as Whitewater I-II and the lower 30 miles as "flat water."[18] The Togiak National Wildlife Refuge (NWR) Public Use Management Plan and Environmental Assessment noted that the Kanektok is floatable over its entire length, adding that it is difficult to navigate with propeller-driven motors above river mile 30. Here, where the river is swift and more sinuous with sweepers and shifting gravel bars, jet boats are more prevalent during moderate to high water conditions.[19]

The Kanektok was one of 12 Alaska rivers identified by the Alaska National Interest Lands Conservation Act (ANILCA) for possible inclusion to the National Wild and Scenic Rivers System.[20] In 1983, an interdisciplinary team evaluated it for National Wild and Scenic River designation, noting that the river flows freely. Although the entire river was found to be eligible for wild status (i.e., generally inaccessible except by trail, with essentially primitive watersheds), ultimately it was not approved, however, because of local opposition and the protection already

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[13] "Draft Wild and Scenic River Study for the Kanektok River, Alaska," p. 18, Dec. 1983, and "Kanektok River System," Oct. 7, 2010, p. 17, AA-93210 (1864), BLM records.
[14] The gradients were calculated using U.S.G.S. quadrangle map Goodnews Bay C-6 and D-6, 1:63,360 scale.
[15] DSD Cadastral Survey (AK-920) to Branch Chief, Branch of Survey Planning and Preparation (AK-927), "Report of Kanektok River character observations," Aug. 13, 2012, BLM records.
[16] "Kanektok River System," Oct. 7, 2010, pp. 8, 21, AA-93210 (1864), BLM records.
[17] Application, pp. 11, 12, and "Kanektok River System," October 7, 2010, pp. 8, 21, AA-93210 (1864), BLM records.
[18] Brown, p. 590.
[19] Togiak National Wildlife Refuge "Public Use Management Plan and Environmental Assessment: Final," February 1991, pp. 112 and 126, and "Kanektok River System," Oct. 7, 2010, pp. 22 and 45, AA-93210 (1864), BLM records.
[20] P.L. 96-487, Dec. 2, 1980.

afforded by much of the river's existing wilderness status, as discussed below.[21] Based on this information, we conclude that the river and lakes are in their natural and ordinary condition, as it would have been found at statehood.

Land Status and BLM Navigability Determinations

The Kanektok River lies entirely within the Togiak NWR, a post-statehood withdrawal established by ANILCA. The riparian lands along approximately the lower 21 miles of the Kanektok, from its mouth through township 4 south, range 72 west, Seward Meridian, Alaska, have been conveyed to Qanirtuuq, Inc., the Native Corporation for village of Quinhagak,[22] and Native allottees.[23] This portion is not managed by the FWS. The remainder of the river (roughly the upper 73 miles) has been designated as Wilderness by ANILCA, Public Law 96-487 (Dec. 2,1980).

The State's report notes that there are roughly 90 Native allotments located in the river corridor of the Kanektok, with more than half of them along the lower 21 miles. The majority are concentrated near the mouth. There are only a handful of parcels along the upper half of the river. The majority stated in their respective applications that they accessed their allotment by boat on the Kanektok, including the Native allotment at river mile 72. The river waters adjacent to these Native allotments were determined to be navigable using the now-disfavored and incorrect standard of the "one-man kayak" on Feb. 21, 1989.[24] There are two Native allotments adjacent to Kagati and Pegati lakes for which it was reported that access to their sites was by floatplane. With the exception of inholdings, the riparian lands above the Interim Conveyed (IC) area, including those surrounding Kagati and Pegati lakes, as well as the submerged lands of non-navigable water bodies, remain in federal ownership as Togiak NWR Wilderness lands managed by the FWS.[25]

The BLM addressed the navigability of the Kanektok River several times in the context of identifying easements and conveying ANCSA selections. On Oct. 25, 1979, the BLM determined that the lower 21 miles (approximately) of the Kanektok are navigable where it traverses lands selected by the village of Quinhagak. The BLM based its determination upon the

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[21] "Draft Wild and Scenic River Study for the Kanektok River, Alaska," p. 5, Dec. 1983, and Togiak National Wildlife Refuge "Public Use Management Plan and Environmental Assessment: Final," Feb. 1991, pp. 112 and 126, AA-93210 (1864), "Kanektok River System," Oct. 7, 2010, AA-93210 (1864), BLM records.

