

The Federal Land Rights Series Edition 13 - Will Yukon Charley ride again? -

Examining the significance and the legal implications of the navigability concept beyond its role in the establishment of boundaries of fee title

Even before the Corps of Discovery, under the leadership of Lewis & Clark, revealed that no Northwest Passage through the heart of North America existed, during the first decade of the Nineteenth Century, it was understood by the leaders of the young American nation that a vast network of rivers and streams drained the continent, offering not only convenient avenues of exploration, but more importantly potential channels of commerce. A course of legislative action which would facilitate the population and development of the continent had to be charted, the wild western lands were to be divided and turned over to private ownership, but those innumerable private acquisitions would be of minimal value if they were not readily accessible, which meant that public routes of travel, open to commerce of every variety, would need to be opened through the dense and rugged landscape lying to the west of the colonial states. Over the coming decades countless public roads would eventually be constructed of course, in those locations where they were required, typically tracing ancient Native American trails, but before such thoroughfares could be built it was essential to utilize the existing natural channels of aquatic travel, and indeed even before 1800 pioneers were doing so, establishing population bases in the fertile river valleys of what was then remote frontier territory, today comprising states such as Ohio, Kentucky & Tennessee. As early as 1787, recognizing the need to formally acknowledge the legitimacy of the activities of the westward bound settlers, the US Congress acted, declaring that "all navigable rivers ... shall be deemed to be and remain public highways", when composing the legal parameters that would outline the settlement and governance of the Northwest Territory, from which the states of the Great Lakes region would later be carved. The die had been cast, the legal impact of those momentous words was destined to cascade down through the decades, shaping the course of subsequent legislation and litigation, at both the federal and state levels. Under this powerful congressional mandate, the concept of navigability as a legal force would not be limited to the coastal areas of our country, pursuant to this congressional stipulation public rights associated with navigability were set to penetrate the continent to its full depth and breadth. However, the navigability concept, while serving as a foundational factor in the establishment of essential public rights, was also on track to become a source of immense and enduring controversy, in a wide variety of ways, which as our featured case reveals, has yet to reach an end.

Since the early Nineteenth Century the navigability concept has functioned as the principal legal factor governing the determination of fee title to land submerged beneath rivers and lakes in our country, because the presence of navigability signifies publicly held bedland title, which does not arise in the absence of navigability. Our national government has always recognized that land covered by navigable waters within US territorial areas is federally held in trust for future states, so given the presence of navigability for title purposes in any particular location, fee title to such land formally passes from federal hands to each state when that state achieves statehood. Accordingly, federal boundary surveys completed by the GLO/BLM and other federal agencies have always acknowledged that submerged lands might subsequently be identified as navigable bedlands and thereby be confirmed as state property, through the establishment of meander lines segregating any such potentially navigable watercourses from the abutting upland. Unfortunately however, while federal land surveyors can visually perceive potentially navigable

streams and lakes which they encounter, and can document their physical location, they have never had any means of conclusively determining the presence or absence of title navigability, so even upon completion of the original boundary surveys and the arrival of statehood for any given state, the navigability determination process, for bedland title purposes, stands incomplete. Thus the undocumented and unconfirmed navigability status of natural watercourses all across our country, most acutely apparent in the newer western states, became highly problematic during the late Nineteenth Century, requiring intensive judicial attention, and remained a source of serious contention throughout the Twentieth Century (FN 1). Even the existence of a single federally approved definition of navigability, to be applied as the sole test of title navigability in all locations nationwide, which has been in place for nearly 15 decades, has not ended the controversy over navigability in the fee title context (FN 2). Nonetheless, as we shall learn, for every dispute that has occurred over fee bedland title, scores of legal battles have taken place which have involved many other vital legal aspects of the immensely broad navigability concept. In our featured case, title navigability is unquestioned, so the fact that the streambed constitutes fee property of the state stands uncontested, yet the presence of navigability, rather than providing repose, has precisely the opposite effect, engendering conflict and producing a major collision in the jurisdictional context, involving rights, powers and legal authority arising at both the state and federal levels.

During the 1970s, the allocation of land in Alaska, between federal, state and private interests, was a matter of intensive congressional focus, culminating in 1980 with the enactment of the Alaska National Interest Lands Conservation Act (ANILCA) which resulted in the creation of numerous federal reservations, intended by Congress to protect many millions of acres in the gigantic and spectacular Land of the Midnight Sun. Among those reservations is the Yukon-Charley Rivers National Preserve (YCR) which is administered by the National Park Service (NPS) and through which several rivers pass, including the Nation River, a major tributary of the mighty Yukon River. In 2007, John Sturgeon, a typical hunter, was confronted by NPS personnel while navigating the Nation River and informed that he was violating NPS regulations, because he was using a hovercraft, and under the relevant federal rules no such vehicles can be used within the YCR boundaries. Sturgeon evidently knew the location of the reservation's outer boundaries and understood that he was well within those lines, in addition he was aware that ANILCA authorizes NPS to patrol YCR and enforce federal regulations, so presumably he was not surprised to encounter federal officers in that area. Sturgeon also apparently knew however, that fee title to navigable riverbeds in Alaska is held by the state, as opposed to being federally held, so he declined to acknowledge that his activities could be federally restricted, asserting that he was immune to federal rules and authority, as long as he stayed within the corridor formed by the riverbed, which he insisted was state property, and was therefore not under federal control. Thus although Sturgeon realized that he was inside the outer boundaries of YCR, he maintained that his hovercraft was not subject to federal regulations, because he was engaged in an activity which was entirely acceptable under state law, and he was not on federal property, so he felt fully justified in challenging NPS authority to limit his use of the river. NPS personnel evidently decided not to arrest or otherwise penalize Sturgeon on that occasion and saw fit to let him off with a warning, but he was apparently unsatisfied and felt compelled to have his right to travel upon that river in his hovercraft judicially validated, so he elected to file an action in federal court, claiming that his use of the river had been unjustifiably impeded, on the grounds that federal regulatory authority did not extend to the navigable riverbed, although it applied to the land on both sides thereof (FN 3).

Sturgeon's knowledge of riparian title and boundary law enabled him to visualize the invisible fee boundaries between the submerged state bedland and the federally reserved upland, which ran along the riverbanks, and whether or not those boundaries carried the legal significance which he attributed to them would determine the fate of his legal action. In his perception, the navigable streams within the reservation effectively sliced the YCR into numerous pieces, separated by navigable river channels, so he sought to frame the litigation as a boundary enforcement scenario, and his objective was a judicial decree limiting NPS jurisdiction to the land lying outside those riverbed boundaries. In response, the US made no suggestion that Alaska does not hold fee title to the riverbed, nor that Sturgeon's activities did not take place in the river corridor, yet federal personnel did not share Sturgeon's perspective regarding the controlling force of riparian fee boundaries. The federal legal team took the position that NPS regulatory authority applies to the river even though Alaska holds fee title to the riverbed, because the US holds a legal interest in any water flowing in any navigable river, essentially maintaining that the fee ownership status of the riverbed was irrelevant, and that the boundaries of the state's fee bedland title were powerless to prevent federal control over activities involving the river. Thus the federal position emphasized that the riverbed was not the legal equivalent of a typical upland highway, because it bore navigable water, which represents an appurtenant feature of the overall landscape, intrinsically connected to the abutting upland, and clearly essential to the conservation objectives which ANILCA was designed to achieve. On that basis the federal team charged that Sturgeon's use of the water, although it took place on Alaskan land, rather than shielding him from federal authority as he believed, rendered him subject to federal regulatory jurisdiction over all navigable waters within the YCR, without regard for the presence or the location of any fee title boundaries. In 2013 the US prevailed in federal district court, as the federal judge awarded victory to the federal team by means of summary judgment without conducting a trial, finding that no factual issues requiring resolution existed, while deeming Sturgeon's position to be legally untenable (FN 4). In 2014, unconvinced that the federal position was legally sound, Sturgeon took his case to the US Court of Appeals for the Ninth Circuit (COA) only to experience defeat once again, as the COA fully upheld the lower court ruling against him (FN 5). Undaunted, Sturgeon opted to persist, elevating the matter to the Supreme Court of the United States (SCOTUS) where both of those prior decisions were struck down in 2016 (FN 6).

The fundamental question to be resolved, the High Court recognized, was a simplistic one, the riparian boundaries of the fee bedland title undisputedly held by Alaska, having been introduced and legally supported by the presence of navigability, either did or did not operate to halt federal regulatory jurisdiction at the riverbank and render NPS administrative authority inapplicable to the corridor formed by the river, within the area comprising YCR, which had been congressionally selected for federal protection. In all such matters, SCOTUS was cognizant, judicial determination of the intent of Congress holds the answer, ultimately dictating the outcome of any litigation which is centered upon the meaning or purpose of any particular Act of Congress, such as ANILCA. In this instance however, legitimate uncertainty and contention resulted from the fact that it was unclear whether or not federal legislators were conscious that navigable streams, under Alaskan ownership, existed within the outer boundaries of YCR at the time of its creation, and further, it was unclear if in 1980, when creating that federal reservation, Congress intended to effectively negate the operation of state law with regard to navigable riverbeds, by mandating federal regulatory control over them. Turning to the specific language of

ANILCA, and observing that nothing appears therein explicitly defining jurisdiction or authority over navigable waters that flow through zones which have been designated for federal protection, SCOTUS noted that the statutory text expressly limits federal regulatory authority to "public land", which is defined for ANILCA purposes as consisting of all lands and waters in which the US retained a title interest when that statute was enacted. Given that fee title to the submerged bedland was clearly held by Alaska and not by the US, this statutory language gave rise to the question of whether or not the US held and retained some form of interest in the flowing water itself, that could be legitimately characterized as a title interest, in which event the US could prevail, based upon the parameters of federal control expressly set forth by ANILCA. SCOTUS was also very well aware however, that demonstrating a federal title interest in the water at issue is not the only means through which federal authority over navigable rivers can be legally established, because federal powers are distinct from property rights, and boundaries of property rights are not always synonymous or coincident with boundaries of jurisdictional authority. So rather than upholding the COA ruling favoring the federal position SCOTUS sent the litigation back to the COA for further attention and deeper thought, essentially requiring the COA to set forth genuinely solid legal justification supporting the application of summary judgment in favor of the US.

