

1 the portion of the Gulkana River contained within the conveyance
2 of purported title to Ahtna, Inc. and Sta-Keh Corporation
3 to be navigable as a matter of law.

4 Accordingly, the issues having been considered and a
5 decision having been rendered,

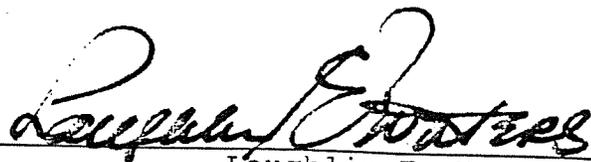
6 IT IS HEREBY ORDERED AND ADJUDGED:

7 1. The United States of America, Ahtna, Inc. and Sta-Keh
8 Corporation have no ownership of or interest in title to the
9 bed of the portions of the Gulkana River system purportedly
10 conveyed by the United States to Sta-Keh Corporation by interim
11 conveyance No. 209, dated June 29, 1979.

12 2. The portion of the interim conveyance No. 209 by
13 the United States of America to Sta-Keh Corporation, dated
14 June 29, 1979, which purports to convey title to the bed of
15 the Gulkana River to Sta-Keh Corporation (since merged into
16 Ahtna, Inc.) is declared null and void and without effect,
17 and the same is ordered cancelled.

18 The Clerk of the Court is directed to enter this Final
19 Judgment forthwith.

20
21 Dated: April 16, 1987



Laughlin E. Waters
Sr. United States District Judge

22
23
24 cc: Judge Fitzgerald
25 Michael Sewright
26 Robert Goldberg
27 Larry Corcoran, AUSA
28 Douglas Baily (BAILY)
O&J #3094

FILED

FEB 27 1987

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By [Signature] Deputy

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,)
)
 Plaintiff,)
 v.)
)
 UNITED STATES OF AMERICA,)
 DONALD HODEL, Secretary)
 of the Interior; ROBERT)
 PENFORD, Alaska State)
 Director, Bureau of Land)
 Management; AHTNA, INC.,)
 and STA-KEH CORPORATION,)
)
 Defendants.)

No. A80-359 Civil (Gulkana River)
SECOND AMENDED
ORDER RE PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT and
UNITED STATES' CROSS MOTION
FOR JUDGMENT ON THE PLEAD-
INGS

This case raises difficult questions concerning application of the well settled principle that a state is vested with title to the beds underlying navigable waterbodies at the time the state enters the Union. The State of Alaska has filed this suit in part for the purpose of obtaining review pursuant to 43 U.S.C. § 1631 of a determination by the Bureau of Land Management that the lower 30 miles of the Gulkana River is a non-navigable waterway belonging to the United States.¹ Alaska claims that this portion of the Gulkana is navigable and that therefore title to the riverbed has at all times belonged to the State of Alaska.

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1 Ahtna, Inc.,² to whom the United States transferred purported
2 title to the lower 30 miles of the Gulkana River, is also named
3 by Alaska as a defendant. Presently pending before the court is
4 Alaska's motion for summary judgment and the United States' cross
5 motion for judgment on the pleadings. For the reasons set forth
6 below, the court now grants Alaska's motion and denies the United
7 States' cross motion.

8 Background

9 The Alaska Native Claims Settlement Act ("ANCSA") permits
10 Native Alaskans to select through regional and village native
11 corporations approximately 44 million acres of public land in
12 Alaska in settlement of aboriginal land claims they had to lands
13 held by the United States at the time Alaska entered the Union.
14 See 43 U.S.C. § 1601 et seq. The Alaska Statehood Act, 48
15 U.S.C. § 21, permits the State of Alaska to select approximately
16 103.5 million acres of public land in Alaska. However, under the
17 "equal footing doctrine," see Pollard's Lessee v. Hagan, 44 U.S.
18 (3 How.) 212, 229 (1845), and its codification in the Submerged
19 Lands Act of 1953, 43 U.S.C. § 1301 et seq., title to the beds of
20 navigable inland waterbodies passes from the United States to the
21 state when the state enters the Union. Utah v. United States,
22 403 U.S. 9, 10, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971);
23 Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 324 n.19, 94 S.Ct.
24 517, 525 n.19, 38 L.Ed.2d 526 (1973), overruled on other grounds,
25 Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S.Ct.
26 582, 50 L.Ed.2d 550 (1977); Oregon v. Riverfront Protection
27 Ass'n., 672 F.2d 792, 794 (9th Cir. 1982); Alaska v. United
28 States, 754 F.2d 851, 853 n.3 (9th Cir.), cert. denied, 106 S.Ct.
333 (1985). Because title to the beds of navigable waterbodies

1 passed automatically to Alaska at the time of statehood, they are
2 neither available for selection nor chargeable to either the
3 ANCSA or the Alaska Statehood Act entitlements. See generally 43
4 U.S.C. §§ 1602(e), 1610-1611, 1615, 1631 and 48 U.S.C. prec.
5 21, Sec. 6(a) and (b). Conversely, the beds of non-navigable
6 waterbodies are available for selection and, if selected, are
7 chargeable against the recipient's entitlement. The United
8 States Department of Interior is responsible for processing the
9 State and native corporation selections and for transferring
10 title to them. See 43 U.S.C. §§ 1611, 1613 and 48 U.S.C. prec.
11 21, Sec. 6(a) and (g). In processing native corporation
12 selections, the Bureau of Land Management ("BLM") of the
13 Department of Interior makes administrative determinations of
14 navigability. 43 U.S.C. § 1631(b); 43 C.F.R. 2650.5-1(b) (1983);
15 see Alaska v. United States, 754 F.2d 851, 852 n.2 (9th Cir.),
16 cert. denied, 106 S.Ct. 333 (1985).

17 On May 16, 1979, BLM issued an administrative decision
18 finding the lower 30 miles of the Gulkana River system
19 non-navigable. On June 29, 1979, the United States made an
20 interim conveyance pursuant to ANCSA of the same lower 30 miles
21 of the Gulkana River system to Ahtna, Inc., an ANCSA regional
22 corporation. In response, Alaska, on November 25, 1980, filed
the instant suit.

