

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

JAN 29 1965

OLGA T. STEGER, Clerk

Deputy

STATE OF ALASKA,

Plaintiff,

vs.

Civil Action No. 62-388

WALT WIGGER and MORTON
deLIMA COMPANY, INC.,

Defendants.

MEMORANDUM OF DECISION

Victor Carlson, Assistant District Attorney,
Fairbanks, Alaska for Plaintiff.
William V. Boggess, Boggess and Taylor,
Fairbanks, Alaska, for Defendants.

The sole issue for determination at this posture of the case is whether or not the Chena River (in the area located between the University Avenue and Cushman Street bridges) was navigable when the Territory of Alaska was admitted to Statehood on January 3, 1959. ^[1] In order to prevail in its within action (based on trespass and conversion theories) the State of Alaska must establish that it has title to the bed of the Chena River. In order to do so the State must establish that at the time of its admission to Statehood the Chena

[1] A separate trial as to this issue was held pursuant to respective counsels' agreement and under the provisions of Rule 42(b), Rules of Civil Procedure. See also 5 Moore's Federal Practice, §42.03 (2nd ed.).

... question was navigable.

Determination of the navigability of rivers within Alaska involves the application of Federal law. Under Federal law it is settled that the test of navigability of a river (for the purpose of adjudicating ownership of a river's bed) is to be determined as of the time of the State's admission to the Union. Chief Justice Hughes in his opinion in United States v. Utah, 283 U.S. 64, 75 (1931) articulated these principles in the following manner:

"In accordance with the constitutional principle of the equality of States, the title to the beds of rivers within Utah passed to that State when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States. The question of navigability is thus determinative of the controversy, and that is a Federal question." [3]

As to the appropriate test to be applied in determining whether a river is navigable, this Court adopts the principles developed in the following cases: The Daniel Ball, 77 U.S. 557 (1870); The Montello, 87 U.S. 430 (1874); United States v. Holt State Bank, 270

[2] Proof on the State's part that it did have title to the bed of the Chena River does not eliminate the necessity of its further establishing that the gravel allegedly converted by defendants came from the river bed.

[3] See also Justice Gray's opinion in Shively v. Bowlby, 152 U.S. 1, 26, 57 (1894); Scott v. Lattig, 227 U.S. 229 (1913); Oklahoma v. Texas, 258 U.S. 574, 583 (1921); United States v. Oregon, 295 U.S. 1, 14 (1935) and Mr. Justice Stone's opinion in Massachusetts v. New York,

U.S. 49 (1926); and in United States v. Utah, supra, at page 76.

Mr. Justice Field in his opinion in The Daniel Ball wrote at page 563 as follows:

"A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. 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 or travel are or maybe conducted in the customary modes of trade and travel on water...."

In The Montello, Justice Davis wrote at page 443 of his opinion:

"...there are but few of our fresh water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases like the Fox River, they maybe so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although navigation maybe encompassed with difficulties by

271 U.S. 65 (1926) at page 89 where he states in part:

"It is a principle derived from the English common law and firmly established in this country that the title to the soil under navigable waters is in the sovereign by express grant or prescription.... The rule is applied both to the territory of the United States....and to land within the confines of the States whether they are original States....States admitted into the Union since the adoption of the Constitution."

reason of natural barriers, such as rapids and sand bars."

The test of navigability as articulated United States v. Holt State Bank, at page 56, is as follows:

"The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and 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; and further that navigability does not depend on the particular mode in which such use is or may be had--whether by steamboats, sailing vessels or flatboats--nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

In its 1931 opinion in United States v. Utah, the United States Supreme Court reaffirmed the Ball, Montello [4] and Holt tests pertaining to navigability.

