

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA PENINSULA CORPORATION,)

Plaintiff,)

vs.)

ANDREW MACK, in his official capacity)
as COMMISSIONER of STATE OF)
ALASKA DEPARTMENT OF NATURAL)
RESOURCES,)

Defendants.)

CASE NO. 3AN-17-08748CI

ORDER

Introduction.

The United States Government issued an interim conveyance of the surface estate of certain land, including Fog Lake and the Outlet Slough (collectively Fog Lake). The conveyance transferred to Alaska Peninsula Corporation (“APC”). APC issued an exclusive license to Rainbow King Lodge for the use and trespass enforcement on APC’s lands, including Fog Lake.

In 2012 the Division of Mining Land and Water (“Division”) of the Alaska Department of Natural Resources (“DNR”) issued a permit to the Alaska’s Sportsman’s Lodge authorizing it to install a mooring buoy, tethered to the subsurface of Fog Lake. Clients of the Alaska’s Sportsman’s Lodge use the

mooring buoy to tie up float planes and other craft in order to begin fishing and rafting trips on Fog Lake and the outlet to the Copper River.

APC perceived this permit to be an erroneous assertion of state ownership of the subsurface of Fog Lake. APC appealed the permitting decision to the Commissioner of DNR, arguing that the Division exceeded its authority. The Commissioner upheld the permit. APC appealed. The Court affirms the Commissioner's actions.

The Dispute.

There is no factual dispute about the history of the conveyances to APC or the permitting actions of DNR. There is a dispute about the legal significance of the federal government's conveyance. Both parties agree that resolution of issues of ownership of the subsurface of Fog Lake turns on the question of navigability and that that federal law applies to that question. Furthermore, both parties agree that the question of navigability must be determined by a court with jurisdiction. Both parties agree that DNR's navigability determination is not binding for purposes of establishing ownership.¹ Both parties agree that regardless of the outcome of this appeal, either could initiate an action

¹ However, the State asserted at oral argument that this Court, in this administrative appeal, could affirm the navigability findings of the Division and issue a decision that finally resolves the ownership of the submerged lands beneath Fog Lake. The State argues that if the superior court affirmed the Division's navigability findings, APC could not pursue a separate quiet title action. The State relies upon *Fairbanks North Star Borough v. State*, 826 P.2d 760 (Alaska 1992). APC disputes that assertion.

to quiet title to the subsurface of Fog Lake. They agree that there is no statute of limitations on this type of quiet title action.²

Until the ultimate question of ownership of the subsurface of Fog Lake is resolved, the narrow question presented by this appeal is whether DNR exceeded its authority by issuing the permit in light of the unresolved question of title to the subsurface of Fog Lake. The answer is yes.

The Conveyance of Fog Lake.

The starting point is statehood. Under the equal footing doctrine Alaska was entitled to the beds of its navigable waters as an incident of statehood.³ “Upon statehood, the State gains title within its borders to the beds of waters then navigable It may allocate and govern those lands according to state law subject

² The Submerged Lands Act of 1988, Pub. L. No. 100-395, repealed the time limitation that had been set by section 901(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1631(a) (1982), for the challenge of the conveyance of submerged land or a determination by the Secretary of Interior that water covering submerged land was non-navigable.

³ *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012) (“The rule for state riverbed title assumed federal constitutional significance under the equal-footing doctrine. In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, “hold the absolute right to all their navigable waters and the soils under them,” subject only to rights surrendered and powers granted by the Constitution to the Federal Government. *Martin v. Lessee of Waddell*, 16 Pet. 367, 410, 10 L.Ed. 997 (1842).”).

only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.”⁴

In December 1979 the Bureau of Land Management (BLM), pursuant to the Alaska Native Settlement Claims Act of 1971 (ANSCA), issued a decision to convey the surface estate of lands, including Fog Lake, to APC’s predecessor.⁵ BLM concluded that Fog Lake was not navigable.⁶ The State disputed that conclusion.⁷ In 1987 BLM revised its assessment and concluded that because Fog Lake was greater than 50 acres, it need not determine the lake’s navigability.⁸ The State again objected.⁹ BLM reassessed the status of Fog Lake yet again and determined it was navigable.¹⁰ However, because of the conveyance, BLM would not “unilaterally adjust the ownership of the beds of [Fog Lake].”¹¹

⁴ *Id.* (parenthetical and quotation omitted). *See also* AS 38.04.062(a) (“Except as provided in (f) of this section, the state owns all submerged land underlying navigable water to which title passed to the state at the time the state achieved statehood under the equal footing doctrine or 43 U.S.C. 1301--1315 (Submerged Lands Act of 1953).”)

⁵ Exc. 155-68.

⁶ Exc. 167.

⁷ DNR Exc. 1-2.

⁸ DNR Exc. 8-10.

⁹ DNR Exc. 11.

¹⁰ DNR Exc. 14.

¹¹ DNR Exc. 14.

