United States Department of the Interior

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In Reply Refer To:
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Memorandum

To: AA-086371

From: Jack Frost
Navigable Waters Specialist (AK-9272)

Subject: Final Summary Report: Federal Interest in Lands Underlying Kuskokwim River in the Kuskokwim Bay Subregion, Alaska

The State of Alaska (State) filed an application, dated March 10, 2006, for a recordable disclaimer of interest (RDI) for the lands underlying the Kuskokwim River. These submerged lands are described as the lands below the ordinary high water lines of the left and right banks from its origins at the confluence with the South Fork of the Kuskokwim River and the North Fork of the Kuskokwim River within Township 28 South, Range 22 East, Kateel River Meridian (KRM), Alaska, downstream to Kuskokwim Bay within T. 2 S., R. 77 W., Seward Meridian (SM), Alaska.[1] The State's RDI application is based on the equal footing doctrine, the Submerged Lands Act of 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, "or any other legally cognizable reason." The Bureau of Land Management (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 three BLM documents (dated May 6, 1980[2], November 8, 1984[3], and July 8, 1985[4]) and an extract of BLM's 1985 Kuskokwim River region report that documents historical information about the Kuskokwim River.[5]

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[1] Michael L. Menge to Henri Bisson, BLM, March 10, 2006, file AA-086371 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in this file.
[2] Robert Arndorfer, Acting State Director to Chief, Division of Resources (930), subject: "Navigable and Nonnavigable Waters in the Upper Kuskokwim River Basin," May 6, 1980, AA-86371, BLM records.
[3] Robert Arndorfer, Deputy State Director for Conveyance Management (960) to Chief, Branch of Conveyance Services (962), subject: "Navigable Waters of the Kuskokwim Region, Alaska," November 8, 1984, AA-86371, BLM records.

This summary report reviews the merits of the State's RDI application. It summarizes the status of adjacent uplands, the history of the BLM navigability determinations, and, where appropriate, the evidence of commercial navigation.

Location

The Kuskokwim River is located in southwestern Alaska. It begins at the confluence of its North and South Forks, about 10 miles upstream from the village of Medfra, and flows in a meandering and southwesterly direction approximately 540 miles to Kuskokwim Bay (downstream from Bethel about 65 river miles). The land area included in this vast river basin is about 11% of the total area of Alaska and the Kuskokwim River is the second longest river in Alaska after the Yukon River. The Kuskokwim River region is bounded by the Alaska Range Mountains on the south and east and the Kuskokwim Mountains on the north and west.[6] Some of its tributaries include the Johnson, Kisaralik, Aniak, George, Holitna, Stony, and Takotna rivers.

Tidal influence of the Kuskokwim River is reported to extend upstream as far as the mouth of the Tuluksak River, at about river mile 97.[7] This has not been confirmed by survey however. The fact that ocean-going vessels dock at Bethel and anecdotal reports suggest that tidewater extends at least as far as Bethel. Tidal waters of the Kuskokwim River are considered to be navigable.

