



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Alaska State Office
222 West Seventh Avenue, #13
Anchorage, Alaska 99513-7504
<http://www.blm.gov/ak>

In Reply Refer to:
1864 (AK9270)

AUG 26 2010

Memorandum

To: Files AA-086376, AA-086377, AA-086378, AA-086379, AA-086380

From: Jack Frost
Navigable Waters Specialist (AK9272)

Subject: Federal Interest in Lands Underlying the Water Bodies within the Yukon-Kuskokwim Portage in the Lower Kuskokwim Subregion, Alaska

The State of Alaska (State) filed applications, dated March 10, 2006, for recordable disclaimers of interest (RDI) for the lands underlying the water bodies comprising the Yukon-Kuskokwim Portage (Y-K Portage).¹ The State asserts that the water bodies were navigable at the time of statehood, January 3, 1959, and, therefore, title to the submerged lands vested in the State upon entry to the Union. 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 Bureau of Land Management (BLM) may disclaim federal interest in the submerged lands on any of the grounds that apply. Consideration is also given to whether or not the State's application for lands underlying the subject water bodies meets the regulatory requirements (43 CFR Subpart 1864).²

The purpose of this paper is to review the merits of the State's RDI applications and to make a navigability determination as the water body existed at the date of Alaska's statehood. If the water bodies were navigable [and unreserved] in fact and in law, then title to the lands underlying the water bodies passed to the State at the time of statehood. If a water body is not navigable, the riparian landowner claims ownership of the submerged lands under riparian law. This paper summarizes the status of adjacent uplands, the history of Federal navigability determinations, physical conditions of the water bodies and, where appropriate, any evidence of commercial navigation.

¹ Michael L. Menge to Henri Bisson, BLM, March 10, 2006, files AA-086376, AA-086377, AA-086378, AA-086379, AA-086380 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in these files.

² On March 12, 2007, the State clarified the Kulik Lake and Unnamed Lake #2 application (AA-086378) to exclude a small unnamed lake from their map, located in section 3, T. 18 N., R. 63 W., SM., and correct the corresponding legal description for Unnamed Lake #2, where the initial application listed the lake in sections 23 and 24, but the map shows the lake in sections 22 and 23. For further information see letter: Scott Ogan, DNR, Natural Resource Manager to Thomas P. Lonnie, State Director, BLM, March 12, 2007, AA-086378 (1864), BLM records.

The Y-K Portage consists of nine water bodies and four land portages; the State applied for the lands underlying water bodies only.³ The State divided these nine water bodies into five separate applications, described in a northwesterly direction from the Kuskokwim River as follows: Mud Creek and Unnamed Lake #1; Crooked Creek and Johnson River; Unnamed Lake #2 and Kulik Lake; Unnamed Lake #3 and Unnamed Lake #4; and the Talbiksok River to the confluence with Portage Slough of the Yukon River.

In support of its applications, the State submitted the following documents: a United States Army, Corps of Engineers' (USACE) reconnaissance report on the Y-K Portage, dated January 31, 1971;⁴ two BLM memoranda addressing the navigability of certain water bodies on the Y-K Portage, dated November 8, 1984,⁵ and July 8, 1985;⁶ and the section entitled "Russian Mission Summer Portage" in a BLM report on the Kuskokwim River Region.⁷ The State also supplied reference maps for each application which generally depicts the route of the Y-K Portage; however, the legal description, located in their applications to BLM, is the controlling document for the lands being applied for.⁸

Location

The Y-K Portage is located in western Alaska about 350 miles due west from Anchorage and about 65 miles northeast of Bethel. The Y-K Portage serves as the shortest practical "link" between two major river systems: the Kuskokwim and Yukon Rivers.

The Y-K Portage follows a general land and water route northwesterly about 72 miles, starting at Mud Creek (located near Lower Kalskag village on the Kuskokwim River) to Unnamed Lake #1, downstream on Crooked Creek to the confluence with Johnson River, upstream on Johnson River to Unnamed Lake #2, across Unnamed Lake #2, Kulik Lake, Unnamed Lake #3, Unnamed Lake #4, then crossing overland to connect with Talbiksok River, and continuing downstream ultimately ending at its confluence with the Portage Slough of the Yukon River, near Russian Mission.⁹

³ Refer to Maps 1-4, at the end of this report, for a generalized route of the Y-K Portage.