Under the aforementioned decisions and tests of navigability and upon consideration of the evidence adduced at the hearing in this cause, this Court has concluded that the area of the Chena River in question was navigable at the

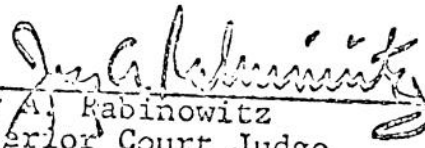
[4] United States v. Utah, supra, at pages 76, 77. Of interest is the following opinion of the Supreme Court--United States v. Appalachian Power Co., 311 U.S. 377 (1940) (a case involving the scope of federal commerce power and the Federal Power Commission licensing authority). Speaking for the Court, Mr. Justice Reed wrote at pages 403, 406, 409, 410 as follows:

"It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies

[5]
time of Alaska's admission into the Union and that, therefore, the State of Alaska has title to the river bed in the area in question.

Therefore, an order should be entered denying defendants' motion for involuntary dismissal in regards to this separate issue of navigability and the remaining issues should be set for trial.

DATED at Fairbanks, Alaska, this 29th day of January, 1965.


Jay A. Rabinowitz
Superior Court Judge

equally widely from the busy harbors of the sea coast to the sparsely settled regions of the Western mountains. The tests as to navigability must take these variations into consideration....

....A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highways suitable for use before commercial navigation may be undertaken....

....Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense....

Note there are no applicable Alaskan precedents in regards to the precise issue before this Court but see: Judge Wickersham's opinion in United States v. Roth, 2 Alaska 257, 258, 259, 261 (Third Division 1904); and Judge Plummer's opinion in Peterson v. United States, 217 F.Supp. 867, 868 (D. Alaska 1963); also of interest in Kemp v. Putnam, 47 Wash. 2d, 550, 288 P.2d 837, 840 (1955) where it is stated:

"Navigability is not destroyed because of occasional natural obstructions or portages, nor is it necessary that navigation continue at all seasons of the year, and it [a stream] does not lose this characteristic even if it has fallen into disuse for a hundred years."

[5] Due to the undersigned's impending "disability", see Pollastrine v. Severance, Opinion No. 141, 375 P.2d 528. (Alaska 1962), it is considered appropriate to make findings of fact in regards to the evidence adduced on the separate issue of navigability. (Note: Rule 41(b), Rules of Civil Procedure, provides in part that: "If the Court renders judgment on the merits against the plaintiff, the Court shall make findings as provided in Rule 52(a)").

Therefore, on the basis of the State's evidence adduced at the hearing (defendants' offered no evidence), the Court now makes and files herein its Findings of Fact as to the issue of navigability (in addition to the Conclusions of Law set forth in the main body of the within Memorandum of Decision):

FINDINGS OF FACT

- (a) The Chena River at a point approximately 12 miles southwest of Fairbanks flows into the Tanana River which in turn flows into the Yukon River. From the confluence of the Tanana and Yukon Rivers, it is approximately 1000 miles downriver to the Bering Sea and 1000 miles upriver to the City of Whitehorse in the Yukon Territory, Canada.
- (b) The Chena River is normally open (free from ice) starting in approximately mid April to mid May and closes during approximately the first week of October. During this period the volume of water in the Chena is increased by "good rains" in late July and August.
- (c) In 1942 and 1943, a dike (17 1/2 miles south of Fairbanks) was constructed to prevent (as a flood control protection measure for the City of Fairbanks) Tanana River waters from flowing into the Chena River upstream from the City of Fairbanks. Since the erection of this dike the volume of water in the Chena River has decreased leading to a "deterioration" in navigation conditions in the area in question (between the University Avenue bridge and the Cushman Street bridge - see plaintiff's Exhibit "A" for precise location of the area in question).
- (d) Before the erection of the dike in 1942-1943 and up to 1940, numerous "two stackers", "big packets" and "paddle wheelers" carrying both freight and passengers would come up the Chena to Fairbanks (from the lower Yukon and Whitehorse, et cetera). Also prior to 1940 hunters and prospectors poled boats up the Chena River from Fairbanks (to points 80 to 90 miles upstream, i.e. to Van Curler's Bar).

