



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Alaska State Office
222 West Seventh Avenue, #13
Anchorage, Alaska 99513-7504
www.blm.gov/alaska

In Reply Refer To:
1864 (AK9410)

AUG 21 2017

Memorandum

To: File AA-92408 *J. Frost*

From: Jack Frost, Navigable Waters Specialist (AK9410)

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 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 Kuskokwim Slough within Township 09 South, Range 67 West, Seward Meridian, Alaska.” The land description and maps for the Kisaralik River and Kisaralik Lake can be found in the State’s application.¹

On August 21, 2012, the State amended its “Description of Waterway” in Section 1 of its original application because there was a typographical error. 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 Kuskokwim Slough within Township 09 North, Range 67 West, Seward Meridian, Alaska.”²

¹ 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.

² 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.

In an email dated November 23, 2015, the State requested the BLM delete from their 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).”³

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.”⁴ 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, the BLM navigability determinations and conveyance actions, and evidence of commercial navigation, subsistence, mining and recreational use.

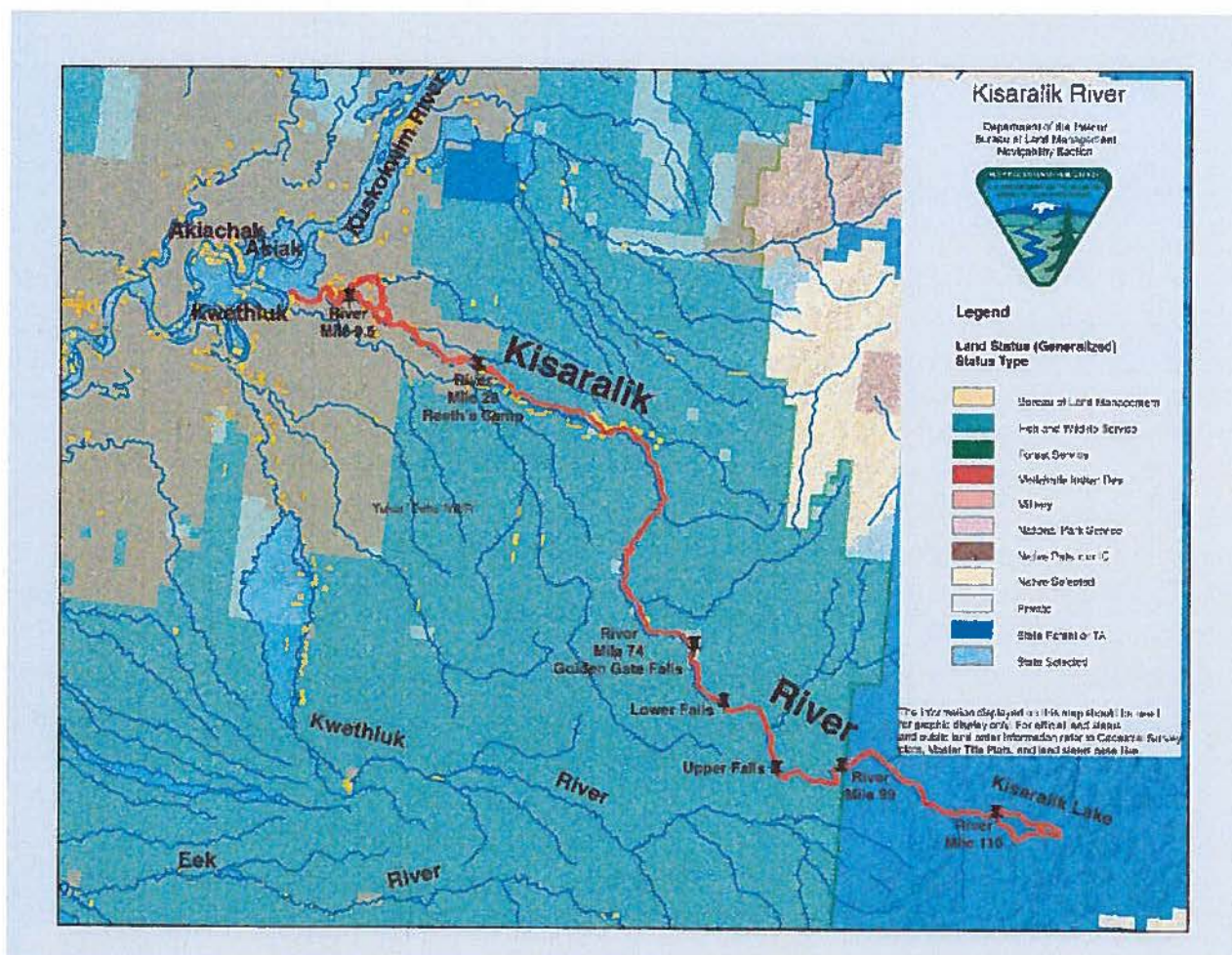
The BLM received an email with two attachments from the State on March 23, 2017 detailing the State’s reasoning that certain modern boats used on the Kisaralik River are meaningfully similar to those customarily used for trade and travel at the date of Alaska’s statehood, January 3, 1959, for commerce. The attachments that they provided were documents used by the State in the Mosquito Fork litigation.⁵ In particular, the State referred the BLM to consider the analysis contained in pages 20-27 and pages 41-46 in the opening brief and pages 4-21 in the reply brief that “I believe articulate answers to the questions that you have raised – i.e. that modern boats are meaningfully similar to those in customary use at the time of statehood.”⁶