⁴ U.S., Department of the Army, Corps of Engineers, Alaska District, "Reconnaissance Report, Section 107 Investigation, Yukon-Kuskokwim Portage, Alaska, January 31, 1971."

⁵ DSD for Conveyance Management (960) to Chief, Branch of Conveyance Services (962), November 8, 1984, BLM records. The subject of this memo is "Navigable Waters of the Kuskokwim Region, Alaska."

⁶ James Ducker, Historian, to Chief, Navigability Section, subject: "Water Bodies Determined Navigable in Regional Report Process as of July 10, 1985," July 8, 1985, BLM records.

⁷ C. Michael Brown, "Alaska's Kuskokwim River Region: A History." Unpublished manuscript, BLM Alaska State Office, 1985.

⁸ Menge to Bisson, March 10, 2006 and Ogan to Lonnie, March 12, 2007.

⁹ Please refer to the Appendix following this report. The maps depict the generalized route commonly referred to as the Y-K Portage.

Land Status

At the time of statehood, the area encompassing the Y-K Portage was in public domain and none of these lands were reserved or withdrawn. However, today, the Y-K Portage route is located entirely within the boundary of the Yukon Delta National Wildlife Refuge (NWR), established under the Alaska National Interest Conservation Act (ANILCA) (P.L. 96-487) on December 2, 1980. Riparian lands along the south and north end of the Y-K Portage has been conveyed out of federal ownership under the Alaska Native Claims Settlement Act (ANCSA).

The lands along the south entrance, from the confluence with the Kuskokwim River and Mud Creek northwesterly to the south boundary of Section 20, Township 17 North, Range, 62 West, Seward Meridian (SM), Alaska, have been conveyed to The Kuskokwim Corporation (Successor in Interest to Upper and Lower Kalskag, Inc.), a village corporation. The lands within the north entrance of the Y-K Portage, along the Talbiksok River in Secs. 27 and 34, T. 19 N., R., 66 W., SM, have been conveyed to the Russian Mission Native Corporation, a village corporation. The subsurface estates for these lands were conveyed to Calista Corporation, a regional corporation.¹⁰ The submerged lands of Mud Creek, Unnamed Lake #1, Crooked Creek, and the Talbiksok River were excluded from these conveyances.

There are several Native allotments, all conveyed under the Native Allotment Act, located along the Y-K Portage. The State does not have any riparian land along the Y-K Portage. The U.S. Fish and Wildlife Service manage the remaining lands, entirely located within the Yukon Delta NWR.

Federal Navigability Determinations

The USACE and the BLM are the only federal government agencies found to have considered the navigation of the Y-K Portage. Generally, the USACE makes navigability determinations for interstate transport or foreign commerce; whereas the BLM determinations are for title.

In June 1970, eleven years after the date of statehood and using different criteria from the BLM, the USACE performed a field investigation of the Y-K Portage, primarily to determine the existing conditions of the portage and the feasibility of improving the existing structures.¹¹ At the time of the field trip, several water bodies were too shallow for boat travel leading the investigators to conclude that they were “unnavigable.” They explained that the low water levels were due in part to an unusually dry year, or one of many dry years. Examples of this can be found in the USACE report’s “Difficulties to Navigation” section. For example, Mud Creek Channel was “not navigable due to insufficient water depths;” the slough between Mud Creek Tram and Unnamed Lake #1 was dry even though the investigators admit Native guides stating that it is normally flooded, but several dry years had lowered surface waters; and the upper

¹⁰ The Kuskokwim Corporation (50-2005-0435); Russian Mission Native Corporation (50-2006-0454); and Calista Corporation (50-2005-0436 and 50-2006-0455).

