

APR 13 1995

D E P A R T M E N T O F T R A N S P O R T A T I O N

UNITED STATES COAST GUARD

JURISDICTIONAL DECISION

FOR

SCOTTIE CREEK

Ref: (a) D17(oan) memo 16591 of 6 Mar 95  
(b) Bureau of Land Management memo of 22 Sep 94  
(c) Federal Highway Administration ltr of 2 Feb 94

1. As Commander, Seventeenth Coast Guard District, I find that the body of water known as Scottie Creek, from the Canadian border to its junction with the Chisana Creek, is not a navigable waterway of the United States for the purpose of asserting independent Coast Guard jurisdiction.

PHYSICAL CHARACTERISTICS

2. Scottie Creek is located in the headwaters of the Tanana Creek in eastern Alaska. The Creek is 50 miles long, and flows southwest from its source in Canada to its junction with the Chisana River near Northway, Alaska. It is 12 river miles from the Canadian border to the junction of the Chisana River. The average depth at mean high water is approximately 7 feet. The Creek varies in width from 60 feet up to a maximum of about 150 feet in some bends. The gradient is less than 1 foot per mile. There are a number of obstructions from deadfalls and beaver dams. References (a)-(c) have more data on the physical and hydrological characteristics and uses of Scottie Creek.

HISTORICAL AND PRESENT USE

3. References (b) indicates that Scottie Creek was historically used by local residents for subsistence purposes. There is speculation that boats may have been taken up the Chisana River and Scottie Creek to a possible former trading post ("High Cache") where traders may have bartered for furs. The evidence of such use is anecdotal and unclear.

4. Today, the only clearly documented use of Scottie Creek is in support of subsistence hunting and fishing by local residents. There is no evidence of present commercial use.

ELEMENTS OF NAVIGABILITY

5. Per 33 CFR §2.05-25, navigable waters generally include:

(a) Territorial seas of the United States;

APR 13 1995

Subj: JURISDICTIONAL DECISION FOR SCOTTIE CREEK

(b) Internal waters of the United States that are subject to tidal influence;

(c) Internal waters of the United States not subject to tidal influence that:

(i) Are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage.

6. Scottie Creek is not part of the territorial sea of the United States, nor is it tidally influenced. Therefore, an analysis of navigability must focus on the highway of commerce test of 33 CFR §2.05-25(a)(3)(i).

7. In deciding navigability issues, courts have held:

Those Rivers be regarded as public navigable Rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The *Daniel Ball*, 77 U.S. (19 Wall.) 557, 563 (1870); The *Montello*, 78 U.S. (11 Wall.) 411; *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *State of Alaska v. United States*, 7854 F.2d 851 (9th Cir. 1985). A river's use need not be without difficulty, extensive, or long and continuous" for the Creek to be a highway for commerce. *Oregon v. Creekfront Protection Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982)(portion of the Mackenzie River found navigable when used to transport "thousands of logs," even though shallow areas and sand bars made the transport difficult).

8. The Supreme Court further held:

And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes of trade or travel on water.

*The Daniel Ball*, *supra*, at 563.

Subj: JURISDICTIONAL DECISION FOR SCOTTIE CREEK

9. The test for determining navigability has required the Courts to define commerce. The Ninth Circuit Court of Appeals has recently held that commerce includes commercial river rafting and guiding services. This decision involved the lower 30 miles of the Gulkana River in southcentral Alaska. On average, the river there is 125-150 feet wide and only 3 feet deep. However, since the 1970's it has been possible to take guided fishing and sight-seeing trips. The industry uses 20 to 24 foot long aluminum powerboats and 12 to 15.5 foot inflatable rafts. The court stated:

A **substantial** (emphasis added) industry of such transportation for profit emerged in the lower Gulkana, which industry today employs approximately 400 people. To deny that this use of the River is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity.

*State of Alaska v. AHTNA*, 891 F.2d 1401, 1405 (9th Cir. 1990), cert. denied, 495 U.S. 919 (1990).

