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OF COWS, CANOES, AND COMMERCE: HOW THE CONCEPT OF NAVIGABILITY PROVIDES AN ANSWER IF YOU KNOW WHICH QUESTION TO ASK*

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I. INTRODUCTION

Crooked Creek, running for eighty-two miles in Newton, Boone, and Marion counties in northern Arkansas, and renowned for its smallmouth bass fishery, was in recent years the center of controversy, which culminated with litigation initiated by the Arkansas Attorney General. Environmentalists expressed concerns that gravel mining activities on the stream were detrimental to the fishery and to the stream itself; the state agency with regulatory authority over water quality (now the Department of Environmental Quality) asserted a right to regulate gravel mining interests; land-owners along the stream emphasized the importance of the mining activity to local economies; recreational users, supported by the Arkansas Game and Fish Commission, wanted to see the stream open for public use; and cattlemen along the stream saw any restrictions on fencing across the channel as an infringement of their property rights. All interested parties believed that the concept of “navigability” was central to the resolution of the controversy.

This clash of interests on Crooked Creek illustrates the extent to which a seemingly simple concept, navigability, is important in various legal contexts: (1) it determines the ownership of the stream bed and, thus, the riparian owner’s rights to make use of the bed and the surface of the stream; (2) it determines the public’s right of access to the stream for recreational uses; and (3) it is relevant to the implementation of regulatory controls affecting

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either the use of the stream or the stream bed. However, determining how to define navigability in all of these contexts can be extremely difficult.

This article begins with a review of the general concept of navigability. Then, it explores how navigability is determined: (1) for questions of title to the land underlying a body of water; (2) for questions of the public's right to use water; and (3) for questions of the applicability of federal or state regulations governing a waterbody. In conclusion, this article illustrates, through the Crooked Creek situation, how the category of rights involved can determine which test to apply to decide whether a stream is navigable and, thus, who regulates its use.

II. NAVIGABILITY—SEARCH FOR A DEFINITION

The definition of navigability has varied considerably over time and according to the purpose to which the concept is applied. The determination of navigability status of a stream for these purposes does not depend upon a designation by statute or regulation although such designations would be of value. The Arkansas legislature, particularly in the 1800s, frequently designated streams or parts thereof as navigable.¹ Even in the absence of a statute or regulation, a court may evaluate the actual navigability status of a particular stream for the purpose of resolving a specific dispute.

Initially, the United States Supreme Court found waters to be navigable for federal admiralty jurisdictional purposes using a "tidal waters" test. This common law test developed in England where jurisdiction was limited to waters within the ebb and flow of the tide.² The Court clearly expanded this test in 1851 when it held that federal jurisdiction extended to all navigable lakes and rivers.³ In 1870 in *The Daniel Ball*,⁴ the Court further expanded the test to find that navigable waters are those that are navigable-in-fact. Rivers are navigable-in-fact: "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."⁵

1. See, e.g., Act of Mar. 18, 1881, No. XLVII, 1881 Ark. Acts 93 (declaring Grandee Lake and Outlet a navigable stream); Act of Feb. 21, 1859, No. 233, 1859 Ark. Acts 300 (declaring Langville River and Bayou Mason navigable streams); Act of Dec. 5, 1846, 1846 Ark. Acts 34 (declaring St. Francis River a navigable stream); Act of Nov. 25, 1846, 1846 Ark. Acts 15 (declaring Antoine River navigable).

2. *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat) 428 (1825), *overruled by* *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), *superseded by statute as stated in* *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972).

3. See *Fitzhugh*, 53 U.S. (12 How.) at 443.

4. 77 U.S. (10 Wall.) 557 (1870).

5. *Id.* at 563.

In *The Montello*,⁶ the Court expanded the basic test it had articulated in *The Daniel Ball* by removing the requirement that commerce be conducted by any particular mode of trade and travel and by placing greater reliance upon the history of actual navigability rather than upon the fact of present non-navigability. The Court stated:

[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use It is not . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.⁷

This language points toward the relationship between the Commerce Clause⁸ and the federal test for navigability—there must exist some kind of substantial commerce before activity upon waterways is sufficient to make them navigable-in-fact and in law.

