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of ALASKA
GOVERNOR SEAN PARNELL

Department of Natural Resources

Division of Mining, Land & Water
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Bud Cribley
State Director
Bureau of Land Management
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BLM, AK SO 954
ANCHORAGE, AK

RE: Response to the Bureau of Land Management's (BLM) draft report on the State of Alaska's (State) Recordable Disclaimer of Interest (RDI) application for the Kisaralik River and Kisaralik Lake

Dear Mr. Cribley;

Pursuant to 43 CFR § 1864, the State provides the following comments regarding the BLM Draft Summary Report on the State of Alaska's Kisaralik River and Kisaralik Lake RDI Application noticed in the federal register and published on the BLM's website on October 9, 2012.

Points of Agreement

The State concurs with the BLM's conclusion that the Kisaralik River is navigable from mile 0 to mile 9.5 and mile 29 to mile 74.

Points of Disagreement

- A) The BLM's finding that the Kisaralik River from mile 74 to mile 99 is not navigable.
- B) The BLM's decision not to make a navigability determination, or issue an RDI based on its previous finding of navigability, for the river between mile 99 and mile 116.

The State does not agree with the BLM on these points, and for the reasons stated below, requests that the BLM reconsider its draft report.

The State also disagrees with the BLM's previous determination that the Kisaralik River from mile 9.5 to mile 29 is not navigable. The State believes BLM's previous navigability determination was in error, that mile 9.5 to mile 29 is navigable, and that the State acquired that section of the river through the equal footing doctrine at the time of statehood. However, given that the uplands were conveyed pursuant to the Alaska Native Claims Settlement Act ("ANSCA"), the State does not dispute the previous navigability determination was the "final agency action" for the purposes of Department of Interior review.¹ However, the State continues to maintain that it is the owner of the submerged lands underlying mile 9.5 to mile 29 of the Kisaralik River and BLM had no interest to convey under ANSCA.

Analysis

A) The Kisaralik River from mile 74 to mile 99 is navigable.

In the draft report, the BLM identifies two agency memoranda that it relies on as authority. The first is Associate Solicitor Hugh Garner's memo of March 16, 1976 with a subject of "Title to submerged lands for purpose of administrating ANCSA" (Garner Memo). The Garner Memo addresses the function of conducting navigability determinations to assist BLM employees in determining the ownership of underwater lands.

The Garner Memo explains that when there is a question of a state's ownership of underwater lands it is necessary to produce a determination of navigability. The Garner Memo lays out the standard for the BLM to follow to determine navigability. The first step is to assemble the facts regarding the water body and then apply the law to make a determination.

The Garner Memo recommends a checklist to aid BLM personnel in gathering the relevant facts. Those facts were to be updated and changed as the conditions of the water body changed. Although the checklist was a recommendation to assist in making a determination, the point is clearly to aid BLM personnel in fulfilling their duty to make a thorough and accurate evaluation of the facts and the law.

The second memorandum cited by the BLM is Regional Solicitor John Allen's memo of February 25, 1980, titled "Kandik, Nation Decision on Navigability" (Allen Memo). The Allen Memo reiterated the Garner Memo with a particular emphasis on more liberally using evidence for finding susceptibility for use in commerce. Significantly, the Allen Memo not only states that noncommercial use may be useful in determining whether the water body is susceptible to

¹ See 43 U.S.C. § 1631(c)(1).

commercial use, but that susceptibility “would be the main determinant of navigability in Alaska.” (Emphasis added).

The State’s application included the Final Summary Report, Rolfe Buzzell PhD, (January 15, 2010), which describes numerous accounts of boat use for the full length of the Kisaralik River, including Kisaralik Lake. That use includes historical and current use. Buzzell also describes the physical characteristics of the Kisaralik River and Lake. Although the BLM discusses some of the facts from the Final Summary Report, the draft report fails to consider much of the evidence the State provided in support of its application. In addition, the draft report fails to explain how the BLM analyzes that evidence under the guidelines of the Garner and Allen memos.

