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Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to Waterways and Its Effect on Riparian Owners

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PROPERTY LAW—THE RECREATIONAL NAVIGATION DOCTRINE —THE
USE OF THE RECREATIONAL NAVIGATION DOCTRINE TO INCREASE PUBLIC
ACCESS TO WATERWAYS AND ITS EFFECT ON RIPARIAN OWNERS

I. INTRODUCTION

An elderly man, his middle-aged son, and his young grandson launch their boat into a river at a public boat ramp. They motor their boat down river and carefully navigate through the tight timber. The old man's eyes fill with memories from long ago. There are trees here close to 1000 years old, and their bases are wider than a car is long. Through the pre-dawn darkness, all three see a smattering of posted signs and purple paint on the trees. Knowing they are still below the ordinary high-water mark, they press on.

As hunting opens, the party begins shooting at ducks coming into the flooded timber to loaf. Everyone is enjoying the many wonders of an Arkansas waterway. Suddenly, two men appear from a neighboring farm. The men tell the hunters that this is private, not public land. They tell the hunters that because the streambed does not meet the criteria to be a navigable waterway, they own the rights to the stream to the center of the stream thread. The men say that if the hunters do not leave, they will call the police and have them arrested for criminal trespass. Additionally, the two men tell the hunters they will sue them for encroaching upon their privately held hunting rights to the timber.

This scenario is neither fiction nor a rare happening. Indeed, among people who enjoy the natural wonders of waterways in Arkansas and other states, there is much debate as to what constitutes a navigable waterway,¹ whether there are any remedies for those who wish to navigate a recreational waterway, and what recourses are available for riparian land owners who want to protect their interest in the land and the waterway.²

A state's approach to the recreational navigation doctrine answers many of these questions. The current trend in Arkansas and many other states is to use this doctrine to open a greater number of streams and waterways once considered private for use by the public to the ordinary high-water mark and to limit remedies for riparian landowners.³ First, this note will discuss the federal definition of navigability.⁴ Second, the note will explore various approaches to the navigation doctrine in jurisdictions foreign to Arkansas.⁵ Next, this note will provide an in-depth historical look at

1. See Arkansas Flyway Forum, <http://www.refugeforums.com/refuge/showthread.php?t=626689&highlight=Village+Creek>.

2. *Id.*

3. See *Anderson-Tully Co. v. McDaniel*, 571 F.3d 760 (8th Cir. 2009); *Nichols v. Culotches Bay Navigation Rights Comm., L.L.C.*, 2009 Ark. App. 365, 309 S.W.3d 218.

4. See *infra* Part II.A.

5. See *infra* Part II.B.

Arkansas's treatment of this doctrine.⁶ Then, the note will analyze the relevance of recreational navigability for waterways that have not yet been declared navigable.⁷ Finally, this note will discuss theoretical issues concerning recreational navigation doctrines as they relate to possible remedies for riparian landowners.⁸

II. BACKGROUND

A. The Federal Standard of Navigability

The Supreme Court of the United States has recognized that the term *navigability* has multiple meanings in different contexts.⁹ The federal government, through the Commerce Clause and admiralty jurisdiction, has reserved an interest in all navigable waterways for the purposes of regulating trade between the states and creating a uniform body of laws governing maritime commerce.¹⁰ Thus, when the United States, as a sovereign, gave title in lands and waterways to the states, the states took title to all except those which were preempted by the federal government.¹¹ These reserved areas of property include navigable waterways.¹²

Under the federal standard of navigability, a navigable waterway is held in the public trust to the ordinary high-water mark.¹³ Federal authorities do not define waterways by the tidal test, in which waters affected by the ebb and the flow of the tide are navigable.¹⁴ Instead, the test of navigability is whether the waterbody may be used as a highway for commerce.¹⁵ If a

6. See *infra* Part II.C.

7. See *infra* notes 94–122 and accompanying text.

8. See *infra* notes 123–24 and accompanying text.

9. *Kaiser Aetna v. United States*, 444 U.S. 164, 171–72 (1979). The term has been used for purposes including setting the boundaries of the navigational servitude, “defin[ing] the scope of Congress’ regulatory authority under the Commerce Clause, . . . determin[ing] the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, and . . . establish[ing] the limits of the jurisdiction of federal courts conferred by . . . the United States Constitution over admiralty and maritime cases.” *Id.*

10. U.S. CONST. art. III, § 2; *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704 (1987); *Gibbons v. Ogden*, 22 U.S. 1, 74–75 (1824); see also J.W. Looney & Steven G. Zraick, *Of Cows, Canoes, and Commerce: How the Concept of Navigability Provides an Answer if You Know Which Question to Ask*, 25 U. ARK. LITTLE ROCK L. REV. 175, 176 (2002) (noting the varied approaches to determining navigability).

11. *Pollard v. Hagan*, 44 U.S. 212, 215–16 (1845).

12. *Id.* at 216.

