United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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TAKE PRIDE IN AMERICA

AA-085446 (1864)

JUN 16 2005

Memorandum

To: Chief, Branch of Lands and Realty (932)

From: Navigable Waters Specialist J. Frost

Subject: Navigability of the Kasilof River in the Cook Inlet Region

On May 12, 2004, the State of Alaska filed an application for a recordable disclaimer of interest for lands underlying the Kasilof River, and all interconnecting sloughs, between the ordinary high water lines of the left and right banks from the boundary of the Kenai National Wildlife Refuge at Sections 5 and 8, Township 2 North, Range 11 West, Seward Meridian (SM), Alaska, downstream to its mouth in Cook Inlet within Tps. 3 and 4 N., R. 12 W., SM. The State identified its application on a map entitled "Kasilof River Recordable Disclaimer of Interest Application," dated December 12, 2003. The map was submitted with the State's application. In general, the Kasilof River is about 18 miles in length; the State has applied for the lower 13 miles of the river.

In support of its application, the State submitted three Bureau of Land Management (BLM) navigability reports dated August 19, 1980, July 12, 1984, and April 8, 1986, all stating that the Kasilof River was navigable.[1] The BLM issued these memoranda in support of land conveyances to Native corporations and the State of Alaska under the Alaska Native Claims Settlement Act (ANCSA) and the Alaska Statehood Act.

This paper considers whether any new information changes or modifies BLM's prior navigability findings that resulted in an appealable decision, or, if the navigability findings are not embodied in an appealable decision, whether a current determination will be required. 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).

Briefly stated, BLM's past recommendations that the Kasilof River is navigable are affirmed. The State's application for "interconnecting sloughs" is not specific without map and name

[1] Tom Irwin to Henri Bisson, BLM, May 12, 2004, file AA-085446 (1864), Alaska State Office, BLM records, Anchorage (hereafter BLM records).

identification and, therefore, under the regulations, must be rejected. However, if waters of the navigable Kasilof River flowed through the sloughs at statehood, and still so flow, these sloughs are considered to be part of the river.

Land Status

Title to the beds of navigable waters in the Kenai National Moose Range did not pass to the State upon statehood. The Kasilof River in T. 2 N., R. 11 W., SM, on the date of statehood, was included within the exterior boundaries of the Kenai National Moose Range. The remainder of the Kasilof River downstream from T. 2 N., R. 11 W., SM is outside of the Kenai National Moose Range boundary.

The Kenai National Moose Range (Moose Range) was originally withdrawn on December 16, 1941 by Executive Order (EO) 8979. The boundary followed the right bank of the Kasilof River from its confluence with Cook Inlet upstream to the township boundary at river mile 11.70, near Mooshead Rapids, where the boundary crossed the Kasilof River to its left bank, and then continued on a southwesterly course away from the river to the watershed boundary thus including the uplands and the river from that point within the Moose Range. Public Land Order 3400, dated May 22, 1964, adjusted the EO 8979 boundary to release lands for the State to select. The Alaska National Interest Lands Conservation Act (ANILCA) of December 2, 1980 expanded the Moose Range by 240,000 acres and renamed it the Kenai National Wildlife Refuge. The Kenai National Wildlife Refuge lands are managed by the U.S. Fish & Wildlife Service.

Most of the uplands along the Kasilof River outside of the original Moose Range boundary have been conveyed out of federal ownership. These conveyed lands, as shown on BLM Master Title Plats, include State lands, a patented homestead, and one patented trade and manufacturing site at river mile 0. However, at approximately river mile 6 (in Sec. 25, T. 3 N., R. 12 W., SM), BLM still manages lands selected by Cook Inlet Region Inc. (CIRI) under AA-20298.

The State has patented lands (50-65-0097) along the Kasilof River in Secs. 5 and 8, T. 2 N., R. 11 W., SM, that were once within the Kenai National Moose Range. Since these lands are no longer reserved, title to the submerged lands goes to the upland owner pursuant to the 1988 Submerged Land Act.

