

In Reply Refer To:  
AA-086375  
1864 (AK9270)

Memorandum

To: AA-086375

From: Ralph H. Basner  
Navigable Waters Specialist (AK9270)

Subject: Navigability of Whitefish Lake and Outlet in the Lower Kuskokwim  
Subregion, Alaska

On March 10, 2006, the State of Alaska (State) filed an application for a recordable disclaimer of interest (RDI) for the submerged lands encompassed by the ordinary highwater line of Whitefish Lake, within Township 14 North, Range 60 West and Tps.15 N., Rs. 59 and 60 W., Seward Meridian (SM), Alaska. Whitefish Lake and its outlet can be found on the Russian Mission, United States Geologic Survey (USGS) Quadrangle map (1:250,000).

The application also included a legal description more particularly described as follows: "All submerged lands within the bed of the Whitefish Lake Outlet between the ordinary high water lines of the left and right banks of the Outlet, beginning at its source, Whitefish Lake, in the SW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> of Section 3, Township 15 North, Range 60 West, Seward Meridian, Alaska USGS 1:63,360 series topographic map Russian Mission B-3(1952). Thence west-northwest to its confluence with the Kuskokwim River in the SW<sup>1</sup>/<sub>4</sub> of Section 16 in Township 16 North, Range 61 West, Seward Meridian, Alaska USGS 1:63,360 series topographic map Russian Mission B-4 (1954 minor revisions 1972)."<sup>1</sup>

On February 11, 2010, the State amended Section I (Description of Waterways), clarifying the State's application for an RDI for the lands underlying Whitefish Lake and the entirety of its outlet, from Whitefish Lake to the confluence with the Kuskokwim River.<sup>2</sup> In its amended application, the State claims to own the land underlying Whitefish Lake and its outlet (from where it flows out of Whitefish Lake to where it flows into the Kuskokwim River). 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 claim is based upon the Equal Footing Doctrine, the Submerged Lands Act of 1953, the Alaska Statehood Act, the Submerged Lands Act of 1988, and "any other legally cognizable reason." The Bureau of Land Management (BLM) may disclaim interest in the submerged lands on any of the grounds that apply. The State's application

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<sup>1</sup> Michael Menge, Commissioner, Department of Natural Resources (DNR) to Henri Bisson, State Director, BLM, March 10, 2006, file AA-086375 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records). The reference documents are also available in the file.

<sup>2</sup> Thomas E. Irwin, Commissioner, DNR to Mr. Thomas P. Lonnie, State Director, BLM, February 11, 2010, BLM records.

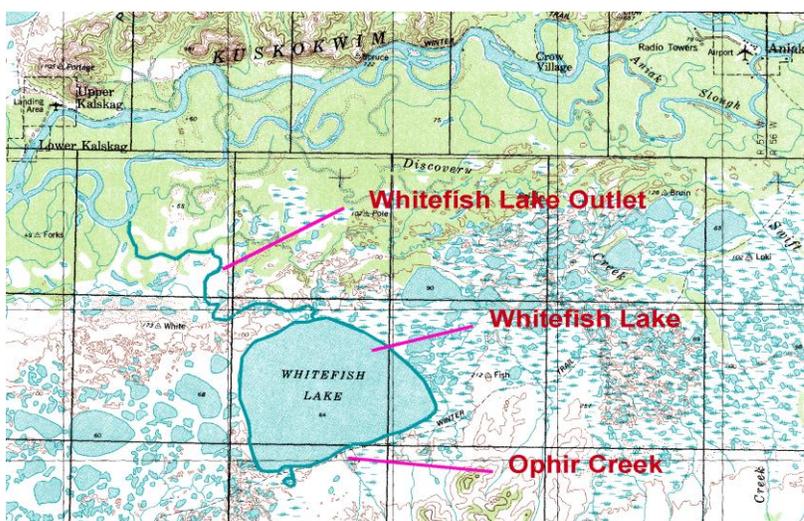
for lands underlying the subject water bodies must also meet the regulatory requirements (43 CFR Subpart 1864).

As evidence of its claim, the State submitted copies of three BLM navigability-related memoranda dated May 6, 1980, November 8, 1984 and July 8, 1985; and an extract of Alaska's Kuskokwim Region: "A History."<sup>3</sup> The BLM issued the memoranda and associated decisions to issue conveyance, dated September 30, 1982 (amended December 10, 1982), June 22, 1987 and October 14, 2008, in support of land conveyances to the Kuskokwim Corporation and Calista Corporation under the Alaska Native Claims Settlement Act (ANCSA) and to the State under the Alaska Statehood Act.

