

In Reply Refer to:  
1864 (AK9270)

Memorandum

To: File AA-92408

From: Jack Frost, Navigable Waters Specialist (AK9272)

Subject: Summary Report on the Federal Interest in Lands Underlying Kisaralik River and Kisaralik Lake in the Kuskokwim Subregion, Alaska

The State of Alaska (State) filed an application, dated November 30, 2010, for a recordable disclaimer of interest (RDI) with the Bureau of Land Management (BLM) for the lands underlying the Kisaralik River and Kisaralik Lake. The application is submitted for “the submerged lands and bed up to and including the ordinary high water line of Kisaralik Lake within Township 3 North, Range 58 West, Seward Meridian (SM), Alaska and for the submerged lands and bed of the Kisaralik River lying between the ordinary high water lines of the right and left banks of that river from the outlet of Kisaralik Lake within T. 3 N., R. 58 W., SM, downstream to the location where the river enters the Kuskokuak Slough within T. 9 N., R. 67 W., SM.” The land description and maps for the Kisaralik River and Kisaralik Lake can be found in the State’s application.<sup>1</sup>

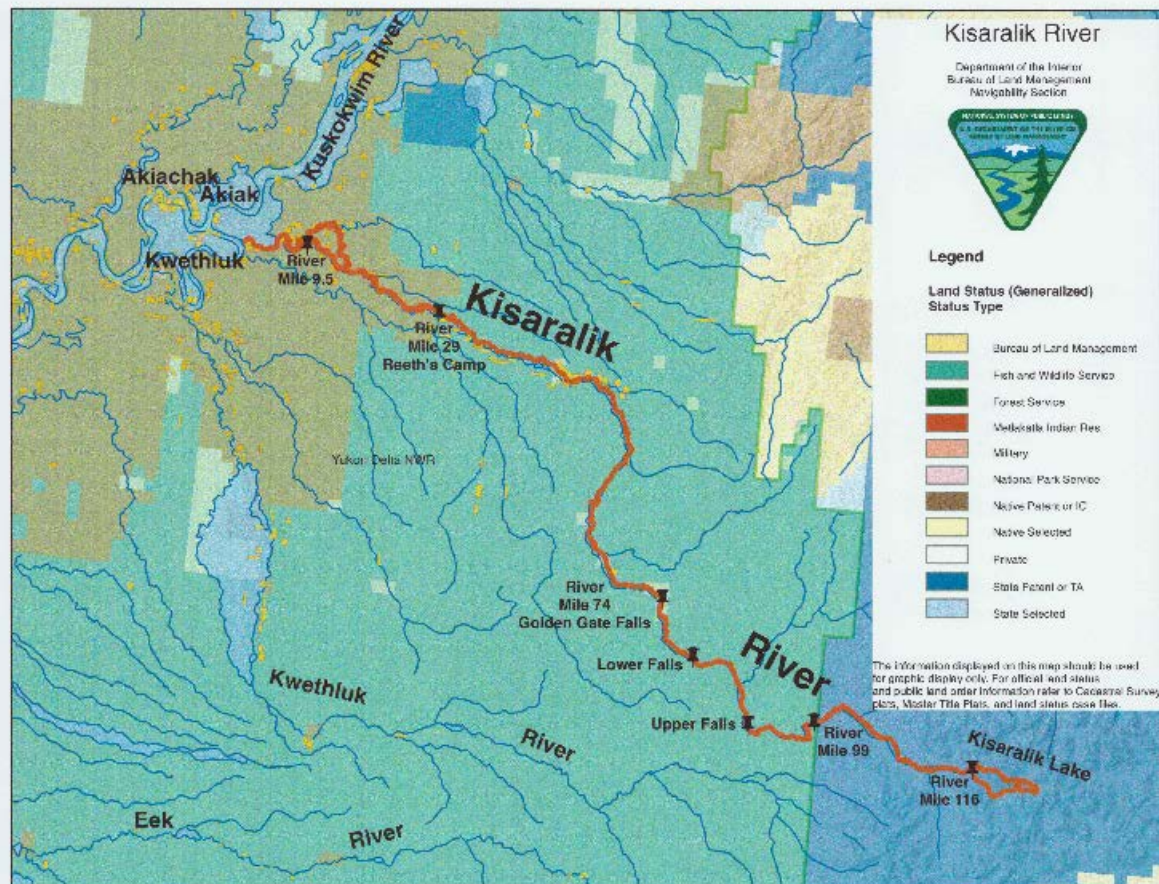
The State’s applications for disclaimers of interest are based on the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, or any other legally cognizable reason. The BLM may disclaim federal interest in the submerged lands on any 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).