Upon contemplating Sturgeon's position once again, at the direction of SCOTUS, the COA rejected it for a second time, adopting the premise that "land" can include interests in water, in accord with the definition of "public land" which is specified in ANILCA (FN 7). After accepting that premise, which was favorable to NPS, the COA acknowledged, in response to Sturgeon's insistence that his rights are controlled solely by the fee title status of the riverbed, that neither the federal government nor the state holds a fee title interest in flowing navigable water, yet this conclusion held no benefit for Sturgeon, since ANILCA contained no stipulation that the requisite federal title interest, facilitating and enabling federal jurisdiction, must be a fee title interest. The COA then proceeded to adopt the concept of appurtenant water rights, rather than the federal navigation servitude, as the primary foundation for the federal victory, since Sturgeon's problematic activity was obviously a genuine form of navigation, which the federal navigation servitude was intended to promote and support rather than constrict or eliminate, cognizant that invoking that servitude as a means of preventing his navigational use of the river could be viewed as paradoxical. The appurtenant water rights concept was also somewhat incongruent with regard to this particular scenario however, because it relates to consumptive water usage and not to the use of water for purposes of travel, but that concept was nonetheless deemed by the COA to dovetail satisfactorily with the environmental protection scheme envisioned by Congress when ANILCA was created. In the eyes of the unified 3 member appellate panel, Sturgeon's right of navigation, despite being legitimate in principle, under both state and federal law, was effectively constricted by the power of the environmental protection mandate embodied in ANILCA, which motivated and facilitated the creation of numerous federal reservations such as YCR, for comparable purposes nationwide. As the members of the COA observed, albeit from varying personal perspectives, the presence of a federal interest of any kind in the river corridor, however that interest might be legally classified or denominated, relating to either the bedland or the flowing water itself, was legally sufficient to support NPS enforcement of federal regulations pertaining to activities like those of Sturgeon within that state owned corridor:

"ANILCA balanced ... environmental values ... with the social and economic needs of the state of Alaska ... regulation by the Park Service serves ... environmental values ... if the US retains an interest ... the land is public to the extent of the interest ... the federal government retains an interest in at least some otherwise non-public lands ... as relevant here, on waters subject to the jurisdiction of the US ... Alaska took title to the riverbed ... but lands submerged beneath inland waterways are distinct from the waterways themselves ... unappropriated waters are necessary to accomplish the purpose for which the reservation was created ... the US has ... implicitly reserved appurtenant waters, including appurtenant navigable waters ... the US had an interest in such waters ... ANILCA's definition of public land applies ... water rights may be essential ... providing sufficient protection for the national interest in scenic, natural, cultural and environmental values ... Congress specified in ANILCA that Yukon-Charley shall be managed for ... environmental integrity ... including streams, lakes and other natural features ... to protect habitat ... ANILCA specified that it did not ... supersede, modify or repeal existing laws ... or regulatory functions in relation thereto ... water cannot be owned ... but may become a property right ... the US has an interest by virtue of the reserved water rights doctrine ... title to an interest in Alaska's navigable waters is in the US."

Having found that the federal position was legally supportable from a title perspective, despite the fact that the US clearly held no fee title interest in the riverbed, and having determined on that basis that NPS regulatory jurisdiction under ANILCA did not stop at the fee title boundaries formed by the riverbanks, as Sturgeon had proposed, the COA could have rested and left the revised COA decision to be reviewed again by SCOTUS in the title context alone. Mindful however, of the breadth of constitutionally mandated federal power over navigation, Appellate Circuit Judge Nguyen, who was the author of both the 2017 COA opinion quoted above and the 2014 COA opinion which SCOTUS deemed to be inadequate in 2016, was not convinced that proper resolution of the matter at hand resided in the realm of title law. She felt that the issue being litigated should actually be adjudicated in accord with another perspective, so she took the highly unusual step of composing a concurring opinion, as an augmentation of her own prior opinion quoted above, which she had written on behalf of the COA as a whole. In so doing, she wisely invoked the overarching principle that property rights of all forms are always subject to the inherently superior force of constitutionally generated governmental powers, thereby arriving at the same ultimate destination by means of an alternative legal pathway:

"A reserved water right is the right to a sufficient volume of water ... this case has nothing to do with that ... it is about the right to regulate navigation on navigable waters ... that is a Commerce Clause interest and should be analyzed as such ... under the navigational servitude ... the US cannot have title to such an interest ... but ... the Supreme Court has referred to navigable waters as the public property of the nation ... the federal interest is not a property right at all, it is a federal power, paramount to proprietary rights of ownership ... the pre-eminent authority to regulate resides with the federal government ... proper exercise of the Commerce Clause is not an invasion of any property rights ... ANILCA expressly left in place federal jurisdiction to regulate navigable waters ... states may regulate their waterways, to the extent that their regulations do not conflict with federal ones ... the purpose of the Submerged Lands Act was not for the federal government to retain exclusive jurisdiction over navigation ... but to retain concurrent jurisdiction ... states may regulate ... navigable waters, so long as they do not encroach on the federal commerce power ... Alaska's navigable waters are not federal lands in the usual sense, because the

riverbeds by default now belong to Alaska. It is the Commerce Clause that permits federal regulation of navigable streams, regardless of who owns the land beneath."

As can readily be seen, the legal conundrum which produced this bifurcated 2017 COA opinion arose from the logical difficulties encountered when trying to fit water into a definition of land. In reality, as Judge Nguyen realized and poignantly communicated, merging such intrinsically variant title interests as those associated with land and water into a single statutory definition, as Congress did when composing the ANILCA text, introduced ambiguity which essentially made controversy inevitable. As she well understood and propounded on this occasion, the Commerce Clause of the US Constitution obviates the need for a federal title interest to be present to support federal jurisdictional authority in the regulatory context, and as she accurately noted, Congress expressed no intention to negate any existing federal regulatory powers when formulating ANILCA, so in her view no judicial need to extend the language of ANILCA focusing upon title interests to this dispute over watercraft usage existed. Judge Nguyen was astute enough to comprehend that federal authority over navigation is legitimately based in the extensive federal regulatory powers emanating from our Constitution, which are not dependent upon any canons of property law, and which therefore frequently extend beyond boundaries that demarcate the limits of either public or private title to real property. Thus in her eyes, the ANILCA language was not the sole factor to be considered in resolving the matter at hand, it was simply an additional component of federal law, signifying affirmative congressional intent to support environmental preservation, and from that viewpoint she concluded that strained or convoluted interpretations of the meaning of words such as "land", "water", "title" and "interest", could not justifiably control the outcome of the Sturgeon litigation. Her stance plainly symbolizes the rise of environmental concerns as important factors in conflict resolution involving land and water rights, along with a corresponding decline in judicial emphasis on support for economic development, which quite ironically the federal navigation servitude was formulated to foster, during a now long bygone era, when judicial support for national economic expansion was crucial to national public interests, marking a judicial trend which accords with the modern federal land rights standards that are embodied in the Federal Land Policy and Management Act of 1976.

The 2017 COA position on the Sturgeon scenario emphasizes the fact that neither Alaska nor any other state has any power to authorize any use of navigable waters which is detrimental to the federal interest therein, highlighting the primacy of federal control over navigable waters, despite the presence of the fee title interest held by each state in such a riverbed and each state's corresponding jurisdictional authority, derived through the federally approved Equal Footing Doctrine (FN 8). In the eyes of the COA, Sturgeon could not prevail under ANILCA since he could not prove that Alaska held title to the flowing water along with the riverbed, to the exclusion of any federal interest in the water, nor could he prevail even if the statutory parameters of ANILCA were not in play at all, or were wholly disregarded, because use of all such waters was subject to federal control long prior to ANILCA, due to the navigable status of the stream for federal jurisdictional purposes, navigability for such purposes being distinct from, and not dependent upon, navigability for purposes of title determination. Sturgeon lost because his view of the relevant legal factors that were in play was too narrow, being excessively focused on real property boundaries, while neglecting to recognize that the controlling force of federal authority is constrained only by jurisdictional boundaries, as opposed to boundaries of title. The deficiency of his position resided in his failure to comprehend the broad scope, and the deeply

entrenched dominance, of federal powers associated with navigable waters, which neither state bedland ownership nor any other non-federal bedland ownership can restrict. Perhaps most importantly, the COA concluded that Sturgeon's reliance upon ANILCA was misplaced, holding that ANILCA was not designed to strip federal officers of their constitutionally mandated regulatory authority or jurisdiction, to the contrary, it represents an enhanced federal emphasis on maintaining the environmental integrity of certain areas, yet that view regarding the controlling force of ANILCA, in relation to historically established federal navigability law, remains subject to SCOTUS approval at this point in time, April 2018. Since the question of whether existing case law reinforces or contradicts this 2017 COA ruling is still in play, pending a decision on the potential need for further review by SCOTUS, which has been requested by Sturgeon, who has proven to be an admirably diligent adversary and has not yet conceded defeat, we are presented with an ideal opportunity to explore the historical role of navigability, which illustrates that its influence extends far beyond the realm of boundary and title law.