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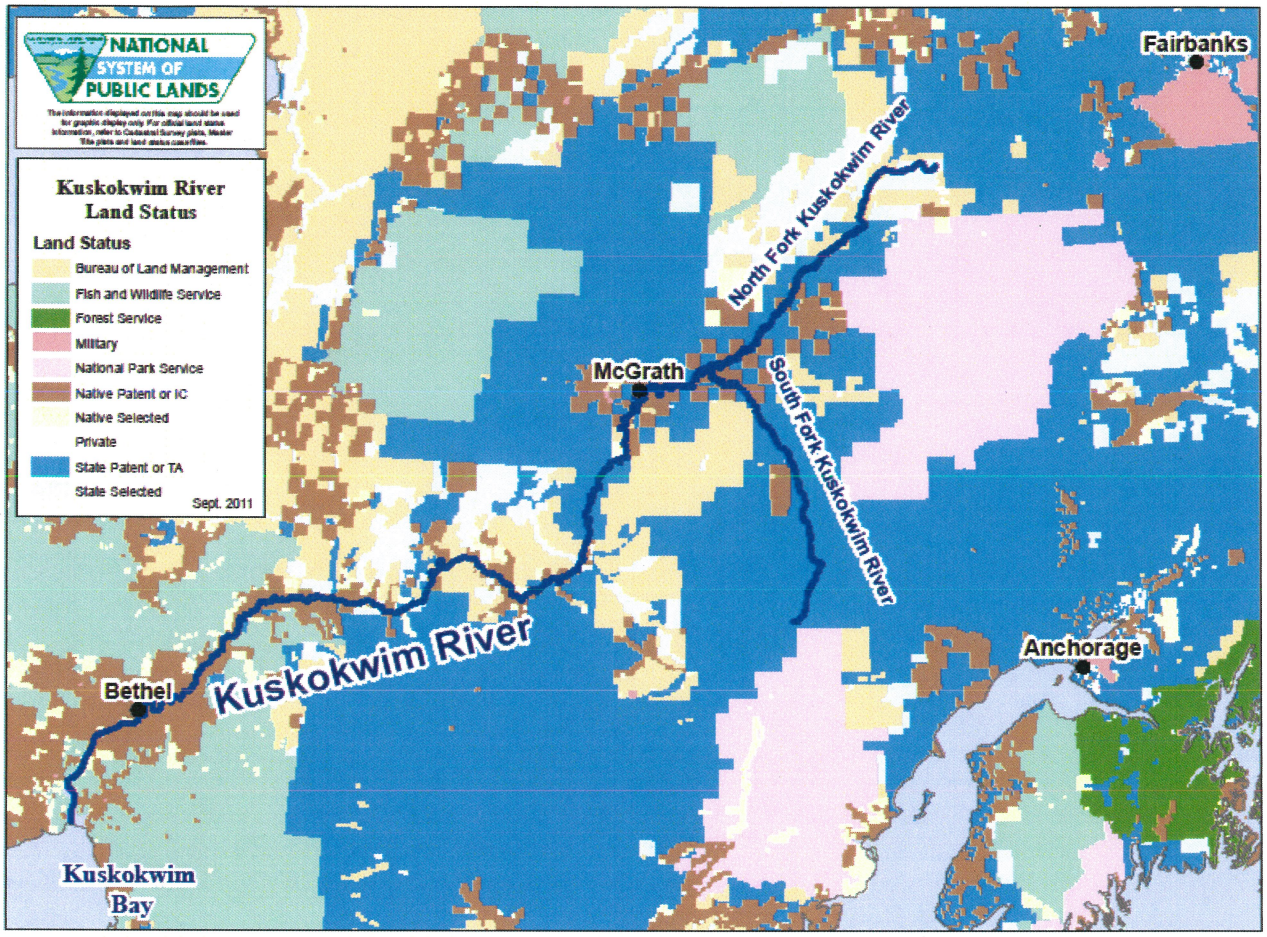
[4] James H. Ducker, Historian to Chief, Navigability Section, subject: "Water Bodies Determined Navigable in Regional Report Process as of July 10, 1985," AA-86371, July 8, 1985, BLM records.
[5] Brown, C. Michael "Alaska's Kuskokwim River Region: A History." Unpublished manuscript, Bureau of Land Management, Alaska State Office, Anchorage, 1985. Copy in Alaska Resources Library, Anchorage.
[6] *Ibid.*, 4-5.
[7] *Ibid.*, 8.



Land Status

The Kuskokwim River flows through approximately 116 townships of mixed land ownership.

The lower one-third (from Kuskokwim Bay upstream to about Aniak) of the Kuskokwim River is located within the exterior boundary of the Yukon Delta National Wildlife Refuge (established by Public Law 96-487 of December 2, 1980) and is managed by the U.S. Fish and Wildlife Service (USFWS). However, most of the adjacent uplands to the Kuskokwim River in this area have been conveyed out of federal ownership under the Alaska Native Claims Settlement Act (ANCSA) to Native corporations.