¹¹ U.S., Department of the Army, Corps of Engineers, Alaska District, “Reconnaissance Report, Section 107 Investigation, Yukon-Kuskokwim Portage, Alaska, January 31, 1971.”

portion of Crooked Creek (Johnson River¹²), a reach of approximately 3 ¾ miles, was so shallow that progress by boat “was not possible.”¹³

For its purposes, the BLM has consistently held that the Y-K Portage water bodies were navigable at the time of statehood. After a thorough study of the Portage’s history, the BLM in 1984 determined all of the water bodies (except Mud Creek) comprising the Y-K Portage to be navigable.¹⁴ (Mud Creek had already been determined to be navigable in a previous ANCSA conveyance action.) On July 8, 1985, the BLM also identified those same water bodies as navigable in a regional report process. Most recently, on July 5, 2000, the BLM included its consideration of the navigability of waters along the Y-K Portage for Native allotments scheduled for survey action. In the memorandum, the BLM cited the findings of the November 8, 1984, memorandum and affirmed that the water bodies are navigable.¹⁵

Evidence of Commerce¹⁶

As one of the shortest practical routes between the Yukon and Kuskokwim rivers, the Y-K Portage has a long history as a route of travel, trade, and commerce. The Y-K Portage was used by Native travelers and Russian traders in the early 1800’s. In 1842, the Russian-American Company hired Lieutenant L. Zagoskin (Russian naval explorer) to take a fact finding tour of the region. He was instructed to explore the Yukon and Kuskokwim rivers to their sources, locate practicable routes of travel, find the best supply routes between the trading posts, and locate new areas where posts could be established. In the report on his investigations, Zagoskin recommended that the Kuskokwim River trading posts be supplied from St. Michael at the mouth of the Yukon River. The Russian-American Company adopted the Y-K Portage to transport supplies and trade goods to Kolmakof Redoubt, a trading post upstream of Kalskag on the Kuskokwim River. After the transfer of Alaska to the United States, the Americans quickly learned of the Y-K Portage’s existence. Josiah Edward Spurr (explorer, author, and geologist), who in 1898 participated in a United States Geological Survey expedition through the

¹² The USACE incorrectly identified Johnson River as Crooked Creek, and vice-versa. This naming convention, although incorrect, is consistent between the report and the map.

¹³ See footnote 3. See also Thomas O. Melius, Regional Director, U.S. Fish and Wildlife Service, Region 7, to Thomas Lonnie, Alaska State Director, BLM, subject: “BLM Navigability Report of the Water Bodies of the Yukon-Kuskokwim Portage, Yukon Delta National Wildlife Refuge,” August 24, 2007, AA-086376, BLM records. Note: This memo describes in comment #2 that “the COE map indicates 5 segments of the Y-K Portage to be “unnavigable.” In an electronic message dated September 11, 2007, Warren Keogh, Water Rights Coordinator, U.S. Fish and Wildlife Service, informed Jack Frost, Navigable Waters Specialist, BLM, that there were 4 segments, not 5, displayed as “unnavigable” on the map.

¹⁴ Robert W. Arndorfer, Deputy State Director for Conveyance Management, to Chief, Branch of Conveyance Services, November 8, 1984, BLM records. The determinations were based upon evidence in the BLM reported cited in footnote 6.

¹⁵ Gust C. Panos, Chief, Branch of Mapping Sciences (AK924) to Chief, Branch of Survey Preparation and Policy Interpretation (AK925), subject: “Navigable Waters in Native Allotments Scheduled for Survey in Window 1283” July 5, 2000, BLM records. This memorandum was found during normal investigation by the writer and was not provided by the State of Alaska in support of its application.

¹⁶ Unless cited otherwise, the information in this section was derived from “Russian Mission Summer Portage” in Brown’s “Alaska’s Kuskokwim River Region: A History” (1985).

Kuskokwim region, learned of the Portage's existence and its great commercial importance in the past; he believed that its importance would grow in the future.