SCOTUS first squarely addressed the interaction of state and federal law in connection with the presence of navigability in 1824, in the context of regulatory authority and jurisdiction with regard to commercial ship traffic, when a state statute expressly bestowing upon only certain specified individuals the right to operate steamboats on navigable waters within New York, to the exclusion of all others, was challenged. The state law in question evidently created no opportunity for others to qualify as steamboat operators, so it was not a law targeted at protecting the public by creating a professional licensing procedure, in order to eliminate incompetent operators. Instead the state statute at issue simply outlawed the operation of steamboats by anyone other than a handful of named people, so it represented a de facto exertion of exclusive regulatory authority over navigation on the part of New York, and put in place a preferential limitation, controlling who was and was not qualified to operate steamboats on navigable waters in that state, which waters had previously been consistently regarded as public, and therefore open to anyone who could afford to build or acquire a steamboat. Thus the fundamental legal question to be resolved was whether or not individual states possess the capability to create and enforce laws that stand in defiance of federal principles and standards pertinent to the regulation of commercial activity on navigable waters. While confirming that operating a steamboat is a genuine form of commercial activity, analogous to vehicular traffic upon upland highways, SCOTUS adhered to the principle of federal law supremacy, with regard to navigational activity that crosses state lines, declaring the relevant state law to be an unconstitutional limitation upon the valuable public right of navigation and an unjustifiable assertion by New York of sole jurisdiction over commercial activity. Upon observing that the contested state law stood in contradiction to federal regulatory authority over commerce, SCOTUS struck it down, thereby freeing others to engage in steamboat navigation in New York, along with those who had been granted an exclusive franchise to provide such services by state legislators:

"The (federal) power of regulating commerce extends to the regulation of navigation ... it does not stop at the external boundary of a state, but it does not extend to commerce which is completely internal (entirely within a single state) ... the power to regulate commerce ... has no limitations but such as are prescribed in the Constitution ... the power ... is exclusively vested in Congress ... the laws of New York, granting ... the exclusive right of navigating waters with steamboats, are in collision with Acts of Congress ... which being made in pursuance of the Constitution, are supreme, and the state laws must yield to that supremacy ... the

commerce power of Congress is complete ... no part of the power of regulating commerce that is vested in Congress can be exercised by a state ... commerce undoubtedly is traffic, but it is something more, it is intercourse ... the word commerce comprehends navigation and a power to regulate navigation ... completely internal commerce of a state then, may be considered as reserved for the state itself, but ... the power of Congress may be exercised within a state ... the Constitution is the supreme law of the land, a statute which is inconsistent with the Constitution is a nullity ... the law of the state of New York ... is repugnant to the Constitution and void." (FN 9).

Recognizing that the young nation needed federal support for navigability, SCOTUS served notice on this occasion that the scope of federal authority associated with navigability is extensive, it does not end or stop at state boundaries, because navigability must be legally acknowledged as a key aspect of commerce, as well as an aspect of admiralty law and title law, making federal regulatory jurisdiction applicable wherever navigability exists in any form. Having adopted the position that the presence of navigability in any given location brings federal law into play, the stage was set for innumerable controversies to arise going forward, as Congress proceeded to make navigability a major factor in legislation of many divergent kinds, pertaining to the vast range of subjects that encompass aquatic activities. Most early Nineteenth Century contention associated with navigability in our country was centered around the right to either install or remove obstructions to river traffic, which due to national expansion were being erected in countless locations, as dams and bridges, of both public and private origin, built for a variety of purposes, appeared virtually everywhere across the national landscape. In addition, the navigability concept offered an opportunity for those wishing to use streams passing through private lands as routes of transportation to obtain public support for their desires, by asserting that any particular stream they wished to use was legally navigable, and thus could not be blocked, redirected or diverted by any private party, including the owners of the lands situated along such streams. Thus as settlers pushed ever farther westward, far beyond the colonial states, making river traffic ever more prevalent, the navigability concept rose to prominence, as a convenient legal mechanism, potentially enabling public rights to penetrate any private estate traversed by any useful watercourse. Controversy was also soon destined to emerge over the extent to which varying consumptive uses of navigable waters should be publicly supported or limited, based on either the ownership status of the submerged land or the inherently public nature of water itself. The myriad of topics in which the navigability concept plays a vital role resulted in the development of multiple definitions of navigability at both state and federal levels, each designed to accommodate differing needs or to resolve litigation stemming from differing circumstances. Although defining and evaluating navigability for title purposes would prove to be quite problematic, the legal consequences of navigability determination for a great many other purposes presented grounds for even broader contention, and in such cases a federal interest would typically prove to be an essential factor.

Just 5 years later in 1829 however, SCOTUS declined to support an assertion that issues arising from the presence of navigability always require federal involvement and can be resolved only in federal courts, as opposed to state courts. In 1822, Delaware passed a law authorizing the Black Bird Marsh Company (BBCM) a corporation which evidently owned a substantial amount of tideland in that state with frontage upon the Delaware River near the Atlantic Ocean, to build dams in order to permanently close creeks in the tidal zone that flowed through the BBCM property, presumably for land reclamation purposes, despite the fact that those creeks were undisputedly navigable public highways under state law. For unspecified reasons, Willson, who

was apparently a typical ship owner and was among those making commercial use of the Delaware River, destroyed at least one dam built by BBCM, leading that company to file an action against him in state court, in which he was found guilty of violating the state law that had authorized the construction of that dam. He responded by turning to SCOTUS, seeking a decree stating that he had a valid right to destroy any such dams, without regard for any state statutes, because they represented illegal obstructions to navigation, wrongly blocking legally navigable tributaries of a plainly navigable river. SCOTUS expressed its agreement with Willson, regarding the basic legal principles associated with navigability and the public status of all navigable waters, yet proceeded to reject his position, refusing to strike down the state court ruling against him, and refusing to deem the Delaware statute which had facilitated the construction of the dam in question to be an unconstitutional infringement upon federal authority over all navigable waters, but not before concluding with a stern warning, reminding the litigants that Congress holds the ultimate authority over all commercial aspects of navigability:

"Navigable streams are waters of the US ... the constitutional power of Congress to regulate commerce includes navigation ... undoubtedly ... the Act (of the Delaware Legislative Assembly) so far as it authorized a dam across the creek was repugnant to the Constitution of the US, but ... plaintiffs sustain their right to build a dam across the creek by the Act ... a navigable stream ... of right ought to have been a common and public way in the nature of a highway ... the constitutionality of a state law was questioned and the decision (of the state court) has been in favor of the party (BBCM) claiming under such law ... plaintiffs were authorized to construct their dam ... it stops a creek and must be supposed to abridge rights ... but this abridgement is an affair between the government of Delaware and its citizens ... we do not think the dam ... can be considered repugnant to the power to regulate commerce ... if Congress had passed any Act, in execution of the power to regulate commerce, the object of which was to control ... navigable creeks in which the tide ebbs and flows ... we should feel not much difficulty in saying that a state law coming in conflict with such Act would be void. But Congress has passed no such Act." (FN 10).

Escalating tension and public consternation regarding the problematic interaction of state and federal law pertaining to navigability became increasingly evident over the ensuing years, as demonstrated by another landmark federal case which was adjudicated in Ohio in 1838. The Ohio Legislature enacted a law in 1834 approving the construction of dams upon the Maumee River, a navigable stream which accommodated steamboats, in order to divert water into a proposed canal. Spooner, who owned land lying along that river and relied upon it as a means of commercial transportation, objected to the dam and canal project, on the grounds that damming the river and directing the water into the canal represented a violation of federal navigability law, which Ohio legislators therefore had no authority to mandate or support, insisting that the canal project was injurious to his property rights. After conducting an extensive review of the legal ramifications of navigability with respect to state sovereignty, focusing upon the Equal Footing Doctrine, the federal Circuit Court rejected Spooner's position, concluding that Ohio had the authority to execute the dam and canal project, despite its impact upon Spooner's federally established right to utilize the navigable river. The central question to be judicially evaluated and resolved was whether the construction of dams and canals, altering the natural condition of a navigable watercourse for a publicly beneficial purpose, represents an unjustified obstruction to navigation, as Spooner maintained, or an improvement to navigation, which therefore accords with federal law authorizing navigational improvements. Decisions such as this one paved the way for countless subsequent public projects which extended the

navigability concept beyond natural bodies of water to artificially created channels of commerce, necessitating the formulation of variant definitions of navigability, associated with structures which both obstruct and enhance navigation at the same time, but for several decades, just as in this instance, judicial approval of such improvements was invariably accompanied by the substantial caveat that the natural stream's navigable character must be preserved:

"... the principles involved are deeply interesting ... for the first time raised for judicial examination ... the people of the state (Ohio) formed a Constitution and it was sanctioned by Congress ... but in regard to ... navigable waters the state Constitution purports to make no alteration ... navigable waters ... shall be common highways and forever free ... by an Act of Congress of 1796 ... all navigable rivers ... shall be deemed to be and remain public highways ... but ... a sufficient supply of water (to operate the canal) may be drawn from the river without injury to its navigation ... navigable rivers in Ohio are common highways ... a right derived not from the Legislature of Ohio but from a superior (federal) source. With this right the Legislature cannot interfere ... they cannot, by any law which they may pass, impede or obstruct navigation ... but this does not prevent the Legislature from improving navigation ... they may build a dam ... with a lock ... as not materially to obstruct navigation ... individuals have been authorized by law to erect dams ... but always upon the condition that locks shall be constructed ... so as not to detract from the utility of the stream as a navigable watercourse ... the Act authorizing the Erie & Wabash Canal ... is not to ... injure the interests of navigation ... this canal is designed as a channel of commercial intercourse ... diversion of a portion of the water of a navigable stream effected by means of a dam ... for the purpose of supplying a canal, designed for the improvement of navigation, cannot be viewed as an obstruction ... or a public nuisance." (FN 11).