BLM and Other Federal Navigability Determinations

The BLM first considered the navigability of the Kasilof River on August 19, 1980 while processing state selection applications for lands in Tps. 3 N., Rs. 11 and 12 W., SM.[2] This report described use of the Kasilof River by fishing boats and Natives for commerce and recommended that the river be determined navigable its entire length. The record is not clear whether or not the 1980 recommendation was ever incorporated into a land conveyance to the State. The State

[2] Mary Jane Sutliff, Historian, "Navigability Recommendations for Kenai Quadrangle FY 80," August 19, 1980; Realty Specialist (932) to files- State Selections Kenai Quadrangles- Report #1, September 4, 1980; Jules V. Tileston to State Director, September 9, 1980, files A-050463 and A-056658, State selections, BLM records.

received patents to the riparian lands in the early 1960's.[3] In a memorandum dated July 12, 1984, the BLM cited the Kasilof River as navigable to and including Tustumena Lake.[4] This memo described various types of uses on the Kasilof River and was the basis for two navigability determinations which were incorporated into land conveyance decisions: one dated August 30, 1984, for lands selected by CIRI in Tps. 3 N., Rs. 11 and 12 W., SM., and secondly, a determination dated March 19, 1986, in T. 3 N., R. 11 W., SM. The March 19, 1986 report stated that title to the beds of navigable water bodies within the Kenai National Moose Range did not pass to the State when it joined the Union. A BLM report identifying navigable and nonnavigable waters in the South Kenai Group Survey, dated April 7, 1986, listed the Kasilof River navigable in Secs. 5 and 8, T. 2 N., R. 11 W., SM.[5]

The U.S. Army Corps of Engineers has determined the Kasilof River to be navigable for 6.0 miles.[6] The U.S. Coast Guard does not list the Kasilof River on its April 2003 listing of navigable streams.[7]

Regional Character

The Kasilof River is located about 12 miles south of Kenai, on the Kenai Peninsula in south-central Alaska. The Kenai Peninsula is a broad area of mountains and lowlands extending into the Gulf of Alaska and lies between Prince William Sound on the east and Cook Inlet on the west. These two bodies of water represent the major indentations of the Alaska coast, and their inland extremities represent the northernmost part of the Pacific Ocean. The greater part of the Kenai Peninsula is drained by streams entering Cook Inlet, the largest of which are Kenai, Kasilof, Chickaloon, Ninilchik, and Swanson Rivers and Resurrection, Sixmile and Fox Creeks.[8]

The Kenai Peninsula includes two very different physiographic divisions: (1) the Kenai Mountains on the eastern side and (2) the Kenai lowland or plain on the western or Cook Inlet side. These divisions are separated roughly by a straight line from the head of Kachemak Bay to Burnt Island on Chickaloon Bay. The Kenai lowland, the region which the Kasilof River lies within, is between Turnagain Arm and Kachemak Bay and covers an area of close to 2,750 square miles. From the Kenai Mountains this area appears as a vast lowland plain, composed of flats, low ridges, and hillocks, and muskeg, dotted with small lakes. The greater part of this plain has an elevation between 50 and 200 feet above sea level, although there is a large area of table lands, known as the Caribou Hills, between Kachemak Bay and Tustumena Lake, where the elevation rises to more than 2,000 feet.[9]

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[3] The pertinent State patents are: 1217603, 1225974, 1232769.
[4] Robert W. Arndorfer, Deputy State Director for Conveyance Management (960), to Chief, Branch of Conveyance Services (962), July 12, 1984, file 2620, BLM records.
[5] Robert W. Arndorfer to Chief, Branch of Conveyance Services (962), April 7, 1986, file 2620, BLM records.
[6] For a listing of the U.S. Army Corps of Engineers' navigability determinations, go to website (http://www.poa.usace.army.mil/reg/NavWat.htm).
[7] See also the U.S. Coast Guard, "Navigable Waters of the U.S. Within the Seventeenth Coast Guard District (State of Alaska)," revision date of April, 2003, in writer's files.
[8] Bennett, 35.
[9] *Ibid.*, 32.