The most sweeping statement of the federal test for navigability is given in *United States v. Appalachian Electric Power Co.*:⁹

The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times. Our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test.¹⁰

Appalachian Electric Power Co. stands for the proposition that if the making of reasonable improvements would make a stream navigable for commerce, then it may be held to be navigable.¹¹

Over the years, the way courts interpret or apply the federal test for navigability has evolved. For example, in a 1906 case, *Harrison v. Fite*,¹²

6. 87 U.S. (20 Wall.) 430 (1874).

7. *Id.* at 441–42.

8. U.S. CONST., art. I, § 8, cl. 3 (stating that Congress shall have power “to regulate Commerce . . . among the several States”). The power to regulate commerce was held to include, by necessity, the power to regulate navigation in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *Leovy v. United States*, 177 U.S. 621, 632 (1900). See also *Texarkana & Fort Smith Ry. Co. v. Parsons*, 74 F. 408, 410 (8th Cir. 1896).

9. 311 U.S. 377 (1940).

10. *Id.* at 404.

11. *Id.* at 407.

12. 148 F. 781 (8th Cir. 1906).

the United States Court of Appeals for the Eighth Circuit determined the navigability of Big Lake and Little River in northeastern Arkansas.¹³ The court stated basic propositions that are still relied upon today.¹⁴ However, it also laid down one rule of law that has been discredited: "It does not follow that, because a stream or body of water was once navigable, it has since continued and remains so."¹⁵

In 1921 the Supreme Court held that a waterway found to be navigable remains so,¹⁶ even though necessary improvements are not completed or even authorized.¹⁷ The federal district court in *In re River Queen*¹⁸ applied this variation of the federal test. The court had to determine whether a river, which had been dammed and thereby had become a part of a federally owned lake, had ever been used commercially to a sufficient extent to allow a finding of navigability. The court found the lake, though wholly owned by the United States through purchase and condemnation proceedings, non-navigable because "the only possible use of the lake [was] for fishing and other means of recreation,"¹⁹ and the stream which formed the lake had "never afforded a channel for useful commerce between states or to and from foreign countries."²⁰

Courts in Arkansas, like the federal courts, applied the "commercial usefulness test" to determine navigability. In 1882 the Arkansas Supreme Court adopted criterion that navigability depended on the usefulness of the stream in its natural state as a public highway capable of carrying off the products of the fields or forests or bringing to the population articles of commerce.²¹ Therefore, the state and federal courts apply the commercial usefulness test of navigability to all bodies of water, including lakes, streams, and rivers.²²

III. NAVIGABILITY FOR TITLE

The question of navigability determines the ownership of stream beds—riparian landowners own the stream beds of non-navigable streams,

13. *Id.* at 782.

14. *See, e.g.*, *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968); *In re River Queen*, 275 F. Supp. 403, 407 (W.D. Ark. 1967); *Parker v. Moore*, 222 Ark. 811, 813, 262 S.W.2d 891, 893 (1953); *Lutesville Sand & Gravel Co. v. McLaughlin*, 181 Ark. 574, 580, 26 S.W.2d 892, 894 (1930).

15. *Harrison*, 148 F. at 784.

16. *Econ. Light & Power Co. v. United States*, 256 U.S. 113 (1921).

17. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940).

18. 275 F. Supp. 403 (W.D. Ark. 1967), *aff'd sub nom. George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968).

19. *Id.* at 409.

20. *Id.* at 410.

21. *Little Rock, Miss. River & Tex. Ry. Co. v. Brooks*, 39 Ark. 403 (1882).

22. *McGahhey v. McCollum*, 207 Ark. 180, 179 S.W.2d 661 (1944).

but the state owns the stream beds of navigable streams. Therefore, deciding which streams are navigable becomes important in determining stream bed ownership rights, and several criteria have been developed to aid in making this determination. On a navigable stream, the riparian owner's rights extend only to the watermark—a point indicated by vegetation and the nature of the soil.²³ While it is true that riparians may “wharf out” into the navigable stream by constructing piers and wharfs in order to make use of the surface, the right to do so is not concrete. In fact, the state may restrict this right because of state ownership of the stream bed, or the federal government may prohibit it under the federal power to regulate navigation.²⁴