The United States issued a Patent to APC for the lands that included Fog Lake in September 1992.¹²

DNR's Permitting Actions.

Alaska Statute 38.04.062(b) is authorizes and requires DNR to compile, maintain, and make public a list and map of all water in the state that the commissioner, the United States Department of the Interior, Bureau of Land Management, or a state or federal court determines was navigable water at the time the state achieved statehood. The submerged land underlying that navigable water shall be included in the inventory of state land prepared under AS 38.04.060.

In the years after APC received its patent and issued the exclusive license to Rainbow King Lodge, DNR received reports of disputes between members of the public who sought to use Fog Lake and APC and its licensee. DNR inspected Fog Lake and in 1993 determined it was navigable.¹³ In 2013 DNR¹⁴ again reviewed the evidence and conclude that Fog Lake was navigable for title purposes.¹⁵ The Division then issued land use permits authorizing the installation of an anchor line and buoy on the submerged land beneath Fog Lake.¹⁶

¹² Patent No. 50-92-0730 (Exc. 68-72).

¹³ DNR Exc. 18-19.

¹⁴ DNR delegated the task of making this determination to the Public Access Assertion and Defense Unit ("PAAD") within DNR's Division of Mining, Land and Water.

¹⁵ DNR Exc. 38.

APC appealed the issuance of the permits to the Commissioner.¹⁷

The Commissioner affirmed the permit.¹⁸

Discussion.

The Division's director is authorized to issue permits for various uses of state lands. Alaska Statute 38.05.850(a) provides, in part:

(a) The director, without the prior approval of the commissioner, may issue permits, rights-of-way, or easements on state land for roads, trails, ditches, field gathering lines or transmission and distribution pipelines not subject to AS 38.35, telephone or electric transmission and distribution lines, log storage, oil well drilling sites and production facilities for the purposes of recovering minerals from adjacent land under valid lease, and other similar uses or improvements, or revocable, nonexclusive permits for the personal or commercial use or removal of resources that the director has determined to be of limited value.

APC does not dispute that the Division could issue the permit on Fog Lake if the State's title to the subsurface land had been established by a court with jurisdiction to determine issues of navigability. Can the Division issue a permit authorizing persons to use what the Division asserts is public land (below navigable water) if title to that land is disputed?

To provide a context for an evaluation of the State's authority to issue land use permits on such land, the State points to the public's constitutional

¹⁶ DNR Exc. 87-96.

¹⁷ Exc. 1-7.

¹⁸ Exc. 5-10.

right to the use of navigable water. Article VIII, section 12 of the Constitution of Alaska provides:

Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

In *Wernberg v. State*,¹⁹ the Alaska Supreme Court observed that “A careful reading of the constitutional minutes establishes that the provisions in article VIII were intended to permit the broadest possible access to and use of state waters by the general public.”²⁰ The State does not argue that this provision or its use of the term “navigable waters” alone grants it title to the subsurface of Fog Lake.²¹ Indeed that term may be defined differently (by the legislature) for public access purposes than it is defined by federal law for purposes of determining title.²² But

¹⁹ 516 P.2d 1191 (Alaska 1973).

²⁰ *Id.* at 1198-99.

²¹ The State did assert at oral argument that some states with a similar constitutional public trust doctrine had construed that doctrine to afford an implied easement for the use of the subsurface lands (even though not titled to or owned by the state) as needed to engage in permitted activities on the surface.

²² There are varied definitions of navigable waters and they are to be sued for different purposes. *See generally, PPL Montana, LLC*, 565 U.S. at 589-593. The legislature has crafted its own definition of navigable waters for use by DNR. *See AS 38.04.062(g)*. As summarized in *PPL Montana, LLC*:

Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, subject as well

the public's right to use the surface of Fog Lake informs the scope of the Division's authority to issue permits for the use of the surface; even though the permit authorizes the use of the submerged land, title to which is unresolved.

The State also notes that it is acting to minimize the escalation of the disputes between APC and other nearby lodges and their clients. The State acknowledges that APC has the right to keep persons from trespassing on its property adjacent to Fog Lake. The other lodges approached the State for the buoy permit not only to clarify their right to use the surface and the mooring buoy, but also to minimize or avoid any claims by APC (whether true or mistaken) that clients of the other lodges were trespassing on the riparian lands owned by APC.

APC challenges the authority of the Division to issue the permit. The Court construes this challenge not to mean APC argues that the Division has not been authorized by statute to issue this type of permit. Alaska Statute 38.05.850(a) expressly authorizes the issuance of the permit on state land.

to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.

565 U. S. at 603-04 (citations omitted).

The Court understands the challenge to be of two parts. First, that the Division can never issue a permit on (arguably) state land that is beneath navigable waters (as defined by the state criteria) unless that land has been found to be state land by a court of competent jurisdiction using the federal test for navigability. This is a question of law. The Court is to apply its independent judgment to questions of law not involving agency expertise.²³ If the question of law involves agency expertise “or a determination of fundamental policies within the scope of the agency’s statutory functions,”²⁴ then the Court applies the reasonable basis standard.