As the latter portion of the Nineteenth Century played out, the subject of governmental control over the broad spectrum of both public and private rights associated with navigable waters became an ever more frequent source of controversy, making it clear that no single definition of navigability could cover the wide variety of scenarios in which navigability issues appear. During this period, the well known "navigable in fact" definition was judicially adopted, and became the legal standard for bedland title determination, but that highly simplistic definition did nothing to resolve ongoing conflict over how the presence of navigability was to be ascertained under widely varying factual circumstances. Moreover, the great majority of cases involving navigability were not title actions, they resulted from the construction or proposed construction of either public or private structures, which constricted, reduced or eliminated the capacity to navigate in some manner, raising many questions about the legal impact of artificial structures within navigable waters, which required navigability to be judicially evaluated as a critical factor in balancing public and private rights. During the 1890s, Congress put in place laws that were designed to protect navigation from unauthorized structural impediments while supporting a vast array of public projects which involved major alterations to navigable waterways, and in many instances the diversion of navigable waters from natural channels into artificial channels, thereby extending the navigability concept far beyond what had been congressionally envisioned a century before (FN 12). In 1897, SCOTUS once again addressed navigability in the context of a dam, which was built to fully and permanently close off an allegedly navigable channel in Louisiana, and in so doing SCOTUS took this opportunity to emphasize the importance of locational specificity with respect to navigability determination. In addition, here SCOTUS poignantly noted the power of federal involvement in any public project, arising from federal funding, which introduces federal authority and control, effectively

creating a federal land rights interest, for the protection of any such federal investment, while also acknowledging that a high level of ambiguity often attends legal application of the navigability concept, citing the "qualified navigability" status of the stream in contention:

"Plaintiffs ... sued in order to perpetually enjoin the building by ... Louisiana of a dam ... the dike, if carried out, would obstruct the navigation of Bayou Pierre ... which stream the court recognized as being navigable in a qualified sense ... Bayou Pierre leaves the Red River a short distance below the city of Shreveport and ... re-enters the river just above the town of Grand Ecore ... the dam was a public work jointly undertaken by ... the US and Louisiana ... part of a system of levees ordered by the state for the prevention of overflows ... the US ... has contributed toward the cost of construction ... the upper part of Bayou Pierre, in which the dam in question is situated, is not navigable ... Bayou Pierre has been frequently navigated by steamboats (downstream) but from the point in question it has never been navigated ... it is nothing but a high water outlet, going dry every summer ... the claim is that the court below erroneously decided a federal question ... (involving) the reserved authority of the general government over all navigable streams ... but ... the stream in question was not navigable ... at the particular place where the dike was proposed to be ... it is argued that ... impeding the water at that point would obstruct the flow of water and injure the navigable stream below ... but ... erection of the dam bore no relation to ... navigation of the stream ... Bayou Pierre ... has no channel ... it spreads out into shallow lakes over a wide expanse ... the qualified navigability existing in Bayou Pierre ... is wholly uninfluenced by water leaving the Red River ... the decree ... is adequately sustained ... the dam was constructed in conformity to the Act of Congress." (FN 13).

Numerous attempts have been made, typically by individual states, to stretch or otherwise unjustifiably leverage the concept of navigability for tangential or marginally relevant purposes, and a major case in the navigability arena which required the attention of SCOTUS in 1929 provides an ideal example of such a scenario. The rapid development and extensive growth of Chicago presented a serious waste disposal problem in Illinois, and state sponsored efforts to resolve that issue during the late Nineteenth and early Twentieth Centuries proved futile. In 1908 the US filed an action against the Sanitary District of Chicago (SDC) seeking to end use of the Chicago River and the Illinois River Canal, which had been constructed in accord with an 1822 Act of Congress, as a route for sewage disposal, by limiting the amount of water extracted from Lake Michigan to supply the Illinois drainage system, and after 17 years of litigation, the controversy reached SCOTUS where the US finally prevailed in 1925. Having been vanquished in federal court however, the SDC, a state agency, immediately sought and obtained a federal permit under the Act of 1899, and continued to use massive amounts of water extracted from Lake Michigan to flush Chicago sewage down the canal system, across Illinois and into the Mississippi River. Wisconsin, supported by other Great Lakes states, then spearheaded an effort to prevent such extraction of lake water, motivated by the fact that the excessive amount of water pumped by Illinois had observably lowered the water level of the lake, and took legal action against Illinois, requiring SCOTUS to address the matter again. The central issue for determination was the allegedly unjustifiable damage to the navigable capacity of Lake Michigan, brought about by the extremely consumptive Illinois sewage system, and that issue operating in tandem with the resultant artificial augmentation of the volume of the Chicago River made navigability key to the outcome. In awarding victory to Wisconsin and shutting down the Illinois waste disposal operation, SCOTUS determined that although Congress possesses paramount constitutionally based authority to regulate any and all aspects of water

usage which relate to navigation, it has no authority to approve any non-navigational water usage under the Commerce Clause of the federal Constitution, thereby rendering the federal permit that was held by Illinois incapable of supporting the illicit waste disposal process in which that state was engaged:

"The exact issue is whether Illinois and the SDC ... have injured riparian and other rights of the complainant states ... defendants assert that such a diversion is ... interstate commerce ... the complaining states reply that ... regulation of interstate commerce under the Constitution does not authorize the transfer by Congress of any of the navigable capacity of the Great Lakes ... to the Mississippi Basin ... the Secretary of War issued a permit in 1925 ... it authorized SDC to divert water ... complainants contend that the permit allows a diversion ... not in regulation of commerce ... support for the permit rests upon ... preserving navigability ... in the Chicago River ... Congress had and exercised the power to prevent injury to the navigability of Lake Michigan and other lakes and rivers ... it is further argued ... that while the power of Congress extends to the protection and improvement of navigation, it does not extend to its destruction or to the creation of obstructions to navigable capacity ... Congress ... may adopt any ... control of navigation ... it may not arbitrarily destroy or impair the rights of riparian owners ... the diversion here ... is for purposes of sanitation ... outside the power confided by Congress to the Secretary ... under the Act of 1899, the Secretary of War could not permit ... withdrawal of lake water merely to aid ... in disposing of sewage ... to get rid of the sewage of Chicago ... is a state purpose, not a federal function ... withdrawals of the water ... for the purpose of taking care of sewage ... were not justified by any control Congress had attempted to exercise or could exercise in interstate commerce ... some flow from the lake is necessary to keep up navigation in the Chicago River ... but that amount is negligible ... beyond that negligible quantity ... the Secretary's permit ... produced a violation of the complainants rights ... they are entitled to a decree ... bringing that violation ... to an end ... it therefore is the duty of this Court ... to compel the reduction of the diversion ... and thus to restore the navigable capacity of Lake Michigan." (FN 14).

16 years later however, SCOTUS was far less receptive to the suggestion that congressional authority over navigation is limited to activities which enhance the usefulness of navigable waterways, more broadly interpreting the scope of the federal navigation servitude, when adjudicating a case which resulted from military activity prior to World War II. Mason Creek was a navigable tidewater stream, about 5 miles long, which emptied into Willoughby Bay near Hampton, Virginia, and the upper portion of that creek formed the boundary between the Hampton Roads Naval Air Station and a large tract owned by Commodore Park (CP) which was evidently a property development firm. CP intended to develop some of the land bounded by the creek, and therefore viewed that navigable watercourse as a highly valuable property asset, providing an aquatic connection between the CP property and the bay. In 1940 however, the US military reservation was expanded, per congressional authorization, by condemning land lying along both sides of the lower portion of the creek, and federal engineers determined that the creek had to be eliminated. The bay was dredged, to make it deep enough to safely land large planes on the water, and the dredged material was used to bury the creek, so that runways and hangars could be built where the creek had once been. Per this federal plan, the lower portion of the stream, between the CP property and the bay, was piped below the surface, making aquatic travel between the CP property and the bay impossible. CP responded by filing an action seeking compensation for the loss of that navigable channel, and initially prevailed, but the US chose to appeal the financial award to CP, and took the matter to SCOTUS, where it was struck down. SCOTUS held that the shoreline, between the lines of high and low tide upon any

navigable stream, like all other navigable bedland, despite being owned in fee by CP under Virginia law, was covered by, and is always subject to, the federal navigation servitude, so the entire bedland portion of the CP property, up to the high water line of the creek, was subject at all times to the superior right and authority of the US to control all activity within any such streambed. In denying any monetary award to CP, SCOTUS indicated that the loss of the useful capacity of any navigable waterway is not a compensable taking, because no land owner can successfully defy a congressionally authorized federal decision to relocate, or to simply remove, a navigable watercourse, since no land owner has any right to insist that a navigable body of water must remain physically unaltered forever, emphasizing full federal control over all navigable streams, even to the extent of their complete elimination:

"respondent's ... land between high and low water marks (of the creek) and its riparian rights of access to the navigable waters (of the bay) both were subordinate to the (federal) government's plenary authority over navigable waters ... the district court held that the entire project had no substantial relation to navigation or commerce ... the Circuit Court of Appeals ... held that the depositing of the dredged material in the creek was not in aid of navigation ... respondent's property was always subject to a dominant servitude, it did not have a right to have this navigable stream remain fixed and unaltered ... closeness to navigable waters does not detract from the government's absolute power in the interests of commerce to make necessary changes in a stream ... an owner of land adjacent to navigable waters ... has no private riparian rights of access ... for which the government must pay ... we are asked to hold that ... the deposit of the dredged material in Mason Creek bore no real or substantial relation to commerce or navigation ... the Circuit Court held that ... the deposit in Mason Creek was not related to commerce or navigation. We cannot agree ... the fact that purposes other than navigation will also be served could not invalidate the exercise ... of congressional power ... all the waters affected were navigable ... the Constitution entrusted to Congress the responsibility of determining what obstructions may or may not be placed in such waters ... navigable waters may be altered or obstructed ... and the (federal) program accomplished ... congressional ... powers are broad enough to justify one unified program for the connected body of waters ... having the power under the Commerce Clause to obstruct navigation ... the government was authorized to deposit in Mason Creek ... there is power to block navigation at one place to foster it at another ... this blocking may be done by altering the stream's course ... the judgment is reversed." (FN 15).