23 In its pleadings, Alaska alleged that the very possibility
24 the United States might declare the portions of the Gulkana River
25 not conveyed to Ahtna, Inc. non-navigable created a cloud over
26 Alaska's title to those portions of the river. As a consequence,
27 in addition to specifically challenging the conveyance of the
28 lower 30 miles of the Gulkana to Ahtna, Inc., Alaska sought by

1 its suit to quiet title in the entirety of the Gulkana River
2 System. Alaska also sought a declaratory judgment³, pursuant
3 to 28 U.S.C. § 2201, concerning (1) the navigability of the
4 Gulkana River System and (2) the relevancy of the criteria
5 applied by BLM in making navigability determinations while
6 processing claims under ANCSA to Gulkana River System lands.
7 Alaska has since represented to this court that in the event
8 summary judgment was entered in its favor on the quiet title
9 portion of the suit, Alaska would not elect to pursue the portion
10 of the suit seeking the foregoing declaratory judgment⁴.
11 Alaska's Reply to United States' Opposition to Alaska's Motion
12 for Reconsideration at p. 7; Alaska's Memorandum in Support of
13 Motion for Reconsideration at p. 6.

14 On June 27, 1984, the United States disclaimed pursuant to
15 28 U.S.C. § 2409a(d) ownership interest in all but the upper
16 reaches of the Gulkana River System. This disclaimer was
17 confirmed by the court on September 24, 1984. On March 1, 1985,
18 the State of Alaska moved to voluntarily dismiss with prejudice
19 any claim to the remaining upper reaches of the Gulkana River
20 System in which the United States still claimed an interest.⁵
21 This motion was granted on March 4, 1985. As a consequence of
22 the United States' disclaimer and Alaska's voluntary dismissal,
23 no concrete dispute remains between the United States and Alaska
24 as to the ownership of the Gulkana River System and the court is
25 without jurisdiction over the United States with respect to the
26 quiet title portion of Alaska's suit. See 28 U.S.C. § 2409a(d).
27 However, the Court retains jurisdiction over the United States
28 pursuant to 43 U.S.C. 1631 to review the Secretary of Interior's
determination that the lower 30 miles of the Gulkana River is

1 non-navigable.⁶ See McIntyre v. United States, 490 F. Supp. 830
2 (D. Alaska 1980). Moreover, because Ahtna, Inc. did not join in
3 the United States' disclaimer, a live controversy remains between
4 Alaska and Ahtna, Inc. as to title to the lower 30 miles of the
5 Gulkana River System. Ahtna, Inc. has joined in the United
6 States' cross motion for judgment on the pleadings. Ahtna,
7 Inc.'s Opposition to Motion for Summary Judgment at pp. 1-2
8 (filed June 17, 1983).

9 Conveyance by BLM of a parcel of submerged land to a Native
10 Corporation is subject to de novo review in District Court. See
11 43 U.S.C. § 1631(a). The execution of an interim conveyance by
12 BLM conveying a parcel of submerged land is the "final agency
13 action" with respect to a decision by the Secretary of Interior
14 that the water covering the parcel is not navigable. 43 U.S.C. §
15 1631(b).

16 Discussion

17 As indicated above, resolution of the parties' claims turns
18 on the question of whether the contested 30 miles of the Gulkana
19 River System are "navigable" as that term is defined under
20 federal law. The federal test for navigability was first
21 articulated in The Daniel Ball⁷, 77 U.S. (Wall.) 557, 563 (1870):

22 Those rivers must be regarded as public
23 navigable rivers in law which are navigable
24 in fact. And they are navigable in fact when
25 they are used, or are susceptible of being
26 used, in their ordinary condition, as highways
27 for commerce, over which trade or travel are
28 or may be conducted in the customary modes of
trade or travel on water.

missing pg. 4

1 the customary modes of trade and travel" must be applied with
2 reference to the nature of commerce and the customary modes of
3 travel at the time of statehood. Alaska's position, on the other
4 hand, assumes that the requirement of the equal footing doctrine
5 that a waterway must have been navigable at the time of statehood
6 for title to have passed to the state means only that changes
7 which have occurred in the physical configuration of the waterway
8 since the time of statehood are to be disregarded for the purpose
9 of determining title navigability. At this stage of the analysis
10 then the court is confronted with the question of how, if at all,
11 the equal footing doctrine bears on application of the Daniel
12 Ball test for title purposes.

13 Navigability was originally created as a legal concept for
14 the purpose of distinguishing those portions of a waterbody which
15 could be privately owned from those portions which could not. See
16 MacGrady, The Navigability Concept in the Civil and Common Law, 3
17 Fla. St. U.L. Rev. 511, 511-512 (1975). At common law, navigable
18 waterbodies belonged to the sovereign who held them as a public
19 trust while non-navigable waterbodies were subject to private
20 ownership.⁸ See, e.g., Rex v. Smith, 99 Eng. Rep. 283, 285 (K.B.
21 1780) ("The soil of a navigable river belongs to the King."); see
22 also MacGrady, The Navigability Concept, 3 Fla. St. U.L. Rev. at
23 583-587. Despite the obvious differences between American and
24 English notions of sovereignty, American courts adopted the
25 English common law principle that navigable waterbodies are held
26 by the sovereign in trust for the public.⁹ In Martin v. Waddell,
27 41 U.S. (16 Pet.) 367 (1842), the Supreme Court found that title
28 to navigable waterbodies in the former colonies, formerly held by
the King of England in trust for the public pursuant to the

1 common law doctrine of navigable waterbodies, was by virtue of
2 the Revolution vested in the states. Id. at 410; accord Mumford
3 v. Wardell, 73 U.S. (6 Wall.) 423, 436 (1867). Thus, as the
4 legal concept of navigability was first transplanted in the
5 original 13 colonies, no violence was done to its underlying
6 purpose: the states stood in the position of the King, holding as
7 a public trust the title to the beds underlying navigable
8 waterbodies.

9 Other considerations unique to the American system of
10 government came into play when applying the doctrine of title
11 navigability to waterbodies lying outside the original 13
12 colonies. Under the equal footing doctrine, new states "have the
13 same rights, sovereignty and jurisdiction . . . as the original
14 states possess within their respective borders." Mumford v.
15 Wardell, 73 U.S. (6 Wall.) 423, 436 (1867); see also Pollard's
16 Lessee v. Hagan, 44 U.S. (3 How.) 212, 228-229 (1845). These
17 rights include ownership of the lands underlying the navigable
18 waters within the state's boundaries. Pollard's Lessee, 44 U.S.
19 (3 How.) at 229 (1845); Mumford, 73 U.S. (6 Wall.) at 436 (1867);
20 Oregon v. Riverfront Protection Ass'n., 672 F.2d 792, 794 (9th
21 Cir. 1982). Thus, states admitted to the Union after the
22 Revolution, being entitled to the same rights as the original 13
23 states, were, like the original 13 states, entitled to the beds
24 underlying navigable waterways. Pollard's Lessee, 44 U.S. (3
25 How.) at 228-229; accord Montana v. United States, 450 U.S. 544,
26 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981). In the newly
27 admitted states, however, land not owned by the state generally
28 was owned by the federal government. As a consequence, in the
newly admitted states, the concept of navigability served the

1 purpose of distinguishing not public from private, but rather
2 state from federal. It is to be noted though that the
3 public/private distinction still has relevance in the American
4 law of title navigability. Under the Americanized version of the
5 common law doctrine of navigability, by virtue of the rights
6 gained in the Revolution and confirmed by the Constitution, it is
7 the state, as opposed to the federal government, which holds
8 title in public trust of "public waterbodies," and it is through
9 application of the definition of navigability that the
10 determination is made of which waterbodies are public and which
11 are not.