³ 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.

⁴ This report, Kisaralik River System (Phase IV Final Submission), January 15, 2010, BLM records, is a product of a Navigability Assistance Agreement (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 907-272-7547 or by email at reference@arlis.org.

⁵ 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.

⁶ See Email correspondence, dated March 23, 2017, James Walker to Angela Nichols and Jack Frost, file AA-92408 (1864), BLM records.



Map 1

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 Kuskokuak Slough, a backwater slough of the Kuskokwim River.⁷ 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, brown and turbid in the lower sandy and silty reaches.⁸

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

⁷ Kisaralik River System (Phase IV Final Submission), January 15, 2010, BLM records, p. 1-2.

⁸ *Ibid.*, p. 18.

Lake.⁹ Numerous Native allotments are scattered along the lower 50 miles of the river with three additional parcels situated between river mile 50 and river mile 74, the site of Golden Gate Falls.¹⁰

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 because of travel, trade and commerce.¹¹ On the same date, the BLM determined the Kisaralik River non-navigable 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, 1982.¹² 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 (FWS). 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 township 3 north, range 59 west, Seward Meridian, Alaska, and in townships 3 and 4 north, range 60 west, Seward Meridian, Alaska.¹³ The BLM did not consider the navigability of Kisaralik Lake and a small section of the Kisaralik River from mile 114-116 in township 3 north, range 58 west, Seward Meridian, Alaska. 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.¹⁴

Background Information

Historically, Alaska Natives have relied on the Kuskokwim River region for a long time in pursuit of salmon and other subsistence goods used in their villages. There are instances where the Natives have hunted in the mountains surrounding Kisaralik Lake and then built skin boats to transport their subsistence goods (berries, caribou, moose, bear, squirrels, etc.) gear and people 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. A few families from Kwethluk continued to build skin boats into the 1980's and use them on the Kisaralik and other nearby rivers.¹⁵

⁹ The refuge was created on December 2, 1980 by the Alaska National Interest Lands Conservation Act (P.L. 96-487).

¹⁰ 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.

¹¹ This location corresponds to the "Y" in Section 13, T. 9 N., R. 67 W., SM where the river splits into two channels.

¹² 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 determined either navigable or non-navigable within the conveyance area. 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).

¹³ C. Michael Brown, Chief, Navigability Section to Dennis P. Daigger, Land Management Officer, June 27, 1990, BLM records.

¹⁴ Barbara S. Knudsen, Lead Land Law Examiner, Branch of Doyon/NW Adjudication to State of Alaska, March 15, 1993, BLM records, F-15346.