10 The jurisdictional test in 33 C.F.R. §2.05-25 differs from the test of navigability used by the courts in that the commerce must be substantial. Substantial commerce is defined by the Bridge Administration Manual, COMDTINST M16590.5A, paragraph 3.F.4.b.(2) as commerce which is particularly important in an economic sense to the area served by the waterway. Previously, we had defined substantial commerce to be more traditional uses of the waterways, such as moving cargo by barge or motor vessel. But, in *AHTNA*, *Id.*, the court decided that a guided fishing and sight-seeing industry employing 400 people was substantial commerce. Even if the commercial recreation industry on a waterway employs fewer than 400 people, it may be susceptible to greater employment, and therefore be navigable. In Alaska few waterways support traditional commerce, but many Creeks or creeks can support commercial guiding and rafting services.

11. The next question is whether this commerce is **interstate or foreign** commerce. Courts have previously held that interstate commerce includes the use of intrastate waters by interstate travelers for water related recreational purposes. *United States v. Byrd*, 609 F.2d 1204 (7th Cir, 1979). See also: *Loving v. Alexander*, 548 F.Supp. 1079 (D.C. Va. 1982) aff'd 745 F.2d 861 (4th Cir. 1984)(recreational use of a waterway by out of state travelers would affect interstate commerce); *United States v. Kaiser Aetna*, 408 F.Supp. 42 (D.C. Hawaii, 1976) aff'd in part, rev'd in part on other grounds, 548 F.2d 378, rev'd on other grounds 444 U.S. 164 (1979)(use of marina by non residents with recreational vessels was legal equivalent of toll-charging channel or harbor, and was interstate commerce). Therefore, the carriage of out-of-state residents as passengers for hire by

Subj: JURISDICTIONAL DECISION FOR SCOTTIE CREEK

APP 13 1995

commercial white water raft outfitters constitutes interstate commerce. Thus, analysis of the commercial use of a waterway must include an analysis of whether that waterway can support commercial river rafting and guide services, as well as more traditional commercial vessel activity.

12. Applying these facts to the law, it appears that Scottie Creek is not currently susceptible for use as a highway for substantial interstate or foreign commerce in its natural or ordinary condition. Specifically, the shallow gradient, numerous obstructions, areas requiring portage, lack of accessibility and remote location render the Creek insusceptible, even for commercial river rafting and guide services. Portaging, while a possibility, would still not make Scottie Creek a commercially viable waterway.

13. Even where a waterway is not susceptible for use as a highway for substantial interstate or foreign commerce in its natural and ordinary condition, if, by reasonable improvements it may be rendered navigable, then the waterway is navigable even without the improvements being made. Whether improvements are reasonable is determined by balancing the cost of making the improvements against the need. The physical characteristics of the Creek would require considerable improvements throughout its length to make it susceptible to substantial commercial use, even by rafting and guide services. The cost of such a waterway project would be prohibitive. No known waterway improvement projects are planned for Scottie Creek.

14. The need for such improvements is virtually nonexistent. There are no towns or industries on or near the Creek that could benefit from improvements that might open up the Creek for a customary commercial use. Even if the Creek could theoretically be used by commercial guide or rafting services, the remote location, and non-accessibility of the area make that use highly unlikely, especially in light of the high improvement costs.

15. Therefore, in balancing the apparent high cost of improvements against the minimal need for such improvements, Scottie Creek does not lend itself to reasonable improvements for commercial use.

#### COAST GUARD JURISDICTION

16. Scottie Creek is not part of the territorial sea or subject to tidal influence. It is not used in its natural and ordinary condition as a highway for substantial interstate or foreign commerce, and is not susceptible for such use with reasonable improvements. Therefore, I determine Scottie Creek not to be navigable waters of the United States from the Canadian border to the junction of the Chisana River, and the Coast Guard shall not assert independent jurisdiction with regard to the waterway.

APR 13 1995

Subj: JURISDICTIONAL DECISION FOR SCOTTIE CREEK

17. This determination solely represents the opinion of the Coast Guard as to the extent of its own jurisdiction, and does not represent an opinion of the extent of the jurisdiction of the United States or any of its other agencies. This determination is subject to modification should additional information be discovered or other conditions change. This determination does not affect the jurisdiction of the Coast Guard pursuant to the Federal Water Pollution Control Act.



R. T. RUFÉ, JR.

Rear Admiral, U.S. Coast Guard  
Commander, Seventeenth Coast Guard District

Copy: CG MSO Valdez  
CG MSO Juneau  
COMDT (G-LMI)