

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES OFFICE OF THE COMMISSIONER

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February 28, 2012

Mr. Bud Cribley
State Director
Bureau of Land Management
222 West 7th Avenue, #13
Anchorage, Alaska 99513-7504

Subject: Recordable Disclaimer of Interest Application for the Kanektok River System
(Including Pegati and Kagati Lakes)

Dear Mr. Cribley:

Pursuant to 43 CFR § 1864, the State of Alaska (State) files this application for a recordable disclaimer of interest (RDI) for the lands underlying the herein-described portions of the Kanektok River System including Pegati and Kagati Lakes. On February 3, 2010 the State forwarded a "draft" application to the BLM and upland landowners. Pursuant to the RDI process, a draft application meeting was held at U.S. Department of the Interior, Bureau of Land Management (BLM) Alaska State offices on November 16, 2011. The State herewith files its "formal application".

I. Description of Waterway

This application is submitted for the submerged lands and bed up to and including the ordinary high water line of Pegati and Kagati Lakes within Township 03 & 04 South, Range 63 West, Seward Meridian and for the submerged lands and bed of the Kanektok River lying between the ordinary high water lines of the right and left banks of that river from the outlet of Pegati Lake within Township 03 South, Range 63 West, Seward Meridian, Alaska, downstream to the location where the river enters the Kuskokwim Bay within Township 05 South, Range 74 West, Seward Meridian, Alaska. This includes the submerged lands and beds of all sloughs, braids and channels that carry water from the navigable Kanektok River and thus are a part of the navigable river and all lands within the river system permanently or periodically covered by tidal waters up to the line of mean high tide. Maps highlighting the river and lake system and legal description of the townships and ranges underlying the river and lake are enclosed as Exhibit 1.

II. Waiver Request

A. Survey Requirements

The State requests that BLM approve the State's request for a waiver of any survey requirements. As previously discussed with the BLM Alaska State Director, the State requests a waiver under § 1864.1-2(d) of the requirement of 43 CFR § 1864.1-2(c)(1) for a description based on a public land survey or certified metes and bounds survey. The map and legal description submitted with this RDI application sufficiently identify the land subject to this application, but if not the recordable disclaimer can be worded appropriately to fit the circumstances without requiring a public land survey. The submerged lands for which this RDI is sought are identified by name or, if unnamed, readily identified as a part of Pegati Lake, Kagati Lake and the Kanektok River including interconnected channels and other portions of the Kanektok River system. Navigable waterways such as the Kanektok River are typically ambulatory, thus making a public survey of them problematic and unnecessary. Such a meander line survey would have to cover a large, long stretch of river system including interconnected channels and sloughs, would be very expensive and time-consuming, and would only be a representation of a moving boundary. The Department of the Interior has issued RDIs to the State for the beds of navigable rivers in the past without requiring a public land survey of the river system or any part of it, and judgments, decisions, and decrees of the U.S. District Court, Ninth Circuit Court of Appeals, and U.S. Supreme Court finding title in the State to the beds of navigable waters have not required a public land survey.¹

III. Basis of the State's Request for a Recordable Disclaimer of Interest

A. Navigable Waterway

The State's RDI application for the lands underlying the bed of the navigable Pegati Lake, Kagati Lake and the Kanektok River system is supported by the Equal Footing Doctrine, the Alaska Right of Way Act of 1898, the Submerged Lands Act of 1953, the Alaska Statehood Act, and other title navigability law. BLM may disclaim interest in the submerged lands on any or all of those grounds.

Because Pegati and Kagati Lakes and the Kanektok River system were navigable on January 3, 1959, when Alaska became a state, the State of Alaska owns the river and lake beds by virtue of the Equal Footing Doctrine and the Submerged Lands Act. *State of Alaska v. Ahtna, Inc. & United States*, 891 F.2d 1401, 1404 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990). The constitutional Equal Footing Doctrine "guarantees to newly-admitted States [like Alaska] the same rights enjoyed

¹ See, e.g., *Alaska v. United States*, 546 U.S. 413, 415-17 (2006); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989); *Alaska v. United States*, 662 F. Supp. 455 (D. Alaska 1987).

by the original thirteen States and other previously-admitted States.” *Id.* (citing *Utah v. United States*, 482 U.S. 193, 196 (1987)). “One of these rights is title ownership to the lands underlying navigable rivers.” *Id.* The Submerged Lands Act of 1953 confirmed and extended “title to and ownership of the lands beneath navigable waters within the boundaries of the respective States.” *Id.* (quoting 43 U.S.C. § 1311(a)). “Congress explicitly provided for this rule to apply to Alaska when Alaska became a State in 1959.” *Id.* (citing 48 U.S.C. Chapter 2 (“the Statehood Act”) note 6(m) prec. sec. 21 (1982)). The rule includes state ownership of tidelands and the beds of marine waters up to three miles seaward of Alaska’s coastline. 43 U.S.C. §§ 1301(a), 1311(a); *United States v. California*, 436 U.S. 32, 35 n.7, 37 (1978). In addition, in the Alaska Right of Way Act of May 14, 1898, 30 Stat. 409, 43 U.S.C. §§ 942-1 to 942-9, Congress recognized application of the equal footing doctrine to Alaska. It expressly reserved, as a matter of federal law: “the title of any State that may hereafter be erected out of the Territory of Alaska, or any part thereof, to tidelands and beds of any of its navigable waters, . . . it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory.”