The remaining lands along the upper two-thirds of the Kuskokwim River (upstream from Aniak) have mostly been conveyed to Native corporations and to the State of Alaska. There are approximately 400 Native allotments scattered along the river and most of them have been surveyed and certificated. In these instances, the river has been meandered and the uplands segregated from the riverbed. The remaining lands are managed by the BLM.

Those lands along the Kuskokwim River which have been conveyed to Native corporations include both regional (Calista Corporation and Doyon, Limited)[8] and village corporations. The village corporations, and village names, are as follows: Akiachuk, Limited (Akiachak), Bethel Native Corporation (Bethel), Iqfijouaq Company (Eek), Kokarmuit Corporation (Akiak), Kwethluk Inc. (Kwethluk), MTNT, Limited (McGrath) (Successor in Interest to Chamai, Inc.), Napakiak Corporation (Napakiak), Napaskiak Inc. (Napaskiak), Oscarville Native Corporation (Napaskiak), Tulkisarmute Inc. (Tuluksak), and the Kuskokwim Corporation.[9]

We examined the forty-nine Interim Conveyance (IC) documents for navigability information within those ANCSA conveyances located along the Kuskokwim River. In thirty-two cases, BLM identified the Kuskokwim River as "navigable" on maps included with the IC. Six other IC's noted the river was navigable within the lands described by township in the IC. One document, IC 1604, stated that navigability would be determined at the time of survey[10] and two documents, IC 2061 and IC 2062, located in T. 21 N., R. 47 W., SM, did not address the issue of navigability. Finally, there are an additional eight IC's correcting previous IC's to exclude Native allotment parcels not identified in the older legal descriptions.[11]

The majority of the uplands conveyed to the State of Alaska along the Kuskokwim River are located in nine consecutive townships between Stony River and McGrath, starting at about river mile 354 and continuing upstream.[12] The State also has a few additional townships with uplands along the river that are located near the town of Medfra and downstream near Lower Kalskag.

As previously noted, the USFWS manages those remaining federal uplands for the lower one-third of the Kuskokwim River; whereas the BLM manages those federal lands within the upper two-thirds.

Federal Reserves and Withdrawals at the Time of Statehood

Public Land Order (PLO) 255 (December 15, 1944) withdrew approximately 7,552 acres of land around McGrath (in T. 33 N., Rs. 33 and 34 W., SM) for use of the "War Department for military purposes," including Air Navigation Site 145 and enlarged 145. This withdrawal included a portion of the submerged lands underlying the Kuskokwim River (less than 20 river miles) described as:

> Beginning at the point of intersection of Latitude 62 degrees 55 minutes N., with the center line of the deep water channel of the Kuskokwim River, approximate Longitude 155 degrees 33 minutes

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[8] The Alaska Native Claims Settlement Act (ANCSA), PLO 92-203, December 18, 1971, provided for the creation of Native corporations.

[9] The Kuskokwim Corporation is the successor in interest to Aniak Limited (Aniak), Chuathbaluk Company (Chuathbaluk), Georgetown Inc. (Georgetown), Kipchaughpuk Limited (Crooked Creek), Lower Kalskag Inc. (Lower Kalskag), Napaimute Limited (Napaimute), Red Devil Inc. (Red Devil), Sleetmute Limited (Sleetmute), Stony River Limited (Stony River), and Upper Kalskag, Inc. (Upper Kalskag)

[10] IC's that mentions "navigability will be determined at the time of survey" for townships where the Kuskokwim River is located are incorrect. The Kuskokwim River was determined by the BLM to be navigable on May 6, 1980.

[11] IC 1976 and 1977 correct IC 616 and 617, IC 1997 and 1998 correct IC 542 and 543, IC 2015 and 2016 correct IC 745 and 746, and IC 2027 and 2028 correct IC 618 and 619.

