



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

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In Reply Refer to:
1864 (AK927)

Memorandum

To: File AA-086372

From: Jack Frost, Navigable Waters Specialist (AK927)

Subject: Federal Interest in Lands Underlying Aniak River and Aniak Lake 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 Aniak River. These submerged lands are described as the lands below the ordinary high water lines of the left and right banks beginning at its source in Section 20 of Township 3 North, Range 57 West, Seward Meridian (SM), Alaska, northerly to its confluence with the Kuskokwim River in Sec. 7, T. 17 N., R. 56 W., SM. The application is also submitted for the submerged lands encompassed by the ordinary high water line of Aniak Lake within T. 5 N., R. 56 W. and T. 4 N., R. 57 W., SM.¹ The purpose of this paper is to review the merits of the State's RDI application. The paper summarizes the status of the adjacent uplands, the history of the Bureau of Land Management (BLM) navigability determinations and where appropriate, the evidence of commercial navigation.

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 a BLM document dated November 8, 1984² and an extract of the 1985 Kuskokwim River Region report³, both documents stating historical information about Aniak River and Aniak Lake. In addition to the documents detailed in their

¹ Michael L. Menge to Henri Bisson, BLM, March 10, 2006, file AA-086372 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in this file.

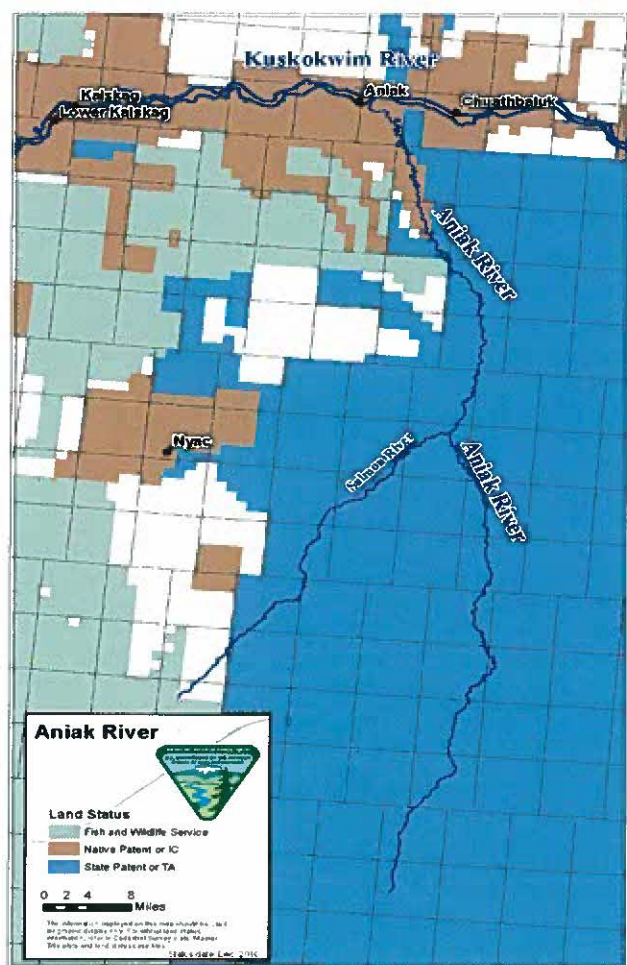
² Robert Arndorfer, Deputy State Director for Conveyance Management (960) to Chief, Branch of Conveyance Services (962), subject: "Navigable Waters of the Kuskokwim Region, Alaska," November 8, 1984, AA-086372, BLM records.

³ C. Michael Brown, "Alaska's Kuskokwim River Region: A History." Unpublished manuscript, BLM Alaska State Office, 1985.

application, the State supplied two additional BLM memoranda dated May 6, 1980⁴ and July 8, 1985.⁵ On May 6, 2009, the State hand delivered a packet of information containing maps and spreadsheets depicting land status, a written physical character description of the area, and provided three accounts of recreational floating on the Aniak River.⁶

Location and Physical Character

The town of Aniak is located approximately one mile west of the confluence with the Kuskokwim and Aniak Rivers and about 317 air miles westerly from Anchorage or about 92 air miles northeasterly from Bethel, all located in Alaska. Aniak is a Yup'ik word meaning "the place where it comes out," referring to the mouth of the Aniak River. The population of Aniak as of 2009 was 485 people.⁷



The headwaters of the Aniak River are located in an unnamed mountain within the Kuskokwim Mountains range about eight river miles north of Aniak Lake. The river flows north about 94 miles to the confluence with the Kuskokwim River upstream about one river mile from the town of Aniak. Major tributaries of the Aniak River going downstream from Aniak Lake include the Kipchuk and Salmon Rivers entering at about river mile 56 and the Buckstock River entering at about river mile 32.⁸ During normal flows the water is slightly blue-green from glacial silt but quickly becomes muddy with rising waters created by snow melt or heavy rains. The upper 2/3 to 3/4 of the Aniak River is moderately swift and shallow with much braiding among numerous gravel bars. Spring runoff and heavy rain periods cause frequent course changes in the river. High water events regularly deposit large trees and other plant material on gravel bars which occasionally block and dam large channels of the river. In the lower reaches, the river has a single deep channel that is slower and the water is less clear.⁹

⁴ Chief, Division of Resources (930) to State Director (910), subject "Navigable and Nonnavigable Waters in the Upper Kuskokwim River Basin," May 6, 1980, AA-86372, BLM records. Note: This determination did not make a determination for the Aniak River or Aniak Lake.

