

Summary of Oregon Court of Appeals Decision on John Day Litigation

Decision of the Oregon Court of Appeals (COA) dated May 11, 2005, concerning:

- The navigability of the John Day River at River Mile 21 (near McDonald Ferry) and RM 135 (near Burnt Ranch), and
- An alleged trespass that occurred at these two locations

The following quotes present the major points of the COA's findings/decision:

- Page 2
"We agree with the trial court that the segments of the John Day River at issue here were navigable at the time of statehood and, therefore, title to those segments passed to the State of Oregon at statehood. We also reject defendants' and intervenor's other assignments of error."
- Page 5
"Thus, the trial court properly denied the Schlechts' motions to dismiss and for a directed verdict."
- *"On de novo review, we examine the record independently, although we give "great weight" to the trial court's credibility determinations and to those factual findings that turn on witness credibility."*
- Page 8
"On this record, there is compelling direct evidence of the river's capability to carry travel and trade by means common at the time of statehood."
- Page 9
"We conclude that, in its ordinary condition in 1859, the John Day River as it passes the defendants' properties would have provided ample capacity for travel and trade by means of dugout canoes."

With regard to Chee Lumber Company - *"Although defendants and intervenor question the accuracy of that report, the success of the 1925 drive is persuasively corroborated by the fact that, between 1927 and 1929, the Chee Lumber Company purchased 5,440 acres of timberland in the headwaters area -- an investment that it would not likely have made without some assurance of the ability to transport that timber downstream."*

"We thus conclude, on de novo review, that, as of 1859, the segments of the John Day River at issue here were susceptible to both travel and trade by craft common to that time. Our review of the hydrologic conditions and of the evidence of post-statehood use persuades us that the John Day was indeed capable of sustaining at least three types of commerce at the time of statehood: Native American canoe-based trade, log runs, and sternwheeler traffic."

"Given the disjunctive nature of The Daniel Ball test, our determination that the John Day was susceptible to use for travel and trade at the time of statehood is conclusive."

- Page 10

"Although the evidence in this record of actual use of the John Day River in the prestatehood period is indirect and circumstantial, we find that evidence to be ultimately persuasive as to "actual use" in the lower John Day River as it passes the Schlechts' and Simantels' properties, but not as it passes the Miani defendants' property."

- Pages 11-12

"Intervenor argues that the foregoing evidence is insufficient to prove actual use of canoes on the John Day by indigenous peoples before statehood--and, indeed, that the lack of physical or recovered historical evidence of such use disproves such use. Intervenor is correct that, while there is considerable, indeed uncontroverted, evidence that Native Americans used dugout canoes on rivers throughout the Columbia River basin, there is no direct evidence in this record of such use on the John Day River specifically. For example, there is no archeological evidence in this record establishing the presence of canoes in the John Day River channel up to 1859."

"Nevertheless, the absence--as opposed to circumstantial and inferential--proof is hardly dispositive."

- Page 12

"On balance, we find that plaintiffs proved "actual use" in the vicinity of the Schechts' and Simantels' properties, but not in the vicinity of the Miani defendants' property."

"In sum, we find that (1) at the time of statehood, the John Day River was susceptible to navigation as it passes defendants' properties; and (2) at the time of statehood, the John Day River was actually used for travel and trade as it passes the Schlechts' and Simantels' properties, but not as its passes the Miani defendants' properties. Accordingly, the State of Oregon held, and holds, title to the land lying below the ordinary high water mark as it passes the real property owned by the Simantel, the Schlechts, and the Miani defendants."

Organization/Content of Findings/Decision

The 17 page document is organized as follows:

- Page 2 - Court decision; presentation of undisputed facts concerning characteristics of John Day River flow.
- Page 2-3 - Brief discussion of lack of evidence of federal actions prior to statehood concerning transfer of bed and banks to defendants
- Page 3 - History of litigation; discussion of Marion County Circuit Court (MCCC) trial and decision

- Page 4 - Discussion of Schlechts' request to have claims dismissed at MCCC trial; discussion of alleged trespass at RM 21
- Page 5 - Discussion of COA's basis for considering evidence; discussion of basis for title navigability
- Page 6 - Discussion of federal test for navigability; susceptibility; distinction between "actual" and "possible" uses
- Page 7 - Discussion of ease of use; canoe use and the floating of timber as appropriate modes of transport to establish navigability
- Page 8 - Discussion of "ordinary condition"; presentation of key question; who were expert witnesses at MCCC trial; susceptibility.
- Page 9 - Discussion of irrigation impacts in reducing flow; susceptibility of the river to use in 1859 by dugout canoes; post-1859 uses: John Day Queen I and II; Twickenham Ferry; Chee Lumber Company
- Page 10 - Discussion of Chee Lumber; "actual" v. "possible" Indian use of waterway
- Page 11 - Discussion of Indian activities at statehood; evidence/lack thereof of Indian use of canoes on waterway
- Page 12 - Discussion of evidence/lack thereof of Indian use of canoes on waterway; COA findings/decision
- Pages 13-17 Footnotes