[12] Storet map Iditarod A-1, BLM records.

> W. From the point of beginning: East, 2.25 miles; North, 3 miles; West, 1.12 miles; to the center line of the deep water channel of the Kuskokwim River; Southwesterly, 14.5 miles, downstream along center line of the deep water channel of the Kuskokwim River, to the point of beginning.

Later, Public Land Order 2133(June 23, 1960), revoked PLO 255 in its entirety. The majority of the lands originally withdrawn by PLO 255 have been conveyed out of federal ownership to MTNT, Limited in McGrath (Successor in Interest to Chamai, Inc.) for the surface estate and Doyon, Limited for the subsurface estate.[13]

The State reviewed the draft RDI report for the Kuskokwim River and submitted written comments and additional information regarding the effect of PLO 255.[14] First, the State provided a letter from the Army dated October 30, 1945 stating that "there was no need for, or use of, the McGrath area for military purposes." Later, another letter, dated June 6, 1956, stated that "all lands acquired under Public Land Order No. 255, with the exception of the lands at Big Delta are no longer required and relinquished." The State asserts that these documents clearly demonstrate that the military no longer had a need for the lands within the withdrawal. The States also submitted a post-statehood Department of Interior (DOI) land examination report dated August 26, 1959 stating that the lands within PLO 255 were not relinquished "through inadvertence." Finally, the State asserts that the description of the lands within the withdrawal is not specific in its intent nor does it include "clear and especial words" to defeat State's title to the submerged lands.

In researching the matter further, the BLM located a Secretarial Order dated March 14, 1947 that transferred jurisdiction over the lands to the DOI. The lands described in this order at McGrath include "Air Navigation Site 145 and 145 enlarged" that "hereby reserved shall be vested in the Department of the Interior, and any other department or agency of the Federal Government according to their respective interests of record."[15] This order demonstrates that, even though representatives of the Army may have indicated that they did not need the lands within PLO 255 after October 30, 1945, the federal government still wanted to keep these lands withdrawn by Secretarial Order on March 14, 1947.

In sum, PLO 255 clearly states an intent to include the submerged lands in the withdrawal by including in its description the "center line of the deep water channel of the Kuskokwim River" as beginning and ending points. The United States' intent to defeat the State's title to lands within military withdrawals was clearly expressed in section 11(b) of the Alaska Statehood Act. Finally, PLO 2133 did not revoke PLO 255 until June 23, 1960 – after the date of Alaska Statehood – and therefore, these submerged lands could not have passed to the State pursuant to the equal footing doctrine or Submerged Lands Act of 1953.

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[13] Patent numbers 50-2005-0352 and 50-2005-0353.

[14] Daniel S. Sullivan, Commissioner to Bud Cribley, State Director, April 28, 2011, subject: "Response to Draft Report regarding the State of Alaska's Recordable Disclaimer of Interest (RDI) Application for the Kuskokwim River," AA-086371, BLM records.

[15] Notice-Secretarial Order, Reference Number 785.5, March 14, 1947, BLM records.

Previous Navigability Determinations

The BLM consistently determined various reaches of the Kuskokwim River to be navigable in support of land conveyances to the State and Native Corporations. On May 6, 1980, in a report about the navigability of water bodies in the Upper Kuskokwim area, the BLM determined the entire length of the Kuskokwim River to be navigable from its mouth to the confluence of its North and South Forks.[16]

Early History – Russian Influence

The navigability of the Kuskokwim River is not in question due to the wealth of information available about use of the river for commerce and the travels of its many users throughout its history. Thus, this report will only summarize the evidence provided by the State. In support of its application, the State provided excerpts from the BLM's regional report, "Alaska's Kuskokwim River Region: A History" (1985), describing how the Kuskokwim River was discovered and explored by Russians in the eighteenth and nineteenth centuries.