13. See *Cherokee Nation of Okla.*, 480 U.S. at 704.

14. *Donnelly v. United States*, 228 U.S. 243 (1913) (citing *In re The Genesee Chief*, 53 U.S. 443 (1851)). (The tidal test prevailing in England is not applicable to the waters of the United States.).

15. 33 C.F.R. § 329.6 (2009).

waterway is navigable in the federal sense, it is open for use by the public to the ordinary high-water mark.¹⁶

Congress has delegated commercial regulation of navigable waterways to the United States Army Corps of Engineers.¹⁷ The Corps of Engineers has created administrative policies concerning the navigability of waterways based on common law and court decisions.¹⁸ The Corps of Engineers looks to several factors to determine if a waterway is navigable.¹⁹ The determinative factor is the waterbody's capability of use by the public for commerce. The focus is on the susceptibility to commercial use rather than present or past commercial use.²⁰ Moreover, a waterway need not cross a state line to be a navigable waterway.²¹ Instead, it needs only to have the potential to carry interstate commercial items.²² However, even this federal standard does not include land covered by water during a flood.²³

The rights to waterways within states that were not preempted by the federal government were transferred to the several states.²⁴ When the states entered the Union, they took title to all property within their respective boundaries that was not reserved to the federal government.²⁵ Accordingly, the lands taken by a state included waterways deemed non-navigable by the federal government. Because states are their own sovereigns, they can exert their own control over these waterways.²⁶ This means that states can either

16. *Shively v. Bowlby*, 152 U.S. 1, 36 (1894) (citing *St. Clair Co. v. Lovington*, 90 U.S. 46 (1874)).

17. 33 U.S.C. § 401 (2009).

18. 33 C.F.R. § 329.3 (2009).

19. *Id.* § 329.5 (2009). These factors include past, present, or potential presence of interstate or foreign commerce, physical capabilities for use by commerce, and defined geographic limits of the waterbody.

20. This is an even more relaxed standard than the one used to assert navigability in cases of admiralty. See *Kaiser Aetna v. United States*, 444 U.S. 164, 171–72 (1979).

21. 33 C.F.R. § 329.7 (2009). This is especially the case when the waterway connects to other waterways through which commerce may flow.

22. *Id.*

23. *Oklahoma v. Texas*, 260 U.S. 606, 632 (1923); *Parm v. Shumate*, 513 F.3d 135, 143 (5th Cir. 2007).

24. *Pollard v. Hagan*, 44 U.S. 212, 215–16, 223 (1845) (“[T]he United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted” by the Constitution.).

25. *Id.* This is called the “Equal Footing” doctrine. *Id.* at 222. New states entering the Union “have the same rights, sovereignty, and jurisdiction over this subject as the original states.” *Id.* at 230.

26. *Id.* at 222. A “fundamental principle underlying the state court decisions is that navigability reflects the public nature of the water.” Duncan Hollomon, *The Struggle for Alaska's Submerged Land*, 5 ALASKA L. REV. 69, 105 (1988) (citing *Welder v. State*, 196 S.W. 868 (Tex. Civ. App. 1917)). “That public nature, as a legal concept, in turn implies sovereign authority to control use by the public, the existence of public usufructuary rights, and the existence of a duty upon the state to protect those rights.” *Id.*

expand or hold fast to the federal definition of navigability as it relates to those waterways.²⁷

B. Various States' Assertions of the Navigability Doctrine

Only a handful of states have declined to expand the definition of navigability to include the recreational use of a waterway. For example, the state of Louisiana has structured its navigability doctrine over state waterways in conformity with the federal standard. On August 12, 1910, the state claimed all waterways not owned by private individuals.²⁸ All determinations of navigability are based on the ability of a waterway to support interstate commerce.²⁹ This standard is one that closely adheres to the federal standard. Additionally, Louisiana has expressly rejected a standard of navigability based on recreational use.³⁰

Louisiana is joined in its approach by Kansas. In Kansas, the state supreme court has interpreted legislation so as to preclude a public trust doctrine for waterways used for recreational purposes.³¹ The Kansas Supreme Court has also refused to create such a doctrine for streams that do not meet the federal definition of navigation.³² The court has strongly implied that making any such change from the bench would be nothing more than judicial legislation.³³ As such, that court has expressly refused to recognize a recreational doctrine of navigability.³⁴ Instead the court has stated that "[i]f the nonnavigable [sic] waters of [Kansas] are to be appropriated for recreational use, the legislative process is the proper method to achieve this goal."³⁵

27. *Pollard*, 44 U.S. at 215–16, 223 (holding that it is for the states to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto).

28. LA. REV. STAT. ANN. § 9:1101 (2008).

29. *State v. Jefferson Island Salt Mining Co.*, 163 So. 145, 150 (La. 1935) (citing *In re The Montello*, 87 U.S. 430 (1874)).