### Location and Physical Description

Whitefish Lake is located in the eastern portion of the Yukon-Kuskokwim Delta region of southwest Alaska. It is situated southerly of the Kuskokwim River and northwesterly of the

Kilbuck Mountains, approximately eighteen miles southwesterly of Aniak, Alaska.<sup>4</sup>



This seven and one-half mile wide, fingernail-shaped water body is among the largest in a myriad of lakes studding the Kuskokwim lowlands, with an area of approximately 19,926 acres (and encompasses a drainage area of approximately 171 square

miles.<sup>5</sup> The surrounding uplands are primarily composed of moist and wet tundra surrounding the lake and outlet with lowland spruce and hardwood forest along the Ophir Creek drainage leading into the southern shore of Whitefish Lake.<sup>6</sup>

Ophir Creek, its largest source of water, enters Whitefish Lake on its south side and drains the west flank of Mount Hamilton in the Kilbuck Mountains.<sup>7</sup> The outlet drains its namesake lake from the north end and flows in a 16.25 mile<sup>8</sup> winding course, generally in a

<sup>3</sup> C. Michael Brown, BLM, Alaska State Office, Anchorage (1985).

<sup>4</sup> Orth, Donald J., *Dictionary of Alaska Place Names*, U.S. Geological Survey Professional Paper 567, Washington: Government Printing Office, 1967. Pg. 1043.

<sup>5</sup> Harper C. Ken, Wyatt TY, Harris Frank, and Cannon David, *Alaska Fisheries Technical Report Number 88*, August 2006 U.S. Fish and Wildlife Service, Pg. 3. (the land area was converted from the 44,340 hectare figure cited in the report).

<sup>6</sup> Selkregg, Lidia, L., *Alaska Regional Profiles, Southwest Region*, Figure 141, University of Alaska, Arctic Environmental and Data Center.

<sup>7</sup> Russian Mission (1:250,000) quadrangle.

<sup>8</sup> The Outlet's total length was calculated by use of Google Earth's measurement tool and should be considered "approximate." It is only intended to provide reference points for the purposes of this paper.

northwesterly direction, joining up with a larger stream flowing from the northeast (at river-mile twelve) and continues to its confluence with the Kuskokwim River, approximately five miles farther downstream. Whitefish Lake's outlet is low-gradient and slow moving, typical of the Kuskokwim lowland's flowing water bodies.<sup>9</sup> Both the lake and outlet remain in their natural and ordinary condition.

### Land Status

Whitefish Lake and its outlet are situated in portions of five townships, entirely within the exterior boundaries of the Yukon Delta National Wildlife Refuge (NWR).<sup>10</sup> The refuge was established under the Alaska National Interest Lands Conservation Act of December 2, 1980, P.L. 96-487. These lands were not reserved at the time of Statehood. Title to most of the uplands surrounding Whitefish Lake remains in the United States under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS). A small area of the uplands abutting the lake's northern shoreline (within Sec. 3, T. 15 N., R. 60 W., SM) are patented to the Kuskokwim Corporation.<sup>11</sup>

At the lake's opposite end, along its southernmost shoreline, a small lake and channel, considered an extension of Whitefish Lake,<sup>12</sup> is surrounded by lands either interim conveyed (IC) to the Kuskokwim Corporation within Sec. 9, T. 14 N., R. 60 W., SM.<sup>13</sup> or withdrawn as part of the YDNWR within Secs. 4 and 5, T. 14 N., R. 60 W., SM. Nine certificated Native allotments are scattered around the remainder of the lake's shoreline,<sup>14</sup> and all of the uplands surrounding Whitefish Lake and outlet have been surveyed.<sup>15</sup>

Whitefish Lake's 16.25 mile long "outlet" drains the lake from its northernmost end in Sec. 3, T. 15 N., R. 60 W., SM.<sup>16</sup> through lands, most of which are owned by the Kuskokwim Corporation.<sup>17</sup> Six certificated Native allotments are situated along the outlet between Whitefish Lake and the Kuskokwim River.<sup>18</sup>

<sup>9</sup> The Outlet is referenced as "Shit Creek" in C. Michael Brown's, Alaska Kuskokwim River Region: A History, (1985) BLM, Alaska State Office, Anchorage. Pg. 416

<sup>10</sup> Yukon Delta National Wildlife Refuge (16 USC 668dd).