The discovery of the Kuskokwim River by a non-Native person is credited to a Russian hunter named Aleksei (or Vasili) Ivanov in the early 1790's. Until the sale of Alaska in 1867, the influx of Russian explorers into Alaska was primarily directed at establishing trading posts throughout the region to obtain furs. The primary pelt that was sought was sea otter but as exploration moved to inland Alaska other less-valued furs such as beaver were traded for with the Aleuts, Eskimos, and Indians. To this end, the Russians formed companies to finance their journeys and build posts in the southern coast of Alaska. One post built in the region that had a great impact on the discovery and development of the Kuskokwim River was located on Lake Iliamna. From this location, Russian expeditions into the Kuskokwim region were conducted. Later, the various Russian companies were replaced by the Russian-American Company that was granted a monopoly over the fur trade in Alaska.

Several unsuccessful trips were attempted to access the Kuskokwim River from sea before the first trip up the Kuskokwim River was taken by a Russian explorer named Captain Adolf K. Etolin in 1821. Etolin cautiously entered the Kuskokwim River in a small boat and proceeded upstream a considerable distance seeking to trade for furs and gain information about local Natives. He learned that there were many lakes teeming with beaver in the region. Etolin reported that traveling the muddy and shifting channels of the Kuskokwim was a hazard to navigation. The report's description of river hazards may have caused later Russian expeditions into the region to be conducted overland. These overland trips were designed to establish trade relationships with the Natives.

In an effort to extend their influence and tap into the reported great fur resources in the Kuskokwim Region, the Russian-American Company sent Fedor Kolmakov, Semen I. Lukin (an

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[16] H.W. Gabriel, Acting Chief, Division of Resources to State Director, May 6, 1980, file 2620, Central Files, BLM Alaska State Office. Copy of memo in casefile AA-086731. Note: In a letter from Ana Hoffman, President/CEO, Bethel Native Corporation to Craig Frichtl, BLM, Chief, Branch of Survey Planning and Preparation, October 26, 2010, a reference to litigation of water bodies in the Upper Kuskokwim area was mentioned in the draft report but was later found to be incorrect. The May 6, 1980 report only referenced litigation of a new navigability standard (Nation and Kandik Rivers) that was incorporated just prior to 1980.

interpreter), and others on a trading expedition and to locate a suitable site for an odinochka (a small trading post usually maintained by one to three men). The Russians first constructed a small cabin during the winter of 1832-33. This site was known as Kolmakov's Townlet and was located close to the confluence of the Kuskokwim and Holitna Rivers near Sleetmute. Later, in the summer of 1833 an odinochka, named Lukin's Odinochka, for Semen I. Lukin, was constructed near the confluence of the Kuskokwim and Kolmakof Rivers (about twenty miles east of Aniak). As a testament to this prime location, the Russians were able to trade for 1,469 beaver pelts in 1834. Normally, the Russians were taking about 5,000 beaver pelts annually throughout Alaska. After a few years, Lukin's Odinochka was elevated to the status of a Redoubt (a small, often temporary defensive fortification) and named after Fedor Kolmakov.

By 1840, the Russian-American Company had considerable knowledge of the Kuskokwim River region and wanted to expand its influence and improve its trading system. In 1842, the company sent Lieutenant Lavrenti A. Zagoskin to explore the Kuskokwim and Yukon Rivers to their sources and to locate routes of travel between them. Lt. Zagoskin traveled extensively in the region, both overland and by water, gaining valuable knowledge of the geography, Natives, locations for trading posts, and routes that would improve their opportunity to trade for furs. The company continued expanding its influence and trading for furs until Russia sold Alaska to the United States in 1867.[17]

Evidence of Commerce

Early on, Russian and American traders recognized the importance of the Kuskokwim River as a highway of travel and transportation in plans to develop the basin's natural resources. However, one of the biggest obstacles was the entrance into the river from Kuskokwim Bay. This area was dangerous because there were no harbors for protection from storms and fog. In addition, there were the navigational hazards of shifting channels, shallow and turbid waters, and extensive mud flats.[18]