The gold rushes to the Innoko and Iditarod region and the later development of hard-rock mining in the Nixon Fork area of the Kuskokwim Mountains stimulated prospecting activity in the entire Kuskokwim region. This increased travel between the two major rivers by prospectors, miners, and traders who sometimes carried large loads of supplies. In 1908, a Nome newspaper quoted an account that two hundred men were using the Y-K Portage and the number was likely to increase due to recent gold strikes in the region.¹⁷ The Y-K Portage was also used to transport mail by boat to Kuskokwim villages. For many years, mail carriers averaged about one to two trips per month. Typically, the carrier transported about 600 pounds per trip and around 4,000 pounds per season. The cost to of transporting the mail was about fifty-one cents per pound per one-way trip.

Because of shallow water and crooked, narrow creeks, travel over the Y-K Portage was difficult; however it did not inhibit its use. Because of the difficulties, many improvements were proposed over the years; and some were implemented. One idea proposed in the early 1900's, but was never implemented, was to build a canal. The Kuskokwim Bay and the Kuskokwim River opened earlier than the Yukon River and Bering Sea, and that route into the Yukon River valley was about 320 miles shorter. With a canal, shipping prices would be reduced and goods would arrive earlier in the season.

Following the construction of the Alaska Railroad from tidewater at Seward to Fairbanks, the Federal Government made improvements to the Y-K Portage, bringing the Kuskokwim's trade to the new railroad. In the 1920's and 1930's, the Alaska Road Commission (ARC), the agency then in charge of building most roads, trails, and bridges in territorial Alaska, improved access across the Y-K Portage by staking the route, installing trams with flat cars, windlasses, cables, dredging and clearing of vegetation, building a small dam to help navigate the portions where there was shallow water, and constructing two shelter cabins for travelers' safety. Suggested improvements and associated expenditures to the Y-K Portage were listed in an ARC letter dated July 26, 1928. Later, instructions to the foreman conducting the improvements, dated April 22, 1929, detailed the plans for each site.¹⁸

During the 1940's (World War II era), mining in the Kuskokwim basin halted and with the advent of air travel, the Federal Government relied more heavily on transporting mail by plane rather than by boat. Thus, commercial travel on the Y-K Portage declined. During this time, local Natives were the primary users as they traveled from their villages to trapping grounds. Soon, the improvements began to deteriorate, as few, if any, repairs were made.

¹⁷ *Nome Nugget*, December 2, 1908.

¹⁸ Thomas O. Melius, Regional Director, United States Fish and Wildlife Service, to Thomas Lonnie, State Director, Bureau of Land Management, September 21, 2007, files AA-086376, AA-086377, AA-086378, AA-086379, AA-086380, BLM records. Note: Refer to attached Alaska Road Commission documents dated July 26, 1928 and April 22, 1929.

Since statehood (1959), Federal and State government officials have periodically demonstrated interest in the old proposal to improve the Y-K Portage as a canal route. The State legislature passed resolutions in 1959, 1961, and 1971, calling upon the Army Corps of Engineers to survey and construct the canal. In 1969, even the U.S. Senate passed a resolution in favor of conducting a preliminary study of the canal project. Also, in 1969, residents of Russian Mission, Upper Kalskag, and Lower Kalskag attempted to rebuild the overland route through Operation Mainstream Program (Department of Labor funding). They repaired one dam, a boat lift above Kulik Lake, and both sections of tramway.

In June 1970, the USACE sent a team to investigate the Y-K Portage and to meet with the residents of the area concerning any improvements. In its report on the investigation, the USACE described the Y-K Portage's history of use, including the types of craft used on the water bodies, its seasonality of use, the possibilities for future transportation of commerce, the residents' desires in improving the route, and the difficulties in navigating the route. The report included plans for improvements on both the land and water sections of the Y-K Portage and an analysis of the benefits and costs associated with the proposed plan. In the end, the proposed plan of improvement was not considered to be economically justified.