In support of its application, the State submitted the “Kisaralik River System Final Summary Report” dated January 15, 2010, hereafter referred to as State’s report.<sup>2</sup> The purpose of this memorandum is to review the merits of the State’s RDI application. This paper summarizes the history of land status actions, BLM navigability determinations and conveyance actions, and evidence of commercial navigation, subsistence, mining and recreational use.

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<sup>1</sup> Thomas E. Irwin to Bud Cribley, BLM, November 30, 2010, file AA-092408 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The State’s report and reference documents are also available in this file.

<sup>2</sup> This report, Kisaralik River System (Phase IV Final Submission), January 15, 2010, BLM records, is a product of a Navigability Assistance Agreement contract (Cooperative Agreement #LAA-04-0010). The research and writing of this report was conducted by the State Office of History and Archeology staff working under the guidance of an Assistance Agreement Management Team composed of the BLM and State. A copy of this report is also available at the Alaska Resources Library & Information Services (ARLIS) in Anchorage, Alaska. To contact ARLIS call 907-27-ARLIS or by email at [reference@arlis.org](mailto:reference@arlis.org).



## Location

The Kisaralik River is located about 80 miles east of Bethel, Alaska. The river flows about 116 miles northwesterly from its origin in the Kilbuck Mountains at Kisaralik Lake to its confluence with Kuskokwuk Slough, a backwater slough of the Kuskokwim River.<sup>3</sup> The Kisaralik River is a non-glacial river draining an estimated 1,470 square miles. The water clarity of the river is described as being generally clear in its upper rocky reaches and brown and turbid in the lower sandy and silty reaches.<sup>4</sup>

## Land Status and BLM Navigability Determinations

The riparian lands between miles 0-29 have been conveyed to Kokarmiut Corporation, miles 29-99 are within the Yukon Delta National Wildlife Refuge and finally the State owns the lands surrounding the remainder of the Kisaralik River from miles 99-116 and all around Kisaralik Lake.<sup>5</sup> Numerous Native allotments are scattered along the lower 50 miles of the river with

<sup>3</sup> Kisaralik River System (Phase IV Final Submission), January 15, 2010, BLM records, p. 1-2.

<sup>4</sup> *Ibid.*, p. 18.

<sup>5</sup> The refuge was created on December 2, 1980 by the Alaska National Interest Lands Conservation Act (P.L. 96-487).

three additional parcels situated between river mile 50 and river mile 74, the site of Golden Gate Falls.<sup>6</sup>

When the BLM, on June 22, 1982, first considered the Kisaralik River's navigability through lands selected by Kokarmiut Corporation it determined only the lower 9.5 miles to be navigable by reason of travel, trade and commerce.<sup>7</sup> On the same date the BLM determined the Kisaralik River nonnavigable through the remaining village-selected lands from river mile 9.5 to river mile 29 (approximately). Both of these navigability determinations were incorporated into a BLM Decision to Issue Conveyance on June 29, 1982.<sup>8</sup> No determination was made from river mile 29 to river mile 99 because these lands were outside the selection area and managed by the U.S. Fish and Wildlife Service (USF&WS). However, the uppermost 18 miles of the Kisaralik River are on State-patented lands from river mile 99 upstream to Kisaralik Lake (river mile 116). The BLM determined a portion of the upper Kisaralik River from mile 99-114 navigable on June 27, 1990 for state selected lands in T. 3 N., R. 59 W., SM and in Tps. 3 and 4 N., R. 60 W., SM.<sup>9</sup> The BLM did not consider the navigability of Kisaralik Lake and a small section of the Kisaralik River from mile 114-116 in T. 3 N., R. 58 W., SM. The Kisaralik River and Lake were not excluded when the lands were patented to the State, but the State was later credited for acreage not properly excluded in the original survey.<sup>10</sup>

### **Background Information**

Historically, the Natives have used the Kuskokwim River region for a long time in pursuit of salmon and other subsistence goods to be used in their villages. Specific use by Natives on the Kisaralik River near the headwaters is not well documented. There are instances where they have hunted in the mountains surrounding Kisaralik Lake and then built skin boats to transport their subsistence goods (berries, caribou, moose, bear, squirrels, etc.) downstream on the Kisaralik River to their village. However, the Natives conducted their subsistence activities or hunted caribou where the migrating herds happened to be located and not in one specific location. These locations and rivers used vary from year to year. The State's report did not specify any facts stating the frequency of Native use of the Kisaralik River, how much weight was transported, or any facts showing how these loads can be considered as commerce, but spoke about the region in general terms.