After several attempts, the Russian traders gave up trying to find a navigable channel into the Kuskokwim River. Due to these dangerous conditions, the Russian traders in the early 1800's then relied on overland routes to supply their station at Kolmakof on the Kuskokwim River. Russian traders first used a land route from Nushagak to Kolmakof and later the St. Michael to Kolmakof trail to move their supplies to the station. Transport of the supplies from Kolmakof to the various villages along the river was by boat. The Russian traders are known to have "ascended the river as far as Vinasale where they met Indians from the upper Kuskokwim basin.[19]" Vinasale is located on the left bank of the Kuskokwim River twenty miles south of McGrath.[20]

The American traders entered the Kuskokwim basin after 1867 and also made several attempts at finding a navigable channel into the Kuskokwim River from the bay. They had greater success descending the river using small Native boats to Warehouse Creek to wait for ships loaded with trade goods and provisions. Warehouse Creek is located in the lower reaches of the Kuskokwim

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[17] Brown, 53-65.
[18] *Ibid.*, 244.
[19] *Ibid.*, 245.
[20] Orth, Donald J. *Dictionary of Alaska Place Names*. USGS Professional Paper 567. Washington: GPO, 1967.

River at its confluence with Kuskokwim Bay. Sometime between 1870 and 1884, the Alaska Commercial Company constructed a storage building near the mouth of Warehouse Creek to house the goods sent there by ocean. The Alaska Commercial Company sent the ship Dora to Kuskokwim Bay each year and its load would be moved to shore for holding until these goods were transported upstream on small scows.[21]

Toward the end of the 1800's, new attempts were made to enter the mouth of the Kuskokwim River. In 1885, Moravian missionaries anchored a chartered schooner from San Francisco not far from the storage building at Warehouse Creek in Kuskokwim Bay. This boat was loaded with lumber and supplies to build a mission. They also offloaded a thirty-five foot sailboat from the schooner, the Bethel Star, and used it to transport the materials from the bay to the mouth of the Kuskokwim River and then upstream to the present site of Bethel, constructing the first Moravian mission building on the river. In 1889, the first ocean-going vessel to enter the river was the 636-ton ship, the Albatross, which ascended the river about forty miles. Before 1910, the 1,923-ton ocean-going vessel Leelanaw was taken up the Kuskokwim River to an island located about forty miles downstream from Bethel.[22]

Steamboats appeared on the Upper Kuskokwim River early in the twentieth century. One of the first steamboats on the Kuskokwim River belonged to the trader Edward Lind. In 1901, he ascended the river in his steamboat as far as the South Fork of the Kuskokwim River. More boats were sailed from other places in Alaska to the river to supply miners at the new camps of Ophir and Iditarod. The Hattie B. was placed on the river at Bethel in 1906 and made the trip to McGrath near the mouth of the Takotna River. This steamer made subsequent trips to McGrath transporting freight destined for the Innoko region. In 1908, the Hattie B. transported about forty tons of freight to the Takotna River where the load was transferred to a smaller steamer destined for Takotna. Other steamboats and schooners were placed on the river during this time to support travel and trade to the region. The Kuskokwim Commercial Company transported about 150 tons of freight in 1909 aboard the steamers Quickstep and Victoria to its posts at Georgetown, Takotna, and The Forks.[23] In 1910, the steamboat May D, draft of four feet and a cargo of thirty-five tons, ascended the Kuskokwim River 650 miles from Bethel to Nikolai (located on the South Fork of the Kuskokwim River).[24] Still, development of the transportation system on the Kuskokwim River was limited due to navigational hazards entering the river from the bay.