Although local residents continue to use portions of the route, they seldom travel the entire Y-K Portage. In 2003, one party's account of traveling the route that summer was published.¹⁹ This article describes the route, its condition, and the effort involved to complete the trip. However, it is evident by this article that the Y-K Portage continues to be used despite its deteriorating physical condition and lack of maintenance of the land improvements. According to the USFWS, the Talbiksok Fire in 2005 ripped through the area, affecting approximately three miles of the land portage between the Talbiksok River and Kulik Lake. As a result, fallen timber on the tramway now obstructs travel between the Talbiksok River and Unnamed Lake #4. It is unknown what the status of the passage is today.²⁰

Conclusions/Recommendations

From the mid 1800's, if not earlier, to the 1930's, the Y-K Portage was a well known route for travel, trade, and commerce. An important link between the two largest river systems in western Alaska, miners, prospectors, mail carriers, missionaries, scientists, and local Natives relied upon the Y-K Portage for travel and transportation. In the 1930's the Federal government made certain improvements to the route, which allowed for easier access and an increase in the numbers of people and quantities of goods transported over the route. With the advent of aviation, the outbreak of world war, and the subsequent decline of the mining industry, use of the Y-K Portage as a route of travel and transportation declined. Nevertheless, at the time of statehood, the Y-K Portage could have been used, if the need had existed, as a highway of commerce.

¹⁹ The July 23, 2003 article "A Boat Ride from Bethel to Marshall" located in *The Delta Discovery* was found during normal investigation by the writer and was not provided by the State of Alaska in support of its application.

²⁰ Thomas O. Melius, Regional Director, United States Fish and Wildlife Service, to Thomas Lonnie, State Director, Bureau of Land Management, August 24, 2007, file AA-086376, BLM records.

Any alterations to submerged lands have to be examined to assess whether or not water bodies became navigable because of the alterations. Water bodies deemed to be navigable before any improvements were made will remain navigable regardless of the nature of the improvements. The location of upland land ownership boundaries where natural ambulatory movement (accretion or reliction) has occurred or where drought conditions of water bodies exist follow riparian boundary law.

The BLM has consistently held that those water bodies comprising the Y-K Portage are navigable, and the State has provided evidence to support that finding. Therefore, certain segments of these lands have been conveyed out of federal ownership.²¹ After reviewing the evidence provided by the State of Alaska, and verifying the factual information presented, I affirm that the water bodies comprising the Y-K Portage were unreserved and were susceptible to use for travel, trade, and commerce at the time of statehood, therefore title to the submerged lands passed to the State of Alaska on the date of statehood. As a result, I recommend that the State's application for a recordable disclaimer of interest in the Y-K Portage be approved for the lands underlying the following water bodies:

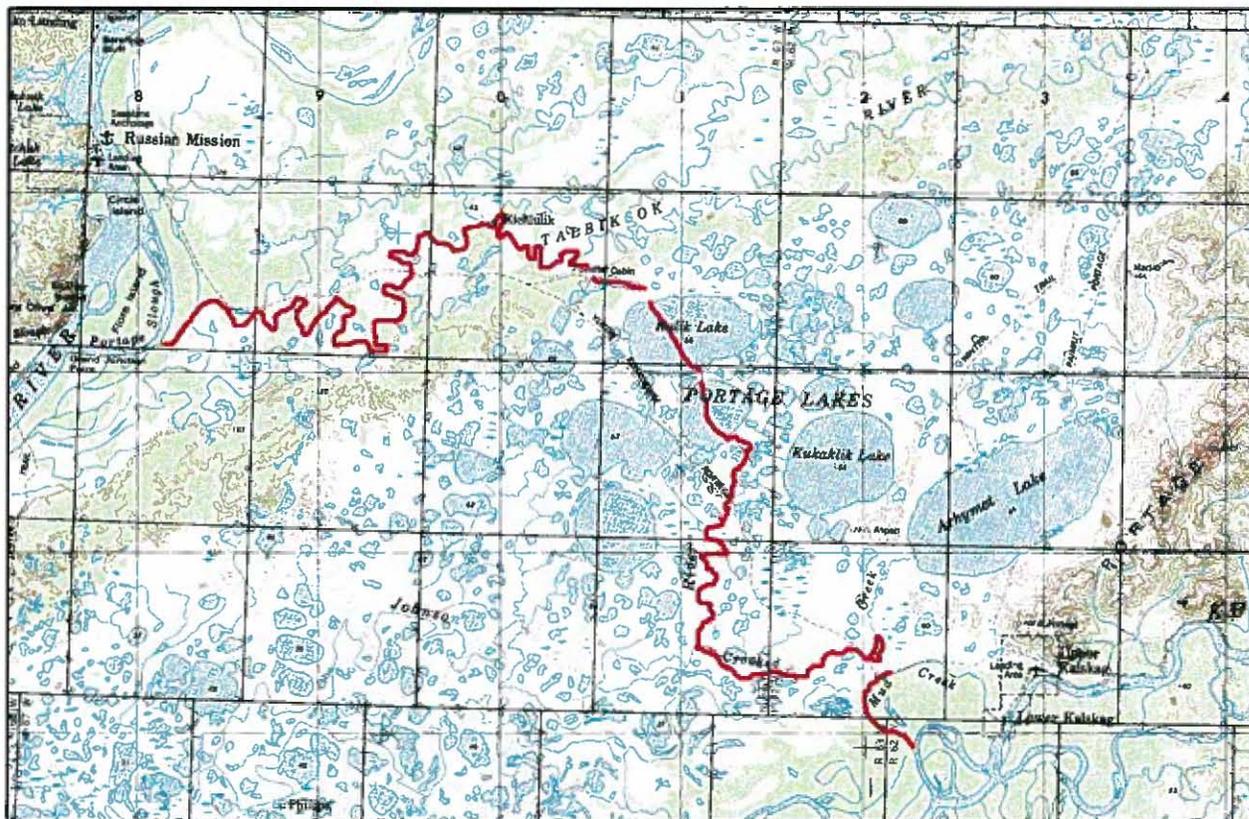
1. Mud Creek from the confluence with the Kuskokwim River upstream to the intersection of the overland traverse in the NW ¼ of Sec. 26, T. 17 N., R. 62 W., SM;
2. Unnamed Lake #1 in Sec. 22, T. 17 N., R. 62 W., SM;
3. Crooked Creek beginning in Sec. 22, T. 17 N., R. 62 W., SM. downstream into T. 17 N., R. 63 W., SM, to its confluence with Johnson River;
4. Johnson River from the confluence with Crooked Creek in Sec. 22, T. 17 N., R. 63 W., SM, upstream into T. 18 N., R. 63 W., SM, to Unnamed Lake #2;
5. Unnamed Lake #2 in Secs. 1-4, 9-12, 14-16, and 22-23, T. 18 N., R. 63 W., SM;
6. Kulik Lake in T. 18 N., R. 63 W., SM, and T. 19 N., R. 63 W., SM;
7. Unnamed Lake #3 in Secs. 18-20, T. 19 N., R. 63 W., SM;
8. Unnamed Lake #4 in Sec. 19, T. 19 N., R. 63 W., SM and Secs. 13, 23-24, T. 19 N., R. 64 W., SM; and
9. Talbiksok River beginning in Sec. 13, T. 19 N., R. 64 W., SM, downstream through T. 19 N., R. 65 W., SM, and T. 19 N., R. 66 W., SM, to its confluence with the Portage Slough in Sec. 33, T. 19 N., R. 66 W., SM.

²¹ Ann Johnson, Chief, Branch of ANCSA Adjudication, Decision, September 30, 1982, F-14888-A, et al., and F-14871-A, et al., and Ruth Stockie, Chief, Branch of ANCSA Adjudication, July 21, 1983, F-14927, et al., BLM records.