The primary use of the Kisaralik River for Natives is centered in the lower portion of the river (lower 29 river miles). Boat use in this section of river is easiest because of the gentle physical

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<sup>6</sup> All references to river miles in this memorandum are taken from the State of Alaska's Kisaralik River System (including Kisaralik Lake) report dated December 2, 2010.

<sup>7</sup> This location corresponds to the "Y" in Section 13, T. 9 N., R. 67 W., SM where the river splits into two channels.

<sup>8</sup> Ann Johnson, Chief, Branch of ANCSA Adjudication to Kokarmiut Corporation and Calista Corporation, "Decision," June 29, 1982, BLM records. Please refer to the maps attached to this Decision for the portions of the Kisaralik River that were either determined navigable or nonnavigable within the conveyance area. The finality of navigability determinations which have been used to make a conveyance in a decision document for the Department of the Interior is based on the Submerged Lands Act of 1988 and a Solicitor's legal opinion dated August 10, 2007.

<sup>9</sup> C. Michael Brown, Chief, Navigability Section to Dennis P. Daigger, Land Management Officer, June 27, 1990, BLM records.

<sup>10</sup> Barbara S. Knudsen, Lead Land Law Examiner, Branch of Doyon/NW Adjudication to State of Alaska, March 15, 1993, BLM records, F-15346.

character. Upstream from river mile 29 there is a scattering of Native allotments that continues upstream to Golden Gate Falls (river mile 74). This section of river becomes more braided and shallow. Above Golden Gate Falls the character of the Kisaralik River changes and becomes more narrow, boulder strewn and a series of three waterfalls that obstruct travel. The State's report mentioned on page 45 that "According to the U.S. Fish and Wildlife personnel, power boats cannot get through Golden Gate Falls." Upstream of the Upper Falls to the Yukon Delta Refuge boundary the State's report does not specify the river's physical character. However, the portion of the river described in the State's report between river miles 103 at the North Fork of the Kisaralik River and river mile 112 at Gold Creek the Kisaralik River was described as being about 75 feet wide and about 2 feet deep with large boulders and a current of 5 mph. The remaining portion of the Kisaralik River upstream to Kisaralik Lake was listed as being a single swift, boulder-strewn channel.<sup>11</sup>

Prospectors seeking gold in the Kuskokwim region in the early 1900's explored and mined in some of the drainages that are tributaries to the Kisaralik River. Several placer and lode claims were staked between Nukluk (river mile 30) and Clear (river mile 33) creeks and others downstream of Golden Gate Falls.<sup>12</sup> A supply camp for mining exploration was established by prospector Herman W. Reeth in the lower reaches of the Kisaralik River near river mile 29. In 1919 Reeth chartered a boat to carry six men and twenty tons of equipment and supplies up to his supply camp. Travel by boat upstream of the supply camp by miners has not been verified.

Reeth proposed building an electric railroad (as shown on his 1912 map in the State's report) that would start near his supply camp on the north side of the Kisaralik River and continue along the river to Golden Gate Falls and Lower Falls.<sup>13</sup> He was unsuccessful in raising money for the railroad and attempted to persuade the Alaska Road Commission (ARC) to build a wagon road from Akiak to Canyon Creek Mining District that followed a local trail. The ARC decided not to build the road into the Kisaralik River valley because mining in the area did not develop enough to warrant the expense. A local miner named H.M. "Big Hans" Hansen agreed with the ARC decision not to build the road since the miners began to rely more on airplanes to access their claims. Also, Hansen noted that a winter trail already existed to Canyon Creek (in the upper Kwethluk River area) and that all that the miners needed was a bridge over Crooked Creek.<sup>14</sup> Hansen discounted Reeth's opinion about a road by saying he had not mined in the area since 1921 and "did not own any ground in that vicinity."<sup>15</sup>

The Alaska Department of Fish and Game in 1976 reported that recreational use for sport fishing on the Kisaralik River was mostly occurring between river miles 29-74. These fishermen primarily accessed this area by boats.<sup>16</sup> Other recreationalist contract with air charters to fly into Kisaralik Lake and then float downstream in rafts or canoes. The floaters are then picked up by charter boats in the lower reaches of the river and transported back to Bethel in most cases.<sup>17</sup>

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<sup>11</sup> Kisaralik River System (Phase IV Final Submission), January 15, 2010, BLM records, p. 18-20.

<sup>12</sup> *Ibid.*, p. 35.

<sup>13</sup> *Ibid.*, p. 32.

<sup>14</sup> *Ibid.*, p. 34.