IV. Reason for the State’s Request for a Recordable Disclaimer of Interest

The lack of any title document or judgment creates a cloud on the State’s title to submerged or submersible lands beneath navigable waters. A recordable disclaimer of interest for this land will help lift the cloud on the State’s title stemming from the lack of any permanent determination of ownership and correct any conflict and uncertainty in the public’s understanding of title and use, without the time, expense and trouble of engaging in quiet title litigation.

V. Determining Navigability of Water Bodies under Current Law

Whether a river is navigable for purposes of state ownership is decided according to federal law. *Ahtna, Inc.*, 891 F.2d at 1404 (citing *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926)). The basic definition for navigability was expressed in *The Daniel Ball*, 77 U.S. (19 Wall) 557, 563 (1870), as follows:

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.

Id. As the appeals board for the U. S. Department of the Interior noted in *Appeal of Doyon, Ltd.*, 86 Interior Dec. 692, 698 (ANCAB 1979), the U. S. Supreme Court used that definition in *Holt State Bank*, 270 U.S. at 56, as the basic test for determining those “streams and lakes” which are navigable for state title.

Subsequent case law, including the *Ahtna, Inc.* and *Appeal of Doyon* decisions regarding the Gulkana, Kandik and Nation Rivers in Alaska, has explained the meaning of that basic definition. An important factor is the physical character of the waterway, and in particular its capacity to be navigated. However, that does not require easy navigation. As the Department of the Interior observed in the *Doyon* decision, citing U. S. Supreme Court authority:

The presence of rapids, sandbars, shallow waters, and other obstructions making navigation difficult or even impossible in sections ... does not destroy title navigability so long as the river or part of it is usable or susceptible to use as a highway for commerce for a significant portion of the time. *United States v. The Montello*, 87 U.S. 430 (1874); *United States v. Utah*, 283 U.S. 64 (1931). * * * A recent case emphasized that sporadic and short-lived use of a waterway for travel and transportation by local residents for their own purposes and not for hire meets the requirement that a waterway be useful as a highway for commerce. *Utah v. United States*, 403 U.S. 9 (1971). * * * Neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation.

86 Interior Dec. at 697.

As the Ninth Circuit Court also stated, with regard to the Gulkana River: "A river's use 'need not be without difficulty, extensive, or long and continuous' for the river to be a highway for commerce." *Ahtna, Inc.*, 891 F.2d at 1404 (quoting *Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982) (finding 32-mile stretch of river navigable in its natural and ordinary condition based on its use for driving logs downstream by the "rough means" of temporarily deepening the channel, using horse teams to move logs over "exposed gravel bars, boulders, and shoals," and breaking up "intractable log jams" with dynamite)). That court emphasized: "Although the river must be navigable at the time of statehood, . . . *this only means* that, at the time of statehood, *regardless of the actual use of the river*, the river must have been *susceptible* to use as a highway of commerce. * * * [I]t is not even necessary that commerce be in fact conducted . . . The extent of existing commerce is not the test." *Id.* (quoting *United States v. Utah*, 283 U.S. 64, 75, 82-83 (1931) (emphasis added)). Rather, it is enough to show:

the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And

this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

Utah, 283 U.S. at 83.

Applying these standards to Alaska, the courts and Department of the Interior have found waterways navigable for title based on their susceptibility to use for navigation by river boats, inflatable rafts, or canoes having a capacity for “commercial” loads of about 1000 lbs. of supplies or recreationists. *Ahtna, Inc.*, 891 F.2d 1401 (Gulkana River); *Appeal of Doyon*, 86 Interior Dec. 692 (Kandik and Nation Rivers); Feb. 25, 1980 Memorandum from Regional DOI Solicitor John (“Jack”) Allen to BLM Alaska State Director re “Kandik, Nation Decision on Navigability”; see also *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000); August 18, 1983 Recommended Decision by DOI Administrative Law Judge Luoma in *Appeal of Alaska*, Interior Board of Land Appeals No. 82-1133 (recommending that the Matanuska River be determined navigable) and July 19, 1990 Memorandum of BLM Alaska State Director E. Spang (Matanuska River is navigable), BLM Files AA-11153-23, -31; *Appeal of State of Alaska & Collier*, 168 IBLA 334 (2006) (noting navigability standards).