<sup>11</sup> Sec. 3, Lots 1 and 2, T. 15 N., R. 60 W., SM, Patent No. 50-2005-0430 (the corresponding subsurface estate was conveyed under Patent No. 50-2005-0431 to the Calista Corporation).

<sup>12</sup> Assistant to the State Director for Conveyance Management to Chief, Division of ANCSA and State Conveyances, Amendment to "Final Easements for the Kuskokwim Corporation for the Village of Lower Kalskag" Memorandum, November 8, 1982, BLM file F-14888-EE (75.4).

<sup>13</sup> IC Nos. 745 & 746, issued to the Kuskokwim Corporation and Calista Corporation, respectively on September 30, 1983. IC No. 745 is for the surface estate and IC No. 746 is for the subsurface estate.

<sup>14</sup> Starting on the north shore of Whitefish Lake and going counterclockwise: 50-97-0191, 50-93-0545, 50-93-0399, 50-93-0194, 50-93-0296, 50-93-0399, 50-93-0161, 50-93-0049, 50-93-0091, 50-94-0118.

<sup>15</sup> The lake and outlet have been "meandered" according to the provisions of the (BLM) Manual of Survey Instructions, 2009.

<sup>16</sup> Memo. from Project Inspector to Survey File No. 10015, dated May 30, 1991, detailing the exact channel because of confusion with another channel, 30 chains to the west which is impassible. BLM file F-14888-EE (75.4).

<sup>17</sup> Patent No. 50-2005-0430 (surface estate to the Kuskokwim Corporation and Patent No. 50-2005-0431 to Calista Corporation).

<sup>18</sup> The Native allotments (all certificated) are listed, by certificate number and U.S. Survey, in order, starting at where the outlet flows from Whitefish Lake and proceeding downstream to the mouth of the outlet at the Kuskokwim River: 50-97-0191, U.S. Survey No. 10015, Lot 4; 50-96-0510, U.S. Survey No. 10015, Lots 1 and 6; 50-93-0446, U.S. Survey No. 10014, Lots 1, 2 and 3; 50-93.0409, U.S. Survey No. 4208, Lots 1, 2

Upon exiting Whitefish Lake, this winding drainage flows through lands conveyed to the Kuskokwim Corporation for approximately 11 river miles, until it reaches lands tentatively approved (TA) to the State in Sec. 24, T. 16 N., R. 61 W., S.M.<sup>19</sup> After a short quarter-mile loop through State -owned lands, the winding outlet turns southerly for approximately 3.6 miles through Kuskokwim-owned lands in Secs. 25 to 28, T. 16 N., R. 61 W., SM. Then, with exception to a certificated Native allotment at the outlet's confluence with the Kuskokwim River, the remaining uplands along the outlet's final 1.3 miles have been conveyed to the State

### Previous Navigability Determinations

The BLM has consistently held that Whitefish Lake and its outlet are navigable water bodies. Since the early 1980s, it has made multiple navigability determinations affecting the lake and outlet. The first determination was included as part of an easement memorandum made in support of a pending land conveyance to the Kuskokwim Corporation (successor in interest for the village of Lower Kalskag). On August 25, 1982, the BLM determined Whitefish Lake and its outlet stream navigable, or susceptible to being navigable, due to travel, trade and commerce, through the proposed conveyance area, including all of Whitefish Lake and including the 16.25 mile long outlet, beginning in the SE $\frac{1}{4}$  Sec. 3, T. 15 N., R. 60 W. and continuing to the Kuskokwim River in the SW  $\frac{1}{4}$  Sec 16, T. 16 N., R. 61 W., SM.<sup>20</sup>

One month later, on September 30, 1982, the BLM issued a decision to convey lands to the Kuskokwim Corporation, clearing the way for the conveyance of uplands along the north shore of Whitefish Lake and much of the waterway connecting the lake and the Kuskokwim River.<sup>21</sup>

On November 8, 1982, the BLM amended its August 25, 1982, easement memorandum to include a small lake and channel, "leading into Whitefish Lake," within Secs. 4, 5 and 9, T. 14 N., R. 60 W., SM, along the south shore of the main body of Whitefish Lake. The memorandum determined that these water bodies are part of Whitefish Lake proper, and therefore, navigable.<sup>22</sup>

On November 8, 1984, the BLM identified navigable water bodies throughout the Kuskokwim Region that were (at the time) under federal jurisdiction, among them, Whitefish Lake and its outlet (23 miles).<sup>23</sup> The report cited Whitefish Lake and its outlet "as a link in a

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and 3; 50-94-0020, U.S. Survey No. 10002, Lots 2 and 3; and 50-95-0531, U.S. Survey No. 10100.