The vegetation of Kenai Peninsula varies with the soil, drainage, elevation, and locality. The principal trees of the lowland division are white and black spruce, birch, aspen, and cottonwood, and these trees also predominate over much of the mountain slopes.[10] Stunted growths of timber are interspersed with marshy areas and a thick carpet of moss covers much of the region.[11]

Kasilof River Physical Characteristics

The Kasilof River heads in Tustumena Lake and flows northwesterly about 18 miles to empty into Cook Inlet.[12] The Kasilof River was in its natural and ordinary condition at the time of statehood. The river has an average width of 225 feet and drains an area of 860 square miles. At low tide, according to the U.S. Army Corps of Engineers, the entrance to the river is very hazardous, due to mud flats and rock pinnacles.[13] Mac Wheeler, BLM Anchorage District Office, reported on a canoe trip he made down the Kasilof River in April 1980. The water stage was quite low at that time. However, Wheeler recorded no deterrents to boating other than two minor rapids or rock gardens.[14] The river water is white in appearance from the rock flour carried in suspension from melting glacial ice.[15] In 1935 William Berry, Fisheries Warden, while inspecting spawning beds along the Kasilof River in a riverboat owned by Tom Odale, described the river as "practically rapids and boulder strewn from tide water to the entrance to Tustumena Lake."[16]

From July 1949 to September 1970, the U.S. Geologic Survey (USGS) maintained a gauge on the Kasilof River at the Sterling Highway Bridge at approximately river mile 7.5. The USGS reported an average discharge over a twenty-one year span of 2,385 cubic feet per second and a maximum discharge on September 14, 1957 of 12,300 cubic feet per second.[17]

The extent of tidal influence has not been officially determined. However, in 1916 Hugh Bennett of the U.S. Department of Agriculture visited the Kasilof River and estimated that tidewater extended nearly a third of the way up the river.[18] Recently, Rhonda Reynolds of the BLM determined, after analyzing color infrared aerial photography (scale 1:63,360) that the Kasilof River is tidally influenced about five miles inland (to the south end of a small unnamed island in the north half of Sec. 24, T. 3 N., R. 12 W., SM). She also noted that the entire river is meanderable (greater than 198 feet in width).[19] Finally, reference was made to the tidal extent of the Kasilof River in a book documenting the life of local guide Andrew Berg. A picture in the book showing the traditional mode of transportation in Kasilof referred to the lower six miles of the Kasilof River as being tidally influenced.[20]

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[10] *Ibid.*, 36.
[11] Moffit, *Mineral Resources of Kenai Peninsula, Alaska: Gold Fields of the Turnagain Arm Region*, 13.
[12] Orth, *Dictionary of Alaska Place Names*, 499.
[13] Ducker, "Alaska's Southcentral Region: A History," 20.
[14] C. Wheeler, "Seldovia and Kenai Quadrangle Trip Report, 13-18 April 1980," May 5, 1980, Kenai Quadrangle file, Navigability Section files, Alaska State Office, BLM.
[15] Moffit, *Mineral Resources of Kenai Peninsula, Alaska: Gold Fields of the Turnagain Arm Region*, 15.
[16] Ducker, 145.
[17] *Ibid.*, 20.
[18] *Ibid.*, 143-145.
[19] Personal communication, Rhonda L. Reynolds, Cartographer, BLM, Alaska State Office, January 3, 2005.
[20] Cassidy, Catherine and Titus, Gary, *Alaska's No. 1 Guide: The History and Journals of Andrew Berg 1869-1939*, 189.

Evidence of Use

The history of use on the Kasilof River begins with the local Natives and the early exploration for mining. In 1904 Fred H. Moffit of the USGS noted that "local Tanaina Indians formerly inhabited a number of sites along the banks of the Kasilof River and Tustumena Lake and used kayaks on the river and lake to travel to and from the coast." Moffit also related that a hydraulic mining plant had been taken up the river to Indian Creek, which empties into Tustumena Lake. He did not give specifics on how the plant was taken up the river but he did state that "access to the lake by way of the river is not difficult if one understands how to take advantage of the tides, and this is the route usually followed." In 1902 Colonel Claude Cane visited Tustumena Lake on a big game hunting expedition and observed a mining camp with a small sawmill operated by the Northwest Exploration and Development Company. Cane further noted that "a storm the previous day had sunk a scow anchored at the lake and loaded with pipes for the hydraulic machinery at the mine. The machinery for the sawmill and the launch had been transported up the Kasilof River to the mine by twelve Indians over the course of twenty-nine days."[21]