VI. Evidence of the Navigability of the Pegati and Kagati Lakes and the Kanektok River System.

Historical documentation and reports regarding boat use, susceptibility of use, historical routes, and activities confirm and establish that the Kanektok River is navigable from Pegati and Kagati Lakes, which are also large and navigable, to the river’s confluence with the Kuskokwim Bay. In addition to the water body’s actual use, the materials attached to and referenced in this application document its physical characteristics. These characteristics also show the river and lakes susceptibility to navigable uses.

A. Use-in-Fact Demonstrating Navigability, including Use and Susceptibility to Use in Commerce

The State of Alaska and the BLM developed an Assistance Agreement whereby historical reports are prepared for rivers in Alaska. Through cooperative arrangements, the BLM and the Alaska Departments of Fish and Game and Natural Resources have supported DNR’s Office of History and Archeology (OHA) in preparing these reports. The first region being researched is the Kuskokwim Basin. The Kanektok River System Interim Report dated October 7, 2010, is part of that Kuskokwim region reporting area. That report is incorporated as evidence of the navigability of the Kanektok River system. Substantial historical information

contained in the OHA report on the Kanektok River system supports the system's navigability. It included the following summary information.²

The BLM has determined all of the Kanektok River navigable from its mouth through T. 4 S., R. 72 W., SM, and portions of the river within Native allotments navigable up to an allotment in T. 3 S., R. 66 W., SM (Figures 5-7). Between the two, an approximately 60-70 mile stretch of the Kanektok River has been administratively determined to be navigable. A tributary of the Kanektok has also been determined navigable to the second Native allotment on the stream in Sec. 26, T. 4 S., R. 70 W., Seward Meridian. No documents discussing the navigability of Pegati and Kagati Lakes have been found despite the presence of three Native allotments along the northeastern shoreline of Kagati Lake. BLM documents have discussed boat travel from the mouth of the Kanektok River all the way to Kagati and Pegati Lakes, which suggests that the agency would support a navigability determination for the full length of the river, were the navigability of upstream portions to come under review.

In 1985, the BLM published "Alaska's Kuskokwim River Region: A History by C. Michael Brown". This report documents the 1898 expedition of J.E. Spurr which included a traverse of the Kanektok River. Information from this report was further expanded upon by Rolfe Buzzell, Ph.D., in the Kanektok River System, HUC-30502, Zone 1 Phase II-B Interim Summary Report. These reports describe Spurr's travel up the Kanektok River in an 18 foot Cedar Peterborough Canoe from the mouth of the river to Kagati and Pegati Lakes, up Aukamunuk Creek, lake hoping to Nenevok Lake and the portage into the Togiak drainage and then his route to reach Bristol Bay. As described in the Phase II-B report; 'This route was known by local Yup'ik people, as Spurr wrote in his diary: "The Native guides say, as near as I can understand their Eskimo, that it will take a very long time to get to Nushagak this way." During their journey up the Kanektok River, Spurr also learned of a portage route to Togiak using Klak Creek and a portage route to Eek using a right tributary of the Kanektok opposite Klak Creek. Spurr's party included Spurr, USGS topographer William Schuyler Post, Oscar Rohn, and George Hartman, a Native guide from Bethel named Andrew, and two Native guides from Quinhagak, named Paviak and Uia. The USGS party travelled in an 18-foot cedar canoe while the Native guides travelled in their own kayaks. Spurr and Post mapped the route and named several geographic features along the way using names provided by their guides. From August 26 to September 8, the party made a difficult ascent of the river, encountering persistent rain and strong river currents. The crew often had to line the boats by wading upstream and pulling them. Through the journey the crew encountered other hardships. Unable to find wood to build fires, their clothes and gear stayed wet throughout most of the trip. Their guide, Andrew, became sick along the journey and

² Attachments 3 & 8 of the Kanektok River System Final Summary Report dated January 15, 2010 address tidal influence for at least the first two miles up the mouth of the river from the Kuskokwak Slough at Kuskokwim Bay.

turned back. Nevertheless, they were able to ascend this fast-flowing river without any recorded mishaps in 13 days.

In 1937 the Alaska Territorial Department of Mines published Preliminary Report of Winchester Group of Claims, Goodnews Bay District, Lower Kuskokwim, Alaska. This report details the restaking of seven claims by the Winchester group in the Atmugiak Creek valley above Kagati/Pegati Lakes. The report details that these claims had been staked prior to 1912 and later restaked several times. Access to the location is stated to be by river boat "up the Kanektok River from the village of Quinhagak a distance of nearly 100 miles by river", or by plane to Kagati Lake or the new aviation field on the Eek River. The owners of these claims were all native and were reported to live in either the Quinhagak or Akiak villages.

Navigability of the Kanektok River may also be based on general knowledge of commercial, sport and subsistence fishing on the river since statehood. Many post-statehood uses such as surveys in connection the Wild and Scenic River system, other government surveys, commercial guiding, sport and subsistence fishing, and Native allotment use have also been referred to in BLM's navigability determinations. The 1985 Kuskokwim Regional Report cites a June 4, 1976 report entitled "Present Recreational Use on Alaskan Waters - Kanektok River". The U.S. Fish and Wildlife Service (USFWS) released a report in 1985 on the public use of the Kanektok River. The USFWS report, in addition to several Alaska Department of Fish and Game reports, discuss commercial fishery and guiding services that have been present on the river since statehood. Further, there have been a number of documents prepared by or on behalf of the USFWS which describe the historical and current use of the Kanektok River. Most discussion centers on the river's potential as a wild and scenic river and the rising amount of river use.