[22] The village corporation was created under the provisions of ANCSA, PL 92-203, Dec. 18, 1971.

[23] IC No. 342, June 25, 1980, and IC No. 978, Dec. 18, 1974, F-14885-A (2651); and Patents 50-95-0284, June 20, 1995, and 50-2006-0296, F-14885-A (2651), June 16, 2006, BLM records.

[24] Deputy State Director for Conveyance Management (960) to Deputy State Director for Cadastral Survey (923), "Navigable Waters on or along Small Tracts in Quinhagak (Window 1562)," Feb. 21, 1989, BLM records.

[25] U.S. Fish and Wildlife Service Comprehensive Conservation Plan: Togiak National Wildlife Refuge, Sept. 2009, p. 2-28, "Kanektok River System," Oct. 7, 2010, AA-93210 (1864), BLM records.

river's susceptibility for travel, trade and commerce.[26] This determination was later incorporated into a Decision to Interim Convey (DIC) for the village, giving finality to the BLM's navigability determination for those lands.[27] *See* 43 U.S.C. § 1631(c).

On Feb. 21, 1989, using the now-disfavored one-man kayak standard, the BLM found the Kanektok navigable in or along small tracts located on the river to and through township 3 south, range 66 west, Seward Meridian, Alaska. It also determined an unnamed left-bank tributary at river mile 34 navigable through two Native allotments.[28] The BLM based its determination for the Kanektok upon the river's history of travel in small boats, rafts and canoes, including recreational and guided floating.

Background Information

The Kanektok River basin has been and continues to be important culturally and economically to the Native people of Quinhagak. The drainage has abundant resources, such as salmon, furbearing animals, minerals, large and small game, etc., providing sustenance and an economic base for local residents. Today, commercial fishing in Kuskokwim Bay is a major source of revenue for the community. The river is invaluable in that it offers fishery, wildlife, scenic, recreational and cultural importance in a roadless and primarily wilderness area.

Overland access to the Kanektok is limited to a coastal trail. Once a historic winter mail run, the trail connects communities along the southern coast of Kuskokwim Bay, crossing the river near its mouth in section 8, township 5 south, range 74 west, Seward Meridian, Alaska. Different portions are known by corresponding stretches, i.e., the Eek Coastal Trail, which runs south along the coast from Eek, the Bethel-Quinhagak Trail, which runs along the coast between Bethel and Quinhagak and the Quinhagak-Goodnews Trail. Use of the latter trail increased during the 1930s due to a resurgence of mining activity in the Goodnews drainage.[29]

Quinhagak has an airstrip and community roads; however, there are no roads, trails or airstrips on the wilderness-designated lands administered by the FWS in the refuge. A trail along the

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[26] Curtis V. McVee, State Director, to Chief, Division of ANCSA Operations, Oct. 25, 1979, F-14885-EE (75.4), BLM records. (The memorandum states that, "The Kanektok River was determined to be navigable by reason of its susceptibility to travel, trade or [sic] commerce." However, in accordance with federal navigability criteria, the statement clearly should have read "travel, trade and commerce.")

[27] Decision, Nov. 15, 1979, F-14885-EE (75.4), BLM records; (See also Dominica VanKoten, Chief, Navigability Section, to Chief, Branch of Survey Planning and Preparation, May 18, 2006, F-14885-EE (75.4), which referenced the Nov. 15, 1979, Decision affecting the river in township 5 south, range 74 west, Seward Meridian, Alaska.). Pursuant to the Submerged Lands Act of 1988, the BLM has no authority or jurisdiction to change this decision or re-determine the navigability of the section of the river within the conveyance area. 43 U.S.C. § 1631(c)(1).

[28] Wayne A. Boden, Deputy State Director for Conveyance Management, to Deputy State Director for Cadastral Survey, Feb. 21, 1989, F 14885-EE (75.4), BLM records. (The Kanektok is identified as being a navigable and excluded from ICd lands in township 4 south, range 72 west, Seward Meridian, Alaska, townships. 4 and 5 south, range 73 west, Seward Meridian, Alaska and township 5 south, range 74 west., Seward Meridian, Alaska in the BLM's Mar. 29, 1988, navigability memorandum addressing selected lands. However, the river is not a subject of that report.)