12 The purpose then of the equal footing doctrine as applied to
13 questions of title navigability is to ensure that all states are
14 vested with the same right of safeguarding "public," that is
15 "navigable," waterbodies. However, this conclusion says nothing
16 about how navigability is to be defined. On at least a
17 theoretical level, defining navigability with reference only to
18 the state of commerce at the time of statehood, as the United
19 States urges this court to do, does not undermine the above
20 described policies and purposes of the equal footing and
21 navigability doctrines. If one were to accept the proposition
22 that as the nature of commerce varies notions of what is
23 "navigable" and hence "public" vary accordingly, it would follow
24 that navigability should be determined with reference to the
25 state of commerce at the time of statehood. The fact that each
26 state has an equal right to the title of navigable or public
27 waterbodies does not in and of itself compel the conclusion that
28 the concept of what is "navigable," and hence "public," is static
and non-malleable. In short, while it is clear the equal footing

1 doctrine guarantees all states equal rights in navigable
2 waterbodies, the doctrine does not guarantee that the concept of
3 navigability is static and not subject to change over the years.

4 However, the United States fails to cite a case that
5 supports the proposition that the elements of the Daniel Ball
6 test concerning susceptibility of the waterway to use "as a
7 highway for commerce," "in the customary modes of trade and
8 travel" must be applied with reference to the nature of commerce
9 and "the customary modes of trade and travel" at the time of
10 statehood. The majority of courts which have applied the Daniel
11 Ball test for the purpose of determining title, while careful to
12 note that navigability is to be determined at the time of
13 statehood, have not made or required specific findings with
14 respect to the "customary mode of trade and travel" at the time
15 of statehood. See, e.g., Utah v. United States, 403 U.S. 9, 91
16 S.Ct. 1775, 19 L.Ed.2d 279 (1971); United States v. Utah, 283
17 U.S. 64, 51 S.Ct. 438, 75 L.Ed 844 (1931); United States v. Holt
18 State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1925);
19 Oregon v. Riverfront Protection Ass'n., 672 F.2d 792, 795 (9th
20 Cir. 1982). There is dictum in a couple of cases which could be
21 construed as supporting the United States' position. See North
22 Dakota ex rel. Bd. of Univ. and State Lands v. Andrus, 671 F.2d
23 271, 278 (8th Cir. 1982), rev'd on other grounds sub nom. Block
24 v. North Dakota ex rel. Bd. of Univ. and State Lands, 461 U.S.
25 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (" . . . [W]e must bear
26 in mind that the issue is one of potential commercial use and
27 hence navigability at the time of statehood, not in the present
28 day[C]anoë travel at the time of North Dakota's statehood
represented a viable means of transporting persons and goods.");

1 Alaska v. United States, 754 F.2d 851, 854 (9th Cir.), cert.
2 denied, 106 S.Ct. 333 (1985) (" . . .[W]e have liberally construed
3 the phrase 'customary modes of trade and travel on water,'
4 [citations omitted], taking into account transportation methods
5 in use at the time of statehood."). These cases, however, hold
6 nothing more than that the "customary modes of trade and travel"
7 at the time of statehood are relevant to the determination of
8 title navigability. The cases do not hold, as the United States
9 here contends, that a determination of title navigability depends
10 exclusively on the customary modes of trade and travel in use at
11 the time of statehood.

12 The case which sheds the most light on the relationship
13 between the equal footing doctrine and the Daniel Ball title
14 navigability test is United States v. Utah, 283 U.S. 64, 51 S.Ct.
15 438, 75 L.Ed. 844 (1931). There, the United States had brought a
16 quiet title action against the State of Utah claiming that
17 portions of the Green, Grand and Colorado rivers were
18 non-navigable. In taking exception to certain findings of
19 navigability made by a special master, the United States argued
20 that the absence of historical evidence of actual use by Indians,
21 fur traders, or early explorers was "weighty evidence" of
22 non-navigability. Noting that the region at issue was unexplored
23 at the time of statehood, the Supreme Court rejected this
24 argument on the ground that a title navigability determination
25 cannot be made to depend upon the relative
26 development or lack of development of a state at the time of its
27 admission to the Union:

27 It is true that the region through which
28 the rivers flow is sparsely settled

1 In view of past conditions, the government
2 urges that the consideration of future com-
3 merce is too speculative to be entertained.
4 Rather it is true that, as the title of a
5 state depends upon the issue, the possibili-
6 ties of growth and future profitable use are
7 not to be ignored. Utah, with its equality
8 of right as a state of the Union, is not to
9 be denied title to the beds of such of its
10 rivers as were navigable in fact at the time
11 of the admission of the state either because
12 the location of the rivers and the circum-
13 stances of the exploration and settlement of
14 the country through which they flowed had
15 made recourse to navigation a late adventure
16 or because commercial utilization on a large
17 scale awaits future demands. The question
18 remains one of fact as to the capacity of the
19 rivers in their ordinary condition to meet
20 the needs of commerce as these may arise in
21 connection with the growth of the population,
22 the multiplication of activities, and the
23 development of natural resources. And this
24 capacity may be shown by physical character-
25 istics and experimentation as well as by the
26 uses to which the streams have been put.

26 United States v. Utah, 283 U.S. 64, 83, 51 S.Ct. 438, 443-44, 75
27 L.Ed. 844 (1931).

28 The holding of the Supreme Court that a state's "equality of

1 right as a state of the Union" is not to be denied because of the
2 state's under-development at the time of statehood undermines the
3 United States' contention that the determination of navigability
4 is limited by "the customary mode of commerce" at the time of
5 statehood. If a state's "equality of right as a state of the
6 Union" is not to be denied because of a state's relative
7 under-development at the time of statehood and if "the question
8 [of title navigability] remains one of fact as to the capacity of
9 the rivers in their ordinary condition to meet the needs of
10 commerce as these may arise," (emphasis added), it necessarily
11 follows that neither the extent nor the nature of commerce in the
12 region at the time of statehood is relevant to title navigability
13 determinations. Rather, it appears that the Supreme Court in
14 United States v. Utah approached the problem of title
15 navigability with fixed, if unstated, concepts of "commerce" and
16 "ordinary modes of commerce" in mind and simply held that those
17 concepts of "commerce" and "ordinary modes of commerce" were to
18 be applied to the river at issue without regard to the extent or
19 nature of actual past or present commercial development in the
20 region surrounding the river.