<sup>19</sup> Tentative approval (TA) AA-12891, issued August 5, 1987.

<sup>20</sup> Assistant to the State Director for Conveyance Management (913) to Chief, Division of ANCSA and State Conveyances (960), Final Easements for the Kuskokwim Corporation for the Village of Lower Kalskag, F-14888-EE (75.4) BLM files.

<sup>21</sup> IC No. 745, issued on September 30, 1983, included lands in Sec. 3, T. 15 N., R. 60 W., SM (the only uplands actually abutting Whitefish Lake) and Secs. 3-6, T. 15 N., R. 60 W., Sec. 1, T. 15 N., R. 61 W. and Secs. 25-28 and 36, T. 16 N., R. 61 W., SM. These lands, which are affected by Whitefish Lake and its outlet are but a portion of IC No. 745. Pursuant to the Submerged Lands Act of 1988, Pub. L. 100-395, 102 Stat. 979 (Aug. 16, 1988) the determination of navigability represents the final agency action with respect to the entirety of Whitefish Lake and the stretches of the outlet affected by the conveyance.

<sup>22</sup> Assistant to the State Director for Conveyance Management to Chief, Division of ANCSA and State Conveyances, Amendment to "Final Easements for the Kuskokwim Corporation for the Village of Lower Kalskag" Memorandum, F-14888 EE (75.4), BLM files.

<sup>23</sup> Deputy State Director for Conveyance Management (960) to Chief, Branch of Conveyance Services (962),

water and land route to prospective mining ground on Ophir Creek and mining operations on the headwaters of the Tuluksak River.”

A few months later, as part of its regional report process, the BLM, on July 8, 1985, reiterated its previous determination that Whitefish Lake and outlet are navigable.<sup>24</sup>

In a May 8, 1989, memorandum, the BLM reexamined State and ANCSA-selected lands, within Secs. 16, 20, 21 and 24, T. 16 N., R. 61 W., SM, including the submerged lands previously excluded from conveyances under the ANCSA and Statehood Act.<sup>25</sup> The BLM used the “one-person kayak” criteria (a standard no longer used by the bureau) and once again, determined the “Whitefish Lake effluent” (i.e. the outlet) in the above described lands as navigable.<sup>26</sup>

And finally, in a May 24, 1989, memorandum,<sup>27</sup> the BLM, affirmed its earlier determinations concerning the navigability of Whitefish Lake’s outlet, where it flows through Secs. 3 to 6, T. 15 N., R. 60 W., SM, and the four Native allotments therein.<sup>28</sup> The report affirmed the November 8, 1982, determination of navigability and recommended that the stream (Whitefish Lake outlet) be meandered through the Kuskokwim Corporation lands and the four affected Native allotments.<sup>29</sup> This memorandum also examined the Ophir Creek tributary (of Whitefish Lake) and determined it navigable “to and through” the southern boundary of F-17343-B,<sup>30</sup> a Native allotment situated along Ophir Creek, about one mile upstream (southerly) from Whitefish Lake.

In a related matter, the BLM, on July 19, 1991, noted the existence of a “probable navigable stream” located on lands selected by neighboring Aniak and Kalskag villages and the State.<sup>31</sup> This stream joins up with the Whitefish Lake outlet approximately 11 miles downstream from Whitefish Lake, in the SW¼ Sec. 24, T. 16 N., R. 61 W., SM and had not been previously addressed for its navigability potential. The BLM followed-up with a Supplemental Navigability Determination, dated October 30, 1991, and determined the stream navigable on village-selected lands (and State lands at the stream’s confluence with the Whitefish Lake outlet).<sup>32</sup> The report noted that the stream (outlet) from Whitefish Lake is actually a tributary of the subject (unnamed) stream and is “significantly smaller.”

### Native Trails

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Navigable Waters of the Kuskokwim Region, Alaska., BLM quad files.