[29] Brown, C. Michael., "Alaska's Kuskokwim River Region: A History," 1985, pp. 758-761; and Cliff Ells, Realty Specialist, to Files, "Summary of Quinhagak Village Easement Proposals Meeting on Sept. 12, 1975, Nov. 15, 1976, "Kanektok River System," Oct. 7, 2010, Attachment 1, AA-93210 (1864), BLM records.

south side (left bank) of the Kanektok provides access from Quinhagak to public lands in the wilderness. Summer access is by riverboat from Quinhagak, or by plane to Kagati or Pegati lakes or to unimproved gravel bars at low water levels. During winter, access is by snowmachine, all-terrain vehicles (ATVs), dog sleds, or planes with skis [30]

Evidence of Pre-Statehood Use

One of the first documented accounts of travel on the Kanektok came from the United States Geological Survey (USGS). In late April 1898, geologist Josiah Spurr led a USGS expedition from Cook Inlet to the Kuskokwim River region in his quest to find a strictly Alaska route to the interior. From Tyonek, Spurr's team traveled up the Yentna and Skwentna rivers in three Peterborough canoes 18 foot long made of light cedar-strip. They portaged over the Alaska Range and canoed down the South Fork and main stem Kuskokwim River to Bethel, where the group split up. Between Aug. 26 and Sept. 8, Spurr and Oscar Rohn continued on to Quinhagak and then up the Kanektok in a lightweight cedar canoe, accompanied by Native guides in kayaks. Despite difficulties battling rain and strong currents, and often having to line the boats, they made it up the river to Kagati and Pegati lakes in 13 days. Traveling across Kagati Lake and up Akamunuk Creek, they had to portage their gear lake to lake and across a high mountain pass to reach Togiak Lake, the Togiak drainage and Togiak Bay.

During that trip, Spurr learned of two other portage routes from the Kanektok, one to Togiak using Klak Creek, a left-bank tributary to the river at mile 62.5 and one to Eek using a right-bank tributary (possibly Sam Creek) opposite Klak Creek.

In 1937, Associate Engineer J.C. Roehm (1937a:l), Territorial Department of Mines, reported the Kanektok River "is navigable with river boats to Kagati or Quinhagak Lake." He made a comment in a mining investigation report that followed summer fieldwork. The Kanektok River navigability comment is in reference to access of the "Togiak Lake region," an area of mining activity that included Kagati Lake and its tributaries.[31]

In the late 1930s, access to the "Togiak Lake region," that included the Kagati Lake area, was by "airplane or riverboat" according to an engineer with the Alaska Territorial Department of Mines (Roehm 1938). Floatplane access was via Kagati Lake. Wheeled airplane access was via a short airstrip in the upper Eek River drainage, near the confluence of Eek River and Rainey Creek. Riverboat access was via Togiak River and Kanektok River. Togiak River travel was via pole boat and described as the "shortest route by boat" into the region. The Kanektok was referred to as the "other route." The Territorial mining engineer reporting on this area in 1937 made no explanatory comments on the extent of Kanektok River travel, noting only that "the riverboat route is up the Kanektok River from the village of Quinhagak a distance of nearly 100 miles by river" (Roehm 1937b:l).[32]

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[30] Draft Wild and Scenic River Study For The Kanektok River, Alaska, Dec. 1983, pp. 10 and 27, and Stanley H. Bronczyk, Realty Specialist, to Files, "Easement Task Force Meeting on Quinhagak," Feb. 1, 1977, F-14885-EE (75.4), "Kanektok River System," Oct. 7, 2010, Attachment 2, AA-93210 (1864), BLM records.

[31] "Kanektok River Navigability Report Dec. 1998," Water Resources Branch Region 7, U.S. Fish and Wildlife Service, page 32, file AA-93210 (1864), BLM records.

[32] *Ibid,* pages 49-50.