As we have seen, the blockage of navigable streams, when dams were built thereupon by private parties or by local public works officers, typically operating under state authority, presented a major legal issue, which had been judicially addressed during the Nineteenth Century, but the erection of dams for broader national purposes, such as flood control, reclamation through irrigation and the production of hydropower, under federal authority, introduced additional legal issues during the Twentieth Century. A federal project involving the erection of a dam, inhibiting or reducing the usefulness of a navigable river channel as a public highway, "forever free" and open to commercial activity, produced further controversy during the 1960s, directly analogous to the Commodore case reviewed above, over the compensation to be federally paid to a riparian property owner whose land was federally taken to facilitate that project. Rands was the owner of a substantial tract in Oregon, situated upon the south bank of the Columbia River, and he anticipated selling his land to Oregon, per an agreement he had with state officials, which envisioned the creation of a port in that location. Those plans were disrupted however, when the construction of the John Day Dam was authorized by Congress in that same location, leading to federal condemnation of the Rands estate, which the US then deeded to Oregon, since the

state functioned as a partner in that federal project. Pursuant to the federal acquisition process, Oregon obtained the land at a fraction of its market value, because the federal judge adjudicating the condemnation action determined that no compensation was due to Rands for any riparian rights associated with his land, enabling the US to acquire the Rands property at minimal cost. Rands protested that ruling, and the Court of Appeals for the Ninth Circuit agreed with his position, holding that additional compensation was due to him, commensurate with the riparian nature and value of his land, just as he insisted. Citing the *Commodore* case however, SCOTUS rejected the assertion of Rands, and struck down the Ninth Circuit ruling in his favor, on the grounds that the US had no need to acquire any riparian rights that were associated with the Rands property, because the US already held superior rights and powers, fully covering all of the proposed federal activities and structures within the navigable riverbed, long prior to the condemnation, in the form of constitutionally mandated congressional authority over all navigable waters:

"The Commerce Clause confers a unique position upon the (federal) government in connection with navigable waters, the power to regulate ... all navigable waters ... they are the public property of the nation ... subject to all requisite legislation by Congress ... this power to regulate confers upon the US a dominant servitude ... exercise of this power is not an invasion of any property rights ... the damage sustained does not result from taking property from riparian owners ... but from the lawful exercise of a power to which the interests of riparian owners have always been subject ... the US may change the course of a navigable stream ... or destroy a riparian owner's access to navigable waters ... even though the market value of the riparian owner's land is substantially diminished ... the navigational servitude of the US does not extend beyond the high-water mark ... but ... the government had dominion over the water ... and cannot be required to pay ... a riparian owner who had no right to appropriate the current ... we are dealing with the constitutional power of Congress to completely regulate navigable streams ... to require the US to pay ... would be to create private claims in the public domain ... state law may give the riparian owner valuable rights of access to navigable waters ... but ... those rights and values are not assertable against the superior rights of the US ... respondents urge that the government's position subverts the policy of the Submerged Lands Act, which confirmed ... the state's title to lands beneath navigable waters ... reliance upon that Act is misplaced ... the US retained its navigational servitude ... for constitutional purposes ... paramount to ... rights of ownership (of bedlands or riparian properties) ... the Act left congressional power over commerce and the dominant navigational servitude of the US precisely where it found them ... the Ninth Circuit ... in holding that the government had taken from respondents a compensable right of access to navigable waters ... erred." (FN 16).

As we have learned, there are multiple legal definitions of navigability, serving a variety of purposes, and among the most important distinctions between the definition of title navigability and other navigability definitions, which pertain to federal jurisdiction, is the artificial alteration factor. While no human alteration can make a naturally non-navigable body of water navigable for title purposes, there is no such limitation upon other applications of navigability, both artificially enhanced and artificially created bodies of water can be legally navigable for many purposes, although they may well be non-navigable in the bedland title context. This distinction often proves to be crucial in litigation, because the federal navigation servitude is not limited to locations in which title navigability exists, it applies to all "navigable waters of the US", acknowledging the scope of congressional authority, and focuses upon the water itself as a legal interest, independent of the title status of the submerged land, as a federal case arising in the

Houston Ship Channel (HSC) demonstrates. Several major corporations, such as Chevron, Exxon and numerous others, operated pipelines crossing beneath the HSC, but in 1998 the Port Authority of Houston (PAH) and the US Army Corps of Engineers, functioning as project partners, announced that those pipelines would need to be relocated, to accommodate a congressionally approved improvement plan, widening and deepening the HSC. After relocating their pipelines as directed, at a combined cost of over \$100,000,000, the pipeline companies filed an action charging that because PAH is a Texas agency PAH was legally required, under Texas law, to bear that cost, and asserting that the companies were therefore entitled to reimbursement covering their relocation expenses from PAH. In 2002 a federal district court agreed, upon finding that Texas law did in fact require PAH to bear the full project cost, but in 2004, citing the then 180 year old Gibbons case reviewed previously herein, the Court of Appeals for the Fifth Circuit vacated that lower court decision, and informed the parties that state law was irrelevant to this scenario, since the costs in question resulted from a federal project involving a navigable waterway. Because PAH acted as a federal partner in the completion of the congressionally mandated project, PAH was legally entitled to the powerful protection provided by the federal navigation servitude, the Fifth Circuit held, which prevents any costs associated with federal navigability improvement projects from being passed on to either federal agencies or their local partners, such as PAH:

"The Rivers and Harbors Act of 1899 prohibits construction in navigable waters ... for more than 100 years the Corps has regulated ... pipelines and other structures beneath navigable waters ... the owners (of the pipelines) filed this action, seeking a declaration that ... the Port's not paying was an unconstitutional taking ... the district court ruled that Texas law ... establishes the Port's cost liability ... the federal navigation servitude cannot be trumped ... the Corps has the authority, under the federal navigation servitude, to require owners to pay relocation costs ... Congress derives the power to control navigation from its power to regulate commerce ... all navigable waters are under the control of the US ... although the title to the shore and submerged soil is in various states ... it is always subject to the servitude ... in favor of the federal government ... this servitude operates to the exclusion of any competing or conflicting right ... the navigational servitude includes the right ... to determine what will be deemed an obstruction to navigation ... in 1899 Congress delegated this power ... to the Secretary of War (now the Secretary of the Army) ... the district court ruled that Texas law applies ... because the Port is a creature of the state ... Texas law does not apply ... the owners bear the relocation costs ... because the channel is a navigable waterway of the US ... consistent with the federal navigational servitude ... the Corps properly exercised its navigational servitude over the pipelines ... the cost of relocating ... a pipeline ... covered by the navigational servitude must be borne by the pipeline owner." (FN 17).

As our review of these several historical judicial decisions and pronouncements has shown, the federal navigation servitude is a most formidable component of federal law, capable of effectively nullifying property rights and rendering fee title boundaries moot, when properly invoked (FN 18). Since the legal force and effect of river boundaries within a federal reservation is central to this conflict over who has the right to authorize or to control Sturgeon's aquatic activities, its worthy of note that the federal navigation servitude, although limited to submerged land, is not subject to the same locational limitations which apply to bedland title derived through navigability. As is generally understood, the navigability status of any body of water for bedland title purposes, unlike other forms and aspects of navigability, is established at the moment of statehood, so even if all of the water subsequently disappears, during an avulsive event, either by

vanishing altogether or by cutting an entirely new channel and flowing elsewhere, leaving an abandoned channel, a sound case can often be made that the fee bedland title of the state remains in the extinct channel, although the formerly submerged land has long been devoid of water or has become a mere slough or backwater channel. However, while fee bedland title is not legally dependent upon the presence of any water, other public rights of usage, stemming from navigability and existing below the fee level, plainly are dependent upon water and are therefore mobile, having the capacity to move along with the water as its locus changes, whether by natural or artificial causes, so those rights of usage shift position with the flowing water, and exist wherever it flows at any point in time. The federal navigation servitude, being an attribute of the navigability status possessed by the water, rather than being linked to fee bedland title, is among those highly mobile rights, thus no event which alters a navigable stream's location, however sudden or dramatic that event may be, can deprive its flowing waters of their usefulness to the public, or remove those waters from federal jurisdiction, they remain protected even though they no longer occupy their original channel, in which the fee title held by the state still resides, if avulsive river movement has occurred. When viewed from this perspective, the 2017 COA ruling against Sturgeon, and the explanatory words of Judge Nguyen, penned in support of the federal position restricting his ability to travel the full length of the Nation River by any means of his choosing, free of any federal interference or control, may appear to be quite logical and fully justified, but at this juncture that ruling stands subject to either approval or disapproval by SCOTUS.