In the early 1900's hunters and others used a wide variety of boats (dories, skiffs, bidarkas, and riverboats) on the Kasilof River. Assisting these early hunting parties was a source of income for the local Natives. To access the Tustumena Lake area for hunting, Colonel Cane and Clifford Little "hired four Indian helpers to take them and their fifteen hundred pounds of goods up the Kasilof River to Tustumena Lake in a large dory." Cane described the river as "twenty-two miles long, the lowest four of which are tidal; then come sixteen miles of continuous rapids, without a single break, up which the boat must be towed; and then two miles of smooth but swift flowing water, which one can row over, before one gets into the lake." Continuing, Cane noted that "towing their boat up the Kasilof River proved to be quite a chore. Due to the high water from snow melt caused by a long heat wave in June and July, one Indian stayed in the boat to steer while the other three Natives toiled on the rope, assisted by Cane and Little whenever they encountered a bad spot. Due to the very swift current they averaged about one mile per hour through the rapids."[22]

Other big game hunters described similar experiences on the Kasilof River. In mid August 1903 English sportsman and writer Charles Radclyffe and two companions employed four Natives from Kenai to line their dory up to Tustumena Lake. They rowed across the lake on the seventeenth. About seven weeks later it took them only four or five hours to descend the river to the coast. In September 1909 Jean DuBrille, acting as a guide for a European nobleman, hired thirty Indians from Ninilchik to line a number of skiffs "against the swift torrent of the Kasilof River" into Tustumena Lake. They had to portage the skiffs and their cargo around the larger whitewater. According to a newspaper, *Chitina Leader*, in the summer of 1921 Ira Minnick, guided by Andy Simons, hunted sheep, moose, and bear near Tustumena Lake after ascending after the river. Although Minnick does not state explicitly that they traveled to the lake by boat, he implies as much in his account. In 1925 the Anchorage newspaper reported on the success of seven men, most of them soldiers from the local post, and their guide named Judd on a hunting trip to

[21] Ducker, 144.
[22] *Ibid.*, 144.

Tustumena Glacier. They reached the lake by motoring and lining two small boats up Kasilof River.[23]

Fur farming (fox) along the Kasilof River was a viable business in 1920's. Most of these farms were located close to the confluence of the Kasilof River and Cook Inlet. In fact, the *Anchorage Daily Times* claimed that most farms were located within the first five miles of the river. Fox farms in the area generally had "from six to eighteen pair of silver-black fox breeders." The pups are "valued at $800 per pair," and "the proven breeders range[d] from $2,000 to $5,000 per pair."[24]

Cole Black Fox & Fur Farm, Inc., operated one of the larger farms along the Kasilof River. Perry A. Cole, who established the firm in 1928, was an inspector for the National American Fox Breeders Association and owner of a very successful silver black fox farm at Alder Creek, New York. The farm, encompassing over 600 acres of land, was located at river mile 5.[25] The farm was accessible by small boat up the river as well as by land. According to Cole, "the Kusilof [*sic*] river district possesses an ideal fur climate" but the only thing lacking in the area was "a wagon road to provide all-year transportation." Cole further stated that "the river is too swift for easy navigation and there are times of the year when ice obstructs the passage of boats. A road is badly needed, not only for the proposed new farm, but also for the seven fur farms already established along the river."[26] By 1930 the Alaska Road Commission, the government agency responsible for road and trail building outside of the National Forests in Alaska, had completed a wagon road from Cook Inlet to the farm, a distance of about seven miles. Upon its completion, Anchorage attorney J. L. Waller observed, "All of the farms are benefited by the road and it has made a lot of fine land accessible to prospective homesteaders."[27]