21 It must be noted that the Supreme Court in United States v.
22 Utah found only that lack of actual navigation at the time of
23 statehood on a waterbody due to the economic under-development of
24 the region surrounding the waterbody is not evidence of
25 non-navigability; the Supreme Court did not directly address the
26 theoretical possibility that a state's right to the title to beds
27 of navigable waterbodies is itself a relative right which varies
28 according to existing concepts of what constitutes commerce,
navigability and publicness. However, to the extent that the

1 Supreme Court did not in United States v. Utah reject the
2 application of this malleable concept of navigability in making
3 title navigability determinations, this court, for the reasons
4 set forth below, does.

5 On a purely theoretical level, the notion that as concepts
6 of what constitutes commerce vary concepts of what is "navigable"
7 vary accordingly has a certain appeal. As a practical matter,
8 however, if such a malleable definition were given to the concept
9 of navigability, the navigability or non-navigability of
10 waterbodies, and hence title to those waterbodies, would be in
11 constant flux. This would plainly be an untenable result. It
12 might be argued that this problem could be solved by permanently
13 fixing title according to the navigability of the waterbody at
14 the time of statehood. However, by making title a constant while
15 at the same time using a malleable definition of navigability,
16 and hence of title itself, an equally untenable situation
17 results: as the nature of commerce and navigability changed,
18 states would be found to have title to non-navigable waterways
19 and without title to navigable waterways. This is, of course,
20 contrary to what the law provides. Thus, as a purely practical
21 matter, it does not make sense to fix title according to
22 prevailing modes of conducting commerce at the time of statehood.

23 In sum then, although there is little authority directly on
24 point, the inference to be drawn from existing authority is
25 clearly that the admonition of the equal footing doctrine that
26 title is to be determined at the time of statehood does not mean
27 that the "usual mode of commerce" element of the Daniel Ball test
28 must be applied with reference to how commerce was conducted at
the time of statehood. In addition, if the malleable,

1 relativistic concept of navigability urged by the United States
2 were adopted, title to waterbodies could not be kept constant
3 without undermining the well established principle that the
4 states hold title to the beds underlying navigable waterbodies.
5 This court consequently concludes that the requirement that title
6 navigability be determined at the time of statehood means only
7 that when making a title navigability determination, the Daniel
8 Ball test is to be applied to the physical dimensions and
9 configuration of the river existing at the time of statehood.

10 Having concluded that the "commerce" and "ordinary modes of
11 trade and travel" elements of the Daniel Ball test need not be
12 construed with reference only to the "commerce" and "ordinary
13 modes of trade and travel" in existence at the time of statehood,
14 the court is left with the question of how those elements of the
15 Daniel Ball test are to be defined and applied in a given case.
16 Alaska advances in the alternative three independent arguments
17 concerning the application and definition of the commerce element
18 of the test. Alaska's first argument is that the term "commerce"
19 no longer has any application in title navigability
20 determinations. As a fall back position, Alaska argues that
21 commerce is not limited to "freight-hauling" activities, but
22 rather encompasses activities such as fishing, camping,
23 sightseeing, trapping, hunting and governmental activities. As a
24 final alternative, Alaska argues that even if the foregoing non
25 "freight-hauling" activities are not commerce, they constitute
26 relevant evidence of a waterbody's susceptibility to bearing
27 traditional forms of commerce. The United States does not
28 dispute the validity of this third argument, nor does the court.
United States v. Utah, 283 U.S. 64, 82-83, 51 S.Ct. 438, 443-444,

1 75 L.Ed. 844 (1931); Utah v. United States, 403 U.S. 9, 11, 91
2 S.Ct. 1775, 1776, 19 L.Ed.2d 279 (1971). The United States does
3 dispute the first two arguments advanced by Alaska and those
4 arguments will be addressed in turn.

5 Alaska contends that the key element of the federal title
6 navigability test is not that the waterbody at issue be
7 susceptible to commercial use, but rather that it be susceptible
8 to utilization as a transportation route. At first glance,
9 Alaska's position would seem to be contrary to all existing law.
10 Indeed, the well established federal title navigability test
11 explicitly provides that a waterbody is navigable if it is
12 susceptible to being used as a "highway for commerce," and courts
13 have consistently cited and applied this commercial use
14 requirement when making title navigability determinations.

15 Nevertheless, the court finds substantial merit in Alaska's
16 position. It is to be noted that the federal test essentially
17 equates the use of a waterbody for transportation and as a
18 "highway for commerce": ". . . as a highway for commerce, over
19 which . . . trade or travel may be conducted. . . ." (emphasis
20 added). This implicit equation between routes for travel and
21 routes for conducting commerce comports with common sense notions
22 of what is required to conduct commerce by means of a waterbody.
23 It is difficult to imagine a situation in which a waterbody is
24 susceptible to use as a transportation route yet not susceptible
25 to use as a highway for commerce. The reverse situation, on the
26 other hand, is not difficult to imagine and indeed is probably
27 always the case: where a waterbody is not susceptible to use as
28 a transportation route, it is highly unlikely that the waterbody
is susceptible to use as a highway for commerce. As a practical

1 matter then, requiring only that a waterbody be susceptible to
2 use as a transportation route would rarely, if ever, alter the
3 result of a given application of the Daniel Ball test. Although
4 this court would not go so far as to hold that susceptibility to
5 use as a highway for commerce is no longer required under the
6 federal title navigability test, it appears to the court that the
7 travel requirement ordinarily subsumes the commerce requirement
8 and that as a consequence, the travel requirement is indeed "the
9 essence of the federal test." Utah v. United States, 403 U.S. 9,
10 11, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971).