Sturgeon's opportunity to legally navigate the Nation River in his hovercraft currently hangs by the proverbial thread, which will be cut if SCOTUS either declines to consider his position again, or reconsiders this matter and then opts to affirm the 2017 COA ruling against him, but if SCOTUS deems his case worthy of an additional investment of the High Court's time, and finds that his position holds merit, or that it has still not been properly addressed, then a variety of outcomes are possible (FN 19). Should SCOTUS find the 2017 COA opinion and decision to be satisfactory, and deem it most appropriate to leave the result as it now stands without comment, Sturgeon will have learned in the wake of his defeat that federal regulatory authority over admiralty, commerce, recreation and all other navigational uses of water, is controlled by congressionally established jurisdictional boundaries, not fee title boundaries, such as those which segregate the navigable Alaskan riverbeds within the YCR from the abutting federally protected upland. Should SCOTUS choose to review and uphold the 2017 COA position, we will learn whether judicial interpretation of the detailed language of ANILCA, or the presence of a federal title interest in the water forming the river, or comprehensive federal authority over all forms of navigational activity and obstruction, represents the most convincing element of this controversy to the High Court Justices, and therefore the soundest foundation supporting this federal victory in their eyes. In essence, Judge Nguyen has concluded that ANILCA itself, by mandating protective measures such as noise abatement in support of federal habitat preservation efforts, resulting in restrictions on the use of motorized watercraft, amounts to a congressionally approved navigational obstruction, legally banning aquatic travel of the type that Sturgeon desires to engage in. Will SCOTUS agree that ANILCA represents a non-physical legal obstruction to free navigation, which has been approved and put in place by Congress, thereby enabling the federal navigation servitude to control the outcome, even though that servitude exists to allow the US to preserve and enhance navigation, rather than to eliminate or prevent it, verifying that the federal navigability servitude can be leveraged by the US even when the US itself is the entity obstructing free passage? Obtuse though it may appear, as we have

seen, such a ruling would not be unprecedented, and would accord with the judicial trend of recent decades, which has been toward support for strengthened federal control over both the use and the fate of natural watercourses and artificial waterways alike, which are navigable for regulatory purposes, and are thus ultimately under congressional control, wherever they may be located (FN 20).

Footnotes

- 1) For a concise yet very comprehensive review of principles and standards relating to title navigability see "Basic Law of Water Boundaries", a federal publication originally created in 1975 in conjunction with the BLM Cadastral training program and updated by BLM surveyor F. A. Hardt in 2009, which provides excellent historical context and perspective on riparian title and boundary issues, and thus provides a fine launching pad from which to embark upon a study of this fascinating sector of the law.
- 2) For the most recent US Supreme Court (SCOTUS) ruling regarding title navigability, demonstrating that intense contention over the presence or absence of navigability for fee bedland title purposes persists, even in the Twenty-First Century, see *Pacific Power & Light (PPL) v Montana* (229 P3d 421 - 2010, reversed by SCOTUS, 565 US 576 - 2012) which provides an excellent example of a high stakes controversy over the application of title navigability to multiple rivers. For the most recent federal appellate court decision on the same topic, see *North Carolina v Alcoa Power Generating* (Court of Appeals for the Fourth Circuit, 853 F3d 140 – 2017) review denied by SCOTUS (2018 WL 942461) addressing a highly comparable controversy set upon the Yadkin River, and illustrating that federal standards for title navigability evaluation which have been established by SCOTUS, as opposed to state standards, rules or laws pertaining to navigability, are applicable in every state and must be utilized for title navigability determination in every state, including the colonial states, as well as the western states that were created from the public domain.
- 3) The origin of Sturgeon's knowledge of riparian boundary and title law is unknown, presumably it resulted from consultations with an attorney, since there is no indication that he was a real estate agent, a land surveyor or an attorney, and there is no indication that he ever engaged or consulted a land surveyor.
- 4) See *Sturgeon v Masica* (2013 WL 5888230). The exact location of the encounter between Sturgeon and NPS officers is unknown, but the case text suggests that it took place near the confluence of the Nation River and the Yukon River, as Sturgeon was preparing to travel upstream on the Nation River. Sturgeon was evidently not engaged in hunting when he was intercepted by NPS personnel, and he was not accused of violating any hunting laws, so presumably all of his activities aside from boating were entirely lawful, he was accused only of using an unauthorized vehicle to access his chosen hunting grounds. Exactly where he intended to hunt is unknown, and whether he was a meat hunter or a trophy hunter or both is unknown as well. Alaska consistently supported Sturgeon's position and initially partnered with him in this litigation, but the state was judicially dismissed from the action, since no direct challenge to the rights, the title, or the jurisdiction of the state was raised, leaving Sturgeon and his legal counsel to engage directly with the federal legal team.

5) See *Sturgeon v Masica* (768 F3d 1066 - 2014). Having been vacated by SCOTUS, this COA opinion now holds no legal value, but of course it remains useful for informational purposes. For a highly analogous recent Ninth Circuit ruling, also centered upon allegedly disruptive use of a federally protected area, see *River Runners v Martin* (593 F3d 1064 – 2010). In that case, the COA declined to strike down an NPS decision to allow motorized watercraft on the Colorado River within Grand Canyon National Park. At first glance, that ruling might appear to contradict the position taken by the COA on the *Sturgeon* scenario, in which motorized travel on a watercourse passing through federally protected lands was once again the source of controversy. In reality however, these superficially opposite judicial positions do not represent conflicting rulings, they are actually in complete harmony, because in both cases the validity of the motorized travel activity itself was not the focal issue under adjudication, the question to be resolved by the COA in each instance was the presence or absence of federal authority to either permit or ban such activities, and on each occasion the COA found the objections to the exertion of federal authority to be without merit. In addition, in the course of deciding that prior case the COA confirmed that Congress has the authority to end all use of motorized watercraft on the relevant portion of that navigable river. Unlike *Sturgeon* however, the plaintiffs in that prior case presented no argument regarding the title status of the relevant riverbed, and Arizona did not participate in that litigation in any manner, so neither riparian boundaries nor riparian title played any direct role in the outcome.

6) See *Sturgeon v Frost* (136 S Ct 1061 - 2016). SCOTUS determined that in 2014 the COA had neglected to fully analyze the relevant statutory language, regarding the meaning and limits of "public land", which is subject to federal regulatory authority under ANILCA, so SCOTUS sent this case back to the COA, providing limited guidance but without ruling upon any of the decisive issues. In so doing SCOTUS also put the "reasonable use" standard in play and expressly identified "state sovereignty" and "federal authority" as issues to be addressed by the COA.

7) See *Sturgeon v Frost* (872 F3d 927 - 2017). The meaning of the highly ambiguous phrase "public land" has been a matter of contention in numerous historical cases, and its meaning is very definitely not always the same. This phrase can include all land in which any public interest exists, or it can be limited to federal properties as opposed to state, county or city properties, or it can represent only a limited subset of all federal land and federal land rights, and that latter meaning is the one which is typically in play in federal land rights litigation. In most federal cases, as in the *Sturgeon* case, the phrase "public land" becomes a source of controversy because it appears in scores of federal statutes, and in all such instances, as both SCOTUS and the COA fully understood, its meaning must be judicially evaluated, determined and applied in a manner which accords with the context and the intent of the relevant federal law. Alaska continued to provide documentary support for *Sturgeon's* position at this stage of the action, although the state was no longer participating as a litigant by this point in time.

8) In the riparian title context, the long federally acknowledged Equal Footing Doctrine provides the basis for state ownership of navigable bedlands, the relevant principle being that each subsequent state is to be endowed, upon being elevated from territorial status to statehood, with the same fundamental attributes of sovereignty that have been possessed by the colonial states since their origination, which includes ownership, in trust for the public, of the beds of natural navigable bodies of water. The Equal Footing Doctrine has controlled the legal status of navigable bedland title in our country since the Nineteenth Century, although it was not

statutorily adopted by Congress until 1953, when it was incorporated into the Submerged Lands Act, more than 100 years after being judicially instituted by SCOTUS.

9) See *Gibbons v Ogden* (22 US 1 - 1824). An even earlier New York case, *Palmer v Mulligan* (2 Am Dec 270 - 1805) has been cited as the first American ruling of substance focused primarily upon the subject of inland river navigability. The published text of that case features separate opinions set forth by 4 of the 5 Justices of the Supreme Court of New York, revealing fundamental divergence of judicial thought on navigability issues, in the course of reaching a 3 to 2 decision in favor of the owner of a new dam on the Hudson River against the owner of an older dam on the same river. Thus began an endless debate over the interaction between public and private land and water rights that are associated with natural inland watercourses, which was destined to spread from the original states across the continent. Judicial disagreement pertaining to jurisdiction over aquatic travel, in the context of interaction between state law and federal law, persists even today, as can be observed in *Herr v United States Forest Service (USFS)* (865 F3d 351 - 2017). About 95% of the frontage upon Crooked Lake in northern Michigan is federally protected land, being part of the Sylvania Wilderness, administered by USFS, while the other 5% of the lake's perimeter is not federally owned, and the Herrs owned one of several properties situated along that privately held lakefront. USFS asserted the authority to regulate all use of the federal portion of the lake, and sought to curtail the Herrs use of the entire lake, but the Herrs insisted that their boating activities were not subject to federal regulations, even upon the portion of the lake lying well within the federal property boundaries, pointing out that such activities are not illegal under Michigan law. By a margin of 2 to 1, and reversing a lower court ruling, the Court of Appeals for the Sixth Circuit decided that the Herrs were right, USFS had no authority to prevent them from engaging in any form of travel upon any portion of the lake's surface, even far inside the federal boundary, demonstrating that property boundaries do not constitute the primary factor in determining jurisdictional limits. Along with all of the relevant land, both federal and private, the lake was subject to state law rather than federal law, the majority found, because the federal land comprising the Wilderness was not undisposed public domain, it was acquired by the US to create the Wilderness, pursuant to an Act of Congress, which expressly preserved existing property rights that had been established under state law, concluding on that basis that the right of surface usage covering the entirety of the lake, held by the Herrs under Michigan law, had been implicitly approved by Congress.