The clear record of historical use, use of motor boats for commercial guided sportfishing and current commercial rafting on and from the Pegati and Kagati Lakes to the mouth of the river at the Kuskokwim bay is conclusive evidence that this river is navigable for title purposes.

B. Physical Character Supporting Navigability

The courts and the Department of the Interior have also considered the physical characteristics of the river system in its natural and ordinary condition in their navigability determinations. *See, e.g., Ahtna, Inc.*, 891 F.2d at 1402, 1405; *Alaska*, 662 F. Supp. at 466-67; *Appeal of Doyon*, 86 Interior Dec. 692. The physical characteristics of the Kanektok River system compare favorably to the Gulkana, Kandik, and Nation rivers considered in those decisions.

1. River. Kanektok River, Variant name: Kanektok/Quinihak.

Coordinate location at confluence with Kuskokwim Bay:

Latitude 59° 44' 58" N

Longitude 161° 55' 51" W

Lake: Major lakes include: Pegati and Kagati Lakes

Basin area: 910 square miles

Elevation at source: 1039 feet

Main Channel Length: 93 miles

Average Channel Slope: 11 feet/mile

2. Climate. The Kanektok River system is within the transitional climate zone, which is between maritime and continental climatic zones. This transition zone in the Yukon-Kuskokwim Delta area extends 100 to 150 miles inland.³ No weather-gathering stations are located along or near the Kanektok River. The nearest stations are located at Platinum and Nyac, which are approximately 50 & 80 miles from the river. The average annual precipitation is estimated to be 22 inches.⁴ The most up to date summary data from the Platinum and Nyac weather stations are provided below (Table 1 and Table 2).⁵

³ Harza Engineering Company, December 1982, Bethel Area Power Plan Feasibility Assessment, Appendix B

⁴ USDI, NPS, 1983, Kanektok River Alaska Draft Wild and Scenic River Study

⁵ Western Regional Climate Center, Historic Climate Records, Retrieved 1/10/11 & 12/3/2008, <http://www.wrcc.dri.edu/summary/Climsmak.html>

3. General Basin Description. The Kanektok River flows from the outlet of Pegati and Kagati Lakes within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 33, Township 3 South, Range 63 West, Seward Meridian at approximately 1600 feet above sea level.⁶ The Kanektok River drains an area of approximately 910 square miles. Flowing in a westerly direction, the Kanektok River flows approximately 93 miles to Section 18, T. 5 S., R. 74 W., Seward Meridian where it enters the Kuskokwim Bay. A map of the watershed area and USFWS gage are shown in Figure 1.