¹⁵ Kisaralik River System (Phase IV Final Submission), January 15, 2010, BLM records, p. 40.

The State's report detailed an account from the 1930's of a local family using the headwaters of the Kisaralik and Nushagak drainages for subsistence and then building a skin boat and floating downstream to their home in Akiak.¹⁶ The State also noted post World War II subsistence use and provided some pictures of skin boats on the Kisaralik River.¹⁷

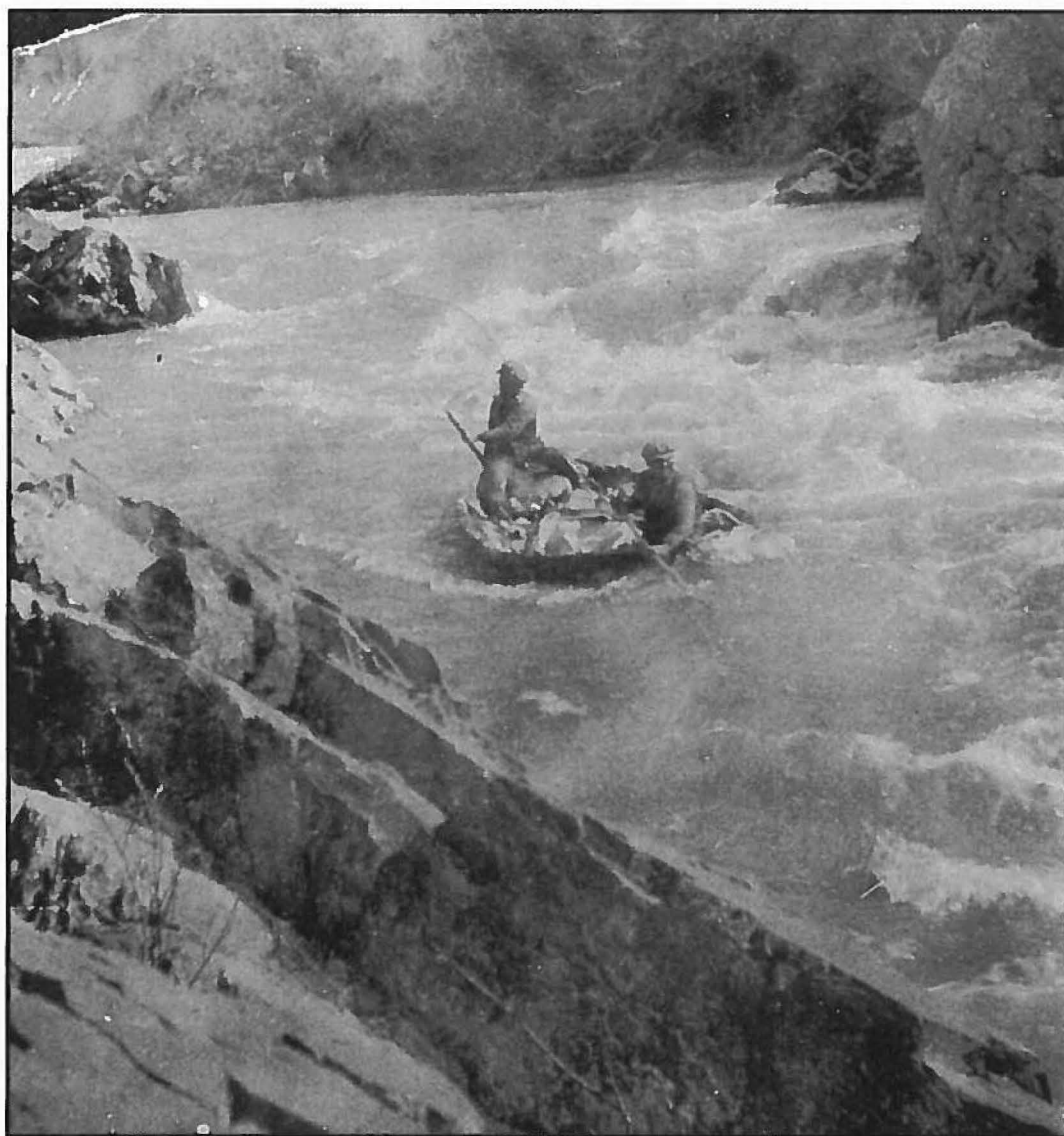


Figure 13. Two Natives descending Golden Gate Falls, Kisaralik River, in a heavily laden skin boat, 1920s. This photo, which was salvaged after the *Tundra Drums* Newspaper collection was dumped, is courtesy of Bethel resident Jon McDonald.¹⁸

¹⁶ *Ibid.*, p. 30.

