H18.11

MEMORANDUM

State of Alaska

INTERIOR DISTRICT

TO: Central District Engineer
Interior District Engineer
Southeastern District Engineer
South Central District Engineer

ATTN: District Right of Way Agent

FROM: Dick Chitty
Right of Way Director
Juneau

DATE: October 12, 1971

FILE NO: 23-2900 HIGHWAYS

SUBJECT: Navigable Waters and Seabeds

I have attached for your information a memorandum dated September 27, 1971, from Assistant Attorney General Robert L. Hartig, subject ownership of the navigable waters and seabeds in Alaska.

This memorandum outlines the position of the State of Alaska concerning title of navigable waters within the boundaries of the State. Title and Plans supervisors and appraisal supervisors and personnel should be given the opportunity to study it.

Attachments: As stated

cc: Charles S. Matlock, Deputy Commissioner of Highways
Jim Peterson, Asst. Attorney General

DC/kf

DIST. ENGR.
PRE-CONST. ENGR.
Design
Right-of-Way
Planning
Materials Lab
ADMIN. OFFICER
Finance
Personnel
Supply & Serv.
CONST. ENGR.
MAINT. SUPERV.
Field Serv.
To: Cameron
Tom K
Return Main File
Bablord

MEMORANDUM

State of Alaska

TO: Jay Bergstrand
Habitat
Department of Fish and Game

DATE : September 27, 1971

FROM: Robert L. Hartig
Assistant Attorney General

SUBJECT: Ownership of the navigable waters and seabeds in Alaska

In the past, numerous requests for opinions have been made to this office from State agencies concerning the ownership of navigable waters and the submerged lands beneath them where these lands and waters occur within the State.

The basic rule concerning the ownership of lands beneath navigable waters was handed down many years ago by the Supreme Court in the case entitled Martin v. Lessees, Wadell, 10 L. Ed. 997 (1842). The court applied the doctrine that the original states were the owners of the land under their navigable waters.

> For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.

Shortly after that doctrine was pronounced by the Supreme Court, it pronounced yet another doctrine in the case of Pollard v. Hagan, 11 L. Ed. 565 (1845), that the navigable waters, and the soils under such waters, were not granted by the Constitution to the United States but were reserved to the states respectively. This decision has become known as the doctrine which requires that land under navigable waters in acquired territory, while such territory is under the sole dominion and control of the United States, is held for the ultimate benefit of future states.

In accordance with that doctrine, the United States traditionally refrains from making disposals of such lands save in exceptional circumstances when impelled to particular disposals by some international duty or public extringency. That policy has also been commented upon in Shively v. Bowlby, 152 U.S. 1 (1894) and United States v. Holt State Bank, 270 U.S. 49 (1925).

According to the authorities, then, during the period of time from the date of purchase in 1867 until statehood, the United States of America held the territory of Alaska and the navigable waters and lands under them, in trust for the future state, or states, that would be carved from the territory of Alaska. At the moment the State of Alaska entered the Union (July 7, 1959), the ownership of the lands beneath those navigable waters and the waters themselves vested in the State of Alaska.

The question concerning whether the United States may dispose of lands and waters otherwise held in trust for future states has been settled. That question also has been answered many times by the Supreme Court. In Holt State Bank, supra, for example, as well as in the earlier case of Shively v. Bowlby, supra, the court said:

> The United States earlier adopted and constantly had adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, has held for the ultimate benefit of future states, and so far has refrained from making any disposals thereof, save in exceptional circumstances when impelled to particular disposals by some international duty or public extrinsency. It follows from this that disposals by the United States during the territorial period are not likely to be "inferred", and are not regarded as intended unless the intention was "definitely declared" or otherwise made very plain. [page 468.]

The State of Alaska obviously takes the position that disposals of lands and waters during the territorial period must be definitely declared or otherwise made very plain. Failure to meet that test means that the waters and lands beneath, formerly held in trust, pass to the State upon its admission to the Union. It must be absolutely understood that the ownership of any particular body of water or the lands beneath any particular body of water, must be determined only after a very careful and close analysis of all the factors surrounding any particular piece of property. However, a few general comments might be made with reference to the status of public lands in Alaska and other lands held for various purposes by the Federal Government such as reservations, wildlife refuges, military installations and mineral reserves.