30. *Johnson v. State Farm Fire & Cas. Co.*, 303 So. 2d 779, 784–85 (La. Ct. App. 1974) (citations omitted) (noting the absence of commercial activity and the presence of recreational activity insufficient to sustain a finding of navigability); *Sinclair Oil & Gas Co. v. Delacroix Corp.*, 285 So. 2d 845, 852 (La. Ct. App. 1973) (rejecting the proposition that a body of water deep enough to float a pirogue is navigable under Louisiana law); *St. Mary Parish Land Co. v. State Mineral Bd.*, 167 So. 2d 509, 514 (La. Ct. App. 1964) (noting that merely because small craft could navigate some areas of water included in the waterway does not prove navigability).

31. *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1364–65 (Kan. 1990).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

However, most states have expanded the definition of navigability to include waterways that are used solely for recreational purposes. Mississippi is one such state.³⁶ That state has recognized that the standard of “navigable in fact” extends to more than just the use of a waterway for commercial purposes and that navigability extends to vessels beyond large commercial types.³⁷ Instead, the presence of recreational activities such as fishing, logging, and recreational pleasure boating, is sufficient to sustain a finding that a waterbody has a navigable character.³⁸

But, in Mississippi, the fact that a waterbody may be used for a recreational activity alone is insufficient to confer a standing of navigability.³⁹ If it were, then every landowner’s private, landlocked pond would be open to trespass by every member of the public with a fishing pole. Instead, a waterbody will be declared navigable for recreational purposes only when a member of the public can reach the waterbody without trespass.⁴⁰ Such access grants to that person the right to use the waterway subject only to a like use by others and reasonable regulation by the state.⁴¹ Mississippi’s recreational navigation doctrine is nearly identical to Arkansas’s doctrine.⁴²

Tennessee also recognizes the recreational navigation doctrine.⁴³ That state’s doctrine holds that a river is navigable if “the river, in the ordinary state of the water, is capable of and suited to the usual purposes of navigation.”⁴⁴ While the ability to support commerce is still the main consideration in the determination of a waterway’s navigability,⁴⁵ Tennessee’s construction of what constitutes a commercial purpose is more liberal than the federal standard of interstate commerce.⁴⁶ In fact, Tennessee holds that duck hunting and guiding duck hunters using gasoline powered boats has a commercial value, even though this type of activity is not the typical trade that

36. See generally *Ryals v. Pigott*, 580 So. 2d 1140, 1150, 1152 (Miss. 1990).

37. *Id.* at 1150 (citing *Rouse v. Saucier’s Heirs*, 146 So. 291 (Miss. 1933)).

38. *Id.* at 1152.

39. *Dycus v. Sillers*, 557 So. 2d 486, 500–01 (Miss. 1990).

40. *Id.* The *Dycus* court considered an “oxbow” lake, or a lake formed when a river, in that case the Mississippi River, changes course cutting off a portion of the old channel and leaving a natural lake. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1613 (Philip Babcock Gove et al., eds., 2002). However, the principle remains true for other types of waterbodies. The crux of a finding of recreation under this doctrine is whether the waterbody “communicates” with another waterway through which access can be obtained. Communication occurs if, for example, the oxbow lake connects to navigable river in any way. *Dycus*, 557 So. 2d at 501.

41. *Dycus*, 557 So. 2d at 501.

42. See generally *State v. McIlroy*, 268 Ark. 227, 234, 595 S.W.2d 659, 663 (1980).

43. See generally *State v. W. Tenn. Land Co.*, 158 S.W. 746, 748–50 (1913).

44. *Id.* at 750.

45. *Id.*

46. See *id.* at 749–50.

occurs by use of an ocean-faring vessel.⁴⁷ Additionally, stumps and trees in the waterway do not indicate that a waterway is not navigable.⁴⁸

A number of western states have also expanded the definition of navigability of waterways to include recreational use. The Oregon Supreme Court has recognized that boating or sailing for pleasure, as well as boating for mere pecuniary profit should be considered navigation.⁴⁹ The court stated that "[m]any, if not most, of the meandered lakes [in Oregon] are not adapted to, and probably will never be used to any great extent for commercial navigation."⁵⁰ On the other hand, the court noted, Oregon's waterbodies are used for multiple other purposes, including sailing, rowing, fishing, fowling, bathing, cutting ice, ice skating, domestic water usage, and irrigation.⁵¹ The court held that a "boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber."⁵²

The Idaho Supreme Court, in recognizing a recreational navigation doctrine, also observed that such a doctrine is the modern trend.⁵³ That court has held that any stream that, "in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable."⁵⁴ In so holding, the court affirmed the trial court's reasoning that, in accordance with modern authorities, the basic question of navigability is the suitability of a particular waterbody for public use.⁵⁵

California has recognized that its streams are a vital recreational resource of the state.⁵⁶ Like Idaho, California not only recognizes a recreational doctrine of navigability, but also that such a doctrine is the modern trend among the states.⁵⁷ The California recreational doctrine provides that "members of the public have the right to navigate and to exercise the inci-

47. *Id.* The court found Reelfoot Lake in Tennessee navigable because it is a prime location for commerce, mostly of which is recreational duck hunting and fishing. *Id.* at 750.