The idea of state ownership of the beds of navigable streams or lakes derives from the common law of England as applied in the early history of this country. Under the common law, the Crown owned the beds of navigable water below the high water mark or those affected by the ebb and flow of the tide.²⁵ The legal underpinnings of the rule were that navigable bodies of water were important for fishing and “for highways of navigation and commerce.”²⁶ Thus, the beds of navigable lakes and rivers were held in public trust by the King of England, by the people, or later by the states in America.²⁷ This concept became part of the law of the original colonies and was later extended to newly admitted states. To put the new states on “equal footing,” the idea developed that if a body of water is navigable, the state acquired ownership of the bed and banks to the high water mark upon statehood. Thus, if a lake or stream was navigable *at the time of statehood*, the bed belonged to the state.²⁸

Prior to the 1920s, state courts adhered to the view that to determine navigability for title, the appropriate test was the state test as announced by each state supreme court.²⁹ No United States Supreme Court case had squarely faced the issue until *Brewer-Elliot Oil & Gas Co. v. United*

23. *St. Louis, Iron Mountain & S. Ry. Co. v. Ramsey*, 53 Ark. 314, 13 S.W. 931 (1890).

24. The Court summarized this concept in *Montana v. United States*, 450 U.S. 544, 554 (1981), as follows: “After a State enters the Union, title to the land is governed by state law. The State’s power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.”

25. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 5 (1997); see also *infra* text accompanying notes 39–41.

26. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

27. *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842).

28. See *infra* notes 34, 36.

29. *St. Louis, Iron Mountain & S. Ry. Co. v. Ramsey*, 53 Ark. 314, 13 S.W. 931 (1890); *Johnson v. Johnson*, 95 P. 499 (Idaho 1908), *overruled by* *N. Pac. Ry. v. Hirzel*, 161 P. 854 (Idaho 1916); *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893); *Roberts v. Taylor*, 181 N.W. 622 (N.D. 1921); *Guilliams v. Beaver Lake Club*, 175 P. 437 (Or. 1918); *Welder v. State*, 196 S.W. 868 (Tex. Civ. App. 1917); *Griffith v. Holman*, 63 P. 239 (Wash. 1900).

States,³⁰ *United States v. Holt State Bank*,³¹ and *United States v. Utah*.³² It was with these cases that the Court finally decided that the question of navigability for title was to be determined by the federal test as pronounced by the federal courts. In applying this rule to the thirteen original states, one must look back to the time the Union was formed to determine navigability for ownership purposes.³³ Subsequently, as new states joined the Union, navigability for ownership purposes is determined at the time of their admission to the Union.³⁴ As in other areas of federal law, the commercial usefulness test of *The Daniel Ball*³⁵ also applies in the watercourse bed ownership cases.³⁶ In other words, under federal law, the navigability for title rule is stated as follows: the states took title to the beds underlying waters, which at the time of statehood were used, or susceptible of being used, as highways for commerce conducted in the customary modes of trade and travel on water. However, if the federal government conveyed the beds prior to statehood to meet some international obligation, to improve commerce with foreign nations or among states, or to carry out other public purposes, the title to the beds of navigable lakes and rivers did not pass to the states upon admission to the Union.³⁷

Congress, in the Submerged Lands Act of 1953,³⁸ applied the title concept developed by the Court. Under this Act, lands within states covered by non-tidal waters that were navigable at the time of statehood and tidal lands, to the three mile limit, are granted to the states. Interestingly, it was not until 1988 that the Supreme Court determined that the states also took ownership of land beneath non-navigable tidal waters at statehood (the "tidal for title" test).³⁹

The key to applying the navigability for title rule is to determine what constitutes a navigable waterbody. A waterbody was and is still considered

30. 260 U.S. 77 (1922).

31. 270 U.S. 49 (1926).

32. 283 U.S. 64 (1931).

33. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842); see also *Rasband*, *supra* note 25.

34. See, e.g., *Pollard*, 44 U.S. (3 How.) at 212; *Martin*, 41 U.S. (16 Pet.) at 367; see also *Arizona v. California*, 377 U.S. 921 (1964); *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Hardin v. Jordan*, 140 U.S. 371 (1891); *Barney v. Keokuk*, 94 U.S. 324 (1876); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471 (1850).

35. 77 U.S. (10 Wall.) 557, 563 (1870). For a discussion of *The Daniel Ball* test, see *supra* notes 4-5 and accompanying text.

36. *Utah*, 283 U.S. at 64; *Holt State Bank*, 270 U.S. at 49; *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77 (1922); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Utah v. United States*, 304 F.2d 23 (10th Cir. 1962).