During this time, a survey was conducted by the U.S. Coast and Geodetic Survey to chart the navigable channels of the Kuskokwim River. The impetus for the survey was to improve transportation into the region so that miners could explore for gold and so that goods could be transported upstream on the river to supply trading posts. This survey was completed by 1915 and ships used the information to access Bethel from Kuskokwim Bay upstream on the Kuskokwim River, where their cargo was transferred to steamboats and barges for shipment to destinations upriver.[25]

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[21] Brown, 244-246.
[22] *Ibid.*, 73, 246.
[23] *Ibid.*, 246-249.
[24] *Ibid.*, 276.
[25] *Ibid.*, 244.

Ships continued to make runs from Seattle to Bethel transporting freight into the early 1950's. Two gas schooners with a capacity of 1,000 tons, Ozmo and the W.H. Tupper, made these runs to Bethel. The Santa Ana Steamship Company also supplied the region with goods. A steamboat hauling about 300 tons of freight then transported the goods from Bethel to McGrath. During the 1920's and 1930's, goods transported upstream were mostly fuel, dredge materials, and foodstuff and the downstream goods consisted of ore from the Nixon Fork mines.[26] During the 1940's and 1950's tonnage increased to accommodate military communication facilities that were being constructed in the region.[27] In addition, the Territory of Alaska authorized the construction of a school at the village of Nikolai in 1948. The materials for the construction were barged to Medfra (located near the head of the Kuskokwim River) and then transferred to smaller boats for shipment upstream to the village located on the South Fork of the Kuskokwim River.[28]

The captain of the steamer Tana, Frank Murray, recalled the summer of 1933 as being the driest that it had been for twenty years on the Kuskokwim River. The Tana carried cargo on its decks and with the aid of a barge it carried 400 tons per trip.[29] That summer they were able to make two full trips and to make an extra trip a long distance on the river. They were able to take more freight than ever before up to McGrath. Freight taken up the river included heavy shipments of gasoline and airline supplies for the trading posts and airplane lines serving the region. Even though there was low-water, the placer operators took out considerable gold and had brought in even more equipment for their operations for the next summer.[30]

During the 1950's and into the 1960's, more and more navigation companies began to compete with each other to transport goods on the Kuskokwim River. The Alaska Rivers Navigation Company operated five tugboats and eight barges on the river. In 1957, about 45,000 tons of cargo landed at Bethel and about one-third of that cargo was transported to upriver destinations. In the early 1960's, at least ten boats (sized from fifty to 125 feet long) and twenty barges operated out of Bethel. The companies operating on the river at that time included the Alaska Puget United Transportation Company at McGrath, the Snow Transportation Company at Crooked Creek, and the McGrath-Kuskokwim Freight Service.[31] The Kuskokwim River continues to be used as a route for commerce to the present.

Conclusions

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (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

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[26] Nixon Fork is a tributary to the Takotna River which, in turn, flows into the Kuskokwim River near McGrath.
[27] Brown, 250-252.
[28] *Ibid.*, 277.
[29] *Anchorage Daily Times*, July 12, 1933, 8.
[30] *Ibid*, October 16, 1933, 7.
[31] *Ibid.*, 252-253.

> 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 of Alaska, we conclude that the Kuskokwim River was navigable in fact and was used as a highway of commerce at the time of statehood. Title to the bed of the river transferred to the State of Alaska except for that reach in PLO 255 (at McGrath). The United States retained title to the bed of the Kuskokwim River at the date of statehood where it lies within the boundaries of this withdrawal.

Recommendations

1. The BLM should reject the State of Alaska's application for lands underlying the Kuskokwim River in the area withdrawn by Public Land Order 255 (at McGrath). The United States retained title to the riverbed in this land withdrawal at statehood.

2. The BLM should approve the State of Alaska's application for the remainder of the lands underlying the Kuskokwim River from Kuskokwim Bay upstream to the confluence of its North and South Forks. Under title navigability law, title to the unreserved riverbed passed to the State of Alaska when it entered the Union on January 3, 1959.