

Alaska's navigable water puzzle

EDITOR'S NOTE: Webster's Dictionary defines "navigable" as "deep enough and wide enough to afford passage to ships," but as the federal and state governments and the Native corporations well know, it isn't that simple. The land beneath navigable water is, with few exceptions, the property of the state, and not available for selection under the Alaska Native Claims Settlement Act. Thus, the determination of what is navigable and what isn't is a significant factor in the settlement itself. The following article describes some of the major questions involved.

BY MOLLY B. JONES

In the unfinished jigsaw puzzle of land ownership in Alaska, the pieces of land under water are the cause of much frustration. If the water has tidal action or is navigable, the land beneath is the property of the state and is excluded from possible selection by the Native corporations under the terms of the Alaska Native Claims Settlement Act. Tidelands are easy to identify. But what inland waters are "navigable"? Clearly the Yukon River is and a 300-foot moose pond is not, but there are millions of acres of waterways in between the extreme examples which pose the question.

The state's rights to the beds of navigable waters stem from the Submerged Lands Act of 1953, which makes no attempt to define navigability. According to a spokesman for the Department of the Interior, the Act affecting navigable waters in all states has resulted in "hundreds of court cases" in the lower 48. Alaska appears to be headed for similar legal encounters. In some instances, Native corporations might seek to prove that a body of water is *not* navigable in order to have the right to select the property; such cases would, in all probability, only arise if the property was known to have valuable natural resources. More likely are suits to establish that streams and lakes *are* navigable, and therefore state-owned, freeing the corporation to select elsewhere from dry land more useful to its stockholders' purposes.

The problem is most serious in the vast delta of the Yukon and Kuskokwim Rivers, where Calista, the Native regional corporation, estimates that "there is almost as much water, in the form of lakes and streams, as there is land." Because the southwest delta area is so flat, tidal action has been observed in inland lakes many miles from the coast, according to Calista's land planning specialist Lou Lively. An accurate determination of where the mean high tide—and state land—stops is a subject of concern to the villages located along the coast, such as Kwigillingok. But more important and

urgent in terms of adequate deficiency land withdrawals is the identification of inland navigable waters.

WHY NO DEFINITION?

Charles Herbert, Alaska's commissioner of natural resources and a member of the Federal-State Land Use Planning Commission, says that the question has concerned the state since the day it entered the union. Early in statehood, he recalls, the late Sen. E. L. "Bob" Bartlett asked the Department of the Interior to provide a definition or a formula. Interior's Bureau of Land Management replied that it didn't have the authority to make such a definition. Bartlett prepared a bill which would have allowed the department to declare waters navigable or not, but the Justice Department convinced him to withdraw it because it was unnecessary; the Interior Department already had the power, they said. But, says Herbert, Interior's solicitor did not agree with the Justice Department's opinion, with the result that neither Congress nor Interior has ever provided a definition.

The acreage under submerged land is not counted in the state's selection of 103 million acres, but the state government felt no urgency in identifying navigable waters—with one exception—until the passage of the Alaska Native Claims Settlement Act. The exception was a suit filed in 1967 in which the state claimed ownership of the land beneath Lake Tustumena on the Kenai Peninsula within the boundaries of the Kenai National Moose Range. In March 1970, the 9th Circuit Court of Appeals overturned the lower court's ruling, finding that the land beneath the lake was included in the purpose for the withdrawal of the refuge and thus was the property of the federal government. The state appealed to the Supreme Court, which denied the request to hear the case. "The Tustumena case showed that all submerged lands in federal withdrawals such as parks and refuges established prior to statehood are the property of the federal government," Herbert says.

An interesting wrinkle may be that Native corporations located in such withdrawals may obtain title to submerged lands in their limited selections within the withdrawals.

THE STATE'S CRITERIA

With the passage of the Settlement Act and the potential clash between the state and the Natives over ownership of submerged lands, Herbert and other state officials began again to urge the Interior Department for a definition of navigability. "We've had continued meetings in Washington," Herbert says. "They just would not act. So I said, 'OK, we'll do it, and you can shoot us down.' They were delighted." Early this year, his department began outlining water bodies it considered to be navigable on acetate overlays of one inch-one mile

maps. The criteria the state says it is using for designation of nontidal navigable waters are:

(1) Streams whose use for waterborne commerce is documented or notorious. All of the major rivers and any of their smaller tributaries belong in this category, and they can usually be identified readily on maps that show towns or villages, trading posts, or mining camps along or adjacent to the streams.