37. *Holt State Bank*, 270 U.S. at 54-55.

38. 43 U.S.C. §§ 1301-1315 (2000).

39. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988).

navigable when it is "navigable-in-fact."⁴⁰ This was the case in *The Daniel Ball* when a waterbody is "used or [is] susceptible of being used, in [its] ordinary condition, as [a highway] for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."⁴¹ To elaborate, the test for navigability is generally comprised of four criteria: (1) the waterbody should be susceptible to navigation, but not necessarily ever used for navigation; (2) the navigation should be for commercial purposes, not merely navigation for any purpose; (3) the waterbody should be susceptible to navigation in its ordinary condition; and (4) the waterbody should be navigable by the customary mode of transportation in the area.⁴²

In most cases, the states have not conveyed their interest in the beds and banks of their inland rivers and streams. As insurers of the public trust, the states have the responsibility of protecting the public's right to use state bodies of water. The public trust responsibility extends to the soils beneath navigable waterbodies and to the minerals in these soils.⁴³ By contrast, the general rule for non-navigable riparian lands is that the recipient of a federal patent to such lands takes title to the center of the waterbody.⁴⁴ This rule applies equally to non-navigable lakes.⁴⁵

IV. PUBLIC'S RIGHTS TO SURFACE USE

The right of the public to use the surface of a stream or lake also depends on a navigability test. This test, however, is not necessarily the same navigability test as that applied to determine the question of stream bed ownership. Recreational use of water has led to greater recognition of public rights to use surface waters through a state test of navigability that may extend the concept beyond the traditional "commercial use" concept. Thus, under the state test, recreational navigability may encompass more surface water than the traditional commercial use concept of navigability.

40. *The Daniel Ball*, 77 U.S. (10 Wall.) at 557.

41. *Id.* at 563.

42. *Id.*; see also *Utah v. United States*, 403 U.S. 9, 10-12 (1971).

43. See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892). States may convey beds of navigable lakes and rivers to private parties under limited circumstances, but must ensure that the rights of the public to unfettered navigability are preserved. *Id.* at 453.

44. *Whitaker v. McBride*, 197 U.S. 510, 516-17 (1905); see also *Hardin v. Shedd*, 190 U.S. 508 (1903).

45. See *Grand Rapids & Ind. R.R. v. Butler*, 159 U.S. 87, 93 (1895). The problem is how to apportion the bed among littoral owners when the shoreline is irregular. Arkansas seems to follow the general rule for non-navigable lakes, at least where the boundaries were meandered by a United States survey. See *McGahhey v. McCollum*, 207 Ark. 180, 179 S.W.2d 661 (1944); *Glasscock v. Nat'l Box Co.*, 104 Ark. 154, 148 S.W.2d 248 (1912).

In Arkansas, the judiciary expanded this concept in the 1980 case of *State v. McIlroy*⁴⁶ involving the passage of recreational boaters on the Mulberry River. The evidence introduced in the case showed that the Mulberry River had been used by the public for recreational purposes for many years. This recreation included fishing, swimming, and canoeing. The court discussed the standard definition of navigability, but adopted what might be called the "pleasure boat" definition of navigability. For this purpose the court suggested that it is not necessary that the stream be floatable at all times, but navigability can be based on the stream's capability during part of the year to withstand use by flat-bottomed boats for fishing, canoes for floating, or both. The court acknowledged the traditional definition of navigability as set out in *Lutesville Sand & Gravel Co. v. McLaughlin*,⁴⁷ which generally focused on the usefulness of the stream for transporting articles of commerce. The court, however, noted hints in past Arkansas case law that recreational as well as commercial use of a stream may influence the question of navigability. As in *Lutesville*, the court discounted evidence that the Mulberry was impassable by boat for as much as six months of the year. In the end, the court joined several other states that had ruled that a stream, which supported recreational boating on a consistent basis, was navigable. Thus, the court reversed the decision of the lower court that found the riparian landowner could prevent the passage of recreational boaters on the Mulberry.⁴⁸

The *McIlroy* case included a discussion of a number of social issues that are still at the heart of the public debate over stream bed control. For example, the majority's closing words indicated that the court was stirred, to some extent, by social concerns beyond those traditionally at stake in a legal dispute: "[T]he state sought a decision that would protect its right to this stream. With that right, which we now recognize, goes a responsibility to keep it as God made it."⁴⁹

The *McIlroy* decision significantly extended the prior concepts governing water use. The General Assembly reacted almost immediately with the adoption of Act 830 of 1981.⁵⁰ The introduction to Act 830 recites that prior to the decision in *McIlroy*, the Mulberry River had previously been considered "non-navigable," and therefore, it was assumed that the bed of the river belonged to the riparian owners. Act 830 further states that the Arkansas Supreme Court decision has "caused considerable confusion regarding pre-

46. 268 Ark. 227, 237, 595 S.W.2d 659, 665 (1980).