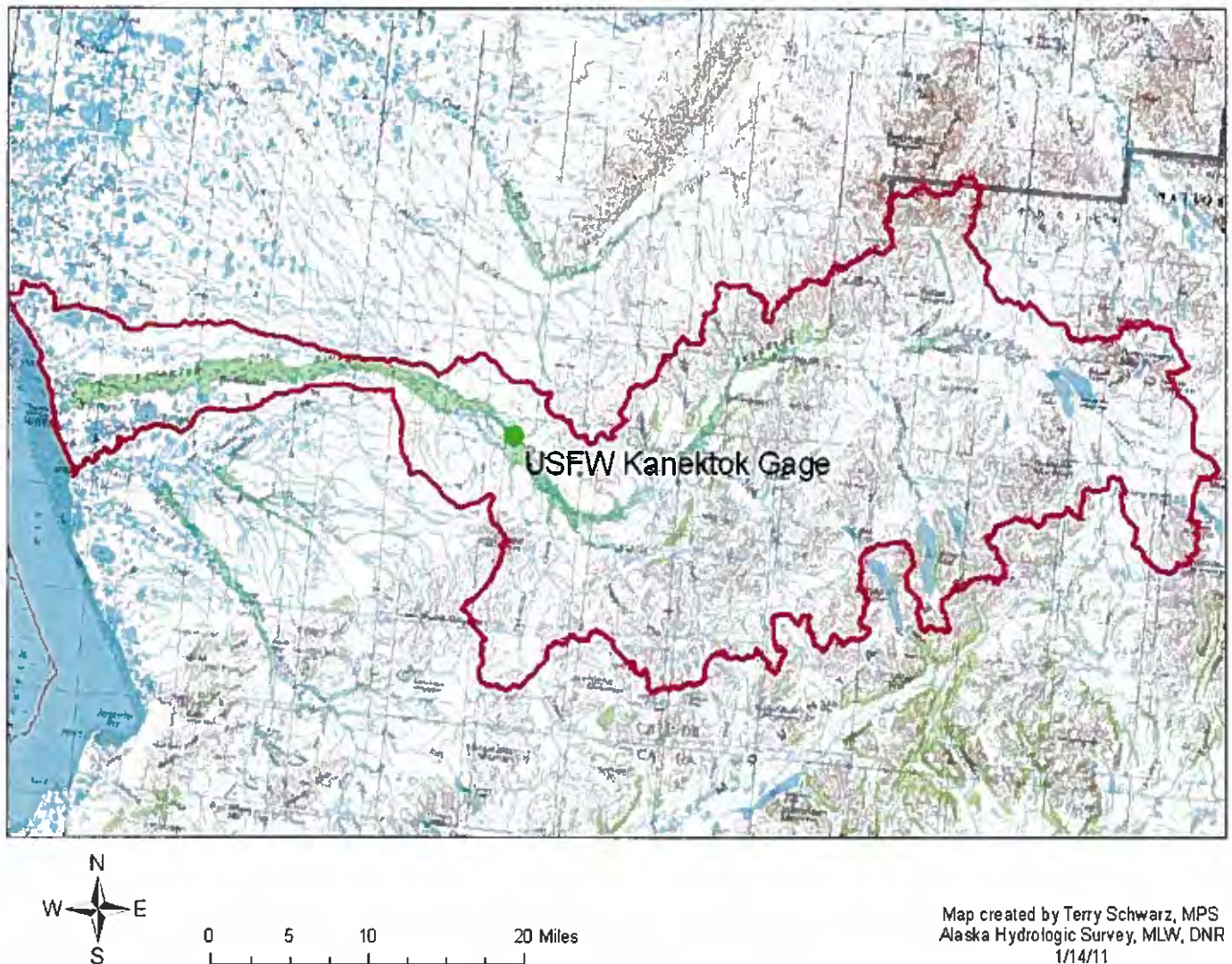


Figure 1. The Kanektok watershed and location of the USFWS stream gage

⁶ Navigable Waters Map; <http://dnratwmlwims01/navwatersmap/>

4. Available Stream Flow Data. The USFWS stream gage was located at Latitude 59° 46" 40' North, Longitude 161° 05" 06' West. Data were recorded at this gage from June 13, 1999 to October 15, 2009. The drainage area upstream of the gage totals 767 square miles. Figure 2 shows the average daily and monthly discharge for the entire period of record for this gage. Table 3 shows the average monthly discharge values for this station, and Table 4 shows the average annual discharge values for the years from 1999 to 2009. Figure 3 shows the flow duration curve for the record period as well.