(2) Lakes whose use for waterborne commerce is documented or notorious.

(3) Lakes on whose shores villages have been established, including those streams, if any, that connect such lakes with streams identified under (1) or with tidal waters.

The state is considering the following categories of inland waters as capable of being navigable:

(1) Streams large enough to be used for waterborne commerce and which are capable of access by water from bodies of water historically used for waterborne commerce but excluding those streams that are non-navigable because of permanent obstructions to passage by waterborne craft, excepting established portages.

(2) Smaller streams, or portions of smaller streams, that can provide access for waterborne commerce to other bodies of water historically used for navigation, or which connect bodies of water capable of navigation.

(3) Lakes of sufficient size, depth and shoreline characteristics to provide direct access to land by seaplanes and boats of customary usage in the waterborne commerce of similar areas.

(4) Small lakes with a minimum length of 3,000 feet which are suitable for use by seaplanes and which provide otherwise unavailable access to an area of commercial use.

Further, the state defines waterborne commerce as including:

(1) The use of boats or seaplanes for the transport of persons and commodities to or from areas of established settlement.

(2) The use of boats or seaplanes for postal service.

(3) The regular or customary use of boats or seaplanes in the pursuit of commerce typical of a certain area, such as trapping, mineral prospecting and development, and the guiding for hire of hunters and fishermen.

The state has excluded islands and sand bars from the area of a navigable body of water if:

(1) The area occupied by the feature is five acres or more, and

(2) The feature is named on the maps of the U.S. Geological Survey, or supports perennial vegetation.

WHAT HAPPENS NEXT?

All the Native village withdrawals have now been mapped with the state's suggested identifications of navigable waters, and the maps have been sent to the BLM for review. The BLM will also determine the acreage involved. "If the BLM refuses to accept our maps, they're useless," Herbert says. "But unless they see a glaring error, they will put our identification on the status maps."

The state has not consulted with the regional corporations on its identifications, and already at least one corporation, Calista, has charged that the state did not always

follow its own criteria for inland navigable waters. Calista planner Lively points to the map of the Lime Hills area, known for its mining potential, and indicates small unnamed lakes and streams marked as navigable by the state, apparently in violation of its criteria. He then refers to a map in the delta area which has several lakes over a mile (5,280 feet) long not identified. "We have no intention of taking the state's determination of navigability as final," he says.

The Interior Department's rules and regulations specify, in Section 2650.5-1(b), that: "Prior to making his determination as to the navigability of a body of water (based on the maps provided by the BLM), the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made."

PECULIAR QUESTIONS

Then, if the state or a Native corporation is not satisfied with the final determination and if there seems to be sufficient economic reason to support litigation, the dispute will wind up in court, and each case must be tried individually. According to Paul Kirton, Interior assistant solicitor, "Alaska has many peculiar questions as to navigability" that have not been tested in court cases in the lower 48, such as:

● *Seaplanes:* Alaska is perhaps the only place in the country where float planes are used as an "ordinary and customary" means of commerce. The planes can land and take off on water too shallow to accommodate a boat the size that would generally be used for commerce. Would their use be sufficient to establish navigability? This question was the stumbling block in the state's negotiations with Interior, Herbert says.

● *Frozen water:* There are streams and rivers too shallow or dangerous for transport by boat in summer which are used as highways in winter. Does navigable water have to be liquid?

● *Transient bodies of water:* Deltas change from year to year, and lakes migrate across the tundra. The Submerged Lands Act specifies that the state acquires title to lands "covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter." But, as Kirton puts it, "Nobody flew around on Jan. 4, 1959, when Alaska became a state, taking pictures and documenting navigable bodies of water." In some instances, a check year by year of where a particular lake or stream is located might be necessary to prove its permanence.

● *Reserves:* The Submerged Lands Act, in Sec. 5(b), makes exceptions for state ownership of navigable waters for "such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians." Prior to the passage of the Settle-

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EGAN APPOINTS FISHERIES PANEL. Anchorage News, July 5. Juneau — Gov. William A. Egan has named a lawyer, a member of his cabinet and a fisherman to head the Alaska Commercial Fisheries Entry Commission. The commissioners are Asst. Atty. Gen. David Jackman, state Dep. Director of Commercial Fisheries Roy Rickey, and Charles J. Stovall, a long-time commercial fisherman and a former enforcement and management agent for the U.S. Fish and Wildlife Service.

Navigable . . .

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