11 This analysis is supported by the facts and holding of the
12 Supreme Court in Utah v. United States, 403 U.S. 9, 91 S.Ct.
13 1775, 29 L.Ed.2d 279 (1971). There the United States contested a
14 finding by a special master that the Great Salt Lake was
15 navigable. The special master had found that the lake had been
16 used by ranchers to transport livestock by boat from the mainland
17 to an island in the lake. The United States contended that use
18 of the waterbody for ranching was not evidence of commercial use.
19 Rejecting this argument, the Supreme Court found that the feature
20 which distinguishes between navigability and non-navigability is
21 use of the waterbody as a "highway" and that the purpose for
22 which travel is conducted on the waterbody is "an irrelevant
23 detail":

24 "The hauling apparently was done by the
25 owners of the livestock, not by a carrier for the
26 purpose of making money. Hence it is suggested that
27 this was not use of the lake as a navigable highway
28 in the customary sense of the word. . . . We think
that is an irrelevant detail. The lake was used as

1 a highway and that is the gist of the federal test."
2 403 U.S. at 11, 91 S.Ct. at 1776.

3 Likewise here, the court finds that the paramount consideration
4 in applying the Daniel Ball test is whether the waterbody at
5 issue is susceptible to use as a route for transportation.

6 By emphasizing the susceptibility of a waterbody to being
7 used as a transportation route when applying the title
8 navigability test, difficult questions regarding how the
9 "commerce" element of the title test is to be applied are
10 resolved in a manner which is both sensible and consistent with
11 the policy considerations underlying the title navigability test.
12 The nature of commerce and the manner in which it is conducted
13 varies substantially from historical period to historical period
14 and from geographical region to geographical region. As a
15 consequence, emphasis of the "commerce" element of the title
16 navigability test would lead to widely varying results depending
17 on where and when the title test was applied. This, as
18 demonstrated above, is an undesirable result because it would
19 undermine the stability of title determinations as well as the
20 equality of the states' right to hold the title in public trust.
21 By emphasizing the capability of the waterbody to serve as a
22 route for transportation, these problems are avoided. Regardless
23 of region or historical period, craft capable of providing
24 transportation must be of a certain minimum size. Assuming, as
25 this court does, that a waterbody capable of serving as a
26 transportation route is in the ordinary case also susceptible to
27 use as a highway for commerce, the task then of a court in
28 applying the "highway for commerce" element of the Daniel Ball
test is much simplified. When determining the title navigability

1 of a waterbody in this manner a court need not specifically
2 concern itself with when and how commerce has or could be
3 conducted in the region surrounding the waterbody; rather the
4 court need only inquire if the waterbody is susceptible to the
5 most basic form of commercial use: the transportation of people
6 or goods.

7 The effect of equating a waterbody's susceptibility to use as
8 a transportation route and its susceptibility to use as a
9 "highway for commerce" is to define commerce in its most
10 elemental form and disregard the regional and historical
11 variations in the manner in which it is conducted. There is
12 nothing, however, in the historical development of the title
13 navigability test that indicates that navigability should depend
14 on the regional and historical characteristics of the commerce
15 conducted in the area surrounding the waterbody. As pointed out
16 above, the concept of navigability was developed to distinguish
17 that which can be privately owned from that which is to be held
18 in public trust by the sovereign. Underlying the use of the
19 concept of navigability to distinguish between public and private
20 is the notion that large waterbodies subject to commercial
21 exploitation should be kept public while waterbodies so small as
22 to not be useful for commercial transportation are suitable for
23 private ownership. MacGrady, The Navigability Concept in the
24 Civil and Common Law, 3 Fla. St. U.L. Rev. 511, 574-575 (1975).
25 This policy, however, is not served by declaring a waterbody
26 capable of transporting goods non-navigable simply because
27 commerce in the region at that time is customarily conducted in
28 vessels too large for the waterbody. See, e.g., The Montello, 87
U.S. (20 Wall.) 430, 441 (1874) ("It would be a narrow rule to

1 hold that . . . unless a river was capable of being navigated by
2 steam or sail vessels, it could not be treated as a public
3 highway."). This is undoubtedly why the Daniel Ball test
4 provides that a waterbody need only be "susceptible" to use as a
5 highway for commerce. As pointed out above, when a waterbody is
6 susceptible to use as a conduit for transportation of any
7 substantial sort, it generally will also be susceptible to use as
8 a highway for commerce.

9 Alaska's second argument, is, as indicated above, that
10 "commerce" is not limited to freight hauling activities, but
11 rather encompasses activities such as fishing, camping,
12 sightseeing, trapping, hunting and governmental activities such
13 as surveying and enforcement of game laws. As the court
14 understands it, Alaska's argument here is not that these are
15 activities which when conducted on a waterbody are evidence of
16 commercial use of the waterbody. Rather, it appears that Alaska
17 is arguing that utilization of a waterbody as an artery of
18 transportation for the purpose of conducting these activities
19 constitutes use of the waterbody as a "highway for commerce." So
20 construing Alaska's argument, the analysis applied by the court
21 with respect to Alaska's first argument is equally applicable
22 here: when a waterbody is susceptible to being used as a route
23 for transporting people or goods, it generally will also be
24 susceptible to use as a "highway for commerce." Again, in the
25 court's view, in the ordinary case there is no material
26 difference between susceptibility to use as a route of
27 transportation and susceptibility to use as a "highway for
28 commerce." As a consequence, it is unnecessary for the court to
decide if utilization of a waterbody as an artery of

1 transportation for the purpose of reaching fishing, trapping or
2 game spots is actual use of the waterbody as a "highway for
3 commerce" or merely evidence of the waterbody's susceptibility to
4 use as a "highway for commerce"; where a waterbody is used as a
5 transportation route, for whatever purpose, ordinarily the
6 waterbody will also be susceptible to use as a highway for
7 commerce. As is well established, susceptibility of a waterbody
8 to use as a highway for commerce in the absence of actual use as
9 a highway for commerce suffices to establish navigability.
10 United States v. Utah, 283 U.S. 64, 83, 51 S.Ct. 438, 443-444, 75
11 L.Ed. 844 (1931). The court does note, however, that when a
12 waterbody is utilized as a means of transportation for conducting
13 some of the activities referred to in Alaska's second argument
14 there may be instances when there is no longer an essential
15 equivalence between use of the waterbody as a route of
16 transportation and the susceptibility of the waterbody to use as
17 a "highway for commerce." It is easy, for example, to imagine a
18 situation in which a fishing or trapping site near a waterbody
19 could be reached only with a single person kayak. Because it is
20 doubtful whether commerce can be conducted in a single person
21 kayak, the fact that the waterbody was used as a highway for
22 reaching the fishing or trapping spot might not necessarily
23 support a finding that the waterbody was susceptible to use as a
24 highway for commerce. In such a case, it would then be necessary
25 to decide the issue of whether utilization of a waterbody as a
26 "highway for reaching fishing spots" is the equivalent of
27 utilization of the waterbody as a highway for commerce. The
28 facts of this case are not such that the court need decide this
issue.