48. *Id.* at 749-50. Reelfoot Lake, Tennessee, and other waterbodies were formed during the New Madrid earthquakes that occurred in 1811 through 1812. STEVE BOWMAN & STEVE WRIGHT, ARKANSAS DUCK HUNTER'S ALMANAC 57 (1998). During one quake, massive depressions were formed, including Reelfoot Lake, causing the Mississippi River to run retrograde as it backfilled into these two lakes. *Id.* Numerous trees and stumps were present in the waterbodies as the depressions forming the lake occurred over forested swamps. *See id.*

49. *Guilliams v. Beaver Lake Club*, 175 P. 437, 442 (Or. 1918).

50. *Id.*

51. *Id.*

52. *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936).

53. *S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1297-98 (1974).

54. *Id.* at 1297.

55. *Id.* at 1298.

56. *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1050 (1971).

57. *Id.*

dents of navigation in a lawful manner at any point below the ordinary high-water mark on waters capable of being navigated by oar or motor-propelled small craft.”⁵⁸

C. Arkansas’s Recreational Doctrine of Navigability

In Arkansas, the riparian owner upon a navigable stream, deriving title from the United States, takes only to the ordinary high-water mark.⁵⁹ However, a riparian owner upon a non-navigable stream is entitled to the center of it, ratably with the other riparian proprietors, with the extent of the interest depending upon the frontage of the stream.⁶⁰ “Although navigability to fix ownership of a river bed or riparian rights is determined as of the date of the state’s entry into the union, navigability for other purposes may arise later.”⁶¹ The term “navigable” is particularly relevant because, in Arkansas, if a waterway is navigable, members of the public have the right to use the waterway at any point below the ordinary high-water mark.⁶² In fact, “determining the navigability of a stream is essentially a matter of deciding if it is public or private property.”⁶³ If a body of water is navigable, it is considered to be held by the state in trust for public use.⁶⁴

Arkansas first adhered to the federal navigation standard in determining which streams were navigable.⁶⁵ In *Barboro v. Boyle*, a 1915 case, the state supreme court held that the key to a finding of navigability was “the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise.”⁶⁶ This merely restated the federal definition of navigation.⁶⁷

58. *Id.*

59. *Barboro v. Boyle*, 119 Ark. 377, 380, 178 S.W. 378, 379 (1915) (citing *St. Louis, Iron Mountain & S. R.R. Co. v. Ramsey*, 53 Ark. 314, 13 S.W. 931 (1890)). Arkansas has adopted the federal definition of the ordinary high-water mark. *See State v. Parker*, 132 Ark. 316, 320, 200 S.W. 1014, 1015 (1917) (citing *Ramsey*, 53 Ark. 314, 13 S.W. 931) (“The high-water mark of a navigable stream, the line delimiting its bed from its banks, is to be found by ascertaining where the presence and action of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil.”).

60. *Barboro*, 119 Ark. at 380, 178 S.W. at 379 (citing *Ramsey*, 53 Ark. 314, 13 S.W. 931).

61. *Ark. River Rights Comm. v. Echubby Lake Hunting Club*, 83 Ark. App. 276, 287, 126 S.W.3d 738, 744 (2003) (citations omitted).

62. *Id.* at 282, 126 S.W.3d at 741.

63. *Id.* at 285, 126 S.W.3d at 743 (citing *State v. McIlroy*, 268 Ark. 227, 595 S.W.2d 659 (1980)).

64. *Ramsey*, 53 Ark. at 322, 13 S.W. at 933.

65. *See Barboro*, 119 Ark. at 380, 178 S.W. at 379.

66. *Id.*, 178 S.W. at 379 (citing *Ramsey*, 53 Ark. 314, 13 S.W. 931).

67. *See id.*, 178 S.W. at 380.

However, in *Barboro*, the court also noted that there was room for the state standard to progress.⁶⁸ Specifically, the court stated that “[i]t is the policy of this state to encourage the use of its water courses for any useful or beneficial purpose.”⁶⁹

The court noted that commercial purposes may include the use of waterways for flooding rice fields and irrigating crops; the use of the waterways by the public for “domestic purposes” is also considered a commercial purpose.⁷⁰ Additionally, the court observed that “waters . . . might be used to a much greater extent for boating for pleasure, for bathing, fishing, and hunting, than they are now used.”⁷¹

Fifteen years later, Arkansas moved away from its adherence to the federal definition of navigability.⁷² Instead, the court began to consider other factors about waterways in making a determination of navigability and focused less on whether the stream had previously been declared navigable.⁷³ The court stated that meander lines are prima facie evidence of navigability.⁷⁴ Additionally, the court held that to accept a finding of non-navigability based on an absence of a federal declaration when meander lines are present is erroneous.⁷⁵ More recently, the Arkansas Court of Appeals reaffirmed the state’s departure from the federal standard of navigability, recognizing that the determination of navigability of state waterways involves an analysis that is in flux rather than some static standard of federal determinations occurring when Arkansas joined the union.⁷⁶

In 1973, the court moved even closer to a full-fledged recreational doctrine by reiterating that commercial viability was not the determining factor

68. *Id.*, 178 S.W. at 380.