<sup>24</sup> Historian to Chief, Navigability Section, Water Bodies Determined Navigable in Regional Report Process as of July 10, 1985, BLM quad files.

<sup>25</sup> Alaska Statehood Act, July 7, 1958, P.L. 85-508 (72 Stat. 339).

<sup>26</sup> This determination of navigability utilized the “one-man kayak” criteria, a standard no longer used by the BLM.

<sup>27</sup> The May 24, 1989, memorandum cited the “one-man kayak” standard, no longer used by the BLM.

<sup>28</sup> Ibid. The affected Native allotments are: AA-12682, AA-12876, AA-12893 and AA-12899 (all 2561).

<sup>29</sup> F-16854; F-17003, Parcel B; F-16022, Parcel A; and F-15845, Parcel B (all 2561 case type).

<sup>30</sup> Now certificated as 50-93-0047 (US Survey No. 10011, Lots 2 and 4).

<sup>31</sup> These lands are generally northerly and easterly of the Whitefish Lake and outlet selection area.

<sup>32</sup> The October 30, 1991, memorandum determined the stream navigable within: Secs. 13, 14, and 21-24, T. 16 N., R. 59 W.; Secs. 27 and 28, T. 16 N., R. 60 W.; and, Sec. 24, T. 16 N., R. 61 W., SM.

The Aniak – Tuluksak trail skirts the southern shore of Whitefish Lake and is identified as EIN 7 D9 on the BLM easement maps.<sup>33</sup> The trail was reserved to the United States for use as a winter trail from the lands granted in Interim Conveyance (IC) No. 745. As stated by the State, Department of Natural Resources (DNR) website, the Aniak-Tuluksak Trail (RST 24) was a winter mail trail and part of the through route from Iditarod to Bethel.<sup>34</sup> Native leaders have stated that the Aniak – Tuluksak Trail had seen little use “for thirty or forty years” (prior to 1975).<sup>35</sup> It is likely the trail provided access to the Ophir Creek gold diggings in the early part of the twentieth century; however, there is no information to suggest the trail played a major role.

The Ophir Creek-Bear Creek Trail, shown as RST 1783 on the State’s DNR website,<sup>36</sup> parallels Ophir Creek from its mouth at Whitefish Lake and runs southerly, through Rockpile Pass, to and along the headwaters of Bear Creek (approximately three miles distant from the headwaters of Ophir Creek). As indicated by the State’s website, the trail was historically used during the early part of the twentieth century for access to mining operations located in the Ophir Creek and Tuluksak River headwaters.

### Physical Character

Whitefish Lake is approximately thirty-three square miles in size, making it one of the larger lakes in the lower Kuskokwim region.<sup>37</sup> In spite of its large size, the lake is typically shallow (like most lakes in this region), averaging less than four and one-half feet deep, according to the USFWS.<sup>38</sup> Field examinations performed for the nine Native allotments spread along the lake’s edge reveal a brushy shore which transitions into a marshy interface with the open water. The field examiners noted a gradual expansion outward that has effectively reduced the surface area of Whitefish Lake.<sup>39</sup> Interviews with the affected Native allottees corroborate the BLM field examiner’s observations.<sup>40</sup>

Alfred G. Maddren of the U.S. Geological Survey ascended the Outlet in 1914 and described the creek as “a sluggish tundra stream” that is “narrow and deep” (six to fifteen feet deep in

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<sup>33</sup> Russian Mission B-3, quadrangle, BLM easement File, F-14888-EE.

<sup>34</sup> [http://dnr.alaska.gov/mlw/trails/rs2477/rst\\_legal.cfm?FILE\\_NUMBER=24&Submit=Submit](http://dnr.alaska.gov/mlw/trails/rs2477/rst_legal.cfm?FILE_NUMBER=24&Submit=Submit). (dated 12/28/10)

<sup>35</sup> C. Michael Brown, Alaska’s Kuskokwim River Region: A History, (1985) BLM, Alaska State Office, Anchorage.

<sup>36</sup> [http://dnr.alaska.gov/mlw/trails/rs2477/rst\\_legal.cfm?FILE\\_NUMBER=1783&Submit=Submit](http://dnr.alaska.gov/mlw/trails/rs2477/rst_legal.cfm?FILE_NUMBER=1783&Submit=Submit) (dated 12/28/10)

<sup>37</sup> Grumman Ecosystems Corporation, pg. 3776. The corporation investigated the navigability of Kuskokwim River Basin streams for the U.S. Army Engineer District, Alaska.