First, as to the lands classified as vacant, unappropriated, unreserved, public lands, the navigable waters which may occur in those areas and the lands beneath them, immediately vested in ownership in the State of Alaska at the moment of statehood as an incident of the State's sovereignty. It is the State's position that the navigable waters and the lands beneath them occurring within the boundaries of the State of Alaska, belong to the State, are not part of the 103,000,000 acres that the State is entitled to select under the Statehood Act.

In other words, the lands which we acquire as an incident of our sovereignty, are lands in addition to the selectable lands under the Statehood Act. A simple example will illustrate the point. The Yukon River, which is clearly a navigable body of water, and the land beneath the Yukon River, belongs to the State of Alaska since the moment of statehood and need not be selected by the State in order to acquire it. Furthermore, the

State should, in every case where it selects lands and those lands contain bodies of water within the boundaries of the selection, subtract the amount of land lying under navigable waters from the total selected. Thus, it is apparent that the State will ultimately own a great deal more land than 103,000,000 acres.

The status of land beneath the navigable waters contained within the boundaries of reservations by the United States for the benefit of Indians during territorial days is mostly settled. The courts have consistently held that those reservations include the land and water because normally the land and water are vitally important to the Indian tribes who utilize such reservations. 1/.

The courts have applied the doctrine of Shively v. Bowlby - which requires, as noted above, that the disposal be made very plain, "in such a way as to be very liberally construed in favor of finding a valid reservation." The courts consistently allow evidence regardless of the language of the disposal that on the facts, there is a need for the use of the land and water, and based upon a showing of that need, the courts thereupon infer that Congress intended to withhold the lands and water from the future states that were finally created from the particular territory.

The ownership of the navigable waters and the lands beneath them is absolutely vested in the state in fee. However, that ownership is always subject to a public easement over the navigable waters themselves for use in trade and commerce by the public.

The United States, because of its supervening constitutional power of regulation over Commerce, retains control over the waters to the extent they are used as highways for trade and commerce. 2/

The questions concerning the criteria and the legal standards applicable for determination of navigability are not completely tied down at every corner. The general rule is, however, well settled:

> 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

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1/ See for example: Himes v. Grimes Packing Co., 337 U.S. 86 (1949); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Moore v. United States, 157 F.2d 760 (1946) cert. denied, 330 U.S. 827; Heckman v. Sutter, 119 F. 83 (1902); Alaska Gold Recovery v. Northern M & T. Co., 7 Alaska 386 (1926).

2/ The Daniel Ball, 19 Law Ed. 997 (1842)

> condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on waters. 3/

Each stream, lake bed, or swamp area must be examined and considered with reference to its own peculiar characteristics, and no general rule can be applied to all lakes or stream beds in Alaska.

Recently, however, Chief Engineer Frederick J. Clark of the U.S. Army Corps of Engineers repeated the corps position that the 1899 Refuse Act applies to all navigable water ways. Clark defined "all navigable water ways" as, "any stream that will float a log." He stated that it would be a rare exception for a stream not to come under the provisions of the act. His statement has support in various court decisions, for example, at page 75 of C.J.S. Vol. 65, under the heading of "Navigable Waters", it is said:

> According to some decisions, streams which are merely floatable and useful for logging purposes may be considered to be navigable, at least for some purposes, even though they are not navigable in the technical sense of the common law, but in order to partake of navigability a stream must be floatable for logs in its natural condition at ordinary recurring freshets.

It is also a general rule that a particular water course need not be navigable continuously in order to be navigable for purposes of applying the ownership test outlined above. That general rule also stated at 65 C.J.S., page 77 is:

> That a stream in order to be constituted a navigable stream, need not be perineally so, but may be floated only at certain times of the year, or at certain seasons. The seasons of navigability, however, must occur regularly and be of sufficient duration to subserve a useful public purpose for commercial intercourse. The same is true of a lake and of marsh land which is occasionally flooded. It should also be noted that whether or not a body of water is in fact navigable or navigable in law constitutes a federal question. 4/

3/ State of Wisconsin v. Federal Power Commission, 214 F.2d 334 cert. denied, 75 U.S. 124, 99 L. Ed. 694.

4/ Supra, The Daniel Ball, 10 Wall 557.