69. *Id.*, 178 S.W. at 380.

70. *Id.* at 382–83, 178 S.W. at 380. The court specifically named “pleasure resorts” as one possible domestic use. *Id.*

71. *Barboro*, 119 Ark. at 382–83, 178 S.W. at 380 (citing *Lamprey v. State*, 53 N.W. 1139 (1893)).

72. *Lutesville Sand & Gravel Co. v. McLaughlin*, 181 Ark. 574, 583, 26 S.W.2d 892, 894 (1930).

73. *See id.*, 26 S.W.2d at 895.

74. *Id.*, 26 S.W.2d at 895; *see also* *Harrison v. Fite*, 148 F. 781, 784 (8th Cir. 1906).

75. *Lutesville*, 181 Ark. at 583, 26 S.W.2d at 895. The use of meander lines as prima facie evidence of navigability has been a staple in navigability determinations through 2003. *See Ark. River Rights Comm. v. Echubby Lake Hunting Club*, 83 Ark. App. 276, 286, 126 S.W.3d 738, 744 (2003) (finding Echubby Lake to be a non-navigable waterbody). *But see State v. McIlroy*, 268 Ark. 227, 233, 595 S.W.2d 659, 663 (1980) (finding the Mulberry River to be a navigable waterway).

76. *Ark. River Rights Comm.*, 83 Ark. App. at 287, 126 S.W.3d at 744 (noting that the Supreme Court of Arkansas did not address navigability for the purpose of public usage in terms of whether the water was navigable at the time of statehood, but whether the water was currently navigable).

to navigability.⁷⁷ In 1980, Arkansas joined the modern trend and endorsed a recreational doctrine of navigability.⁷⁸ In *State v. McIlroy*, the Arkansas Supreme Court held that it need not be bound by the federal conception of navigability.⁷⁹ The court stated that the test of navigation is one that should not be applied too literally.⁸⁰ In fact, according to the court, a stream need not be navigable at all of its points or for the entire year to support a state finding of navigability.⁸¹ The court then announced that a waterway is navigable if it can be used for recreational purposes, even if it is not in use year-round.⁸² The court stated that a finding of navigability through recreation confers all the rights incident to a finding of navigability for commercial purposes.⁸³

The court's holding in *McIlroy* is compelling for a variety of reasons. First, the court traced language back to *Barboro* to reach the *McIlroy* holding, making the language in *Barboro* nearly prophetic. In *Barboro*, although the court adhered to the federal standard in defining navigability and its dependence upon a commercial criterion,⁸⁴ the court added that "[i]t is the policy of this state to encourage the use of its water courses for any useful or beneficial purpose. There may be other public uses than the carrying on of commerce of pecuniary value."⁸⁵ In doing so, the *Barboro* court alluded to the fact that a river may be navigable for purposes other than the benefits of commerce.⁸⁶ This inference was relied upon by the *McIlroy* court in its finding of a recreational doctrine of navigability.⁸⁷

Another reason the *McIlroy* holding is compelling is that the court indicated that it had found an opportunity it had been waiting for for over half

77. See *Hayes v. State*, 254 Ark. 680, 682, 496 S.W.2d 372, 374 (1973) ("[T]he financial success of a navigable venture was not an exclusive test of navigability.").

78. See generally *State v. McIlroy*, 268 Ark. 227, 595 S.W.2d 659 (1980).

79. *Id.* at 234, 595 S.W.2d at 663 (citing *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961)) ("Navigation in fact is the standard modern test of navigability, and, as embroidered by the federal courts, controls when navigation must be defined for federal purposes maritime jurisdiction, regulation under the Commerce Clause, and title disputes between the state and federal governments.").

80. *Id.*, 595 S.W.2d at 663 (citing *Econ. Light & Power Co. v. United States*, 256 U.S. 113 (1921); *St. Louis, Iron Mountain & S. R.R. Co. v. Ramsey*, 53 Ark. 314, 13 S.W. 931 (1890)).

81. *Id.*, 595 S.W.2d at 663 (citing *Econ. Light & Power Co.*, 256 U.S. 113).

82. *Id.*, 595 S.W.2d at 665.

83. *Id.*, 595 S.W.2d at 665. This means that a state finding of navigability for recreational purposes will entitle the public to use the waterway up to the ordinary high-water mark.

84. *Barboro v. Boyle*, 119 Ark. 377, 382, 178 S.W. 378, 379.

85. *Id.*, 178 S.W. at 380.

86. *Id.* at 382–83, 178 S.W. at 380.