<sup>38</sup> Ibid. (the approximate figure cited was converted from 1.5 meters, the depth referenced in the report), August 2006 U.S. Fish and Wildlife Service, Pg. 3.

<sup>39</sup> See field reports located within the following BLM case files: F-029275, F-16534, F-17003, F-16853, F-16850, F-17348, F-15676, F-16351, F-17345 (all 2561 case type).

<sup>40</sup> Letter, James A. Kvamme, Jr., Realty Specialist (for Kuskokwim Native Association) to Jim Moore, Calista Adjudication (963-BLM), Native Allotment parcels located in the Whitefish Lake area belonging to David Nook, serial No. FF-017348 and Mary Ann McKindy, serial No. FF-017345, June 12, 1991, BLM files. Memorandum, Moxie Alexie, Realty Office (for Kuskokwim Native Association) to Jim Moore, Calista Adjudication (963-BLM), Whitefish Lake Native Allotments, June 7, 1991, BLM files.

places). Willows, alders and grass line its banks among scattered growths of “fair-sized” spruce trees.<sup>41</sup>

In a memorandum dated May 29, 1991, the BLM project inspector for Native allotment surveys noted that the lake’s water level appears to fluctuate “from season to season and year to year as evidenced by the lack of mature plant growth, save for the seed pods of the grass.” He added that the lake bed is very flat with a “mud flat” type soil, sloping less than one foot in one-thousand feet.<sup>42</sup>

Aerial photography reveals the outlet leading from Whitefish Lake to be consistently narrow (ten to fifteen feet wide), but still passable for boats, from the lake to its confluence with the larger, unnamed stream, approximately 11 miles downstream from Whitefish Lake. The remainder of the outlet (between the confluence with the unnamed stream and the Kuskokwim River) appears to be much wider (up to sixty feet) and unobstructed.<sup>43</sup>

On October 30, 1991, the BLM reported on an unnamed stream flowing westerly to its confluence with the Whitefish Lake outlet in Sec. 24, T. 16 N., R. 61 W., SM. This stream is, in fact, the larger of the two streams effectively making the drainage from Whitefish Lake, a tributary of the larger creek. The report describes the creek to be approximately twenty-five to thirty-five feet in width throughout its course with an average gradient of about two feet per mile.<sup>44</sup>

### Evidence of Commerce

Up until 1940, The Akulmiut, or tundra people of the Johnson River area (generally that area northwest of Bethel, between the Kuskokwim and Yukon rivers) were engaged in an economy based on furs and fishing, utilizing non-salmon species such as pike, blackfish and whitefish in a region where salmon are primarily targeted. Trade with the coastal Yupik often involved the exchange of dried pike and frozen whitefish for walrus hides and seal oil.<sup>45</sup> Later, with the establishment of the Moravian mission at Bethel (approximately 65 miles southwesterly of what) in 1885, local natives sold dried whitefish as a food source to the missionaries.<sup>46</sup>

Enumeration studies undertaken by the USFWS<sup>47</sup> indicate that Whitefish Lake supports three sub-species of whitefish<sup>48</sup> and that subsistence harvests continue to be an important activity

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<sup>41</sup> “Gold Placers of the Lower Kuskokwim, with a note on Copper in the Russian Mountains,” in A. H. Brooks, et al., Mineral Resources of Alaska, Report on Progress Investigations in 1914, U.S. Geological Survey Bulletin 622, Washington, D.C.: GPO, 1915, p. 308.

<sup>42</sup> Memorandum, Orrin Frederick, Project Inspector to Mr. Tom Deiling & Mr. Danny West, Lower Kalskag Native allotments Contact No. N651-C1-3022, May 29, 1991, BLM files.

<sup>43</sup> NASA color infra-red (1:60,000) photos flown in 1980. Roll 2911, Frames 6381, 6382, and 6383.

<sup>44</sup> Deputy State Director for Conveyance Management (960) to Deputy State Director for Cadastral Survey (923), supplemental Navigability Determination for Reports on Window 1834 (Group survey 254: May 8, 1989) and Window 1833 (Group survey 256: May 24, 1989), BLM file, F-14831-EE (75.4).