47. 181 Ark. 574, 577, 26 S.W.2d 892, 894 (1930).

48. *McIlroy*, 268 Ark. at 230, 595 S.W.2d at 661.

49. *Id.* at 237, 595 S.W.2d at 665.

50. Act of Mar. 28, 1981, No. 830, 1981 Ark. Acts 1880 (codified at ARK. CODE ANN. § 22-5-406 (Michie Repl. 1996)).

viously executed oil and gas leases,"⁵¹ because if the stream is navigable, the state owns the bed of the stream. Therefore, Act 830 purported to disclaim the state's title and interest in any gas, oil, or other minerals under the bed of the Mulberry.⁵² The *McIlroy* decision and the legislative reaction represent the increased legal and public awareness of the importance of water resources. The legislative action accepts the *McIlroy* ruling as a proper statement of the law although it may have been based on understandable confusion as to the effect of the decision regarding stream bed ownership.

V. NAVIGABILITY AND REGULATORY CONTROLS

The federal government, through the Commerce Clause of the United States Constitution, has considerable power related to development activities within watercourses. These include the planning, construction, and operation of flood control, irrigation, hydroelectric, and water supply projects. The power to regulate interstate commerce is broad indeed, and easily encompasses these development activities even though the regulated waters are often not navigable in reality.

Traditionally, Congress limited the exercise of its regulatory reach to activities in navigable waters. However, the courts, in a sense, began to broaden jurisdiction by expanding the definition of navigability. For example, the Court expanded the test of navigability in the 1874 case *The Montello*⁵³ to include waters that had the capability of commercial use, not merely those in actual use.⁵⁴ The Court again expanded the definition in the 1921 case *Economy Light & Power Co. v. United States*⁵⁵ to bring in waterbodies whose history of commercial use made it navigable despite subsequent physical or economic changes preventing present use for commerce.⁵⁶ In the 1940 case *United States v. Appalachian Electric Power Co.*,⁵⁷ the Court held that a waterway would be deemed navigable-in-fact if by "rea-

51. *Id.* at 1881.

52. *Id.* This legislative solution is similar to that of Act 112 of 1965 where the General Assembly sought to clarify the ownership of lands inundated by artificially created lakes and channels that were presumptively navigable. Notably, Act 112 also provided that "the exercise of rights of extraction and removal . . . [of minerals under inundated lands] shall not be permitted to interfere with or impair, the rights of public navigation, transportation, *fishing, and recreation* in and upon such navigable waters." Act of Feb. 23, 1965, No. 112, 1965 Ark. Acts 310 (codified at ARK. CODE ANN. § 22-5-815 (Michie Repl. 1996)) (emphasis added).

53. 87 U.S. (20 Wall.) 430 (1874).

54. *Id.*

55. 256 U.S. 113, 113-14 (1921).

56. *Id.*

57. 311 U.S. 377 (1940).

sonable improvements" it could be made navigable.⁵⁸ Thus, the jurisdictional basis broadened until only the most insignificant body of water could escape one of the tests of navigability.

In early cases construing federal power, the courts focused on the question of whether the particular waterway was navigable as a means of determining whether the activity could be federally regulated.⁵⁹ In particular, the power to control commerce, which is given to Congress, necessarily included power over navigation. Thus, any exercise of state authority over navigable waters is subject to the overriding jurisdiction of the federal government. However, it is clear that congressional authority over water does not depend solely on the stream's navigability. The navigation power certainly gives that authority, but interstate commerce is much broader than navigation. As a result, more recent interpretations allow the extension of federal regulatory authority to navigable streams and lakes *and* their non-navigable tributaries. Federal reclamation, hydroelectric projects, and federal water pollution control can be justified on grounds broader than navigation regulation.