1 In sum then, the title navigability of a particular
2 waterbody is not dependent on the nature of commerce conducted in
3 the region surrounding the waterbody at a given time. A
4 waterbody which is capable of transporting people or goods will
5 in the ordinary case also be susceptible to use as a "highway for
6 commerce." With these precepts in mind, the court now turns to
7 the facts of this case.

8 Ahtna, Inc. and Alaska have entered into extensive
9 stipulations of fact concerning the physical configuration of the
10 portion of the Gulkana River here at issue and the uses to which
11 it has been put¹⁰. These factual stipulations provide more than
12 a sufficient basis for applying the legal principles the court
13 has concluded to be applicable in this case. Consequently,
14 resolution of this case on the cross motions before the court is
15 appropriate. See Oregon v. Riverfront Protection Ass'n., 672
16 F.2d 792, 794 (9th Cir. 1982).

17 In view of the stipulated facts, there is no question that
18 the portion of the Gulkana River here at issue (hereinafter the
19 court will refer to the portion of the river at issue as simply
20 "the river" or "the Gulkana") is capable of transporting people
21 and goods and consequently is "susceptible to use as a highway
22 for commerce." Much of the river is ordinarily slow moving and
23 3-6 feet deep and about 150 feet wide. Other areas are
24 characterized by unbroken, comparatively fast running (2-3
25 m.p.h.) waters 2-4 feet deep under average conditions. These
26 stretches are interrupted by shorter segments of alternating
27 riffles and pools. In a three mile stretch between points 7.5
28 miles and 10.5 miles above the river's confluence with the Copper
River there are segments ranging from just a few feet to a couple

1 hundred feet in length which contain standing waves up to three
2 feet high, capable of swamping an open canoe in places and
3 requiring maneuvering to avoid. These waves are no obstacle to
4 other more stable watercraft such as riverboats and inflatable
5 rafts which are larger and wider than canoes.

6 The shallowest spot reported is a gravel shoal area a couple
7 hundred feet long located about a quarter mile above the
8 Richardson Highway Bridge (3.75 miles above the Gulkana's
9 confluence with the Copper River) crossing the Gulkana River. At
10 this spot the water depth is normally about a foot and a half
11 deep, and it can drop down to a foot during low water conditions
12 which sometimes occur after mid-July. Just below the Richardson
13 Highway Bridge, there is another gravel shoal maybe 50 feet long
14 where the deepest channel, to the right side of the river heading
15 downstream, is normally about two feet deep. The water level at
16 this spot sometimes drops to 16-18 inches after mid-July and at
17 times drops another 3 to 4 inches in late August or September.
18 Below this point the entire river slows and is several feet deep
19 as it approaches its confluence with the Copper River.

20 There could be some question as to whether the river is
21 navigable in its shallowest spot, that is, the couple of hundred
22 feet stretch above the Richardson Highway Bridge where the water
23 is normally only a foot and a half deep and at times only a foot
24 deep¹¹. This stretch, however, is very short and neither the
25 United States nor Ahtna, Inc. has produced any evidence that
26 navigation over this stretch is not possible. Moreover, it is
27 well established that "navigability, in the sense of the law, is
28 not destroyed because the watercourse is interrupted by
occasional natural obstructions or portages." Economy Light &

1 Power Co. v. United States, 256 U.S. 113, 122, 41 S.Ct. 409, 412,
2 65 L.Ed. 847 (1921); accord North Dakota ex rel. Bd. of
3 Univ. and School Lands v. Andrus, 671 F.2d 271, 277 (8th Cir.
4 1982), rev'd on other grounds sub nom. Block v. North Dakota ex
5 rel. Bd. of Univ. and School Lands, 461 U.S. 273, 103 S.Ct. 1811,
6 75 L.Ed.2d 840 (1983); United States v. Utah, 283 U.S. 64, 86-87,
7 51 S.Ct. 438, 444-445, 75 L.Ed. 844 (1931); see United States v.
8 Holt State Bank, 270 U.S. 49, 56-57, 46 S.Ct. 197, 199-200, 70
9 L.Ed. 465 (1925) (waterbody at issue found navigable despite
10 difficulties to navigation posed by sand bars and vegetation);
11 Oregon v. Riverfront Protection Ass'n., 672 F.2d 792, 795 (9th
12 Cir. 1982) (portion of McKenzie river found navigable as a matter
13 of law despite fact that portion of river at issue at times had
14 exposed gravel bars, boulders and shoals). Thus, even assuming
15 that navigation of the short stretch of shallow water above the
16 Richardson Highway Bridge might be difficult, the impediment to
17 navigation posed by the stretch is not of sufficient magnitude to
18 compel a finding that the river is non-navigable.

19 Any concern that any segment of the river is non-navigable
20 is put to rest by the evidence concerning the various uses that
21 have actually been made of the river. The first reported use¹²
22 of this section the Gulkana River is one told by Ahtna Natives of
23 a short-statured Gulkana area chief who traded copper for furs
24 with the Tanana people at Isabel Pass (9 miles north of Paxson
25 Lake), had the furs loaded into Native boats, and then
26 transported them down the Gulkana River to a village for
27 redistribution to other Ahtna groups in the Copper River Valley.
28 The village was reportedly located at the combined mouths of Bear
Creek and the Gulkana River, about 2.3 miles above the river's

1 confluence with the Copper River. This story, set in the late
2 1700's or early 1800's, is not documented, but is considered
3 historical by the Ahtna who tell it. It is known that for the
4 period of the story the Ahtna had villages and hunting camps
5 within the Gulkana River drainage, that inter-tribal trade
6 existed between the Ahtna and other native groups, and that the
7 commonly shared Ahtna technology included canoe-type craft
8 constructed of birch bark or animal skins sewn together over a
9 wooden frame. These crafts were customarily about 17 feet long, 4
10 feet wide and 2 feet deep. The craft were primarily used for
11 down stream travel.