<sup>45</sup> Andrews, Elizabeth Frances. 1989. The Akulmiut: Territorial Dimensions Of A Yup'ik Eskimo Society (Yup'ik Eskimo), Ph.D. Dissertation, University of Alaska, Fairbanks, 1989, Pg. 367.

<sup>46</sup> Andrews, Pg. 366.

<sup>47</sup> Harper, Pg. 1.

<sup>48</sup> Broad Whitefish *Coregonus nasus*, Humpback Whitefish *Coregonus pidschian*, and Least Cisco *Coregonus sardinella*.

for local villagers.<sup>49</sup> These fish were known to have been sold or bartered throughout the Kuskokwim region.

While there is no documented evidence of the harvest, barter, or sale of Whitefish Lake's rich population of the fish by the area's aboriginal inhabitants, the fact that these fish were commercially harvested throughout the lower Kuskokwim region makes it at least possible that Whitefish Lake and its outlet could have supported this activity.

In his 1914 ascent, Alfred G. Maddren was taken by Pete McDonald in a poling boat from Oknagamut on the Kuskokwim River, via the outlet, to Whitefish Lake. After crossing Whitefish Lake, Maddren visited Charles Heckman's fish camp about a half mile up Ophir Creek, a tributary draining into the south side of Whitefish Lake. Upon reaching Heckman's camp he met two Japanese and one German who were netting spawning whitefish (600 to 800 per day) and curing them for sale to the miners (at \$0.50/pound) who were working the Bear Creek diggings on the other side of Rockpile Pass from the Ophir Creek headwaters.<sup>50</sup>

In the early 1970s, the State promulgated commercial fishing regulations prohibiting the commercial exploitation of the species in Whitefish Lake and the Johnson River, a tributary of the Kuskokwim River, downstream of Bethel. Reduced size led to concerns that the fish were being over exploited.<sup>51</sup> In his 2007, stock assessment of the lake's fishery, FWS biologist Ken C. Harper wrote that "large numbers of whitefish were removed and possibly taken to market in Bethel," prompting the establishment of time and gear regulations for subsistence fishing in 1992.<sup>52</sup>

Mining played an important role at Whitefish Lake. Alfred H. Brooks, of the USGS reported on the "Yellow River Stampede" on Ophir Creek during the winter of 1901-2, when gold was first discovered. The prospects turned out to be limited, amounting to little more than "color."<sup>53</sup> Claims were staked but no serious prospecting had occurred. However, in 1913, a dozen or more prospectors filed claims along about ten miles of the creek starting at four miles upstream of Whitefish Lake. Half a dozen cabins were constructed and for the first time the miners were prepared to stay through the winter, indicative of a more serious effort to find higher concentrations of gold.<sup>54</sup>

Prospecting with a drill was first attempted during the winter of 1913-14. According to Brooks "the most essential parts of the drill outfit were sledged to Ophir Creek from Bear Creek where the machine had been operated with steam power the previous year." However, the miners were unable to provide sufficient power to actually operate the drill resulting in very little exploratory drilling. Brooks concluded that dredge mining appeared to be the best practicable method to find gold in Ophir Creek's gravels. Noting Ophir Creek's proximity to Whitefish Lake and its connection to the Kuskokwim River, Brooks wrote: "Ophir Creek is

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<sup>49</sup> Harper, Pg. 8.

<sup>50</sup> Brown, C Michael, Pg 416.

<sup>51</sup> Harper, Pg. 2.

<sup>52</sup> Harper, Pg. 2.

<sup>53</sup> Evidence of gold (small flakes) but usually not enough to support a commercially viable enterprise.

<sup>54</sup> Brooks, Alfred H (and others), Mineral Resources of Alaska, Report on Progress of Investigations in 1914, Bulletin 622, U.S. Dep't of the Interior, U.S. Geological survey, Pg. 336.

somewhat favored as regards the transportation of heavy mining equipment and supplies, for the water route from Kuskokwim River to Whitefish Lake is available if the proper kind of boat is used. It would be less difficult to place a small dredge on Ophir Creek than on the other placer creeks now known in the district, because tedious and expensive overland hauling would not be necessary.”<sup>55</sup>

Later in 1917, it was reported that miner Joseph Lewis and his associates planned to haul a gasoline-powered drill and three tons of gasoline, in addition to other supplies, from Bethel to Ophir Creek to prospect for gold. Presumably they reached Ophir Creek via Whitefish Lake and its outlet. They reportedly travelled in a specially built boat powered by a thirty-horsepower motor.<sup>56</sup>

With the decline in mining and its associated activities, little information about later use of this waterway has come to pass. Current State and BLM records reveal no mining activity along Ophir Creek.<sup>57</sup> According to BLM’s Anchorage District Office, “small boats travel this route in subsistence activities.”<sup>58</sup> Fifteen Native allotments are situated along lake’s shoreline and outlet where traditional subsistence activities continue to play a major role.