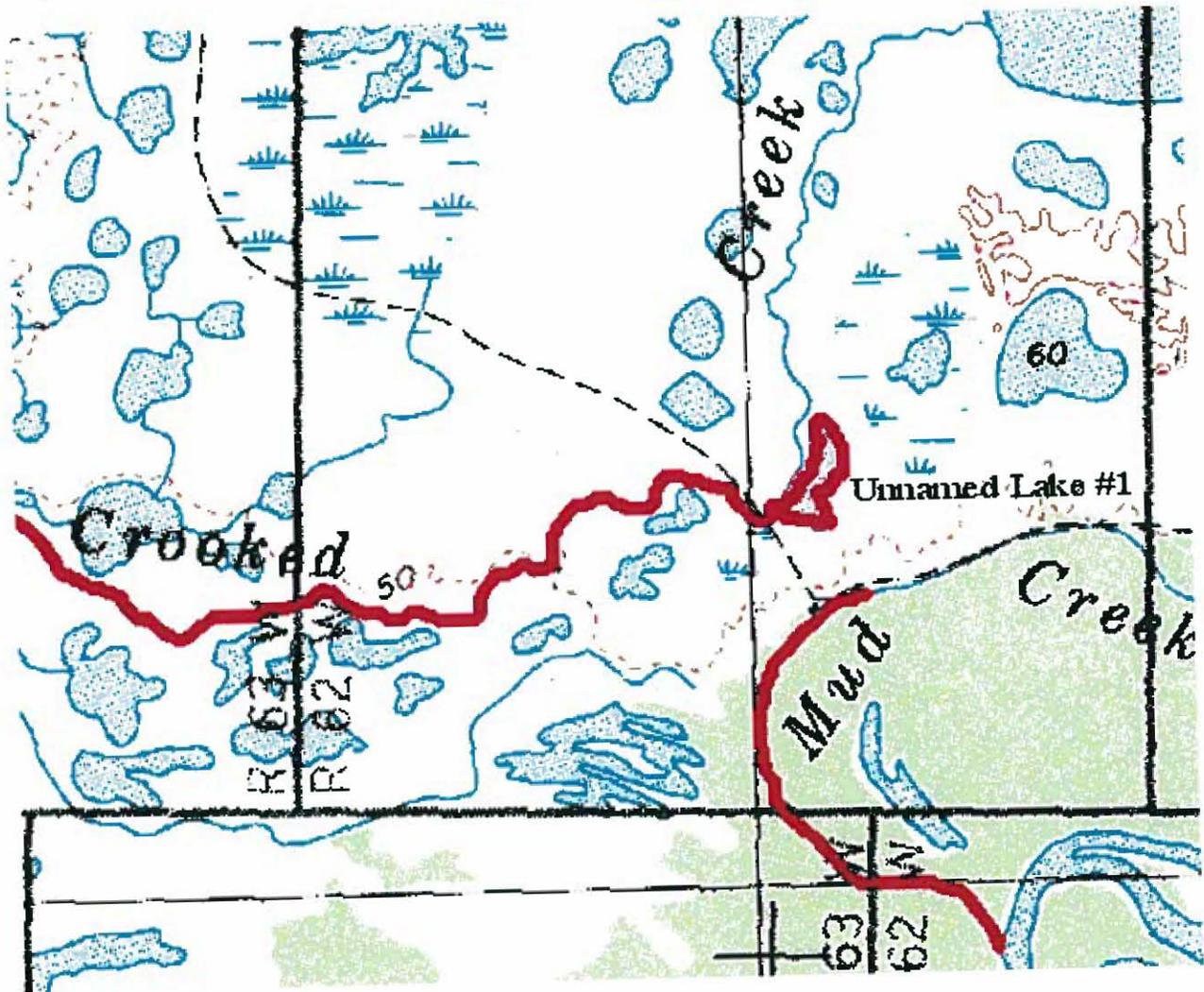
APPENDIX

Note: The four maps shown below are for reference only (based on the USGS, Russian Mission, Alaska Quadrangle, 1980, 1:250,000) and depict the generalized water route of the Y-K Portage. For a legal description of the State of Alaska's application please refer to Casefiles AA-086376, AA-086377, AA-086378, AA-086379, and AA-086380.