<sup>15</sup> *Ibid.*, p. 36.

<sup>16</sup> *Ibid.*, p. 46.

<sup>17</sup> *Ibid.*, p. 62.

## Conclusions

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). 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 Interior Department’s Solicitor’s Office. 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*, 565 U.S. \_\_\_\_ (2012), summarizes and explains the proper interpretation of *The Daniel Ball* criteria. Associate Solicitor Hugh Garner’s memo of March 16, 1976, (“Title to submerged lands for purposes of administering ANCSA”) and Regional Solicitor John Allen’s memo of February 25, 1980 (“Kandik, Nation Decision on Navigability”) provide valuable guidance on applying title navigability law in Alaska. In cases concerning prestatehood reservations, BLM uses the established criteria set out and applied by the Supreme Court in two Alaska cases, *Alaska v. United States*, 545 U.S. 75 (2005) (“*Glacier Bay*”) and *United States v. Alaska*, 521 U.S. 1 (1997) (“*Arctic Coast*”/“*Dinkum Sands*”).

After reviewing the evidence provided by the State, I conclude that the Kisaralik River was navigable in fact and was used as a highway of commerce at the time of statehood from its confluence with the Kuskokuak Slough in T. 9 N., R. 67 W., SM upstream about 9.5 miles to a place where the Kisaralik River splits near the eastern township boundary of T. 9 N., R. 67 W., SM. The BLM determined this part of the Kisaralik River navigable in an administrative decision for the conveyance of lands to Kokarmuit Corporation on June 29, 1982. In that same decision the BLM determined the Kisaralik River to be nonnavigable from about mile 9.5, or near the eastern township boundary of T. 9 N., R. 67 W., SM, where the Kisaralik River splits, upstream to the eastern township boundary line of T. 8 N., R. 66 W., SM (approximate mile 29). These determinations are final for the Department of the Interior.<sup>18</sup>

The Kisaralik River from about mile 29 to mile 99 the uplands are managed by the USF&WS for the Yukon Delta National Wildlife Refuge. Many Native allotments are located in this section along the Kisaralik River upstream but stop at Golden Gate Falls near mile 74. Most of these allottees noted that they access their allotments by boat where they conducted subsistence activities. However, the river begins to change from a wider and deeper channel to a more braided, rocky, and shallow character. The State’s report noted that the Kisaralik River from “the braided portion from mile 29 to mile 45 can usually be negotiated by jet boats.”<sup>19</sup> Very little boat use upstream of mile 45 is documented and then only at higher water flows. One reason is that the recreational fishing appears to be better in the mile 29 to mile 45 zone due to the fact that the braided character of the river provides better fish habitat than further upstream.

<sup>18</sup> Deputy Regional Solicitor, Alaska Region to State Director, Bureau of Land Management Alaska State Office (910), “Finality of BLM Navigability Determinations under the Submerged Lands Act of 1988,” August 10, 2007, BLM records.

<sup>19</sup> *Ibid.*, p. 45.

The physical character of the river upstream of mile 45 is susceptible for boat use up to Golden Gate Falls. The Kisaralik River from about mile 29 to Golden Gate Falls at about mile 74 is considered navigable based on susceptibility.

Upstream of Golden Gate Falls the Kisaralik River is used by boats floating downstream from their access at Kisaralik Lake. Natives occasionally built skin boats and floated their subsistence goods down the river before and after the date of statehood. There is no evidence that miners used the Kisaralik River in this section to transport goods or people. Currently, recreational rafters are being flown into Kisaralik Lake and then float downstream to be picked up by boats in the lower section of the river. There has not been any evidence provided of boats commonly used for commerce at the time of statehood traversing the Kisaralik River from Golden Gate Falls upstream to Kisaralik Lake. The reason for the one-way floating is the change in physical character of the Kisaralik River upstream of Golden Gate Falls. The river becomes more narrow, rocky, and the presence of three distinct waterfalls located in this section make it difficult for boats to navigate upstream of Golden Gate Falls. The Kisaralik River from Golden Gate Falls at about mile 74 upstream to eastern township boundary of T. 3 N., R. 61 W., SM (approximate mile 99) is considered to be nonnavigable.

The State of Alaska owns the uplands along the Kisaralik River, upstream of the western township boundary of T. 3 N., R. 60 W., SM (approximate mile 99) to and including Kisaralik Lake (approximate river mile 116) in T. 3 N., R. 58 W., SM. Therefore, the State owns the submerged lands beneath the Kisaralik River and Kisaralik Lake based on riparian ownership, even though BLM has not found the water bodies to be navigable.