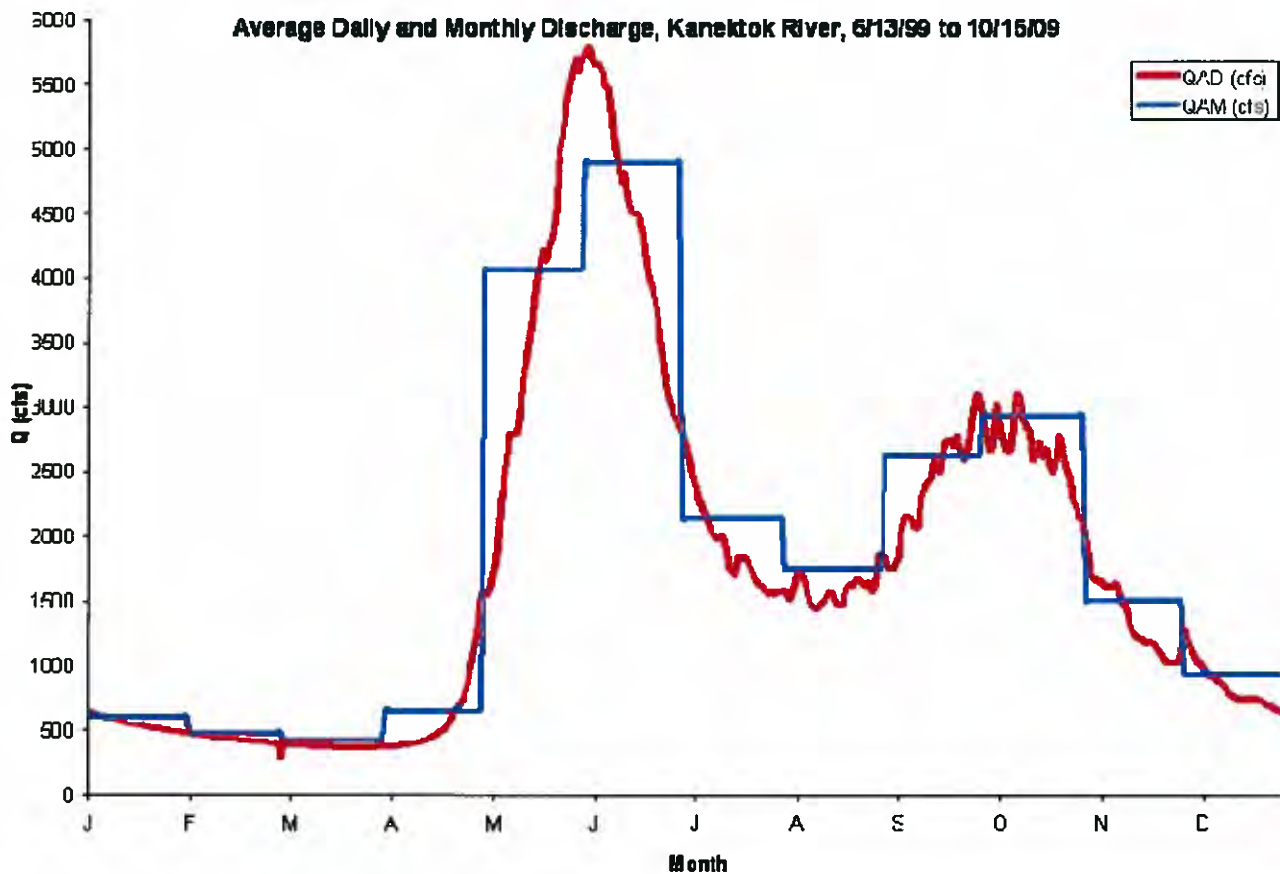
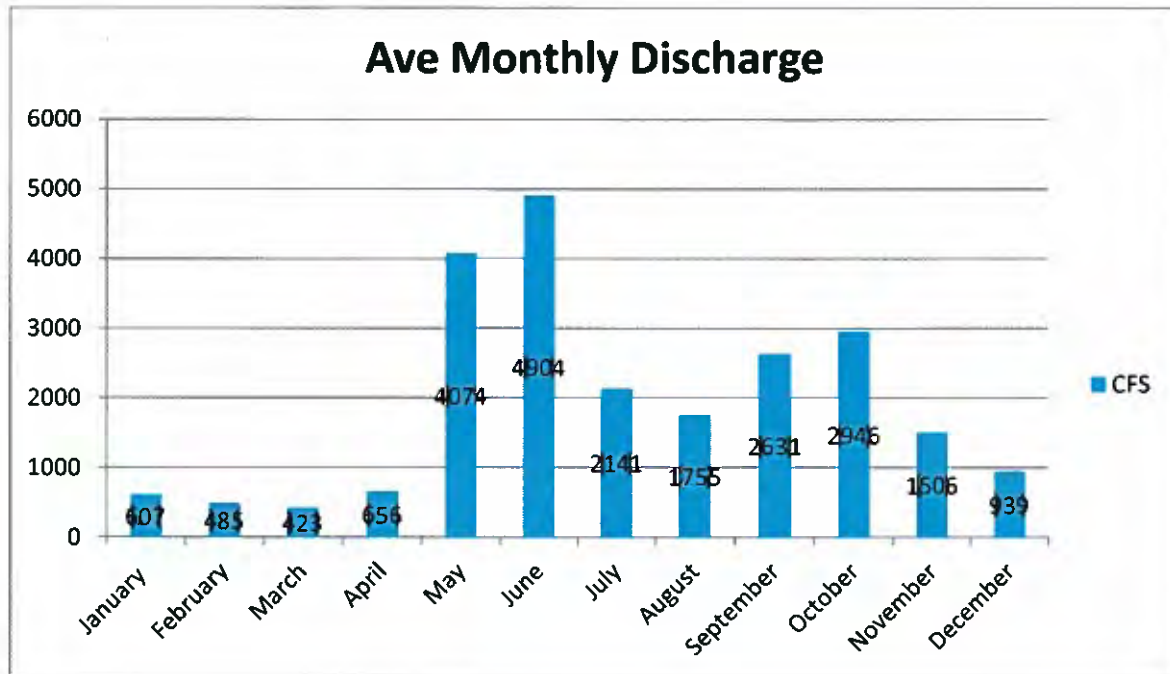


Figure 2. Average Daily and Monthly Discharge for the Kanektok River at the USFWS gage.