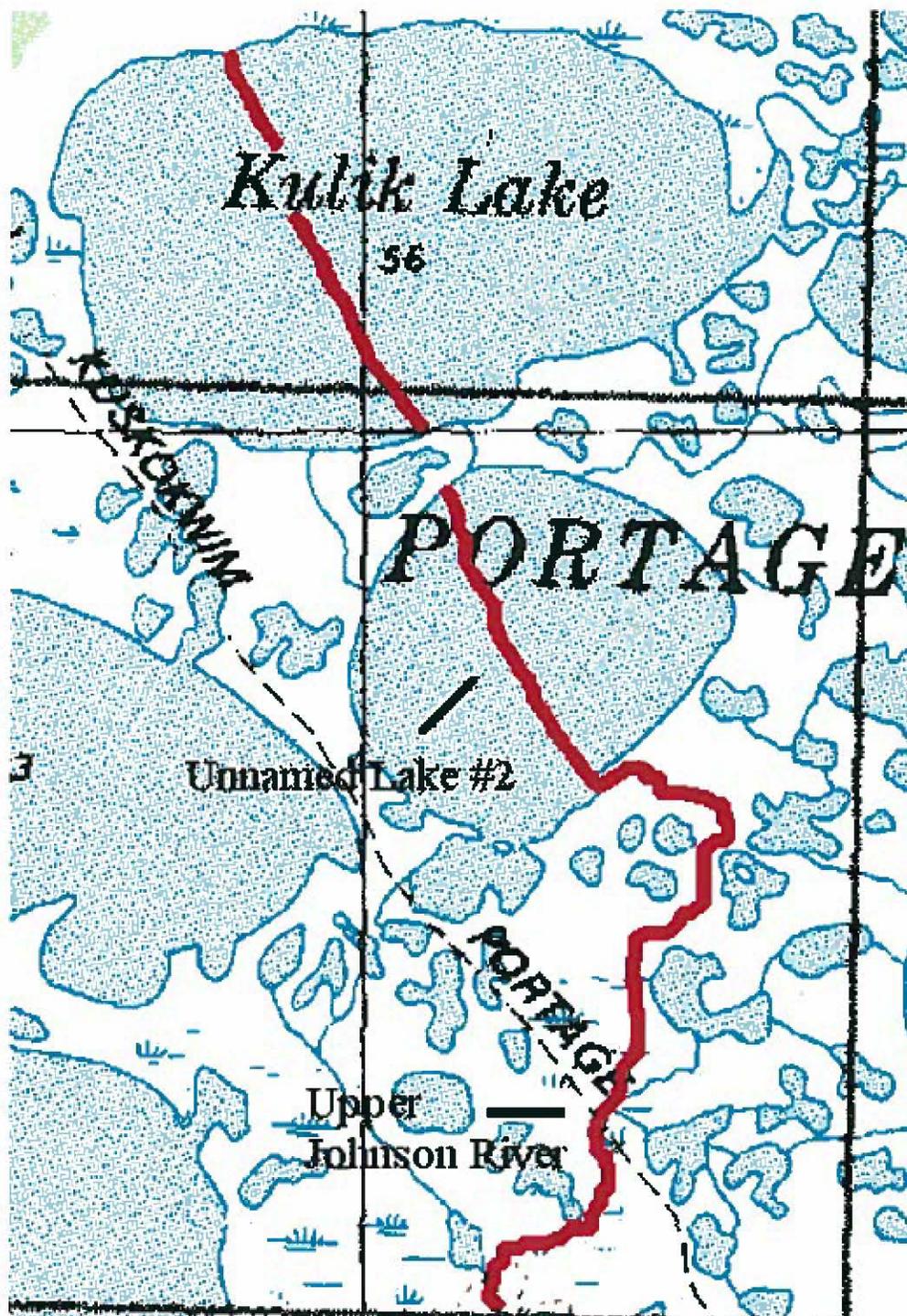
Map #1. General Route of the Yukon-Kuskokwim Portage.



Map #2. Mud Creek to Unnamed Lake #1 section.



Map #3. The Upper Johnson River to Unnamed Lake #2 section.



Map #4. Kulik Lake to Unnamed Lakes #3 and #4 section.

