



# United States Department of the Interior



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In Reply Refer To:  
AA-92408  
1864 (LLAK9420)

SEP 01 2017

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

## DECISION

State of Alaska	:	AA-92408
Department of Natural Resources	:	Recordable Disclaimer of Interest
Division of Mining, Land & Water	:	Application
Public Access Assertion & Defense Unit	:	
550 West Seventh Avenue, Suite 1420	:	Kisaralik Lake and River System
Anchorage, Alaska 99501-3579	:	River Miles 74-99

### ADMINISTRATIVE WAIVER GRANTED APPLICATION REJECTED

On November 30, 2010, the State of Alaska (State) filed with the Bureau of Land Management (BLM) an application for a recordable disclaimer of interest (AA-92408) under the provisions of Section 315 of the Federal Land Policy Management Act of October 21, 1976 (FLPMA), 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864, for the lands underlying the Kisaralik Lake and River system within the Kuskokwim River Region, Alaska located in southwestern Alaska.<sup>1</sup> The State's application included "the submerged lands and bed up to and including the ordinary high water line of Kisaralik Lake within Township 03 North, Range 58 West, Seward Meridian, 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 Township 03 North, Range 58 West, Seward Meridian, Alaska, downstream to the location where the river enters the Kuskokuak Slough within Township 09 South, Range 67 West, Seward Meridian, Alaska."

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<sup>1</sup>Tom Irwin, Commissioner, Alaska-Department of Natural Resources, to Henri Bisson, BLM-Alaska State Director, October 3, 2005, file FF-094615 (1864), Alaska State Office, BLM records.

The State filed an amended RDI application to modify the “Description of the Waterway” in Section 1 because there was a typographical error. The State typed Township 09 South and it should have been Township 09 North. The new description states “This application is submitted for the submerged lands and bed up to and including the ordinary high water line of Kisaralik Lake within Township 03 North, Range 58 West, Seward Meridian 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 Township 03 North, Range 58 West, Seward Meridian, Alaska, downstream to the location where the river enters the Kuskokuak Slough within Township 09 North, Range 67 West, Seward Meridian, Alaska.”<sup>2</sup>

On November 23, 2015 the State advised that “you may delete from our application that portion of the Kisaralik River conveyed to Kokarmiut Corp. and Calista Corp. by I.C. 610 & 611 from the forks in Section 13 of T. 9 N., R. 67 W., SM (Mile 9.5) upstream through Section 12, T. 8 N., R. 65 W., SM (Mile 29).”<sup>3</sup>

The State contends that Kisaralik Lake and River are navigable, and the application for a disclaimer of interest is based upon entitlement under the Equal Footing Doctrine, the Submerged Lands Act of May 22, 1953, the Submerged Lands Act of 1988 (P.L. 100-395), and the Alaska Statehood Act.

The Submerged Lands Act of 1953, 43 U.S.C. §1311(a), granted and confirmed to the states title to the lands beneath inland navigable waters within the boundaries of the respective states. It also gave the states the right and power to manage and administer these lands in accordance with state law. Section 6(m) of the Alaska Statehood Act, July 7, 1958, made the Submerged Lands Act applicable to Alaska.<sup>4</sup> Section 315(a) of FLPMA authorizes the Secretary of the Interior to issue a document of disclaimer of interest(s) in any lands in any form suitable for recordation where the disclaimer will help remove a cloud on the title of such lands and where he determines a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

This decision relates only to Kisaralik River miles 74-99. River miles 0-74 and 99-116, including Kisaralik Lake are the subject of a separate decision to be issued concurrently.

## BACKGROUND

In support of its application, the State submitted the “Kisaralik River System Final Summary Report” dated January 15, 2010. The State also sent an email with two attachments on March 23, 2017 detailing the State’s reasoning that certain modern boats used on the Kisaralik River are meaningfully similar to those customarily used for trade and travel at the date of Alaska’s statehood, January 3, 1959, for commerce.

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<sup>2</sup> David W. Schade, DNR Navigability Subunit Manager to Craig Frichtl, Chief, Branch of Survey Preparation and Planning, BLM, August 21, 2012, file AA-092408 (1864), BLM records.

<sup>3</sup> See Email correspondence, dated November 23, 2015, James Walker to Jack Frost, file AA-92408 (1864), BLM records. The reference document is also available in this file.

<sup>4</sup> 72 Stat. 339, 343

On October 9, 2012, notice of the State's application was published in the *Federal Register*.<sup>5</sup> The BLM prepared a draft navigability report, "Summary Report on the Federal Interest in Lands Underlying Kisaralik River and Kisaralik Lake in the Kuskokwim Subregion, Alaska" describing the State's application and supporting evidence, riparian land status, physical character and historical uses.