As a 7 year-old child, James Guy (pers. com. 1998) accompanied his father Daniel Guy (also known as Guy Tegylre) and another relative on a boat trip up the Kanektok River in about 1935. They traveled in a home built wooden boat powered by a nine horsepower outboard, which according to James was considered very big for its time. They ascended the river to Kagati Lake and spent the entire summer and winter in the area hunting, trapping, and prospecting. In August 1937, Associate Engineer J.C. Roehm (1937a:l), Territorial Department of Mines, reported, "several families of Eskimos were encountered camped on the northwest end of Kagati or Quinhagak Lake on and near the head of the Kanektok River." Roehm's (1938:6, Map 1; 1937a:1) reports show Guy Tegylre's name, as well as others from Quinhagak and Akiak.[33]

Exploration and Placer Mining

Early in the 20th Century, not long after Spurr's expedition, prospectors from the Innoko River area were searching the region for placer deposits of gold and platinum. While there was insufficient gold for the region to be important during the 1900 to 1901 gold rush, placer deposits of gold and platinum near the headwaters of the Kanektok River led to the discovery and staking of seven placer claims near the headwaters of Atmugiak Creek, a 10-mile-long tributary to Kagati Lake prior to 1912. By 1937, the claims known as the Winchester group had been abandoned and restaked several times. Access options to the claims was either 100 miles up the Kanektok and across Kagati Lake by riverboat from Quinhagak or by plane to Kagati Lake or a new airfield near the Eek River followed by a 12-mile hike to Kagati Lake, and then 10 miles up the Atmugiak valley.[34] However, there was not any mention of how supplies were transported to the claims.

In 1927, prospectors discovered a mineral deposit northeast of Kagati Lake and gold three miles up Sam Creek, a left-bank tributary of the Kanektok at approximately river mile 63. Miners from Bethel staked cinnabar claims six miles above Kagati Lake in 1956. Access to this site was also via floatplane to the lake or a nearby smaller lake and then eight miles over a tractor road.[35] Between the 1920s to the 1940s, placer mining for gold and platinum was prevalent in the Arolik, Goodnews, Eek and Kanektok river systems.[36]

Subsistence Use

The Kanektok River has been important traditionally, culturally and economically for the people of Quinhagak, who have relied on the river and its resources for years. The river has supported the subsistence lifestyle of the people of Goodnews Bay, Platinum and Kwethluk, as well. According to elders from Quinhagak and Kwethluk, local residents have used the river and its basin seasonally and cyclically, moving inland and up and down river for resources, for more

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[33] *Ibid,* page 46.

[34] Draft Wild and Scenic River Study For The Kanektok River, Alaska, Dec. 1983, pp. 10, 27 and 28, and Roehm, J.C., "Preliminary Report of Winchester Group of Claims, Goodnews Bay District, Lower Kuskokwim, Alaska," Alaska Territorial Department of Mines, Aug. 12, 1937, "Kanektok River System," Oct. 7, 2010, Attachment #24 and p. 30, and AA-93210 (1864), BLM records.

[35] "Kanektok River System," Phase II-B Interim Report, Oct. 7, 2010, pp. 30, 31, AA-93210 (1864), BLM records.

[36] Togiak National Wildlife Refuge "Comprehensive Conservation Plan," Sept. 2009, U.S. Fish and Wildlife Service, Kanektok River System, Oct. 7, 2010, Exhibit 5, p. 3-40, AA-93210 (1864), BLM records.

than a century. Early on, they used dog teams on the river in winter, traveled to muskrat trapping camps in the spring and moved to fish camps in the summer, drifting or poling downriver in kayaks and small boats with sails or oars, as outboard motors were rare. Some years in early spring, families moved up the Kanektok from Quinhagak or over the mountains from Kwethluk to squirrel trapping camps in the mountain valleys, where they built wooden-framed skin boats and drifted down the Kanektok River with gear, meat and furs back home.[37]

Evidence of Post Statehood Use

Subsistence Use

The Kanektok River continues to be an important resource for subsistence use by area residents. Though skin boats were dominant before statehood, as described above, later on, powerboats became more prevalent on the river, particularly on the lower reaches. By the 1970s and 1980s, shallow-draft aluminum or plywood skiffs 16-20 feet long with 35-75 horsepower outboard motors and 18-24 foot flat-bottomed boats with 70-140 horsepower propeller-driven motors and load capacities of 1,500 to 2,000 pounds were common. Beginning in late May and continuing through June and July, local residents use gill nets to harvest king, chum and pink salmon near the river's mouth. Families move to temporary camps along the lower 20 miles of the Kanektok for fishing and berry picking in August and September. Between late August and early October, there is gill netting in the river for coho salmon, char, round whitefish, grayling and rainbow trout and hunting for brown bear and moose in the drainage. In winter, there is trapping and hunting for furbearers and small and large game, some from winter camps along the Kanektok. From late January through April, smelt and cisco are taken from holes in the river.[38]