⁵ James H. Ducker, Historian to Chief, Navigability Section, subject: "Water Bodies Determined Navigable in Regional Report Process as of July 10, 1985," AA-86372, July 8, 1985, BLM records.

⁶ Materials located in file AA-86372, May 6, 2009, BLM records.

⁷ Alaska Department of Commerce, Community and Economic Development Division of Community & Regional Affairs, Alaska Community Database Community Information Summaries (CIS), "Aniak."

⁸ Brown, p. 28.

Land Status

The majority of the uplands along the Aniak River have been conveyed to the State except for the lower 1/3 of the river. At the confluence of the Aniak River with the Kuskokwim River (river mile 0) the riparian ownership is primarily within the surface ownership of Interim Conveyance (IC) 741 (The Kuskokwim Corporation, Successor in Interest to Aniak, Limited) and the subsurface owner of IC 742 (Calista Corporation) and continues upstream approximately twenty miles to the south section line of Sec. 33, T. 16 N., R. 56 W., SM, Alaska. The only exception is that the State has lands patented (50-2006-0108) in three sections within this area that are located within Secs. 26, 35, T. 17 N., R. 56 W. (about river mile 9) and the last one is in Sec. 5, T. 16 N., R. 56 W., SM (about river mile 13). The remaining portion of the riparian along Aniak River not in State ownership is the surface estate within Secs. 3, 4, 9, 10, 15, and 22, T. 15 N., R. 56 W., SM have been patented to The Kuskokwim Corporation (Successor in Interest to Aniak, Limited) by 50-2008-0120 and the subsurface estate was conveyed to Calista Corporation by 50-2008-0121 (about river miles 20-29).

Upstream of this location, the remaining riparian ownership is held by the State except for a small portion of federal interest within the Yukon Delta National Wildlife Refuge within Secs. 1 and 12, T. 14 N., 56 W., SM (about river miles 20-22). The U.S. Fish & Wildlife Service manages the lands within the refuge established by the Alaska National Interest Lands Conservation Act (ANILCA), Public Law 96-487 of December 2, 1980.¹⁰ The rest of the lands have been either Tentatively Approved (TA) or patented to the State except for twelve Native allotments located adjacent to the Aniak River and one application located adjacent to Aniak Lake.¹¹

Previous Navigability Determinations

The BLM has consistently determined the Aniak River navigable in its lower regions. On August 23, 1982, the Aniak River was determined navigable throughout The Kuskokwim Corporation (Successor in Interest to Aniak, Limited) village conveyance area (to Sec. 22, T. 15 N., R. 56 W., SM or to about river mile 29).¹² In decisions to convey land to The Kuskokwim Corporation, in the Aniak conveyance area, dated September 23, 1982 and November 9, 2007, the BLM determined that river miles 0-29 of the Aniak River were navigable.¹³

⁹ Dunaway, D. O. 1997, "Monitoring the sport fisheries of the Aniak River, Alaska, 1996." Alaska Department of Fish and Game, Fishery Management Report No. 97-4, Anchorage.

¹⁰ 94 Stat. 2371.

¹¹ The Native allotment (AA-51175, parcel D) located adjacent to Aniak Lake within T. 5 N., R. 56 W., SM, is still in the application phase of processing. This allotment has been surveyed by U.S. Survey 13143 and is considered an "Aguilar" case. This township has been conveyed to the State by patent 50-76-0040.

¹² Assistant to the State Director for Conveyance Management (913) to Chief, Division of ANCSA and State Conveyances (960), "Final Easements for the Kuskokwim Corporation in the Vicinity of the Village of Aniak," August 23, 1982, FF-14831-EE (75.4), BLM records.

¹³ BLM, Decision to Issue Conveyance, September 23, 1982 and November 9, 2007, FF-14831-EE/2, BLM records.

On April 15, 1983, the BLM again determined the Aniak River navigable within T. 15 N., R. 56 W., SM, this time for State selected lands (about river miles 29-31).¹⁴ Farther upriver (going south, about river miles 39-45), the BLM on December 30, 1983, examined state lands within T. 13 N., R. 55 W., SM, and found the Aniak navigable there too.¹⁵ On November 8, 1984, the BLM identified the 56 mile stretch of the Aniak River navigable from its mouth upstream to the confluence with Salmon River, affecting lands remaining under federal jurisdiction.¹⁶ Citing the findings from BLM's Regional Report process, the BLM, on July 8, 1985, summarized that the Aniak River was navigable from its mouth up to the Salmon River, effectively affirming the previous determinations described above.¹⁷

On July 1, 2009, the BLM issued a navigability determination on State TA lands near Sleetmute that included certain townships within the upper portion of the Aniak River watershed. This determination reiterated the 1984 determination that the Aniak River was navigable to the confluence with the Salmon River. However, the 2009 determination concluded that the Aniak River was nonnavigable upstream of the confluence with the Salmon River.¹⁸

Evidence of Commerce

In the early 1900's, prospectors started exploring the Aniak River basin in earnest after learning that gold had been discovered by a well-known miner named "Old Man Keeler."¹⁹ During the gold rush era the Aniak River was an important poling boat highway to the site where the diggings were located in the upper tributaries to Salmon River. Later, a caterpillar trail extending from the village of Aniak to the diggings was used to transport supplies.