¹⁷ *Ibid.*, p. 39-40.

¹⁸ *Ibid.*, p. 28.

The primary use of the Kisaralik River by Alaska Natives occurs 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 character (See Figure 18). 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 the river becomes more braided and shallow (See Figure 12). Above Golden Gate Falls, the character of the Kisaralik River changes and becomes more narrow and boulder strewn including a series of three waterfalls that obstruct travel (See Figures 9, 10, 13). 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 National Wildlife 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.¹⁹

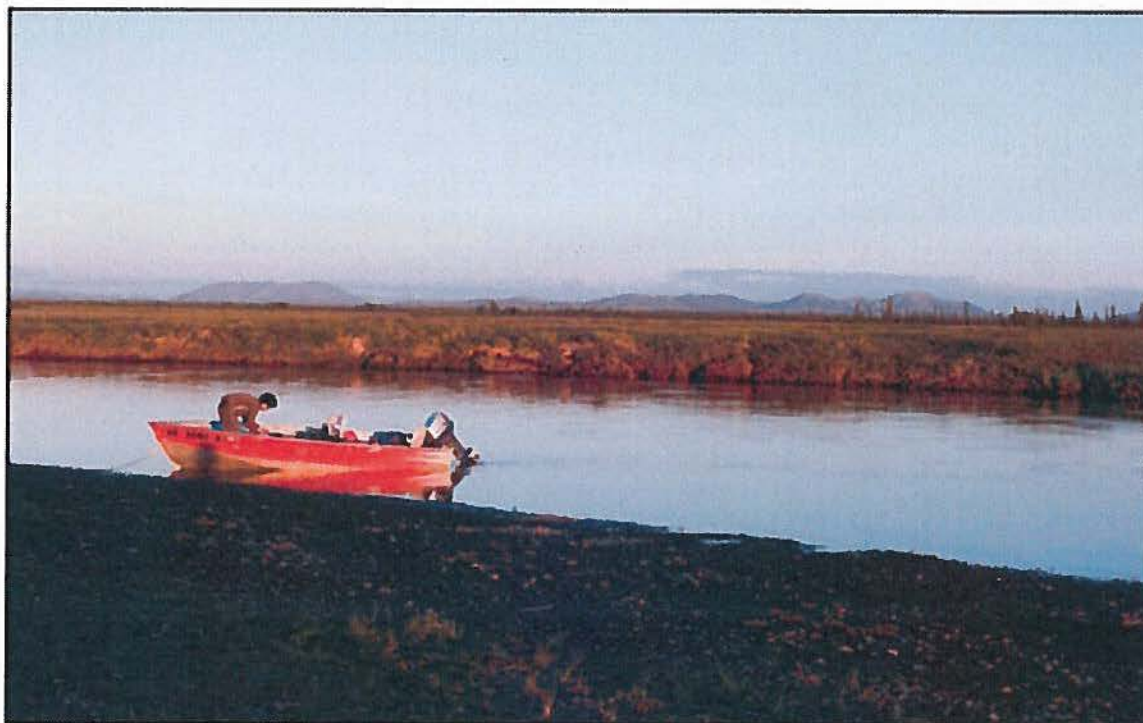


Figure 18. A Native with an outboard motorboat on the lower Kisaralik River, August 2008. Photo courtesy of <http://www.flickr.com/photos/imagesoflife/sets>.²⁰

Prospectors seeking gold in the Kuskokwim region in the early 1900's has 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

¹⁹ *Ibid.*, p. 18-20.