One consequence of a determination of Commerce Clause regulatory authority relates to the federal government's direct control over navigation and the so-called "navigation servitude doctrine." Essentially, this concept means that the federal government has a right to make improvements on navigable waters for the purpose of enhancing navigation and can do so without compensation to riparian owners. This is the result of a "lawful exercise of a power to which the interests of riparian owners have always been subject."⁶⁰ This power is not, however, limited to navigable waters, but applies to riverbed interests whether retained by the state or held by a riparian owner.⁶¹ And, according to some authorities, navigability is actually immaterial if Congress exercises power over a non-navigable tributary to protect the navigable capacity of a navigable stream.⁶²

Congress formally extended its regulatory reach beyond navigation on October 18, 1972, when it enacted the Clean Water Act (CWA),⁶³ which establishes regulatory programs to combat pollution of the nation's waters.

58. *Id.* at 409.

59. *E.g.*, *Econ. Light*, 256 U.S. at 113; *Leovy v. United States*, 177 U.S. 621 (1900); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899); *The Montello*, 87 U.S. (20 Wall.) at 430; *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

60. *United States v. Rands*, 389 U.S. 121, 123 (1967) (citing *United States v. Chicago*, 312 U.S. 592, 596-97 (1941)); *see also* Chris A. Shafer, *Public Rights in Michigan's Streams: Toward a Modern Definition of Navigability*, 45 WAYNE L. REV. 9 (1999).

61. *See United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 704 n.3 (1987).

62. *See* Ralph W. Johnson & Russell A. Austin, Jr., *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RES. J. 1, 14 n.65 (1967).

63. 33 U.S.C. §§ 1251-1387 (2000) (originally titled the Federal Water Pollution Control Act Amendments of 1972).

Congress adopted the CWA to provide the legislative vehicle for regulating the discharge of pollutants into surface waters by municipal sources, industrial sources, and other specific and non-specific sources. The national goal is to eliminate the discharge of pollutants.⁶⁴ Congress made unlawful "the discharge of any pollutant by any person" except as in compliance with the CWA.⁶⁵ It defined "discharge of a pollutant," in part, as "any addition of any pollutant to navigable waters from any point source."⁶⁶

Due to a statutory definition of navigable waters as "the waters of the United States," the CWA is potentially expansive in application.⁶⁷ The term "waters of the United States" has been judicially interpreted to include almost all surface waters, permanent and transient, navigable and non-navigable. For example, in *United States v. Ashland Oil & Transportation Co.*,⁶⁸ the defendant, Ashland Oil, was indicted for failing to immediately report the discharge of 3200 gallons of oil into a creek. Ashland Oil claimed that Congress did not have the constitutional power to control pollution on non-navigable tributaries of navigable streams. The company alleged that the creek was non-navigable in fact and that the discharge never reached navigable water. The Court indulged in generous quotations from the statutory language of the CWA to make the following point: "Congress' clear intention as revealed in the Act itself was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution a part of a navigable stream."⁶⁹ The Court squarely addressed the issue of congressional intent by stating: "[W]e believe Congress knew exactly what it was doing and that it intended the Federal Water Pollution Control Act [CWA] to apply, as Congressman Dingell put it, 'to all waterbodies, including main streams and their tributaries.'"⁷⁰

The *Ashland Oil* case gave rise to the following two questions: (1) Did Congress intend to define away the old navigability restriction and (2) Does Congress have such power? The court in *United States v. Holland*,⁷¹ citing *Ashland Oil*, answered affirmatively to both.⁷² In *Holland*, the government contended that defendants filled the waters of a bayou with sand, dirt, dredged spoil, and biological materials without the permits required under the CWA. The courts had not yet been faced with the question of whether

64. *Id.* § 1251(a)(1).

65. *Id.* § 1311(a).

66. *Id.* § 1362(12).

67. *Id.* § 1362(7).

68. 504 F.2d 1317 (6th Cir. 1974).

69. *Id.* at 1323.

70. *Id.* at 1325.

71. 373 F. Supp. 665 (M.D. Fla. 1974).