Today, during open water, residents of Quinhagak, Goodnews and Platinum as well as other individuals boat the entire river upstream to the lakes primarily for access to mining, subsistence hunting, fishing and berry picking areas in motorized boats. They reach hunting, ice fishing and trapping areas by snowmachine, some pulling sleds, after freeze up.[39] Several cabins or camps, fish racks and set net sites located along the river are used seasonally for subsistence hunting, fishing, trapping, gathering plants, berries, firewood, sport fishing and bear hunting.[40] Recognizing its use as a primary transportation route between local villages for individuals, supplies and equipment and for subsistence gathering activities, the BLM in 1979 considered the river to be a major waterway for easement purposes through Quinhagak lands.[41]

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[37] Draft Wild And Scenic River Study For The Kanektok River, Alaska, Dec. 1983, pp. 26, 27; William C. Johnston, Acting Chief, Branch of Mapping Sciences, to Chief, Branch of Survey Preparation and Policy Interpretation, June 17, 1998, Navigability Report, p. 3, Attachment 23, "Kanektok River System," Oct. 7, 2010, p. 26, AA-93210 (1864), BLM records.

[38] Draft Wild And Scenic River Study For The Kanektok River, Alaska, Dec. 1983, pp. 26, 27, "Kanektok River System," Oct. 7, 2010, pp. 32, 40, 41, AA-93210 (1864), BLM records.

[39] Gordon W. Watson, Area Director, Fish and Wildlife Service, to District Manager, Bureau of Land Management, June 17, 1975, "Kanektok River System," Oct. 7, 2010, AA-93210 (1864), Attachment 26, BLM records.

[40] Draft Wild And Scenic River Study For The Kanektok River, Alaska, Dec. 1983, pp. 14, 26, and Togiak Comprehensive Conservation Plan, Sept. 2009, p. 3-77, AA-93210 (1864), BLM records.

[41] Curtis V. McVee, State Director, to Chief, Division of ANCSA Operations, Oct. 25, 1979, F-14885-EE (75.4), BLM records.

Sport fishing/Recreational Use of the Kanektok River

With its five species of salmon, rainbow trout, Arctic grayling, Dolly Varden, and Arctic char, as well as the scenic setting, the Kanektok River is very attractive to anglers. Along with the Goodnews and Togiak rivers, the Kanektok is one of the most popular fishing areas in the refuge. It is recognized worldwide as "a premier recreational salmon and trout fishing destination" and "is consistently the most popular destination on Togiak Refuge."[42] There is excellent sport fishing for king, chum, pink and red salmon from June to mid-July and for silver fishing in August, and for rainbow trout fishing, particularly on the lower river.[43]

The Kanektok River is similar to other popular rivers in the refuge, most notably the Goodnews and the Togiak rivers, in that most sport fishing – whether guided or unguided -- is done by floating or drifting. Likewise, those interested in a wilderness experience oftentimes begin their trips with a fly-in to Kagati Lake and float the river in canoes, rafts, and kayaks between June and September, typically spending six to ten days on a trip. In the mid-1980s, the principal use of the Kanektok was for unguided fly-in trips.[44] Recreational unguided fishing and float trips originating at the lake do not require permits.

The Alaska Department of Fish Game (ADFG) has studied the Kanektok River and its fishery since 1960, using counting towers, weirs, sonar, and surveys of the river. ADFG biologists floated the Kanektok River in mid July 1973 and from Kagati Lake in a raft in late July 1973 and in 1983, taking a floatplane to Kagati Lake. In 1996, ADFG biologists and the USGS set up a fish weir with a boat gate at river mile 15. In 2001, they moved the weir 20 miles upstream from its original 1960 location to river mile 42, noting that boats with outboard propeller-driven motors passed the weir infrequently and required a towrope when passing upstream. Jet boats were most common and could pass over the panels at the weir by reducing speed.[45]

The Kanektok River gained popularity for recreational fishing in the 1970s, when it interested federal agencies as well. A U.S. Bureau of Outdoor Recreation team floated the river in 1973 for a Wild and Scenic River evaluation. The interagency group spent considerable time dragging canoes over rocks and gravel bars in the upper river during that August descent from Kagati Lake. In 1977, two BLM employees studying raptors floated about a 33-mile stretch of the river from about five miles below Kagati Lake. That same year, recognizing significant recreational use, the BLM recommended streamside easements along both banks of the Kanektok.[46]

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[42] Togiak National Wildlife Refuge Comprehensive Conservation Plan, FWS, Sept. 2009, pp. 3-55 and 3-77, "Kanektok River System," Oct. 7, 2010, AA-93210 (1864), BLM records.