²⁰ *Ibid.*, p. 42.

downstream of Golden Gate Falls.²¹ 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.

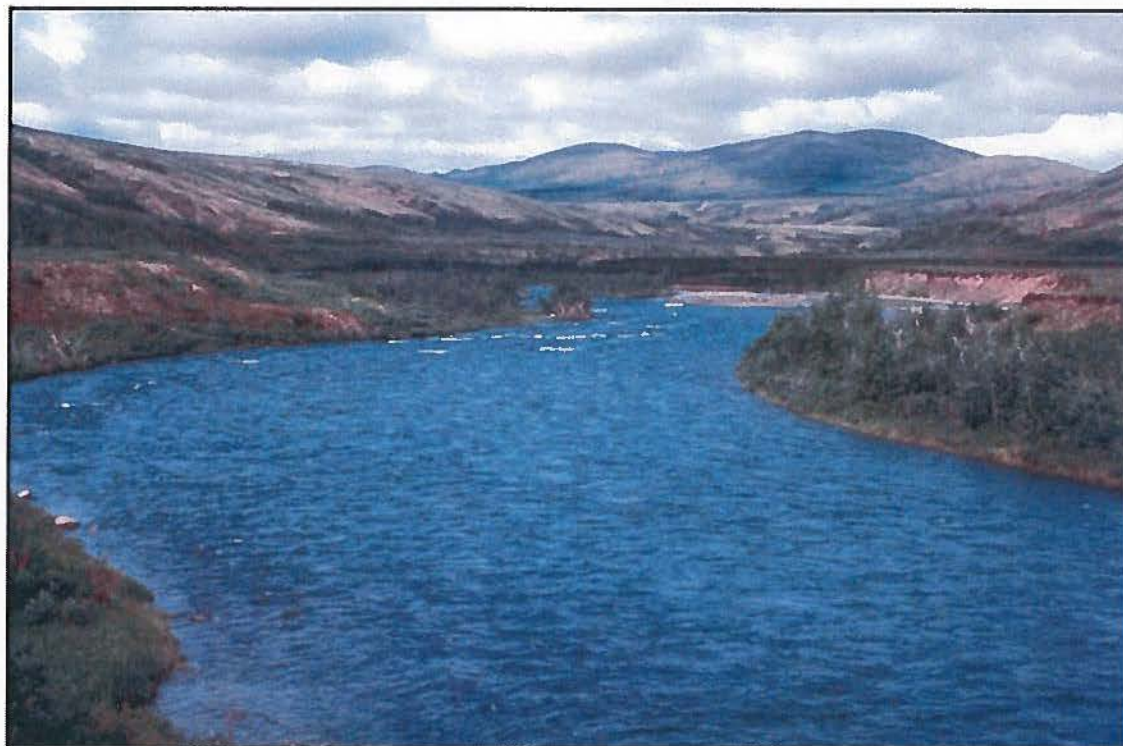


Figure 12. The Kisaralik River between Clear and Quartz creeks, April 19, 2004. Photo courtesy of U.S. Fish & Wildlife Service.²²

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.²³ 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. In addition, 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.²⁴ 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."²⁵

²¹ *Ibid.*, p. 35.

²² *Ibid.*, p. 23.

²³ *Ibid.*, p. 32.

²⁴ *Ibid.*, p. 34.

²⁵ *Ibid.*, p. 36.

In 1976, the Alaska Department of Fish and Game reported that recreational use for sport fishing on the Kisaralik River was mostly occurring between river miles 29-74.²⁶ These anglers primarily accessed this area by boats. Other recreational anglers contracted with air charters to fly them to Kisaralik Lake. They then floated downstream in rafts or canoes. The first documented rafting trip from Kisaralik Lake downstream detailed in the State's application occurred in the summer of 1973.²⁷ Recreational rafting trips have occurred every year since then. Government employees have also flown into Kisaralik Lake and floated downstream documenting river conditions for a possible designation as a Wild and Scenic River and other purposes.²⁸ Typically, floaters meet up with charter boats in the lower reaches of the river and then transported back to Bethel.²⁹