Average monthly discharge for the Kanektok River at the USFWS Gage

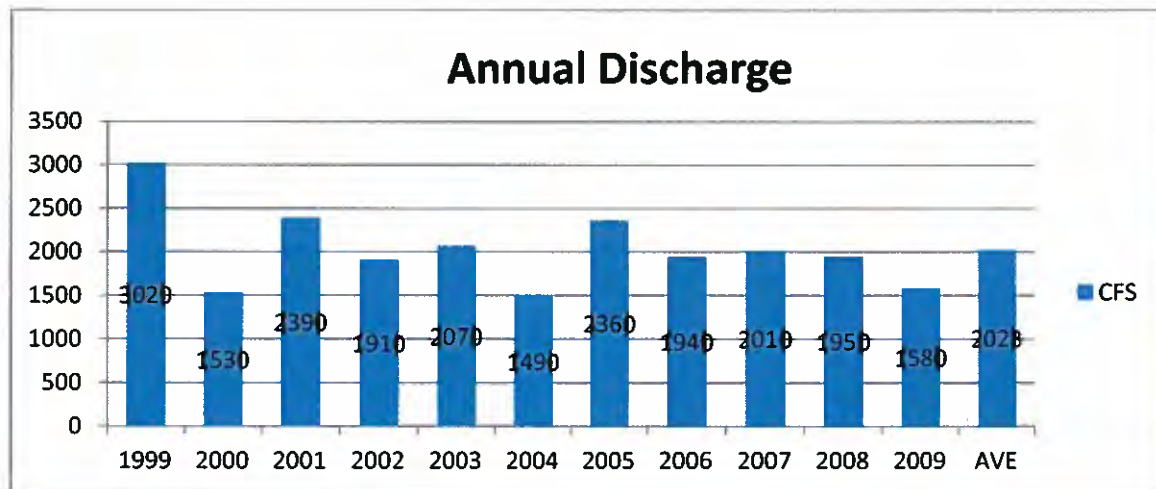


Table 4 Average annual discharge for the Kanektok River at the USFWS Gage

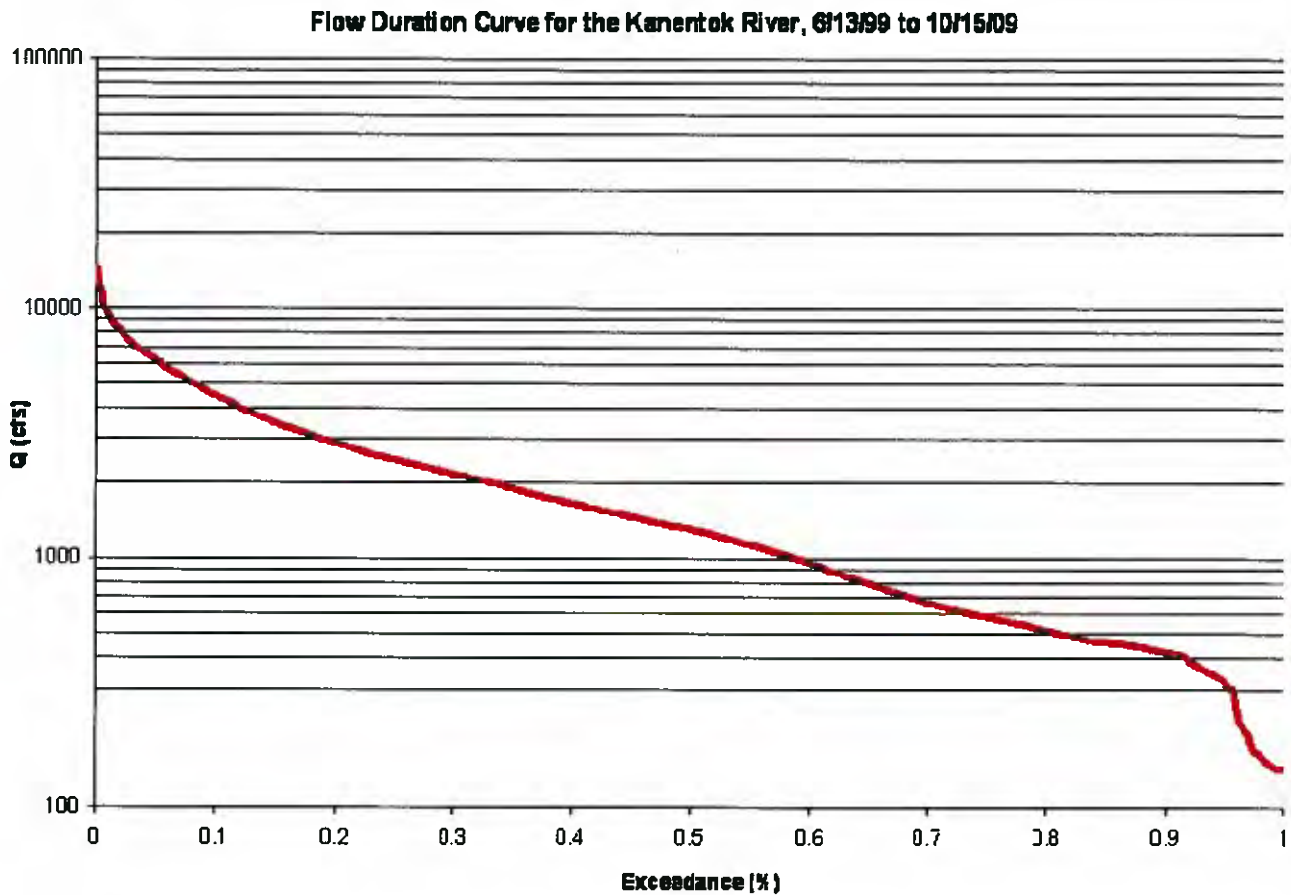


Figure 3. Flow Duration Curve for the Kanektok River at the USFWS gage.