The Court concludes that the issues surrounding ANSCA conveyances to Native corporations and the identification navigable waters implicate fundamental policies for the Division. The State’s protection of public land that it received at statehood is a profoundly important obligation that impacts all of Alaska’s citizens in general. Each determination that a particular body of water is or is not navigable also impacts those individuals, communities, private and public corporations, and political subdivisions that are near the property in question. The Court concludes that the Division had a reasonable basis for construing the applicable statute to allow (and probably require) it to make a permitting decision, when called upon to do so, despite the fact that the water in

²³ *West v. Municipality of Anchorage*, 174 P.3d 224, 226-27 (Alaska 2007).

²⁴ *Alyeska Pipeline Serv. Co. v. State*, 288 P.3d 736, 740 (Alaska 2012).

question has not been deemed navigable or non-navigable by an appropriate court.²⁵

The second part of APC's challenge is specific to this permit and APC's claim to the subsurface of Fog Lake. The challenge is to the factual underpinning of the Division's investigation that resulted in the legal conclusion that the submerged lands below Fog Lake are state lands. The Court reviews those findings and that conclusion to ensure that the Division's decisions were not "arbitrary, unreasonable, or an abuse of discretion."²⁶ The Court should overturn the Division's decision only when it is "left with the definite and firm conviction that a mistake has been made."²⁷

In 2013 PAAD undertook an extensive review of the geography of Fog Lake, the history of earlier evaluations of its status, aerial photographs of its condition in prior years,²⁸ and the susceptibility of Fog Lake in the past for use at statehood.²⁹ It reviewed the history of the conveyance of Fog Lake and the

²⁵ If the Court were to apply its independent judgment to this question, it would reach the same conclusion.

²⁶ *Alaska Exch. Carriers Ass'n v. Regulatory Comm'n of Alaska*, 202 P.3d 458, 461 (Alaska 2009) (quoting *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619, 623 (Alaska 2007)).

²⁷ *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 858 (Alaska 2010).

²⁸ PAAD reviewed aerial photographs and maps from 1955, 1978, 1993, and 2013. DNR Exc. 32.

²⁹ DNR Exc. 28-38.

positions and objections of the parties and governments involved. The Division's investigation reflected an accurate understanding of the state and federal tests for navigable waters.³⁰ The decision it made, based upon this investigation, was reasonable. The Court does not have a "definite and firm conviction" that the Division erred. Thus the decision was not arbitrary.

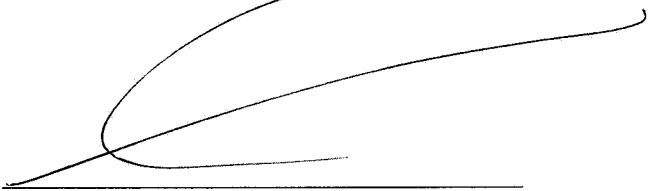
It is important to understand the larger context of this dispute. The State is obligated to protect the lands it received at statehood. This necessarily requires the determination of the navigability of perhaps millions of bodies of water. Such determinations can only be final if made by a court of competent jurisdiction. It is practically impossible to make the necessary number determinations efficiently or quickly. In the meantime, land must be used and protected. DNR must protect arguably state land, yet allow proper public and private use of that land. DNR's permitting process includes an evaluation of whether water is navigable under state and federal definitions. But DNR's determination that water is navigable under the federal definition and thus was

³⁰ It is true that PAAD made a determination that Fog Lake was navigable for purposes of the equal footing doctrine. DNR Exc. 38. It is also true that at oral argument the State asserted that DNR could make this decision and, if the superior court affirmed that decision in an administrative appeal, that judicial decision was the equivalent of a final quiet title decision. The State cited *Fairbanks North Star Borough* in support of this assertion. The Court does not read that case to support the State's assertion. Thus, APC (or the State) may, despite of this Court's decision in this case, prosecute a quiet title action to have the ownership of the submerged lands under Fog Lake definitively determined.

state land at statehood, is not binding. An interested party may revisit that determination by a quiet title action in the proper court. In this way DNR is able to make land use decisions that do not depend upon a final judicial decision regarding federal navigability, yet interested parties have a means by which to have the ownership implications of DNR's permitting decisions reviewed.

The decision of the Commissioner is affirmed.

DONE this 19th day of December 2018, at Anchorage, Alaska.

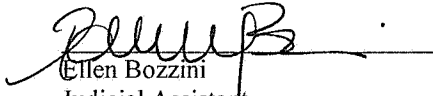


William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 19 December 2018
a copy of the above was emailed/mailed to each of the
following at their addresses of record:

S. Fortier
AGO: J. Alloway



Ellen Bozzini
Judicial Assistant