Beginning in the 1920's the Alaska Glacier Tours Association (or its subsidiary, Alaska Guides, Inc.), organized by Anchorage businessmen, conducted commercial hunting expeditions to the Tustumena Lake country.[28] Wealthy hunters and photographers from outside of Alaska were drawn to this area because of the large numbers of big game animals (moose, bear, and Dall sheep). Initially, the company planned to transport clients from Anchorage to the mouth of the Kasilof by motor ship and then up the Kasilof River to Tustumena Lake by river boat. In 1926 the company's agents, Tom Odale and Alex Liska, constructed several "lodges" in the Tustumena Lake area. A main lodge with tent shelters, called the "Birchwood camp" was located at near "Birch Creek" on the lake, perhaps on land filed under Tom Odale's name. During the company's first season (fall of 1926), fifteen clients in four hunting parties visited the Birchwood camp for periods of one to three weeks. The visitors, some of whom became repeat visitors over the years, were astounded by the large numbers of big game in the area. William B. Allen, a "capitalist" from Louisville, Kentucky, said, " I have hunted in many sections of both the United States and Canada, but never before have I seen big game animals in such great numbers."[29] Several parties claimed that they had counted 200 sheep, 21 black bears, and 30 to 50 moose in a day.[30]

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[23] *Ibid.*, 144; *Anchorage Daily Times*, September 26, 1925, p. 3.
[24] "Fox Farming to be One of Territories Leading Industries," *Anchorage Daily Times*, May 12, 1925, p. 2.
[25] *Anchorage Daily Times*, September 23, 1927, p. 7; and June 7, 1930, p. 4.
[26] *Anchorage Daily Times*, September 23, 1927,, p. 7.
[27] *Anchorage Daily Times*, June 7, 1930, p. 4.
[28] Gus Gelles and Robert Bragaw, Jr., both Anchorage businessmen, were the principals in the company.
[29] "Veteran Hunter Sees Most Game on Alaskan Trip," *Anchorage Daily Times*, September 16, 1926, p. 8.
[30] *Anchorage Daily Times*, September 10, 1926, p.5, and September 11, 1926, p. 2.

Guided hunting trips created jobs and revenue in the Kasilof and Anchorage area. For example, the company hired local guides and packers for the hunters' trips. Local airplane pilots and marine boat operators (e.g., Captain Heinie Berger of MS *Discoverer*) were hired to transport clients, equipment, and supplies from Anchorage to Kasilof or Tustumena Lake. In 1926 the company reportedly had fifteen men on its payroll. "More money is being distributed in this community by the organization than any other industry, except the railroad and canneries," reported the local Anchorage newspaper.[31]

Most clients were flown by small pontoon-equipped airplanes from Anchorage to Tustumena Lake. To a less extent, the company used boats to transport clients, equipment, and supplies to the lake. For use on the Kasilof River, the company had a tunnel boat constructed in Anchorage. In February 1926, a company representative announced plans to build a thirty-two-foot-long river boat with a six-foot beam. It was designed to carry three or four tons of freight. Six months later, the company announced that its riverboat "Agta II" was operating on the Kasilof River. A picture of the "Agta II" (note: the name "Agta" is an acronym for the Alaska Glacier Tours Association) operating on the Kasilof River can be seen in *Alaska's No. 1* Guide.[32] According to the company's president, Robert Bragaw, Jr., the "Agta II" was a thirty-foot-long tunnel riverboat powered by a Fordson motor. He claimed that "[t]his boat is the only one that has ever ascended the river without lining." The boat required six hours to reach Tustumena Lake, but little more than an hour to descend the entire river. In addition, the company had three other boats, all equipped with outboard motors, on the lake for the use of its clients.[33]

Little more is known about the Alaska Glacier Tours Association's use of riverboats on the Kasilof River. From the newspaper records, it appears that over the years, especially after 1930, the company relied more and more on airplanes for transportation to and from the lake. Nevertheless, there are numerous reports from the late 1920's suggesting that the Kasilof River was also used as a transportation route. In August 1927 Gus Gelles, one of the principals of Alaska Glacier Tours Association, remarked, "While making the flight yesterday the passengers in the plane saw the river vessel of the tour company with the Oestler party aboard in the Kasilof river a short distance from Tustumena lake. The river vessel would have reached the lake in about half an hour. . . ." The following month, the company announced that the Alaska Guides Association, its subsidiary, would transport eight Pennsylvania hunters from Anchorage to Kasilof by the chartered steamer "Redondo" and from Kasilof to its Tustumena Lake camp by the "association's boats." In an advertisement that appeared in an Anchorage newspaper in 1928, the Tustumena Lake district was described as accessible by the Motor Ship *Discoverer* and "River Boats." In September 1930 Al Hardy, one of the company's guides and a local fur farmer, drowned in the Kasilof River when his boat drifted into a sweeper and capsized. He and another guide, Ed Zettle, who survived the incident, were en route to Tustumena Lake "with a load of supplies for a big game hunting party scheduled to arrive the following day."[34] Between 1930 and 1939 the local Anchorage newspaper