[43] Draft Wild And Scenic River Study For The Kanektok River, Alaska, Dec. 1983, p. 24, "Kanektok River System," Oct. 7, 2010, AA-93210 (1864), BLM records.

[44] "Kanektok River System," Oct. 7, 2010, pp. 48, 49, 54, 58, AA-93210 (1864), BLM records.

[45] "Kanektok River System," Oct. 7, 2010, pp. 43, 44, AA-93210 (1864), BLM records.

[46] Curtis V. McVee, State Director, "Notice Of Proposed Easement Recommendations For The Village Of Quinhagak," Mar. 24, 1977, F-14885-EE, Attachment 4, and Curtis V. McVee, State Director, to Chief, Division of Technical Services, "Final Easements for the Village of Quinhagak," Mar. 24, 1978, F-14885-EE (75.4), Attachment 5,and "Kanektok River System," Oct. 7, 2010, pp. 8, 9 and 44, Oct. 7, 2010, AA-93210 (1864), BLM records. (The BLM dropped the easements in 1979 with the issuance of new regulations prohibiting recreational easements.)

Sport fishing continued to increase during the 1980s with the increase in the number of guides and guiding operations. Wanting to balance use and allocate fishing opportunities and resources between subsistence, guided and unguided users, the Togiak NWR began work on a Public Use Management Plan. During the 1980s and 1990s, FWS biologists inventoried fish resources and conducted public use surveys of the Kanektok and other water bodies in the Togiak Refuge, utilizing rafts and boats with outboard motors with jet units on the river.[47] The FWS noted that motorboat access to Kagati Lake is confined to periods of high water. While boats equipped with jet units could travel about 65 miles upriver during moderate to high water periods, access for boats with propeller-driven motors was much less.[48]

The FWS maintains a presence on the upper Kanektok with its seasonal field camp at Kagati Lake. Here refuge personnel can interact with visitors, share information and monitor public use to the wilderness. Wanting to collect use and resource data and provide information to all visitors, river rangers began patrolling the upper river in a small powerboat in 1991.[49]

Guided Sportfishing/Rafting

Guided sport fishing, mostly conducted by floating (the majority of the use in the wilderness), began in 1964 when Enchanted Lake Lodge owner Ed Seiler started taking clients from Kagati Lake downstream to Quinhagak to fish and sightsee.[50] His trips included five people per trip using rafts and canoes. The number of guided recreational trips on the Kanektok River increased substantially in the late 1970s and into the 1980s with the growing popularity of sport fishing and the establishment of the Refuge.[51] Not only did the number of guides increase, but the number of clients in each group grew as well.[52] Today the industry has grown significantly, where the number of guided clients in 1989 listed at 1,608 visitors and 1,016 unguided visitors floating on their own.[53] The river also gained notoriety with magazine articles touting its resources and opportunities for a wilderness experience.

Concerns about the effects of recreational fishing (such as litter, motor boat use, loss of wilderness values, etc.), led to issuance of the Togiak NWR Public Use Management Plan (PUMP), which restricts the number of commercial permits available. During the summer months, permits, obtained through a competitive bid process, limit the number of boats and clients on the wilderness portion of the river at any given time. To protect resources and preserve a wilderness experience permits for guided float and motorized trips originating within the Togiak Wilderness at Kagati Lake, including those for air taxi operators, are regulated. In its