12 Today watercraft are commonly used within this 30 mile
13 section of river in connection with the fishing and camping
14 activities which take place within the river corridor. Travel on
15 this section is most frequently between the Sourdough Campground
16 (33 miles above the confluence of the River with the Copper
17 River) and the Richardson Highway Bridge, which provide access to
18 the river by road. Use of watercraft between the bridge and the
19 confluence of the river with the Copper River is also prevalent.
20 These river stretches are customarily used, and susceptible to
21 use, by the following craft: (1) powered square-sterned
22 flat-bottomed riverboats and skiffs and V-nosed round bottomed
23 lake boats, most commonly constructed of aluminum but also
24 fiberglass or wood, between 16 to 24 feet long by 4 to 10 feet
25 wide, capable of carrying loads ranging between 900 and 2,000
26 pounds on the river, with the draft for the metal boats of this
27 type commonly running between 3-6 inches unloaded and 2-4 inches
28 more when loaded to capacity and sitting still in the water, and
powered by contemporary jet units, large outboard propeller

1 motors or air propeller engines which can reduce or increase the
2 real draft of the boat once under power; (2) inflatable rafts
3 most commonly ranging between 12 and 15 1/2 feet long and 5 to 7
4 feet wide, with a river load capacity between 1,250-2,000 pounds
5 and a draft of 6-8 inches when loaded to capacity, and used
6 almost exclusively for downstream travel using rowing frames and
7 oars; (3) square-sterned motorized freight canoes and
8 double-ended paddle canoes 15 to 19 feet long.

9 Most travel within this section is by recreationalists in
10 their own craft to reach fishing and camping spots on the river
11 between the mouth and Sourdough. Traffic is most pronounced
12 during mid-June through July, while the salmon are running in the
13 river. During a busy weekend day between a dozen and 20 boats
14 carrying 60 or so people are commonly in use within this section.
15 Powerboats are the craft most commonly used, followed by
16 inflatable rafts and canoes.

17 Facts in addition to the above are stipulated to by Alaska
18 and Ahtna, Inc. It is not necessary, however, to reiterate those
19 additional facts because the facts already recited are more than
20 sufficient to support a finding that the portion of the Gulkana
21 River here at issue is susceptible to use as a highway for
22 commerce, over which trade or travel may be conducted in the
23 customary modes of trade or travel on water¹³. Accordingly, the
24 court, finding ~~the lower 30 miles of the Gulkana River to be~~
25 ~~navigable~~ as a matter of law, hereby GRANTS the State of Alaska's
26 motion for summary judgment and DENIES the United States' cross
27 motion for judgment on the pleadings.

28 IT IS SO ORDERED.

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DATED: 16 Apr 89


LAUGHLIN E. WATERS
Sr. United States District Judge

cc: Michael Sewright
Robert Goldberg
Larry Corcoran, AUSA
Douglas Bailly (BAILY)
Judge Fitzgerald

FOOTNOTES

1. This court has jurisdiction over this suit pursuant to 28 U.S.C. § 1331. Oregon v. Riverfront Protection Ass'n., 672 F.2d 792, 794 (9th Cir. 1982). See infra note 6.
2. As is discussed infra, Ahtna, Inc. is a regional corporation organized under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 et seq., and occupies the area in which the disputed portion of the Gulkana River is located. Sta-Keh Corporation, a village corporation organized under ANCSA, was also a transferee of the title conveyed by the United States and is also named as a defendant in this suit. However, Sta-Keh Corporation and Ahtna, Inc. have since merged, with Ahtna, Inc. being the surviving corporation and successor in interest to Sta-Keh Corporation. Answer of Ahtna, Inc., paragraph VII.
3. Alaska also seeks a permanent injunction prohibiting the federal defendants from "patenting, conveying, transferring title to, or otherwise disposing of any land, or interest in land, underlying any part of the Gulkana and connected lakes." Second Amended Complaint, paragraph 5, at p. 12. Alaska has not attempted to demonstrate however that issuance of an injunction is necessary to protect or enforce its substantive legal rights.
4. Because the declaratory judgment portion of Alaska's suit is not before the Court on these motions, the Court expresses no opinion as to the merits of the request for a declaratory judgment.
5. Alaska had previously withdrawn its claim to a very small portion of the Gulkana. See Alaska's Withdrawal of Claim, filed February 14, 1986.

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2 6. The belated suggestion of the United States that this Court
3 lost all jurisdiction over the United States as a
4 consequence of the disclaimer is without merit. 28 U.S.C. §
5 2409a(d) provides that jurisdiction of the District Court
6 "shall cease" if the United States disclaims interest in the
7 property at issue "unless [the court] has jurisdiction of
8 the civil action or suit on ground other than and
9 independent of the authority conferred by [28 U.S.C. §
10 1346(f)(the statutory grant of jurisdiction over quiet title
11 actions involving property in which the United States claims
12 an interest)]." Here the Court has federal question
13 jurisdiction arising under 43 U.S.C. § 1631 and that
14 jurisdiction is independent of the authority conferred by 28
15 U.S.C. § 1346(f). As a consequence, the disclaimer filed by
16 the United States pursuant to § 2409a(d) does not, by the
17 terms of § 2409a(d), divest this Court of jurisdiction over
18 the United States. It should also be noted that the
19 disclaimer of the United States in no way renders moot
20 Alaska's suit against the U.S. By making its disclaimer the
21 United States did not concede the navigability of the lower
22 30 miles of the Gulkana River, see "Stipulation Concerning
23 Extent of Gulkana River System Litigation," filed May 2,
24 1984, nor is there any evidence that BLM has attempted to
25 rescind or disavow its determination that the Gulkana is not
26 navigable.

27
28 The jurisdiction of this court over Ahtna, Inc. has not
been challenged. The same federal question--that of the
navigability of the Gulkana River--is raised by Alaska
against both Ahtna, Inc. and the federal defendants. Wholly
apart from jurisdiction pursuant to 43 U.S.C. 1631, federal
question jurisdiction has been found to exist in title
navigability suits. See, e.g., United States v. Oregon, 295
U.S. 1, 14, 55 S.Ct. 610, 615, 79 L.Ed. 1267 (1935). This
is true even where title to the river bed is not claimed by
the federal government, but merely descends from purported
federal title. Oregon v. Riverfront Protection Ass'n., 672
F.2d 792, 794 (9th Cir. 1982). Thus, this court
unquestionably has jurisdiction over Ahtna, Inc.

1 Under federal law, there are three instances in which the
"navigability" of a waterway must be determined: (1) to
establish the parameters of the admiralty jurisdiction of a
federal court, The Montello, 87 U.S. (20 Wall.) 438 (1874);
(2) to define the scope of federal regulatory jurisdiction
conferred by authority of the commerce clause, United States
v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct.
291, 85 L.Ed. 243 (1940); Puget Sound Power & Light Co. v.
Federal Energy Regulatory Comm'n., 644 F.2d 785 (9th Cir.),
cert. denied, 454 U.S. 1053, 102 S.Ct. 596, 70 L.Ed.2d 588
(1981); Gibbons v. Ogden, 22 U.S. (Wheat) 1 (1824); and (3)
to establish title to the waterbed underlying an inland
waterway. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

The Daniel Ball concerned the parameters of admiralty
jurisdiction, not title to the beds of inland waterways.