10) See *Willson v Black Bird Creek Marsh* (27 US 245 - 1829). Its noteworthy that on this occasion the High Court did not hold that a dam cannot be classified as an obstruction to navigation, SCOTUS held instead that this particular dam was adequately authorized at the state level and that such blockage or elimination of the navigable capacity of a particular stream was not in direct conflict with any existing congressional enactments or mandates. This approach, manifesting judicial deference toward state law authority, was destined to be overhauled with respect to control over navigability issues however, particularly with regard to what does or does not constitute an obstruction to navigation, as federal statutes focused upon preserving and enhancing navigability were subsequently put in place. As shown by *United States v Republic Steel* (362 US 482 - 1960) judicial perspective upon protection of navigable waterways changed dramatically over the 13 decade period that had elapsed since the Willson ruling by the end of the 1950s. In that case, by a majority of just 5 to 4, SCOTUS rejected the assertion that only structures could comprise obstructions to navigation under federal law and elected to deem water pollution to be a form of navigational obstruction as well, upon finding

that materials emanating from industrial plants operated by Republic and other corporations had settled upon the bottom of the navigable Calumet River in Illinois, markedly reducing its depth and thereby constricting its usefulness to commercial vessels. During the early Twentieth Century, federal courts had begun to leverage the navigability concept for a wide array of law enforcement purposes, as in cases like *The Scow No. 9* (152 F 548 - 1907) and *The Pile Driver No. 2* (239 F 489 - 1916) operators of vessels were convicted of violating federal law banning any impairment of navigation by deliberately dumping either sunken or floating detritus into harbors, but the 1960 Republic ruling represented a dramatic escalation in the scope and judicial application of the concept of navigability. The Republic case also played a major role in the arena of environmental law, as the dissenting Justices openly called upon Congress to strengthen federal water pollution standards, and over the ensuing years Congress responded, revamping the Federal Water Pollution Control Act of 1948, now known as the Clean Water Act, in 1972.

11) See *Spooner v McConnell* (22 F Cas 939 - 1838). Throughout the remainder of the Nineteenth Century and well into the Twentieth Century, navigability operated as a central factor in the judicial determination of the fate of thousands of dams and bridges, as *Delaware Railroad v Weeks, Secretary of War* (293 F 114 - 1923) illustrates. In 1919, pursuant to a 1917 Act of Congress, the US acquired fee title to a canal right-of-way in Delaware which was crossed by a railroad bridge, by which point in time both the canal and the bridge had been in use for several decades. When the US deemed the bridge to be an obstruction to navigation of the canal and ordered it to be demolished the railroad company filed an action seeking compensation from the US for the loss of the bridge, and a federal district court agreed, requiring the US to pay, but for only the portion of the bridge situated upon upland, not for the portion of the bridge located directly above the canal and supported by the bed of the canal. Noting that the canal at issue qualified as a navigable waterway for federal regulatory purposes, the federal judge explained that, "Congress has power over navigable waters for the purpose of regulating and improving navigation ... title to the submerged soil is always subject to a servitude in respect of navigation in favor of the federal government ... the power of Congress extends to the whole expanse of a navigable stream ... requiring alterations to a bridge to secure navigation ... is not a taking ... upland is not however, subject to the same rule ... compensation must be made for the upland". As the judge realized and informed the litigants, the existence of the federal servitude mandating the protection of navigation made it unnecessary for the US to pay for any federal demolition activity within the width of the canal itself, but if the US destroyed the bridge abutments standing outside the canal, then the US would have to pay the railroad, because the rights associated with the federal servitude reached no farther than the banks of the canal. Also with regard to the navigability status of those canals that are designed to accommodate transportation as well as irrigation, SCOTUS confirmed that such waterways are subject to federal regulatory control based upon navigability in *The Robert W. Parsons* (191 US 17 - 1903). On that occasion, a majority of 5 to 4 struck down a New York statute pertaining to the regulation of boats operated upon canals as an infringement upon federal authority, stating that "the only distinction between canals and other navigable waters is that they are rendered navigable by artificial means ... we fail to see, however, that this creates any distinction in principle".

12) Federal statutes demonstrating the capacity of Congress to control all usage of navigable waters were enacted during the 1890s, as 26 Stat 454 (1890) and 30 Stat 1151 (1899) effectively bestowed federal decision making authority over all governmental operations impacting

navigability upon the Executive Branch, specifically the Secretary of War, who was directed to base such decisions upon data and plans that had been created or approved by the Corps of Engineers. The latter statute represented an enhancement of the former, and underwent repeated modification before eventually being partially supplanted by subsequent Acts of Congress during the late Twentieth Century. The 1899 statute, commonly known as the "Rivers and Harbors Act" has been identified as the earliest federal legislative attempt to curtail water pollution, and thus stands as a now remote but noteworthy milestone in the evolution of federal environmental protection standards. Nonetheless, despite the legal force and effect of these and other comparable federal statutes, it is possible for a state, as a bedland title holder, to block a federal project under certain circumstances, as illustrated by *United States v Arizona* (295 US 174 - 1935). By means of the Boulder Canyon Project Act (45 Stat 1057) Congress provided authorization for the construction of Boulder Dam on the Colorado River, but in 1933 the Corps of Engineers decided to expand the project to include construction of Parker Dam, about 150 miles downstream, and the US began construction work there in 1934. Arizona authorities soon shut down the work at Parker Dam however, compelling the federal project team to seek support from SCOTUS. The US asserted that federal statutory law supported federal plans to dam the Colorado at multiple locations, but SCOTUS held that only the construction of Boulder Dam had been congressionally authorized. In so holding, SCOTUS informed the US legal team that "the Colorado between Arizona and California is navigable ... Arizona owns part of the riverbed ... the title of the state is held subject to the power granted to Congress by the Commerce Clause ... but no Act of Congress specifically authorizes the construction of Parker Dam ... the Act of 1899 forbids the construction ... until the consent of Congress shall have been obtained ... plaintiff maintains that the restrictions (in the 1899 Act) ... apply only to ... private parties, but no such intention is expressed (in the 1899 Act) and ... none is implied.". Arizona was right and thus prevailed, because in this unusual instance federal law operated against the federal project team, as the Act of 1899 prevented unauthorized federal construction activities, along with all other unauthorized navigational impairments.

13) See *Egan v Hart* (165 US 188 - 1897). The difficulties still attending accurate navigability determination for varying purposes during this era were yet again vividly displayed 3 years later in another case set in Louisiana (*Leovy v United States* - 177 US 621 - 1900) which like the *Egan* case resulted from the blockage by state officials of an allegedly navigable channel known as Red Pass, located in a coastal area amidst land obtained several decades earlier by Louisiana under the federal Swampland Act. SCOTUS deemed the channel in question to be non-navigable, upholding the right of Louisiana to close it on that basis, despite the fact that it was situated in the tidal zone near the mouth of the Mississippi River, and cited both the 1824 *Gibbons* case and the 1897 *Egan* case as support for the principle that under federal law navigability requires evidence of "commerce of a substantial and permanent character", a defining test which Red Pass was unable to meet. In so ruling SCOTUS also concluded that the federal navigation improvement statutes, put in place by Congress in the 1890s (cited in FN 12) did not represent congressional intent to exert total federal control over navigation, to the exclusion of all state level jurisdiction over navigable waters, citing the 1829 *Willson* case among others, for the proposition that federal and state authority over navigation constitute concurrent and locationally coincident rights and powers, which are not mutually exclusive. That same year, in *Scranton v Wheeler* (179 US 141 - 1900) SCOTUS observed that "navigable waters are the public property of the nation ... subject to an easement of navigation which the (federal) government can lawfully enforce" and explained that all rights of access to a navigable river channel, which

are associated with riparian properties are "held in subordination to the right of the (federal) government to improve navigation ... in due subjection to the rights of the public", meaning the public right to benefit from navigational improvements, which can result in the elimination of riparian rights that benefit one or more riparian properties. Thus SCOTUS established that federally authorized navigation projects which limit riparian access rights do not generate or support compensation to the riparian party for a taking, under the principle that all riparian properties penetrated by or abutting upon navigable waters are simply subject to such publicly beneficial restrictions at all times, and this ruling has been frequently cited as the judicial foundation of the modern federal navigation servitude.

14) See *Wisconsin v Illinois* (278 US 367 - 1929). This legal battle actually involved several states, as Michigan, Minnesota, New York, Ohio and Pennsylvania all sided with Wisconsin in deploring and attacking the lake water extraction practice adopted by Illinois, while Arkansas, Kentucky, Louisiana, Mississippi, Missouri and Tennessee all supported Illinois, because they wanted the diversion of the lake water to continue, for their own benefit. Ironically, none of these states focused upon the environmental component of the case, their concern was riveted upon water usage, so the litigation played out as a controversy over a state project augmenting the navigable capacity of a navigable watercourse for purposes that were not primarily targeted at, or expressly designed to achieve, enhancement of commercial navigation, to the detriment of another state or states. The downstream states apparently had no problem with the pollutants that were being conducted into the Mississippi River by Illinois, they evidently supported the position taken by Illinois because they liked the fact that the strong and steady flow of water transmitted through the Illinois drainage system, from the Great Lakes Basin into the Mississippi Basin, increased and stabilized the flow and volume of the Mississippi, making it an even more robust channel of commerce than it naturally is. Quite understandably however, SCOTUS was entirely unreceptive to their position and was unwilling to allow the Great Lakes to serve as a reservoir to be tapped for the support of an entirely separate watershed. The dominant power of Congress with respect to navigability, and the applicability of the principle of federal law supremacy to navigation impairment issues, were once again on display 7 years later, in *Miami Beach Jockey Club (MBJC) v Dern, Secretary of War* (83 F2d 715 & 86 F2d 135 - 1936). In that case, Florida sold a 200 acre portion of the bed of Biscayne Bay to MBJC in fee, so MBJC could build an artificial island and a resort, but Secretary Dern shut down the proposed development by refusing to approve a federal permit that would have enabled the project to obstruct the navigable waters of the bay. MBJC then filed an action asserting that state approval of the island development plan was legally sufficient to support the project, and that Dern's refusal of federal consent was unreasonable and legally unsupported. To the contrary however, the Court of Appeals for the District of Columbia upheld a lower court ruling against MBJC, confirming that under the Act of 1899, the Secretary, as the express delegate of Congress, has complete authority over all proposed construction upon navigable bedlands, thereby verifying that federal disapproval can negate state approval of any project which impacts navigability to any extent.