According to whitefish enumeration studies conducted by the USFWS, the three sub-species of whitefish endemic to the lake “make it a major subsistence harvest location, drawing people from as far away as Bethel.”<sup>59</sup> Contemporary use of Whitefish Lake appears to be primarily centered on the whitefish subsistence fishery. There is no evidence that recreational use of the lake or its outlet plays any significant role. The apparent lack of salmon or trout makes it less likely that this shallow tundra lake would appeal to sport fishermen, who regularly flock to southwest Alaska’s rivers in order to partake in the region’s world class salmon, grayling and trophy trout fishing.

### Conclusion

The federal test of navigability is found in *The Daniel Ball*, 77, U.S. (10 Wall.) 557 (1870). The 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 also relies upon federal administrative case law and the advice of the Interior Department’s Solicitor’s Office. Pertinent DOI Office of the Solicitor’s opinions include 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”). The agency is also guided by the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988.

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<sup>55</sup> Brooks, Pg. 336.

<sup>56</sup> Brown, C Michael, Pg 417.

<sup>57</sup> BLM, Alaska Case Retrieval Enterprise System (ACRES), TWPALL. and State of Alaska, DNR, Land Administration System.

<sup>58</sup> See endnote 378 in Browns regional report.

<sup>59</sup> Harper C., Pg. 24.

The administrative record for the conveyance of lands to the Kuskokwim Corporation (for the village of Lower Kalskag) includes a determination of navigability for Whitefish Lake which was incorporated into an administrative decision for the conveyance of lands on September 30, 1982 (IC No. 745).<sup>60</sup> The Whitefish Lake Outlet was referenced synonymously with its namesake lake as a continuous route of travel, trade and commerce on August 25, 1982.<sup>61</sup> Therefore, the upper 11 miles of the Outlet (from the lake, downstream to where it flows into State lands) was also determined to be navigable, and the uplands were conveyed to the Kuskokwim Corporation, at the same time as Whitefish Lake proper.

The lowermost reaches of the Outlet are surrounded by lands conveyed (TA) to the State, including uplands which border on two relatively short stretches of the (lower) Whitefish Lake outlet in Secs. 16, 20, 21 (river-mile fifteen and one-half to river-mile seventeen) and 24 (river-mile twelve to river-mile twelve and one-half), T. 16 N., R 61 W., S.M. The TA did not specifically exclude the submerged lands beneath the lower reaches of the Whitefish Lake outlet. However the administrative decision, dated June 22, 1987, directed that a navigability determination be made prior to the issuance of a patent. In the course of administrative actions undertaken by the BLM, Whitefish Lake's Outlet, within the two stretches bounded by the State lands described above, has consistently been determined to be a navigable water body.

I conclude from the available evidence that the stretch of the Whitefish Lake Outlet, within State lands in Sec. 24 (river-mile 4.9 to 5.10), and Secs. 16, 20 and 21 (river mile 0 to 1.3) was susceptible for travel, trade, and commerce at the date of Statehood. Historical accounts indicate Whitefish Lake and outlet provided a means of access and a continuous route of travel to the Ophir Creek and Tuluksak River goldfields during the early part of the twentieth century. Whitefish endemic to Ophir Creek and Whitefish Lake were harvested as a food source for sale to miners working the Bear Creek and Tuluksak River diggings. Modern day travel on Whitefish Lake and outlet is primarily related to subsistence activities owing to numerous Native allotments situated along the lake and its outlet.

Therefore, I recommend that the State's application for a recordable disclaimer of interest for Whitefish Lake and its outlet be approved.

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<sup>60</sup> IC No. 745 was issued September 30, 1983. These lands are now patented as Patent No. 50-2005-0430.

<sup>61</sup> Assistant to the State Director for Conveyance Management to Chief, Division of ANCSA and State Conveyances (960), August 25, 1982, Final Easements for the Kuskokwim Corporation for the Village of Lower Kalskag, BLM file AA-086375 (1864).