1 Nevertheless, because the Supreme Court has consistently
2 employed the Daniel Ball test in determining "navigability
3 for title," see, e.g., Utah v. United States, 403 U.S. 9, 91
4 S.Ct. 1775, 29 L.Ed.2d 279 (1971); United States v. Oregon,
5 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935); United
6 States v. Utah, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844
7 (1931), it is well settled that that test applies in title
8 navigability cases. Alaska v. United States, 754 F.2d 851,
9 853 (9th Cir.), cert. denied, 106 S.Ct. 333 (1985); Oregon
10 v. Riverfront Protection Ass'n., 672 F.2d 792, 794 (9th Cir.
11 1982).

12 8. There is, however, debate as to whether the Crown owned only
13 the beds of waterbodies subject to the "ebb and flow of the
14 tide" or if instead the Crown owned the bed of navigable
15 waterbodies regardless of whether the waterbody was subject
16 to the ebb and flow of the tide. See MacGrady, The
17 Navigability Concept, 3 Fla. St. U.L. Rev. at 569-587. In
18 the Nineteenth century, American and English courts concluded
19 that in England there are no waterbodies beyond the ebb and
20 flow of the tide large enough to be navigable and that as a
21 consequence in England navigable waterbodies and waterbodies
22 subject to the ebb and flow of the tide were co-extensive.
23 The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.)
24 443, 454-455 (1851); Murphy v. Ryan, 2 Ir. R.C.L. 143,
25 151-153 (1868); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563
26 (1870). By so concluding, previous cases which held that
27 the Crown held title to the beds of navigable waterbodies
28 were reconciled with cases which had found that the Crown
held title only to the beds of tidewaters. The court would
note that the assertion that in England there are no
waterbodies beyond those subject to the ebb and flow of the
tide which are large enough to be navigable seems
implausible. See MacGrady, The Navigability Concept, 3 Fla.
St. U.L. Rev. at 571. This, however, is a problem of the
English law of title navigability, not the American law of
title navigability, because under American law, navigable
waterbodies are not limited to those subject to the ebb and
flow of the tide. The Daniel Ball, 77 U.S. (10 Wall.) 557,
563 (1870); see infra note 9.

22 9. American courts did not, however, adopt the English
23 definition of navigability, which requires that the
24 waterbody be subject to the ebb and flow of the sea. See
25 note 8, supra; The Daniel Ball, 77 U.S. (10 Wall.) 557, 563
26 (1870). American courts declined to adopt the English
27 tidewater test based on the perception that whereas in
28 England no navigable waterbodies were to be found in inland
areas unaffected by the tide of the sea, see supra, note 8,
in the United States "rivers are as navigable for many
hundreds of miles above as they are below the limits of
tidewater, and some of them are navigable for great
distances . . . which are not even affected by the tide at
any point during their entire length." The Daniel Ball, 77
U.S. (10 Wall.) at 563; see also The Propeller Genesee Chief
v. Fitzhugh, 53 U.S. (12 How.) 443, 454-457 (1851). Thus,
29

1 the differences between the English and American definitions
2 of navigability stem from perceived differences between
3 American and English geography, and not from differing
4 perceptions as to the legal purpose of the concept of
5 navigability.

6 10. While the United States has not joined in this stipulation,
7 it has represented to the court that it is "willing" to do
8 so. United States' Opposition to Alaska's Motion for
9 Reconsideration at p. 7. Whether the United States does or
10 does not actually join in the stipulation is not crucial
11 however because the United States has not disputed Ahtna's
12 and Alaska's description of the physical characteristics of
13 the lower 30 miles of the Gulkana.

14 11. It is axiomatic that navigability is a question of fact, The
15 Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870), and that as
16 a consequence analogies to other waterways found to be
17 navigable are not always helpful. Nevertheless, the court
18 would note that even the most difficult passage of the
19 portion of the Gulkana at issue here compares favorably with
20 waterbodies found to be navigable in other cases. See,
21 e.g., North Dakota ex rel. Bd. of Univ. and School Lands v.
22 Andrus, 671 F.2d 271 (8th Cir. 1982), rev'd on other grounds
23 sub nom. Block v. North Dakota ex rel. Bd. of Univ. and
24 School Lands, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840
25 (1983) (Little Missouri River found navigable despite report
26 that maximum depth of river was two and one-half feet).

27 12. Ahtna, Inc. and Alaska have stipulated that the "natural and
28 ordinary condition of the [Gulkana Rivers System] is the
same now as it was at statehood in terms of location and
general physical characteristics such as water volume,
gradients, geology and general weather and water level
conditions." Stipulation of Facts, filed November 21, 1984,
at p. 8. There is nothing in the record to indicate that
the physical characteristics of the Gulkana were at any time
prior to statehood significantly different than they are at
present. As a consequence, when considering evidence of
actual use of the Gulkana in determining whether the Gulkana
was susceptible at the time of statehood to use as a
"highway for commerce," it is irrelevant when the actual use
occurred. Oregon v. Riverfront Protection Ass'n., 672 F.2d
792, 795 (9th Cir. 1982); see Utah v. United States, 403
U.S. 9, 9-10, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971);
United States v. Utah, 283 U.S. 64, 82, 51 S.Ct. 438,
443-444, 75 L.Ed. 844 (1931).

13. The Gulkana is frozen over approximately six months out of
the year. Stipulation of Facts, filed November 21, 1984, at
p. 7. However, it is well established that climatic changes
rendering a waterbody non-navigable on a seasonal basis do
not preclude a finding of overall navigability. Oregon v.
Riverfront Protection Ass'n., 672 F.2d 792, 795 (9th Cir.

1 1982); North Dakota ex rel. Bd. of Univ. and School Lands v.
2 Andrus, 671 F.2d 271, 277-278 (8th Cir. 1982) rev'd on other
3 grounds sub nom. Block v. North Dakota ex rel. Bd. of Univ.
4 and School Lands, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d
5 840 (1983). Thus, in light of the above finding that the
6 Gulkana is navigable when not frozen over, it is not
7 necessary for the court to decide whether evidence of ice
8 use can be admitted to prove navigability. The court would
9 observe, however, that the holding of the Ninth Circuit in
10 Alaska v. United States, 754 F.2d 851 (9th Cir.), cert.
11 denied, 106 S.Ct. 333 (1985), would appear to preclude
12 admission of evidence of ice use.
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