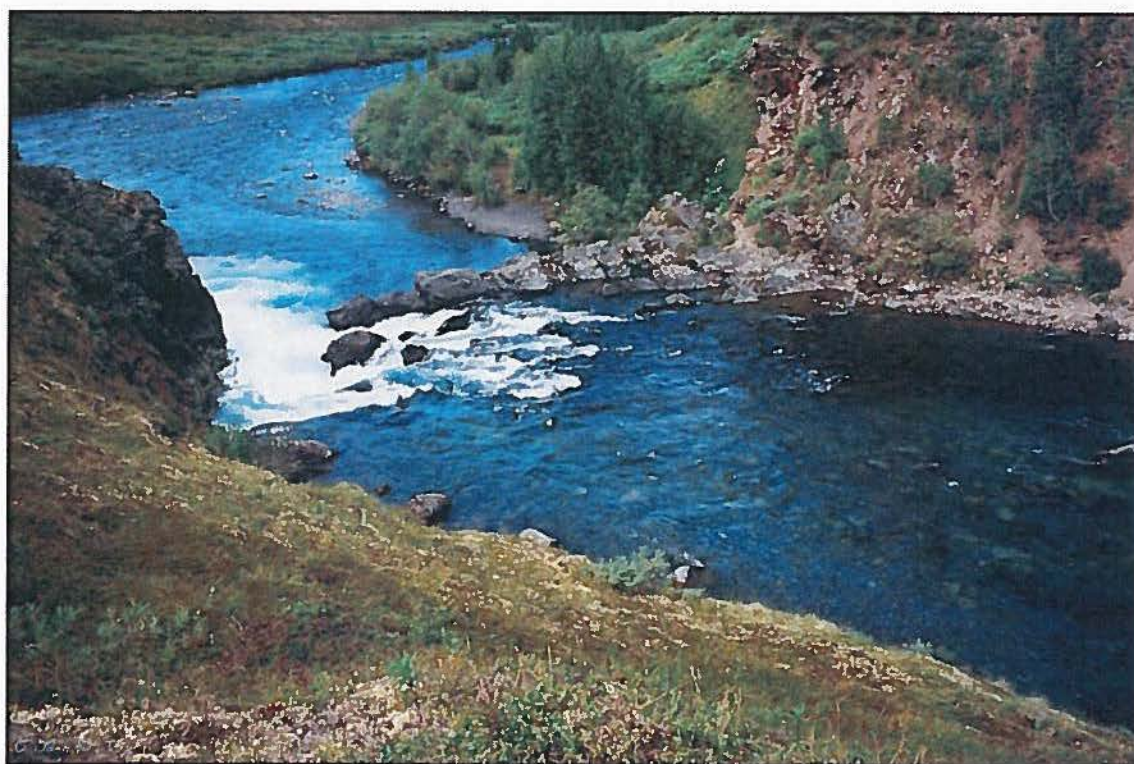


Figure 10. Lower Falls on the Kisaralik River, August 26, 2008. Photo by Oden W. Jahn, downloaded from <http://picasaweb.google.com/1h/photo/rrDnTOrOWHW24QJfPk1Lxg>.³⁰

²⁶ *Ibid.*, p. 46.

²⁷ *Ibid.*, p. 52.

²⁸ *Ibid.*, p. 49-50.

²⁹ *Ibid.*, p. 62.

³⁰ *Ibid.*, p. 21.