87. See *McIlroy*, 268 Ark. at 235–36, 595 S.W.2d at 664 (citing *Barboro*, 119 Ark. at 382–83, 178 S.W. at 380).

of a century, since *Barboro*. In *McIlroy*, the court noted that, since *Barboro*, “no case presented to us has involved the public's right to use a stream which has a recreational value, but lacks commercial adaptability in the traditional sense.”⁸⁸ The court called its definition of navigability in *Barboro* “a remnant of the steamboat era.”⁸⁹

The recreational doctrine lay relatively dormant until 2003, when the Arkansas Court of Appeals cited *McIlroy* authoritatively.⁹⁰ The court of appeals also clarified the recreational doctrine. It held that state action inundating one's private land to the extent that it becomes flooded for a period of time may indicate that the land is now subject to the recreational doctrine of navigability.⁹¹ Additionally, the court of appeals held that in order for a waterbody to be navigable under the recreational doctrine, it would require a “level of recreational use . . . compar[able] with the extensive use of the Mulberry River in *McIlroy*.”⁹² The court of appeals held that that “the occasional foray by a fisherman” upon a waterway “does not render it navigable.”⁹³

III. DISCUSSION

Recent court decisions in Arkansas indicate that the use of the recreational navigation doctrine is on the rise.⁹⁴ In some cases, the doctrine is invoked in an attempt to have waterways, or features of waterways, declared navigable through a declaratory judgment.⁹⁵ In other cases, private citizens are using the doctrine to assert public rights over waterbodies claimed to be private by certain individuals.⁹⁶ In most cases, the courts have found navigability.⁹⁷

88. *Id.* at 236, 595 S.W.2d at 664.

89. *Id.*

90. *See generally* Ark. River Rights Comm. v. Echubby Lake Hunting Club, 83 Ark. App. 276, 286, 126 S.W.3d 738, 744 (2003).

91. *Id.*, 126 S.W.3d at 744.

92. *Id.* at 286–87, 126 S.W.3d at 744.

93. *Id.*, 126 S.W.3d at 744. This particular phrase has the effect of altering the *McIlroy* doctrine. Though it has often been cited in briefs, it has not been expressly adopted by the Supreme Court of Arkansas. In fact, it is questionable whether the phrase is still favored by the court of appeals.

94. *See generally* Anderson-Tully Co. v. McDaniel, 571 F.3d 760 (8th Cir. 2009); State v. Hatchie Coon Hunting & Fishing Club, Inc., 372 Ark. 547, 279 S.W.3d 56 (2008); Nichols v. Culotches Bay Navigation Rights Comm., L.L.C., 2009 Ark. App. 365, 309 S.W.3d 218; Ark. River Rights Comm. v. Echubby Lake Hunting Club, 83 Ark. App. 276, 126 S.W.3d 738 (2003).

95. *Nichols*, 2009 Ark. App. 365, at 1, 309 S.W.3d at 219 (seeking a declaratory judgment that Culotches Bay, a portion of the Cache River, was navigable for recreational purposes).

96. *Anderson-Tully*, 571 F.3d at 761 (attempting to intervene for purposes of invoking

State declarations of navigability only occur on waterways specifically declared non-navigable by the federal government. Such declarations reveal two facts. First, a dominant public servitude on a state level exists notwithstanding the similar federal servitude.⁹⁸ Second, federal declarations of navigability or non-navigability do not dispose of the issue of a navigational servitude.⁹⁹

Private citizens have asserted the recreational doctrine to gain rights of access that inure from such a declaration.¹⁰⁰ In *Nichols v. Culotches Bay Navigation Rights Committee, L.L.C.*, a motion for a declaratory judgment was filed seeking to have the Culotches Bay, a portion of the Cache River, declared navigable for recreational purposes.¹⁰¹ The appellant moved for summary judgment to have the Bay declared non-navigable.¹⁰² The trial court denied the motion and instead raised and granted a sua sponte motion declaring the Bay navigable.¹⁰³

the doctrine on behalf of an Arkansas citizen sued by a private club).

97. Compare *Hatchie Coon Hunting & Fishing Club*, 372 Ark. at 559, 279 S.W.3d at 64 (island submerged by navigable stream was in public trust) and *Nichols*, 2009 Ark. App. 365, at 1, 309 S.W.3d at 220 (trial judge finds Culotches Bay navigable), with *Ark. River Rights Comm.*, 83 Ark. App. at 286, 126 S.W.3d at 744 (recreational use not extensive enough to make Echubby Lake navigable).

98. It is worth noting that if such a doctrine exists at the state level, it must exist through common-law principles.

99. Compare *Nichols*, 2009 Ark. App. 365, at 4, 309 S.W.3d at 222 (state appellate court affirming refusal to declare the Cache River, Arkansas, non-navigable via summary judgment), with 33 U.S.C. § 25 (2009) (federal declaration that the Cache River, Arkansas is not navigable).

100. *State v. McIlroy*, 268 Ark. 227, 237, 595 S.W.2d 659, 665 (1980) (A finding of navigability through recreation confers all the rights that are incidental to such a finding); *St. Louis, Iron Mountain & S. R.R. Co. v. Ramsey*, 53 Ark. 314, 322, 13 S.W. 931, 933 (1890) (If a waterway is declared navigable, it is held in the public trust to the ordinary high-water mark.).