The State of Alaska published a Public Notice of the State's application and the availability of the draft navigability report in the *Anchorage Daily News* (November 6, 13 and November 20, 2012). The BLM posted information about this application, including the draft navigability report, on the BLM-Alaska website.

The BLM sent copies of its draft navigability report to the following: State of Alaska (Departments of Natural Resources and Fish and Game); the United States Fish and Wildlife Service (USFWS); Akiachak, Limited; Calista Corporation; Bethel Native Corporation; Kokarmiut Corporation; Kwethluk, Incorporated; Tulkisarmute, Incorporated; and The Kuskokwim Corporation. The notices invited review and comments and afforded each recipient an opportunity to provide additional information. The comment period ended on January 9, 2013.

On December 17, 2012, the State of Alaska requested a 30-day extension to the January 9, 2013 deadline for comments on the *Federal Register* notice. On February 7, 2013, Kevin Sorenson, with the State requested an additional 30-day extension to comment by email.

During the published notice period, the BLM received comments from the State of Alaska, the U.S. Fish and Wildlife Service and the Kokarmiut Corporation. The BLM received no other comments.

On December 31, 2012, the U.S. Fish and Wildlife Service responded in a memorandum concurring with the BLM's draft summary report. They specifically stated that they did not feel the State's application provided "site-specific evidence clearly demonstrating past use, or susceptibility for use as a 'highway of commerce'". The BLM does not address the U.S. Fish and Wildlife Service comments in the final report because the comments do not provide substantive factual evidence bearing on navigability that would change the BLM summary report.

On January 9, 2013, the Kokarmiut Corporation responded in a letter vehemently opposing the "proposed navigability designation of the Kisaralik River". They stated that they have used this "river for subsistence food of fish and game for many, many years or since the time of immemorial". They enclosed a resolution adopted by the four nearby villages of Tuluksak, Kwethluk, Akiachak, and Akiak opposing the navigability designation proposed by the State of Alaska. They would like to protect and manage the lands under the Kisaralik River. Again, the BLM does not address these comments in the final report because the comments do not provide substantive factual evidence bearing on navigability that would change the BLM summary report.

<sup>5</sup> Vol 77, No. 195, FR 61427-61428

On March 11, 2013, the State of Alaska provided comments to the BLM on the draft Kisaralik Lake and River System summary report. The State concurred with the BLM's conclusion that the Kisaralik River is navigable from mile 0-9.5 and mile 29-74. The State representatives disagreed with the BLM's findings that the Kisaralik River from mile 74-99 is not navigable, and "the BLM's decision not to make a navigability determination, or issue an RDI on its previous finding of navigability, for the river between mile 99 and mile 116." The State did not provide additional factual evidence bearing on the BLM's determination on the portions of the river where the BLM found it to be non-navigable and therefore their comments are not addressed in the final summary report.

On November 19, 2015, the BLM sent an email to the State representatives informing them that in a conveyance document dated June 29, 1982, the BLM determined a portion of the Kisaralik River (approximate river mile 9.5-29) to be non-navigable. 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.<sup>6</sup> Based on the finality of our decision documents the BLM would have to reject the portion of this State's application. The BLM asked the State if based on this they would like to modify their application and remove this portion of the water body. The State responded by email on November 23, 2015, requesting the BLM delete the portion of the water body included in Interim Conveyance 610 and 611 from the forks of Section 13 of T. 9 N., R. 67 W., Seward Meridian (mile 9.5) upstream through Section 12, T. 8 N., R. 65 W., Seward Meridian (mile 29) from their application. They also made clear they did not concede the non-navigability of this portion of the river, but were willing to remove it to move matters along and to facilitate disclaimer of the other lands included in their application.

On November 23, 2015, the BLM emailed the State informing them that section of the river from Golden Gate Falls upstream to where the State lands begin, the BLM considered non-navigable. The BLM asked the State if they would like to keep this segment in their application or remove it. On November 25, 2015, the State responded to the email with questions. After some discussions, the State responded by email on November 30, 2015, stating they would like to keep the segment in question in the State's application.

When drafting the summary report the BLM had numerous discussions with the State requesting they provide the BLM with evidence on how the boats used in the part of the Kisaralik River that the BLM considered non-navigable, were meaningfully similar to boats used for commerce at statehood.<sup>7</sup> On November 1, 2016, the BLM sent a notice to the State formally requesting additional information on how the watercraft cited in the State's application was meaningfully similar to those customary for trade and travel at the time of statehood. This notice requested the State submit their information within 60 days from the date they received the notice. In an email dated February 3, 2017, the State requested an additional 30 days to provide their response to the BLM's request for additional information. The State said they would have their response to the BLM no later than March 6, 2016 (2016 was a typo as the email was sent in February 2017). On March 23, 2017, the BLM sent an email to Alaska Natural Resource Manager, James Walker