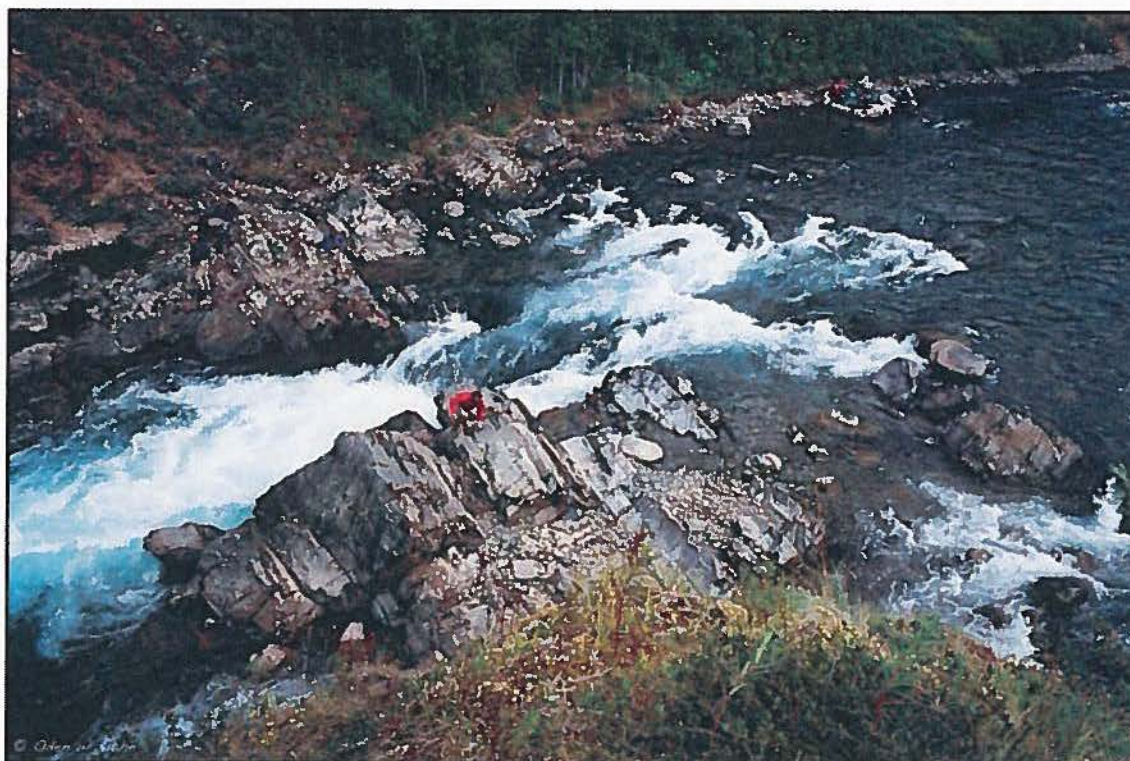


Figure 9. The Upper Falls, Kisaralik River, August 26, 2008. Note the individuals on either side of the falls scouting the route and their rafts at upper right. Photo by Oden W. Jahn, from <http://picasaweb.google.com/1h/photo/XPHhSPTei8mEHYn1EsYjQg>.³¹

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*”);

³¹ *Ibid.*, p. 20.

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. December 21, 1970) (Tustumena Lake).

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 township 9 north, range 67 west, Seward Meridian, Alaska, upstream about 9.5 miles to a place where the Kisaralik River splits near the eastern township boundary of township 9 north, range 67 west, Seward Meridian, Alaska. 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. This determination was final for the Department of the Interior.

The FWS for the Yukon Delta National Wildlife Refuge manages the uplands of the Kisaralik River from about mile 29 to mile 99. 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. 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.”³² There is very little boat use upstream of mile 45 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 because the braided character of the river provides better fish habitat than further upstream. The physical character of the river upstream of mile 45 is susceptible for use as a highway of commerce up to Golden Gate Falls. The Kisaralik River from about mile 29 to Golden Gate Falls at about mile 74 is navigable based on susceptibility.

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.³³ 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.”³⁴ 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

³² *Ibid.*, p. 45.

³³ *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989).

³⁴ *Ibid.*, p. 45, 65.

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 township 3 north, range 61 west, Seward Meridian, Alaska (approximate mile 99) is non-navigable.

The State of Alaska owns the uplands along the Kisaralik River, upstream of the western township boundary of township 3 north, range 60 west, Seward Meridian, Alaska (approximate mile 99) to and including Kisaralik Lake (approximate river mile 116) in township 3 north, range 58 west, Seward Meridian, Alaska. Therefore, the State owns the submerged lands beneath the Kisaralik River and Kisaralik Lake based on riparian ownership.