72. *Id.* at 671-73.

federal jurisdiction over water pollution encompassed wetlands above the mean high water line.⁷³ In a well-reasoned opinion, the court set out its rationale for why the waters receiving the impact of the prohibited conduct were indeed within the jurisdiction of the CWA.⁷⁴ Because the congressional effort was to control the discharge of pollutants *at the source*, it was necessary to go “beyond the confines of a high water line” to do so.⁷⁵ The court reasoned that Congress had “wisely” determined that federal authority to control pollution rests on the Commerce Clause, which gave Congress “ample authority to reach activities above the mean high water line.”⁷⁶ This approach was dramatically illustrated the next year when another federal district court, in interpreting the term “navigable waters,” indicated that Congress had asserted federal jurisdiction over the nation’s waters “to the maximum extent permissible under the Commerce Clause” and the term “navigable waters” as used in the water pollution legislation was “not limited to the traditional tests of navigability.”⁷⁷

The Supreme Court in the 1985 “takings” case of *United States v. Riverside Bayview Homes, Inc.*,⁷⁸ further demonstrated that regulation under the CWA was not tied to navigability. The plaintiff challenged the Army Corps of Engineers’ (the “Corps”) regulation, which required a permit before fill material could be placed on the plaintiff’s property.⁷⁹ The Court held that neither the imposition of the permit requirement itself nor the denial of a permit necessarily constitutes a taking.⁸⁰ The Court was also persuaded that the language, policies, and history of the CWA compelled a finding that the Corps acted reasonably in interpreting the CWA to require permits for the discharge of fill material into wetlands adjacent to the “waters of the United States.”⁸¹

However, in its most recent effort to deal with the question, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,⁸² the Court gave the CWA provisions a less expansive reading and refused to extend the authority of the Corps to regulate wetlands not

73. *Id.* at 670. These wetlands, referred to as “intertidal,” were not within the traditional scope of federal jurisdiction. *See id.*

74. *Id.*

75. *Id.* at 675.

76. *Id.* at 676.

77. *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

78. 474 U.S. 121 (1985).

79. *Id.* at 124.

80. *Id.* at 126.

81. *Id.* at 131.

82. 531 U.S. 159 (2001). For an insightful analysis of this case, see Margaret A. Johnston, Note, *The Supreme Court Scales Back the Army Corps of Engineers’ Jurisdiction over “Navigable Waters” Under the Clean Water Act*, 24 U. ARK. LITTLE ROCK L. REV. 329 (2002).

adjacent to open water. In this case, the Corps had asserted jurisdiction over the site of an abandoned sand and gravel pit mining operation, which had, since abandonment, evolved into permanent and seasonal ponds used as habitat by migratory bird species. The Corps recognized that this site was not one containing wetlands, but asserted that it qualified as "waters of the United States" and that its jurisdiction could be upheld on intrastate waters that provide habitat for migratory birds.⁸³

The Court determined that the "Migratory Bird Rule"⁸⁴ was not supported by the CWA and indicated that *Bayview Homes* was premised upon a "significant nexus" between the wetlands and "navigable waters."⁸⁵ While *Bayview Homes* recognized that Congress intended to include in the CWA some waters that would not meet the traditional test of navigability, the Court was not willing to agree that the use of the phrase "waters of the United States" in the CWA could "constitute[] a basis for reading the term 'navigable waters' out of the statute."⁸⁶ Chief Justice Rehnquist, writing for the majority, said:

But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.⁸⁷

The Court was also unwilling to find that Congress had acquiesced in previously promulgated Corps regulations that included the more expansive definition and assertion of jurisdiction.⁸⁸

While *Solid Waste's* more restrictive view of the language used in the CWA raises questions about congressional intent, it does not alter the underlying fact that the authority to regulate under the CWA is based on the broad power of the Commerce Clause, although the majority suggests that

83. *Solid Waste Agency*, 531 U.S. at 164.

84. The Corps promulgated the Migratory Bird Rule in 1986. It provides for an extension of the CWA's jurisdiction to intrastate waters:

- (1) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- (2) Which are or would be used as habitat by other migratory birds which cross state lines; or
- (3) Which are or would be used as habitat for endangered species; or
- (4) Used to irrigate crops sold in interstate commerce.

Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

85. *Solid Waste Agency*, 531 U.S. at 167.

86. *Id.* at 172.