A recent decision by the Supreme Court of the United States entitled State of Utah v. United States, reported in the Environmental Reporter, Vol. 2, p. 1759, which decides that the State of Utah, rather than the United States, entitles Utah to the shorelands around the Great Salt Lakes, the decision rests upon a determination that the lake was navigable at the time Utah was admitted to the Union. The decision is important since it appears to acquire somewhat more restrictive tests as to navigability than cases preceding it. It is more important evidence of the position that Alaska can expect the United States to assume with regard to waters and lake beds and stream beds in Alaska.

The United States strongly contested the finding by the Special Master in that case, that the Great Salt Lake was navigable at the time of statehood. The court did not accept the proposition advanced by the United States and found that indeed the Great Salt Lake was navigable at the time of statehood. Justice Douglas summarized the opinion of the Supreme Court by saying that:

> The Lake was used as a highway and that is the gist of the federal test.

If indeed the federal test is that waters must actually be used as highways of commerce, then Alaska faces an awesome task. The court previously held, simply, that the stream must be navigable, in fact, but not necessarily used by vessels and other commercial conveyances in order to be subject to ownership by the states. Again, and most importantly, this decision is an indication that Alaska can expect the federal authorities responsible for land management in Alaska to take a very restrictive view towards the test of navigability. That is to say, that if the federal government "vigorously" contested the issue of the navigability of the Great Salt Lake, then it appears likely they will just as "vigorously" contest the navigability of many lakes in ALASKA, which although navigable, have never been used as highways of commerce simply because of their remoteness.

Hopefully, the government's attempt to read into the navigability test a requirement of "actual" navigation has been precluded by an earlier case also arising in the state of Utah entitled United States v. Utah, 283 U.S. 64 (1931). There the court held:

> The question of the susceptibility (to use as highways of commerce) in the ordinary condition of the rivers, rather than mere manner or extent of such use, is the crucial question. The government insists that the uses of the rivers have been more of a private nature than a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling; when the rivers are

> shown to be capable of commercial use. The extent of actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but where condition of exploration and settlement explain the infrequency or limit of such use the susceptibility to use as a highway of commerce may still be satisfactorily proved. In Economy Power and Light Co. v. U.S., 256 U.S. 113, 122, 123, the court quoted with approval the statement in the Montiello, supra, that the capability of use by public for purpose of transporation and commerce affords the true criterian of the navigability of a river than the extent and manner of such use. [Emphasis supplied.]

A more important case, and one which should control in any litigation involving Alaska and its submerged lands, is the case entitled United States v. Holt Bank, 270 U.S. 49 (1926). That case, also a Supreme Court case, pointed out that the lake was susceptible of being used as a highway for trade and travel if there had been a need for trade and travel on the lake. The facts in that case revealed that early settlers and perhaps natives in the area had used the lake for some navigation, however, such navigation was indeed limited.

The question has also arisen concerning the lands and water patented by the Federal Government before and after statehood. As noted previously,5/ those navigable waters and submerged lands held by the Federal Government prior to statehood was being held in trust for the future State of Alaska. It follows, therefore, that any attempt to grant these lands and waters away prior to statehood must fail unless such grant clearly falls within the language of the holding in United States v. Holt State Bank, supra. That is, unless such transfer was impelled by some international duty or public extringency, such transfer would not be effective.

So too, any attempt by the Federal Government to grant away navigable waters and the submerged lands beneath them following statehood will also be ineffective as title to such waters and land has been in the State since statehood.

In those particular areas arising over the ownership to the waters and submerged lands by virtue of federal patents under the Homestead Act, each patent must be examined to determine if any waters and

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5/ Pollard v. Hagen, Shively v. Bowlby, United States v. Holt State Bank, supra.

submerged lands beneath them were meant to be included and, secondly, whether the particular body of water is navigable or was navigable at the time the Federal Government acquired it. The State has taken the position, and necessarily so, that where it can be justified, bodies of water must be classified as navigable.

Recognizing the potential problems over these lands and waters as development occurs in the State, we have encouraged the Federal Government to meet with State officials and to make navigability determination to the streams and lakes within the State. We have had no encouragement, however, and it would appear that we must continually be faced with these problems.

If this office can be of assistance to your department concerning specific problems in this area which is of vital concern to the State, please call upon us.

RLH:gs

cc: F. J. Keenan, Director
Division of Lands

Marge McCormick
Division of Aviation