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[31] "Another Party on Way to Make Big Game Hunt," *Anchorage Daily Times*, September 3, 1926, p.7.
[32] Cassidy, Catherine and Titus, Gary, *Alaska's No. 1 Guide: The History and Journals of Andrew Berg 1869-1939*, 138.

[33] *Anchorage Daily Times*, February 9, 1926, p. 8; August 5, 1926, p. 5; and September 28, 1926, p. 7.
[34] *Anchorage Daily Times*, August 10, 1927, p. 4, September 26, 1927, 5, August 17, 1928, p. 4, September 9, 1930, p. 4.

carried numerous reports of the company transporting hunters to and from Tustumena Lake. This was accomplished by airplane. The reports contain no indication that boats were used.

Today, the Kasilof River seldom sees any boat traffic. This is because of many changes that have taken place in the Kasilof River and Tustumena Lake area since the 1920's. First, roads have been built in the area, thus limiting and possibly eliminating the need to transport goods and services along the river. Additional factors include the creation of the Moose Range in 1941, more restrictive hunting and fishing laws, and other areas of Alaska being discovered for its hunting potential. Current restrictions on the river limit the use of motors on boats to certain locations. The primary area being used by commercial sport fishing outfits in the non-motorized area is from where the Sterling highway bridge (river mile 7.5) crosses the river downstream. People wanting to access Tustumena Lake can drive from the Sterling Highway to a boat ramp a short distance downstream from the lake. The area between the Sterling highway bridge upstream to the boat ramp receives very little use in comparison.

Conclusions

In assessing the merits of the State of Alaska's application for a recordable disclaimer of interest application, the BLM relies upon federal administrative and case law and the advice of the Interior Department's Solicitor's Office. The classic definition of navigable waters is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). 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 Equal Footing Doctrine, the Submerged Lands Act of 1953, the Submerged Lands Act of 1988, and any other cognizable reason.

1. Based on the past references of people using the river and information provided by a BLM Cartographer we conclude the Kasilof River is tidally influenced up to mile 5 (to the south end of a small unnamed island in the north half of Sec. 24, T. 3 N., R. 12 W., SM). That reach was not reserved at the time of statehood; therefore the river is navigable in law to that point and the application should be granted.[35]

2. After reviewing the State's application, current land status, the historic record pertaining to the Kasilof River, and the legal guidance on title navigability, we conclude that the Kasilof River was navigable from river mile 5 upstream to the northern border of the Kenai National Moose Range boundary at river mile 11.7 (south boundary of Sec. 32, T. 3 N., R. 11 W., SM).

3. The portion of the State's application for the Kasilof River within the Kenai National Moose Range in Secs. 5 and 8, T. 2 N., R. 11 W., SM, was withdrawn on December 18, 1941 and remained withdrawn on January 3, 1959, the date of statehood. Therefore, the submerged lands were not available to the State under the Equal Footing Doctrine. However, if the land that was withdrawn is no longer owned by the United States, then title

[35] A survey is needed to make an exact tidal boundary determination.

to the submerged land goes to the upland owner pursuant to the 1988 Submerged Lands Act. Those lands were conveyed to the State: therefore title to the submerged lands in Secs. 5 and 8, T. 2 N., R. 11 W., SM vested with the State. Where the land is still owned by the United States, title remains in the United States.

4. The State of Alaska's application for the beds of interconnecting sloughs should not be approved. If water from the navigable Kasilof River flowed through the slough at statehood and the area was not reserved, then the slough was considered to be an integral part of the river and if the river still flows through the slough, the State would hold title to the lands underlying the slough.

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