87. *Id.*

88. *Id.* at 170.

when Congress passed the CWA it was exerting nothing more than its power over navigation.⁸⁹ As the dissenting opinion points out, the goals of the CWA have nothing to do with navigation at all,⁹⁰ but constitute environmental regulation—"an accepted exercise of federal power."⁹¹

Nonetheless, the CWA's power to regulate navigable waters gives it a broad reach over a variety of state and private activities. For example, the CWA requires permits from the Corps for dredging and filling operations in any navigable waters,⁹² as well as certification related to water quality standards by the state or the Environmental Protection Agency.⁹³ In addition, the CWA provides for the regulation of discharges from individual polluting activities through the National Pollution Discharge Elimination System. State law authorizes the Arkansas Department of Environmental Quality "to administer on behalf of the state its own permit program for discharges into navigable waters within its jurisdiction in lieu of that of the Environmental Protection Agency."⁹⁴

In addition, the CWA requires states to promulgate water quality standards protecting fishable and swimmable uses in all streams.⁹⁵ Arkansas law treats this mandate as an administrative rulemaking function assigned to the Arkansas Pollution Control and Ecology Commission (PC&E).⁹⁶ In carrying out the delegated authority, PC&E's Regulation 2,⁹⁷ among other things, designates a use classification for all waterbodies of the state.⁹⁸

When the states act pursuant to the CWA, a federal statute enacted by Congress, they are acting pursuant to specific authority delegated by Congress under its broad Commerce Clause jurisdiction. Actual navigability is only generally related to a state's congressionally delegated authority to regulate water quality. Thus, for regulatory purposes, the navigability concept makes an even wider sweep than it does when used to determine title and recreational rights. Non-navigable water bodies could easily be regulated by the federal government and the state as its proxy under this broad concept of navigability.

89. *Id.* at 168 n.3.

90. *Id.* at 181 (Stevens, J., dissenting).

91. *Solid Waste Agency*, 531 U.S. at 191 (Stevens, J., dissenting).

92. 33 U.S.C. § 1344 (2000). Under the Supreme Court's reading of the statute, this includes traditionally navigable waters, their non-navigable tributaries, and adjacent wetlands.

93. *Id.* § 1341 (2000).

94. ARK. CODE ANN. § 8-4-208(a) (LEXIS Repl. 2000).

95. 33 U.S.C. § 1313 (2000).

96. *See* ARK. CODE ANN. § 8-4-202(b)(3) (LEXIS Repl. 2000).

97. Arkansas Pollution Control and Ecology Commission, Regulation 2 (July 2001), available at http://www.adeq.state.ar.us/regs/files/deg02_final_010917.pdf.

98. *Id.* at 3-1 to 3-5.

VI. CONCLUSION

The litigation involving Crooked Creek set the stage for a definitive judicial statement on how the navigability concept could be used in resolving such disputes. All interests asserted that their positions would be upheld if the court applied the concept. The Attorney General, who filed the initial lawsuit, asserted that if the stream was navigable—suitable for even recreational use—the barbed wire fencing obstructing such use would have to be removed. Environmental groups asserted that this would also mean that the state owned the stream bed and could stop activities, such as gravel mining, which are detrimental to fish, wildlife, and water quality. Landowners and mining interests asserted that if the stream was non-navigable, under traditional commercial use concepts, the state's ability to regulate, as well as the public's access, could be limited. On the sidelines, the state agency most involved in water quality regulation, the Department of Environmental Quality, quietly asserted that through the CWA and the Commerce Clause, it had the power to regulate activities affecting water quality regardless of any finding of actual navigability. Navigability status is relevant to the assertion of each interested group. However, since the test for navigability differs, depending on the purpose, the answer to the question of what rights a party has to use a waterbody and the land underlying it depends upon the question posed.

Judge John Lineberger, who heard the Crooked Creek case in the Marion County Chancery Court, chose to answer the question posed by the landowners and mining interests and ignored the other navigability questions. Lineberger found that the state failed to prove that the stream was navigable for commercial purposes at statehood, and thus, properly applied the commercial usefulness test and not the recreational use test urged by the state.⁹⁹ As such, the Crooked Creek case illustrates that determining a party's rights in a waterbody depends not only on identifying the purpose for which the rights are being determined, but also on establishing which test should be applied by the Court.

99. *State v. Sharp*, No. 97-229-1 (Marion County Ch. Ct. June 8, 1999). Lineberger, however, did find that the public had acquired a prescriptive easement due to long term use of the stream. *Id.*; see also Julie Stewart, *Judge: Public Can Use but Doesn't Own Crooked Creek*, ARK. DEMOCRAT-GAZETTE, June 9, 1999, at A1.