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[47] "Kanektok River System," Oct. 7, 2010, pp. 46, 47, 48, 51, 54, Oct. 7, 2010, AA-93210 (1864), BLM records.
[48] Togiak National Wildlife Refuge "Final Public Use Management Plan and Environmental Assessment," Feb. 1991, p. 126, AA-93210 (1864), BLM records.
[49] Togiak National Wildlife Refuge "Final Public Use Management Plan and Environmental Assessment," February 1991, pp. 114, 117 and 126, and Kanektok River System, Oct. 7, 2010, pp. 46, 47, Oct. 7, 2010, AA-93210 (1864), BLM records.
[50] "Kanektok River System," Oct. 7, 2010, pp. 59-60, AA-93210 (1864), BLM records.
[51] Togiak National Wildlife Refuge "Final Public Use Management Plan and Environmental Assessment," Feb. 1991, pp. 114, 117 and 126, and "Kanektok River System," Oct. 7, 2010, pp. 46, 47, 48, Oct. 7, 2010, AA-93210 (1864), BLM records.
[52] "Kanektok River System," Oct. 7, 2010, p. 48, Oct. 7, 2010, AA-93210 (1864), BLM records.
[53] "Kanektok River System," Oct. 7, 2010, pp. 67, AA-93210 (1864), BLM records.

2009 Comprehensive Conservation Plan, the Togiak NWR allowed summer float trips from the lake on alternate days, awarding permits through a competitive bid process.[54]

Conclusions

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). There, the U.S. Supreme Court stated: "Those rivers must be regarded as public navigable rivers 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."

In assessing the navigability of inland water bodies, the BLM relies upon this test as well as Federal statutes, Federal case law, and the advice of the Department of the Interior's Office of the Solicitor. Relevant Federal statutes include the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988. The Supreme Court's most recent decision on title navigability, *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), summarizes and explains the proper interpretation of *The Daniel Ball* criteria. Additional guidance is provided in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied,* 495 U.S. 919 (1990) [Gulkana River]; *Alaska v. United States,* 754 F.2d 851 (9th Cir. 1983), *cert denied,* 474 U.S. 968 (1985) [Slopbucket Lake]; and *Appeal of Doyon, Ltd.*, Alaska Native Claims Appeal Board RLS 76-2, 86 I.D. 692 (1979) [Kandik and Nation Rivers].

In cases concerning pre-statehood reservations, BLM uses the established criteria set out and applied in Alaska cases including *Alaska v. United States,* 545 U.S. 75 (2005) (*"Glacier Bay"*); *United States v. Alaska*, 521 U.S. 1 (1997) (*"Arctic Coast/Dinkum Sands"*); *Utah Division of Lands v. United States,* 482 U.S. 193 (1987) (Utah Lake); *Alaska v. United States*, No. 98-35310 (9th Cir. 2000) [Kukpowruk River]; *Alaska v. United States*, 102 IBLA 357 (1988) (Katalla River); and *United States v. Alaska*, 423 F.2d 764, 1 ERC 1195, (9th Cir. Dec. 21, 1970) (Tustumena Lake).

The Kanektok River and Kagati and Pegati lakes are entirely within the exterior boundaries of the Togiak National Wildlife Refuge, which is managed by the FWS. The BLM previously determined the lower 21 miles of the Kanektok River– through ICd lands in section 24, township 4 south range 72 west, Seward Meridian, Alaska, navigable in a Nov. 15, 1979, Decision for the conveyance of lands to Qanirtuuq, Inc., for the village of Quinhagak. This determination was final for the Department of Interior and therefore not being reconsidered here.

For the remaining portion of the submerged lands encompassed by the State's application, from river mile 21 upstream to include Kagati and Pegati lakes, evidence exists of powerboat use. As stated earlier, the physical character of the Kanektok River is such that it is easily navigated by boats, similar to those in existence at statehood used for commerce, for its first 30 miles or so. Upstream of river mile 30 the character of the river changes becoming more braided and shallow, making it more difficult but not impossible to navigate into Kagati and Pegati

[54] Togiak National Wildlife Refuge "Comprehensive Conservation Plan," Sept. 2009, p. 3-54, 3-77, "Kanektok River System," Oct. 7, 2010, AA-93210 (1864), BLM records.

lakes. The majority of Native allotments are located upstream to river mile 72 of the Kanektok River, access is stated to be by boat. In addition, there are two allotments located on Kagati and Pegati lakes. Residents of the area access the lakes and their allotments in boats similar to those used for commerce at statehood. Typically, these boats are 18-24 foot flat-bottomed boats with 70-140 horsepower propeller-driven motors and load capacities of 1,500 to 2,000 pounds. For these reasons, we conclude that the Kanektok River along its entire length, to include Kagati and Pegati lakes, is navigable based on a well-documented history of use by boaters and susceptibility for use as a highway for travel, trade, and commerce.