Also prior to 1940 there was considerable logging up-stream from Fairbanks - the logs being floated down to the Independent Lumber Company's mill in Fairbanks.

(Note: The upriver logging operations of Independent Lumber Company commenced in 1914 and terminated in the early 1950's due to obstructions placed upriver from Fairbanks by the United States Army.)

(e) During the period 1940 until Statehood was achieved on January 3, 1959 commercial traffic on the Chena River gradually decreased. This reduction was due in part to the completion of the Alaska Highway in 1942-1943; increased air commerce; and the deterioration of water conditions in the Chena River due to the erection of the dike mentioned in paragraph (c) herein.

(f) During this 1940-1959 period, the following conducted commercial freight operations on the Chena River above the location of the present University Avenue bridge and up to the Cushman Street bridge: Black Navigation based 1/2 of a mile above the University Avenue bridge site; Day Navigation (operating in upper Chena that is above the present location of the Cushman Street bridge); Doc. Gordon's boat (also upper Chena); Peterson Navigation; Tarnac (one boat); the Beaver (one boat); and the God Speed (300 yards above the present University Avenue bridge site).

(g) In 1958-1959, Captain Jim Binkley brought his 80 foot sternwheeler, Discovery, up the Chena to the Cushman Street bridge in connection with a Golden Days celebration. (Note: There are three relatively permanent bars above the University Avenue bridge, two of which are located in the area of the Riviera Boatel and one at the bend at Westgate - see plaintiff's Exhibit "A". The evidence also discloses that a coal conveyor across the Chena to the City Power plant is located 5 miles above the University Avenue bridge.) The last time Captain Binkley brought his tourist boat, the Discovery, up to the Cushman Street bridge was in 1961 (at which time he encountered difficulties with the three aforementioned bars).

(h) At the time of Statehood, Black's Navigation was using Black's Landing infrequently.

(i) Since Statehood, the area of the Chena River in question has been used to the following extent:

(i) Captain Binkley testified that he last observed a commercial freighting operation in the summer of 1963 at which time the operation was taking place 300 yards upriver from the University Avenue bridge.

(ii) Fish camp natives use the Chena River in the area in question to come to Fairbanks to purchase supplies.

(iii) In 1963 and 1964, jet boat tourist tours have been conducted from the area of the Cushman Street bridge downriver (on 30 mile excursions). Several hundred trips were made during this period in these jet boats.

(iiii) The area in question has been used for outboard riverboat races to and into the Yukon River and back and for pleasure boating.

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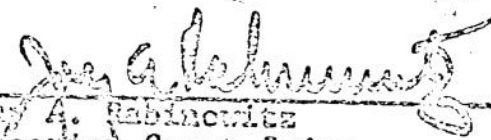
ORDER

The above captioned cause having come before the Court for trial, without jury, upon the separate issue as to the navigability of the Chena River (in regards to an area located at a point between the University Avenue and Cushman Street bridges), and the Court having considered the evidence adduced pertaining to this issue (a separate hearing having been ordered as to this issue), and the Court having heretofore filed a Memorandum of Decision in regards thereto, and the Court being advised in the premises,

IT IS HEREBY ORDERED:

Defendants' motion for involuntary dismissal, made pursuant to Rule 41(b), Rules of Civil Procedure, as the same pertains to the issue of the navigability of the Chena River, be and the same is Denied. [1]

DATED at Fairbanks, Alaska, this 26th day of January, 1965.


Jay A. Rabinowitz
Superior Court Judge

[1] A separate hearing was held as to the issue of the

navigability of the Chena River pursuant to the stipulation of respective counsel and in accordance with the provisions of Rule 42(b), Rules of Civil Procedure.

Rule 42(b), Rules of Civil Procedure, provides in part as follows:

"The court in furtherance of convenience
....may order a separate trial of any
....separate issue."