15) See *United States v Commodore Park* (324 US 386 - 1945). Judicial approval of federal plans involving the relocation of navigable river channels did not originate in the Twentieth Century however, as *Avery v Fox* (2 F Cas 245 - 1868) set in western Michigan illustrates. In that case, a federal Circuit Court approved a federal proposal to relocate a portion of the navigable White River, connecting White Lake, which was also navigable, to Lake Michigan, over the protest of a mill operator, whose facility, situated upon the existing natural river channel, was rendered

useless by the channel relocation plan, noting in so ruling that the river relocation project had been congressionally funded and therefore clearly carried affirmative congressional approval. Not all waterways of substantial acreage or volume that are physically open to the public and are useful for purposes of travel are legally navigable however, even under the broadest definition of navigability, as demonstrated by *United States v Ross* (74 F Supp 6 - 1947). A long lagoon, up to 200 feet in width, was created during the 1930s, paralleling the Mississippi River for several miles, when land along the west side of that river was excavated during the construction of a river containment levee in Lincoln County, Missouri. At an unknown point in time, an unspecified number of short channels were cut by unknown parties, connecting the lagoon to the river, essentially making it part of the river, and Ross, an enterprising boat owner, began using the lagoon as an estuary, where he loaded duck hunters onto his boat, before taking them out to choice hunting spots on islands up and down the river. During one such trip however, disaster struck and his boat sunk, leading the families of the drowned hunters to persuade a federal legal team to file an action against Ross in federal court, charging him with reckless and negligent boat operation resulting in fatalities upon navigable waters. A federal district court dismissed the action however, explaining that because the boat sunk in the lagoon rather than the river, the incident did not take place upon or within a navigable waterway, thus no federal jurisdiction over the incident existed.

16) See *United States v Rands* (389 US 121 - 1967). Although this SCOTUS ruling presents an especially clear and strong expression of the concept that the constitutionally founded federal navigation servitude represents both a "paramount" federal right and a transcendent federal power, of unlimited durability and efficacy, and has therefore been widely regarded as the leading modern case on that topic for half a century, it was not the first case in which SCOTUS supported the premise that federal authority, introduced by the presence of navigability, can render fee title to bedland meaningless and irrelevant. *United States v Gibson* (166 US 269 - 1897) which represents a particularly dramatic example of this principle in operation, was centered upon a claim of compensation for an alleged taking of riparian rights arising from the presence of a navigable watercourse abutting riparian property, just as in the *Commodore* and *Rands* cases. Gibson owned an island in the navigable Ohio River in western Pennsylvania, and she operated a farm with a typical boat landing, where vessels navigating the river regularly stopped to pick up her produce and take it to market. Her access to the river was abruptly terminated however, without her knowledge or consent, when Congress authorized federal construction of a dike cutting her island off from the main river channel, thereby making her boat landing inaccessible and useless. In upholding a lower court ruling approving the federal closure of the river channel in which Gibson's island was situated, and denying that her demand for compensation held any validity, SCOTUS stated that "all navigable waters are under the control of the US ... although the (fee) title to the shore and submerged soil is in the various states ... riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the (federal) government ... a servitude to which her property had always been subject.". As can readily be seen, the concept that "improvement" of navigation can include placing structures which actually inhibit the usefulness of navigable waters to riparian property owners, and can even include altering the natural location of a navigable channel, lends legitimacy in judicial eyes to federal exertions of control over every aspect of navigability, by acknowledging the discretion and approval of Congress as the sole factor determining whether or not any given federal decision impacting navigational activities is legally supportable.

17) See *Air Liquide v United States* (Court of Appeals for the Fifth Circuit, 359 F3d 358 - 2004) review denied by SCOTUS (543 US 918). It would be a mistake however, to conclude that the federal navigation servitude enables the US to prevail in every legal battle involving navigation, navigability, navigable waters or lands beneath or abutting navigable waters, as *United States v Miltenberger* (2015 WL 1186749) demonstrates. In 2014, Miltenberger was boating upon Umatilla Lake, which is part of the navigable Columbia River, as enlarged by a downstream dam, and he camped on the shore of an island in that lake. Miltenberger was aware that the island was part of the Umatilla National Wildlife Refuge, under the jurisdiction of the United States Fish & Wildlife Service (FWS) because the island was posted with signs, located along the high water line, alerting visitors to the island's protected federal status and notifying them that the island has been federally closed to public recreational use. When FWS officers arrived however, Miltenberger declined to agree that he was breaking any laws by camping at the water's edge and refused to leave, insisting that he had a right to camp in the shorezone, below the high water line, despite the fact that the interior of the island was closed to the public. FWS personnel disagreed and filed an action against Miltenberger, charging him with unauthorized use of federally protected land, maintaining that the spot where he had camped was within the federal refuge boundaries, and that his activities in that area were therefore clearly subject to FWS regulations. A federal judge disagreed however, and refused to find Miltenberger guilty, pointing out that the FWS team had neglected to present any evidence proving that the island in question was not subject to undocumented public easement rights, facilitating public access and usage, which had formed prior to the acquisition of the island by the US from Washington, during the time period when the island was in state ownership rather than federal ownership, and which rights were not extinguished when the island was federally acquired. As can be seen, not all federally held land merits the same status as land that has never left the federal public domain, because federal land rights can be limited by prior events, in the case of properties, such as this island, which were federally re-acquired after being removed from the public domain, leaving such federal lands subject to rights that developed and crystallized, often without documentation, at a time when the land at issue was unshielded from the accrual of such rights by any protective federal interest.

18) As we have observed, the federal navigation servitude has been variously described on many different occasions in the judicial context both as a right and as a power. When viewed as a right, it has also sometimes been described as an easement, making it noteworthy that the terms "easement" and "servitude" have long been closely linked, and have often been judicially regarded and treated as being virtually synonymous. Although technically an easement is just one of many forms of servitude, legal commentators have long associated the word "easement" with the beneficial or positive aspect of any given right, which is bestowed upon the dominant party or estate, while equating the word "servitude" to the burdensome or negative aspect of that same right, which is borne by the servient party or estate. In an early Nineteenth Century ruling involving the navigation of a particular ship along and across certain boundaries, Justice Story linked the origin of the word "easement" to common law and the word "servitude" to civil law, suggesting that no material or meaningful distinction exists between those terms (see *The Fame* - 8 F Cas 984 - 1822) and SCOTUS has subsequently utilized them accordingly on numerous occasions. However, SCOTUS has also repeatedly taken or endorsed the view that a state or condition of servitude can emanate from governmental power, becoming evident when such power is legitimately exercised, rather than arising as a real property right, and has defined

governmental imposition and enforcement of servitudes as an element of sovereignty, illustrating that "servitude" is a fundamentally broader term than "easement". This perception of the federal navigation servitude, as a component of the power that is constitutionally vested in Congress, accords with the fact that beyond the realm of land rights, in the broader field of human affairs, servitude typically signifies a state of subjection to a source of power, enabling servitudes to occupy a position of dominance when they are legally applicable in the context of land rights.

19) While speculation about results potentially emerging from additional SCOTUS review of any given litigation holds little value, a look back at analogous and therefore especially relevant decisions in prior cases can often give some indication of what a forthcoming SCOTUS ruling upon any given controversy may look like. The position taken by Sturgeon in our featured case rests entirely upon his right to use the Nation River for the purpose of travel as a typical citizen and a member of the public, he makes no claim that he owns the riverbed, which is undisputedly real property owned by Alaska, or that he holds any form of exclusive right to use the river, so in reality Surgeon is simply insisting upon his right to use a public right-of-way, while denying that the US has any authority to prevent him from using it in any manner which Alaska deems to be fully acceptable. In *US v Vogler* (859 F2d 638 - 1988) the defendant asserted that he had a right to use a certain trail within the YCR, free of any federal restrictions upon his use of that trail, on the grounds that the trail became and constituted a public right-of-way, held by Alaska, long prior to the creation of the YCR, making federal regulatory authority inapplicable to that trail. The Ninth Circuit informed Vogler however, that the existence of a right-of-way held by Alaska within the YCR could give him no right to use the trail in defiance of federal authority, so he could not escape the imposition of federal regulations governing the use of that trail, and SCOTUS declined to strike down that COA ruling. Thus as of 2018 it has been established for 30 years that any use of a public right-of-way owned by Alaska within the YCR is subject to federal regulation, in accord with the long judicially established principle that right-of-way boundaries do not halt federal regulatory authority or raise a stop sign which federal jurisdiction must heed. In addition, for 45 years the Supreme Court of Alaska has recognized that "the federal government has the power to regulate all navigable waters in the United States", based upon the 1824 *Gibbons* case cited herein, and has formally acknowledged that any authority or jurisdiction of Alaska over navigable bedlands, stands "subordinate" to the federal navigation servitude (see *Wernberg v State* - 516 P2d 1191 - 1973).

20) The Ninth Circuit has confirmed that obstructions to navigation can be "affirmatively authorized by Congress" under the Rivers and Harbors Act of 1899 (see *US v Alameda Gateway*, 213 F3d 1161 - 2000) review denied by SCOTUS (531 US 1121) but SCOTUS has never expressly stated that the federal navigation servitude can operate to negate or effectively nullify public rights, such as those asserted by Sturgeon, derived directly from the navigability status of any given body of water.

(The author of this series of articles, Brian Portwood (bportwood@mindspring.com) is a licensed professional land surveyor, federal employee and historian of land rights law, providing material for the ongoing professional education of all members of the land rights community. All of the materials cited herein are freely available by means of a standard internet keyword search or directly from the author of this article.)