101. 2009 Ark. App. 365, at 1, 309 S.W.3d at 219. Culotches Bay is a subsidiary of the Cache River. The Cache River is a federally non-navigable waterway. See 33 U.S.C. § 25 (2009). The Cache River has been declared a “wetlands of international importance” and non-navigable by the United States Army Corps of Engineers. BOWMAN & WRIGHT, *supra* note 48, at 57. Such a finding precludes a federal preemption. In this case, the appellant relied upon the Corps of Engineers declaration.

102. *Nichols*, 2009 Ark. App. 365, at 1, 309 S.W.3d at 219.

103. *Id.* at 4, 309 S.W.3d at 222. The case was reversed and remanded on appeal. The reason for the reversal was procedural and not substantive, as the reviewing court held that the trial court erred in improperly raising a sua sponte motion. *Id.* at 6, 309 S.W.3d at 219. The Arkansas Court of Appeals affirmed the trial court’s denial of the motion for summary judgment to declare the area non-navigable effectively affirming that the area is not “non-navigable.” However, the issue of true navigability remains ripe for litigation. Nonetheless, if the trial court’s sua sponte motion is a litmus test for a future ruling, then it is likely the area will be declared navigable.

Another recent case, *Anderson-Tully Co. v. McDaniel*, represents the joint interest of the state and the populace in asserting the recreational navigation doctrine.¹⁰⁴ In that case, a duck hunter sought an opinion from the Arkansas Attorney General's Office regarding the ability to hunt in a waterbody¹⁰⁵ posted as private in Desha County, Arkansas.¹⁰⁶ The Attorney General's office informed the hunter that, because the waterbody was accessible via a chute from the Mississippi River, it was navigable under the *McIlroy* recreational doctrine and that the hunter could use the waterbody to the ordinary high-water mark.¹⁰⁷ The club that purported to hold the hunting and fishing rights to the lake brought an action in trespass in Desha County Circuit Court.¹⁰⁸ The Attorney General's office filed a motion to intervene, asserting state ownership of posted land pursuant to the recreational navigation doctrine.¹⁰⁹

The club voluntarily non-suited its case against the hunter before the trial court had an opportunity to rule on the motion to intervene.¹¹⁰ The club then brought a federal suit, alleging a deprivation of its federal constitutional rights under 42 U.S.C. § 1983, and sought a declaration that the *McIlroy* doctrine violated the United States Constitution.¹¹¹ The suit also sought to quiet title to the posted land¹¹² and to "enjoin the Attorney General from attempting to take private property for public use by application of the recreational [navigation doctrine]."¹¹³ The United States Court of Appeals for the Eighth Circuit held that the § 1983 claim against the Attorney General was barred by the Eleventh Amendment and that the Attorney General had

104. 571 F.3d 760 (8th Cir. 2009).

105. The waterbody was Stimson Lake, Arkansas. *Id.* at 761.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Anderson-Tully*, 571 F.3d at 761. A plaintiff has an absolute right to a voluntary non-suit anytime before the case is submitted to a fact finder in the state of Arkansas pursuant to ARK. R. Civ. P. 41(a)(1). A voluntary non-suit in such cases is a dismissal without prejudice. ARK. R. Civ. P. 41(a)(2). The club's action in non-suiting its claim against the duck hunter deprived the trial court of jurisdiction, thereby preventing res judicata on the fact that the state has an unseverable interest.

111. *Anderson-Tully*, 571 F.3d at 761.

112. *Id.* The § 1983 claim asserted an essential federal question, which was the basis for federal court jurisdiction. *See* 28 U.S.C. § 1331 (2009).

113. *Anderson-Tully*, 571 F.3d at 761. These claims came under federal pendant jurisdiction. *See* *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). The club was undoubtedly trying to get into federal court for all the benefits thought to inure in a federal forum. Had the federal court ruled favorably on the pendant claims, the club could re-file in state court against the duck hunter and assert res judicata; title to the waterway would have vested in the club and could not be navigable and, therefore, could not be public, leaving the state with no interest in the waterbody through the *McIlroy* doctrine.

sovereign immunity.¹¹⁴ With the federal court lacking jurisdiction, the club was left to pursue its claims in state court.¹¹⁵

One question of law that the Eighth Circuit broached, but did not address in *Anderson-Tully*, was whether the use of the recreational doctrine creates a condemnation under the Takings Clause of the United States Constitution.¹¹⁶ In 1979, the Supreme Court indicated that imposing a navigational servitude does not provide a blanket exception to the Takings Clause when Congress exercises its Commerce Clause authority to promote navigation.¹¹⁷ However, in 1987, the Court noted a distinction between a taking under Congress's authority to regulate via the Commerce Clause and a waterway that is navigable through a public domain navigational servitude.¹¹⁸

The United States Court of Appeals for the Ninth Circuit has also distinguished between the power to regulate waterways declared navigable under the Commerce Clause via the Rivers and Harbors Act and waterways made navigable through a public domain navigational servitude.¹¹⁹ The Ninth Circuit noted that the latter type of navigational servitude is "a dominant servitude, a plenary authority, and a superior navigation easement . . . [which] generally relieves the government of the obligation to pay compensation for acts interfering with the ownership of riparian, littoral, or submerged lands."¹²⁰

This distinction is a subtle one that both reconciles and distinguishes between the different types of navigational determinations and the effects of those determinations. For example, if the government asserts control over a privately held waterway via the United States Army Corps of Engineers, then a taking may have occurred for which compensation may be available.¹²¹ However, if the government declares a waterway to be navigable in

114. *Anderson-Tully*, 571 F.3d at 764.