For instance, the draft report acknowledges uses of the Kisaralik River between mile 74 and 99. The draft then implies that there are three reasons that the Kisaralik River is not navigable between mile 74 and 99: 1) The State failed to present evidence of use by boats commonly used at or before statehood; 2) the evidence presented by the State consisted of only people floating down river (one way floating); and 3) navigation of the Kisaralik River between mile 74 and 99 is difficult. The State contends that the BLM’s conclusions are not supported by the facts or the authority BLM cites.

- 1) The State presented evidence of use between mile 74 and mile 99 by boats commonly used for commerce at statehood.

The Allen Memo instructs BLM personnel that “susceptibility-not historical use would be the main determinant of navigability in Alaska.” The Allen Memo goes on to state that noncommercial use can “clearly establish that a water body is susceptible of being used as a highway for commerce.” The Allen Memo was issued in response to the December 14, 1979 decision in *Appeal of Doyon, Limited*.² There, the Alaska Native Claims Appeal Board clearly found that “evidence of private use may be considered to demonstrate susceptibility of commercial use for purposes of determining navigability.”³

In the Final Summary Report, Buzzell describes the Native use of the Kisaralik River and Kisaralik Lake. The draft report ignores Carl Kawagley’s account of his family’s annual trips in the 1930s. He describes coming down the Kisaralik on a boat approximately twenty feet long that carried “everything,” including his whole family, sled, dogs, pelts, skins, and containers. Kawagley also stated that his family would travel down the river with other families doing the same thing. The draft report states that the State’s report did not specify any facts regarding the frequency of Native use, but clearly these instances happened more than once and as the Supreme Court stated in *United States v. Utah*, it is

² 4 AN CAB 50, 85 I.D. 692 (1979); see also *United States v. Utah*, 283 U.S. 63, 67, 68 (1931) (stating that a river is navigable if it is shown to be capable of commercial use)

³ *Id.* at 702.

not the “extent of existing commerce” but whether the river is susceptible to use as a highway of commerce.⁴

In addition, Buzzell gives detailed information regarding skin boats, including how the boats were made and how the boats were used. He identifies one skin boat that was fourteen feet long, eight feet wide and 20 inches deep. Buzzell quotes a description by Michael Coffing of post-World War II skin boats used by Natives. These boats typically could carry “several people, their gear, dried meat and furs.” The State has provided sufficient evidence to support a finding that these boats could carry at least a commercial load of 1,000lbs, and therefore the State has provided sufficient evidence to support a finding that the river could be used for commercial purposes. The BLM provides no analysis or explanation as to why this evidence is not relevant and why it was not considered, either as direct evidence of commercial activity or as evidence that this section of the Kisaralik was susceptible to commercial use.

Kawagley’s account should be addressed as directed by the Garner and Allen memos, as well as any other relevant caselaw and authority. In this context, the BLM needs to explain: 1) why this type of annual boat use by multiple families does not constitute evidence of boats commonly used at statehood; 2) why this enterprise does not constitute commercial activity; and 3) why this use is not adequate to establish that the Kisaralik River is susceptible to being used as a highway of commerce.

Additionally, in the Final Summary Report there is a picture of two Native men rafting through the falls in a heavily laden skin boat in the 1920s. Buzzell also includes a photograph of a skin boat built in 2007 and on display at the Anchorage Museum of History and Art. He explains that Natives used this type of skin boats both in the spring and the fall. Buzzell describes the Native people hunting for large mammals in the vicinity of Kisaralik Lake and fishing for lake trout in Kisaralik Lake. They would then return by skin boat down the Kisaralik River. Buzzell notes that skin boat use on the Kisaralik continued until the 1980’s. The BLM needs to explain, within the context of relevant authority, the following: 1) why this description by Buzzell and the picture is not an indication of a boat commonly used for commerce on the Kisaralik River before statehood; and 2) why these skin boats are not evidence that can establish that the Kisaralik River is susceptible of being used as a highway of commerce.