In August 1911, gold prospector Harry Buhro made a strike at Marvel Creek and later he and two other prospectors found gold on Fisher and Dome creeks, all tributaries to the Salmon River. Even though gold was found at numerous tributaries to the Salmon River most miners focused their attention on Marvel Creek. A hydraulic plant was installed in 1913 to aid in the extraction of the gold and over time additional equipment was brought in to help in the recovery. The mine eventually changed hands but was still in operation until the 1970's.²⁰

In early September 1911, miners stampeded to the Aniak River. U.S. Commissioner E.J. Stier described the Aniak River in the Iditarod Pioneer newspaper in 1912 as being large, swift, and difficult to pole upstream. He also noted that a party of three prospectors made it up to Salmon

¹⁴ Acting Assistant to the State Director for Conveyance Management (913) to Chief, Division of ANCSA and State Conveyances (960), "Final Navigability Determination for State Selection Located on Aniak River (Russian Mission USGS Quadrangle)," April 15, 1983, AA-012681 (2628), BLM records.

¹⁵ Deputy State Director for Conveyance Management (960) to Chief, Branch of State Adjudication (964), "Final Navigability Determination for a State Selection on the Russian Mission Quadrangle," December 30, 1983, AA-51491 (2620), BLM records.

¹⁶ Deputy State Director for Conveyance Management (960) to Chief, Branch of Conveyance Management (962), "Navigable Waters of the Kuskokwim Region, Alaska," November 8, 1984, BLM records.

¹⁷ Historian to Chief, Navigability Section, "Water Bodies Determined Navigable in Regional Report Process as of July 10, 1985," July 8, 1985, BLM records.

¹⁸ Chief, Branch of Survey Planning and Preparation (927) to Group Survey Number 944, "Navigability Determination affecting State Lands near Sleetmute," July 1, 2009, FF-14900-EE, BLM records.

¹⁹ Brown, p. 121.

²⁰ *Ibid.*, p. 121.

River by boat. Later, a newspaper in Iditarod reported that J.M. Pickle and his wife poled a boat up the Aniak River to the strike.²¹

Instances of miners poling up the Aniak River have been recorded in a local newspaper in Iditarod. One prospector in particular reported on a trip from the diggings downstream and then the return trip back upstream to Marvel Creek. According to the miner, descending the Salmon River and Aniak River in a small boat was easy and he made the trip to the Kuskokwim River in about twenty hours. However, returning back upstream was no easy matter. The miner noted that it took two men “at least fifteen working hours of constant concentration and vigilance” for twenty days to pole and line their boat loaded with two tons of supplies up the river.²²

Today people recreate on the Aniak River for fishing, hunting, floating and sightseeing. Typically, most are either flown into Aniak Lake or upper Salmon River and float out in inflatable rafts to the village of Aniak. The Aniak and Salmon Rivers are home to salmon, rainbow trout and grayling for fishermen and the uplands surrounding these rivers are home to many species of big game (moose, bear, caribou and wolves) for hunters.²³ Residents of Aniak also use the Aniak River to participate in subsistence activities.²⁴

Conclusions/Recommendations

The Federal test of navigability is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (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 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 and evidence obtained by the BLM, we conclude that the Aniak River was navigable in fact and was used as a highway of commerce at the time of statehood from its confluence with the Kuskokwim River upstream to Salmon River.

²¹ *Ibid.*, p. 406.

²² *Ibid.*, p. 407.

²³ Jeff Varvil, “Flowing Towards Heaven, Kings and Calm on the Aniak,” *Fish Alaska Magazine*, May 2002, p. 52.

²⁴ Tracie Krauthoefer, Jim Simon, Michael Coffing, Madel Kerlin and Wayne Morgan, “The Harvest of Non-salmon Fish by Residents of Aniak and Chuathbaluk, Alaska, 2001-2003,” Technical Paper No. 299, February 2007.

Recommendations

1. The BLM should approve the State of Alaska's application for the Aniak River from its mouth at the confluence with the Kuskokwim River upstream to Salmon River (approximate river mile 56).
2. Upstream of the confluence with the Salmon River the State of Alaska owns the uplands along all of Aniak River and Aniak Lake. Therefore, the State owns the submerged lands of the Aniak River upstream from the confluence with the Salmon River and Aniak Lake based on riparian ownership. The BLM should acknowledge that the federal government does not have an interest in these submerged lands based on riparian law and approves the State of Alaska's application (from approximate river mile 56 upstream to its headwaters).