Average Annual discharge at the gage is 2023 cubic feet per second (cfs) with average flows during June reaching 4904 cfs for the last 11 years since the gage was in operation. Snow melt typically begins in May in this region of Alaska and continues through June. The gage data show a substantial increase in mean flow between April and May as snowmelt begins (figure 2). The high flows of April and May decline in July and August, but there is a fall rainy season increase which peaks in October at 2946 cfs. (figure 2) The highest peak stream flow of 14400 cfs at the area of this gage was recorded on May 30, 2006.

5. Review of Existing Hydrologic and Onsite Studies.

The “[Kanektok River] flows west-southwest from Kagati Lake in the Ahklun Mountains before reaching the village of Quinihak on the Kuskokwim Bay. A clear water stream, the Kanektok rolls along a rocky/sandy streambed for most of its length. From Kagati Lake, the river flows through a narrow mountain valley before reaching the Kuskokwim lowlands.”⁷ The rivers length may vary from 90 to 95 miles. The inspection report describes river conditions including river width, depth, flow rate, river morphology, and color.

The Alaska Department of Fish and Game describes the Kanektok River in the Inventory and Cataloging of Sport Fish and Sport Fish Waters of Western Alaska, (Alt)⁸ This report divides the river into 4 sections. Section 1 is from the Kuskokwim Bay upriver 11 miles. This part of the river is approximately 200 feet wide and the current runs 2-4 miles per hour (mph). Section 2 begins at mile 12 and extends upstream to mile 33. This part of the river is very braided with willows and cottonwood trees along the banks. Section 3 runs from mile 33 to mile 59 with Kanuktik Creek as the upper boundary. The river is in a mountainous area in this section. Section 4 begins at mile 59 and runs upstream 27 miles to Kagati Lake. The river meanders quite a bit in this upper valley. Kagati Lake (including Pegati Lake) is 168 feet deep, has two arms each 2.7 and 3 miles long and .7 miles wide. Details regarding this river and these lakes, including data describing the fish and wildlife in and around the river, are included in this report.

VII. Other Known Interested Parties

Parts of this river system are within the exterior boundaries of the Togiak National Wildlife Refuge. Part of the river system also crosses lands conveyed to the village corporation, Qanirtuuq Inc., and to the regional corporation, Calista Corporation.

VIII. \$100.00 Application Fee

The State also submits the \$100.00 application fee with this application.

⁷ US Fish and Wildlife Service, December 1983, Kanektok River, Alaska, Draft Wild and Scenic River Study.

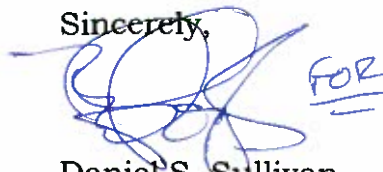
⁸ Alt, Kenneth T, 1977, Inventory and Cataloging Western Alaska Waters, Alaska Department of Fish and Game, Sport Fish Division.

IX. Conclusion

The State of Alaska has determined there is sufficient evidence to conclude that the Kanektok River system, including Pegati and Kagati Lakes, as described in section I of this application, are navigable waterways and its submerged lands and beds are owned by the State of Alaska and should be disclaimed by the BLM. The evidence of tidal influence at the mouth of the river system, along with the extensive historical and present use information shows the river's use and susceptibility to use as a highway of commerce. All of this evidence supports the State's conclusion of navigability for title purposes.

The state agency responsible for this application is the Alaska Department of Natural Resources, Division of Mining, Land and Water, 550 W. 7th Avenue, Suite 1070, Anchorage, Alaska 99501, Attention: David W. Schade, (907) 269-6008. Please continue the application process for this river and forward the estimate of cost of administration. As this is a priority application, the State will forward processing funds promptly.

Sincerely,



Daniel S. Sullivan
Commissioner

Attachments: Exhibit 1: Map and Legal Description
 Exhibit 2: Referenced Hydrological Documents - Kanektok
 River pages only
 Exhibit 3: January 6, 2011 Kanektok Phase II B Interim Report –
 Office of History and Archaeology

cc: Mr. Geoffrey L. Haskett, Regional Director, USFWS
 Cora Campbell, Commissioner, Alaska Department of Fish and Game
 Andrew J. Guy, President and CEO, Calista Corporation⁹
 Karl Potts, President and Chief Executive Officer, Kokarmiut
 Corporation¹⁰

⁹ This recipient was provided only with a copy of the application filed with BLM. Copies of the map(s) for the water bodies and any historical documents referenced in support of this application can be obtained via DNR's website (<http://www.dnr.state.ak.us/mlw/nav/rdi/>) or the Bureau's website (<http://www.blm.gov/ak/st/en/prog/rdi.html>). If you are unable to access these websites or are unable to download the information, please feel free to contact Wendy Steinberger at (907) 269-6018 for a copy of the information through the mail.

¹⁰ Ibid.