115. *Id.*

116. *Id.* at 762 n.2 (noting that the club did not assert a takings claim).

117. *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979). Takings only occur when there is a deprivation of property which would destroy private rights. Regulation of water by the government does not constitute a taking. See Peter N. Davis, *Recreational Use of Watercourses*, 4 MO. ENVTL. L. & POL'Y REV. 71, 78 (1964) (citing *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950)). However, denial of land use, or the deprivation thereof, as part of a scheme to regulate a navigable waterway might be considered a taking. See *id.*

118. *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704 (1987) (citations omitted) (holding that "[t]he proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject").

119. *Boone v. United States*, 944 F.2d 1489, 1492–93 (9th Cir. 1991) (citations omitted).

120. *Id.* at 1493–94 (citations omitted).

121. Whether or not a taking has occurred will likely depend on whether the abolished

the sense of a public domain, no taking occurs and no compensation is available. Instead, the riparian rights in the latter types of cases were merely illusory and always held by the state.¹²²

A declaration of navigability for recreational purposes will likely fall under the public domain type of declaration, depending on the meta-principles of the particular doctrine followed by a court.¹²³ An astute argument for a taking will take into consideration the nature of the navigation declaration. If the purpose of the declaration is to regulate current or potential commerce, including the commercial nature of recreation, then a takings argument may be viable.¹²⁴ However, in a state that has recognized a dominant navigational servitude under a public domain theory rather than a commercial regulation theory, the declaration of navigability will likely be the type of servitude described by the Ninth Circuit in *Boone*.

States considering expanding or recognizing a recreational navigation doctrine would benefit from grounding their doctrine in a public domain type of declaration. This is because they can avoid, or at least minimize, litigation by avoiding takings claims related to federal and state constitutional limitations on government condemnation. When declarations avoid regulation appearances and fall under public domain assertions, it is likely that any deprivation of property rights claimed by riparian landowners will be a deprivation of a right they never truly possessed. This will make it difficult for riparian landowners to recover from a state declaration of navigability for recreational purposes as the riparian land owners never held the rights to the waterway usage they claim to have lost by such declaration.

property bundle is an "important one." Daniel C. Kramer, *When Does a Regulation Become a Taking? The United States Supreme Court's Most Recent Pronouncements*, 26 AM. BUS. L.J. 729, 761 (1989) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

122. "Water users who allege a taking of their interests in water bear a heavy burden of establishing compensable property rights." Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV., 679, 733 (2008) (citing Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVT'L. L. & POL'Y 1, 12-13 (2002)). "In most cases, they will not be able to meet this burden because the law of nearly every state gives broad regulatory powers to the government to restrict an appropriator's rights to use water where necessary to protect endangered species, water quality, and other environmental interests." *Id.* (citing Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVT'L. L. & POL'Y 1, 26 (2002)) (internal quotation marks omitted).

123. The viability of a taking depends upon the meta-theory of the state navigation doctrine. There are multiple types of navigability. See *supra* note 9. If the state doctrine's meta-theory is grounded in admiralty, then it is likely that no taking has occurred. See *supra* notes 118-21. However, if the state doctrines meta-theory is grounded upon commerce, then a taking argument may succeed. See *supra* notes 118-21.

124. In states such as Tennessee and Mississippi, where the definition of commerce has been expanded, the argument is ripe. It seems antithetical that a federal action may be a "taking" where a similar state action will not be a "taking." Moreover, the state's taking may present a federal issue sufficient to confer federal constitutional oversight.

Hence, there will be nothing for which the government will be obligated to compensate as a result of the navigation declaration.

Recreational navigation declarations in Arkansas are consistent with the public domain type of assertion. As such, riparian landowners in Arkansas will have few, if any, remedies for the state's declaration of a stream to be navigable for recreational purposes. Other states considering a recreational navigation doctrine could similarly avoid takings claims by grounding their doctrines as assertions in the public domain.

IV. CONCLUSION

The modern trend in Arkansas and in most states is to encourage a finding of navigability if a stream or waterway can be used for recreational purposes. It is likely that this trend will continue, and more litigants will assert the recreational navigation doctrine in order that more streams and waterbodies will be declared navigable by courts in Arkansas. Often, the decision to declare a waterbody navigable is a discretionary one, making a reversal on the merits unlikely. The firm support from appellate courts for the doctrine indicates that the modern trend will likely continue.

In Arkansas, recreational navigation declarations are based on public-domain types of assertions. These assertions limit the potential for litigation based on the Takings Clause of the United States Constitution and the Arkansas Constitution. However, in states where recreational navigation declarations are premised on regulation, some remedies may be available to riparian owners in condemnation and inverse condemnation claims against the government.

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