Buzzell provides a detailed description of subsistence use by Natives involving watercraft other than skin boats. The Natives used the Kisaralik River up to the Kisaralik Lake extensively and Buzzell cites Alaska Department of Fish and Game and BLM officials to describe that activity. The BLM official stated that the Natives used eighteen to twenty-four foot aluminum boats to get to traditional hunting areas. These boats were available at statehood and carry

⁴ 283 U.S. at 82.

over 1,000 pounds. Buzzell notes that when a mining company was looking at opening a mine around Kisaralik Lake there was intense opposition. The manager of Kwethluk Inc. stated “Our livelihood depends on that lake.” This statement verifies the Native’s subsistence use of the entire Kisaralik River to Kisaralik Lake. The BLM does not explain why a twenty-four foot aluminum boat used the length of the Kisaralik River is not an indicator of susceptibility to commerce.

Buzzell’s report also describes two inter-agency expeditions. The first was an eight day expedition by seven men and their equipment on two thirteen person Avon rafts in 1978. Four of the expedition members were BLM personnel. The expedition put in at Kisaralik Lake and floated to mile 3 of the Kisaralik River. The expedition had a couple of short portages, but otherwise traveled the length of the Kisaralik River by raft. Along the way the expedition recorded river conditions. The second occurred in 1981. This expedition included six men and equipment on a 12 foot and a 13 foot raft. They put in at Kisaralik Lake. Later, the expedition described their trip and the condition of the river; the description was similar to that of the 1978 expedition.

The draft report does not explain why these government sponsored boat trips from Kisaralik Lake to the mouth are not considered. The accounts of these expeditions are detailed and provide credible evidence that the entire length of the Kisaralik is susceptible to commercial navigation. In *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989), the United States conceded customary watercraft at the time of statehood included “powered boats with a load capacity of approximately 1,000 lbs.” The State’s report provides that “[t]he river is in its natural and ordinary condition since the time of statehood and no natural or man-made changes have occurred since 1959 that would prevent use of the Kisaralik River to transport goods.”⁵ The draft report does not dispute that finding. The Ninth Circuit concluded that the rafts employed today—such as the rafts on these expeditions—have a maximum load capacity of 2,000 lbs. The BLM needs to explain why these boats are not materially similar to the watercraft used at statehood and, therefore, why this evidence has not been considered.

Buzzell’s report also describes the recreational rafting that has occurred on the Kisaralik and the United States Fish & Wildlife Service’s attempt to manage it. Buzzell’s discussion is detailed and shows a significant amount of use. For instance, in 2000 a local outfitter picked up one hundred and ten people at the mouth of Kisaralik River who had put in at Kisaralik Lake. Buzzell also provides four photographs of inflatable rafts on the Kisaralik River that meet the standard of boats available at statehood that haul one thousand pounds. (See Figures 8, 21, 22 and 24.) The BLM fails to explain: 1) why this does not

⁵ Final Summary Report, at 65.

constitute commercial use; 2) why this has no bearing on the question of susceptibility; or 3) why these boats are not materially similar to the boats commonly used at statehood.

The State's application provided substantial evidence of boats that have used the Kisaralik River from the lake to the mouth. The draft report failed to address those facts within the guidelines that the BLM listed as authoritative, or within the other caselaw and authorities that are relevant.

2) The ability to carry a commercial load down a river, from one point to another, is sufficient to provide that a river navigable in fact.

The BLM fails to cite authority in support of its position that one way floating is not relevant evidence of navigability. Neither case law nor any other authority requires that travel be two way to qualify for navigability. Moreover, simply because one way traffic may be the typical mode of travel for recreationalist and fisherman, that does not necessitate a finding that the river is not susceptible to two-way travel.

In addition, the State provided evidence that the Kisaralik has been navigated upstream by powerboats at least to Upper Falls (mile 90). "Golden Gate Falls at Mile 74 and Lower Falls at Mile 81 have been navigated by power boats going upstream in high water. Power boats are not known to have gone up Upper Falls at Mile 90. Local outfitters and several government studies report that the river is accessible by power boats from its mouth to Upper Falls (Mile 90), depending on water levels."⁶ The draft report makes no mention of this evidence.