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<sup>6</sup> 43 U.S.C. § 1631 (c)(1)

<sup>7</sup> PPL Montana LLC v. Montana, 132 S. Ct. 1215 (2012)

reminding him that the BLM still had not received a response to the BLM's request for additional information. On March 23, 2017, Mr. Walker responded to the email from BLM with an assertion that certain modern boats used on the Kisaralik River are meaningfully similar to those customarily used for trade and travel at the date of Alaska's statehood, January 3, 1959, for commerce. Mr. Walker did not provide any information specific to the Kisaralik River system, but instead provided copies of pleadings filed by the State in the Mosquito Fork litigation.<sup>8</sup> The State referred BLM to the analysis contained in pages 20-27 and pages 41-46 in its opening brief as well as pages 4-21 in its reply, which is where the State argued for very expansive interpretations of the court decisions in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012) and *Alaska v. Ahtna, Inc.* 891 F.2d 1401 (9th Cir. 1989).

#### ADMINISTRATIVE WAIVER GRANTED

Pursuant to 43 CFR 1864.1-2(c)(1) and (d), unless a waiver is granted, a legal description of the lands for which a disclaimer is sought must be based on either an official United States public land survey, or a metes and bounds survey tied to the nearest corner of an official public land survey. In its application the State of Alaska requested a waiver of this requirement under 43 CFR 1864.1-2(d). The Kisaralik Lake and River System is easily identifiable on United States Geological Survey (USGS) topographic maps Bethel B-1-4, C-3-6, D-4-6.<sup>9</sup>

#### APPLICATION REJECTED

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 prestatehood 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*");

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<sup>8</sup> State of Alaska v. United States of America, *et al*, Civil Action NO: 3:12-cv-00114-SLG, State of Alaska's Motion for Summary Judgment; Alternative Motion to Establish Law of the Case; and Memorandum of Law in Support, filed June 1, 2015, and State of Alaska's Reply in Support of its Motion for Summary Judgment; Alternative Motion to Establish Law of the Case, filed July 13, 2015, BLM records.

<sup>9</sup> USGS 1:63,360 Topographic Maps: Bethel B-1-4, C-3-6, D-4-6.

*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 (9<sup>th</sup> 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, (9<sup>th</sup> Cir. December 21, 1970) (Tustumena Lake).

The final navigability report, “Summary Report on the Federal Interest in Lands Underlying Kisaralik Lake and River System in the Kuskokwim Subregion, Alaska” (dated August 21, 2017), concluded that upstream of Golden Gate Falls the primary use of the Kisaralik River is 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 fly into Kisaralik Lake and then float downstream where powerboats in the lower section of the river pick them up. However, we have not found any evidence that boats commonly used for commerce at the time of statehood, as described in the Ninth Circuit Court’s ruling on the Gulkana River, have traversed the Kisaralik River from Golden Gate Falls upstream to Kisaralik Lake.<sup>10</sup> While the State indicated that powerboats have navigated the Kisaralik River upstream to about Upper Falls, the State’s report shows that this use happens at high water when the river is not in its natural and ordinary condition and it makes no mention of the size of loads other than a vague remark by a rafter that some of the boats appeared to be “heavily loaded.”<sup>11</sup> The State’s report also states on page 45 that “According to the U.S. Fish and Wildlife personnel, powerboats cannot get through Golden Gate Falls.” 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. For these reasons, we conclude that 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 non-navigable.

Therefore, the State’s application for the lands underlying the Kisaralik River from the Golden Gate Falls at about mile 74 upstream to the eastern boundary township of T. 3 N., R. 61 W., SM (approximate mile 99) must be, and is hereby, rejected based on the facts.

#### HOW TO APPEAL THIS DECISION

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (either at the above address or the e-mail address set forth on Form 1842-1) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulations contained in 43 CFR 4.21 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board,

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<sup>10</sup> *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9<sup>th</sup> Cir. 1989).

<sup>11</sup> *Ibid.*, p. 45, 65.

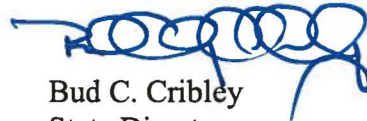
the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below.

Copies of the notice of appeal and petition for a stay, if any, must be submitted to each party named in this decision, the Interior Board of Land Appeals, and to the appropriate Office of the Solicitor (see 43 CFR 4.413 and Form 1842-1) at the same time the original documents are filed with this office.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal must show sufficient justification based on the following standards:

- 1) The relative harm to the parties if the stay is granted or denied;
- 2) The likelihood of the appellant's success on the merits;
- 3) The likelihood of immediate and irreparable harm if the stay is not granted; and
- 4) Whether the public interest favors granting the stay.



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cc (w/o enclosure):

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