3) A river need not be navigable without difficulty; the State presented substantial evidence that, although travel may be difficult at times, the Kisaralik River between mile 74 and 99 is navigable.

The BLM draft report states that this stretch of the river is difficult because of three distinct water falls. The descriptions that Buzzell provides indicate that these falls are not significant drops, but rather more like severe rapids that are confined and run for a short distance. Buzzell explained that although most would make a short portage around the waterfalls, the waterfalls could be (and were) floated by some boaters. Indeed, as mentioned above, the Golden Gate Falls at mile 74 and the Lower Falls at mile 81 have been navigated upstream by powerboat. Buzzell also included photographs from the 1920s of two native men in a heavily laden skin boat and two men in a raft in 1921 floating the Golden Gate Falls.

⁶ Final Summary Report, at 65.

The 1978 interagency expedition floated through two of the falls and then made a portage around Golden Gate Falls. The 1981 interagency expedition floated through Golden Gate Falls, but made a 400 foot portage around Upper Falls on a “well used trail.”

Buzzell cites a 1984 publication by NPS based on the 1981 interagency expedition. The NPS report notes that travel from the headwaters can be accomplished by raft (which were available in 1959) with “occasional portages depending on water levels.” The report goes on to say that the falls can be easily portaged for those not inclined to run the falls.

The Garner Memo states:

Impediments to navigation such as sand bars, or rapids do not necessarily make the river non-navigable for purposes of title, even at that particular point. Where the impediment is of short duration on a river, the State’s ownership of the bed will extend through the impediment.

The BLM’s reliance on difficulty to float as a reason to determine twenty-five miles of the river non-navigable is contrary to the Garner Memo and subsequent caselaw. The Alaska Native Claims Appeal Board found the Kandik and Nation rivers navigable, based on use, although “[these rivers] are difficult rivers to navigate.”⁷ It is clear from the Garner Memo and other authorities that difficulty does not automatically make waters non-navigable and the State presented ample evidence of use in its application. If the BLM is using other authority it should identify the authority it is using and apply some analysis to the law and facts.

B) The BLM should find the Kisaralik River from mile 99 to mile 116 navigable.

The State agrees that because it is the upland owner along the margins of the waters in this area, the State owns the lands underlying these waters regardless of navigability. However, the State objects to BLM’s refusal to issue a recordable disclaimer of interest for this section on two points: (1) it is contrary to the evidence provided; and (2) the BLM’s action undermines the State’s position that mile 74 to 99 is navigable.

Buzzell notes that on June 27, 1990, the BLM determined the Kisaralik River navigable from mile 99 to mile 114.5, but did not address the remaining 1.5 miles of the river or the lake. This determination utilized the standard of “inflatable rafts, canoes and larger watercraft with a payload of about a thousand pounds or more.” Additionally, with its application the State has

⁷ 4 ANCAB 50, 85 I.D. 692, 709 (1979);

presented substantial evidence of historic use that began at the headwaters of the Kisaralik River and continued to its confluence with the Kuskokuak Slough.

Those individuals that used mile 99 to mile 114.5—which the BLM previously determined navigable—also used mile 74 to mile 99. By refusing to issue a navigability finding or recordable disclaimer of interest for mile 99 to mile 116, the BLM avoids addressing the evidence of navigability that the State has presented. In other words, the BLM avoids providing an explanation as to why the same evidence is sufficient on one section of the river (mile 99 to mile 114.5), but is insufficient on another (mile 74 to mile 99). The BLM should issue a recordable disclaimer of interest as it previously found that mile 99 to 116 was navigable. Its failure to recognize that evidence now is prejudicial and ignores the State's evidence supporting the navigability of the full length of the river.

CONCLUSION

The State presented substantial evidence to the BLM that the full length of the Kisaralik River and the Kisaralik Lake are navigable under the applicable law. The BLM's draft report failed to address that evidence. The BLM has failed to properly apply the authority that it cites, as well as other relevant authority and caselaw. The State contends that the evidence is contrary to some of BLM's conclusions under the applicable law.

Your reconsideration will be appreciated.

Sincerely,



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