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Outline of Section 10 Case Law: Summary of Key Concepts and Terms Relevant to the Work of the Assumable Waters Subcommittee

PURPOSE

The purpose of this outline is to help frame the discussion of which waters are subject to state assumption under Section 404(g)(1) of the Clean Water Act. It is not intended to be an exhaustive list of all cases that have addressed the term "navigable waters of the United States" under the Rivers and Harbors Act of 1899 or under any other statute or judicial doctrine. It is intended to address some of the key terms used in or applicable to interpreting the parenthetical within Section 404(g)(1). The outline includes extensive quotes from the key cases so that every member of the Assumable Waters Subcommittee (Subcommittee) has ready access to the relevant portions of those cases. This draft outline is a work in progress and will be updated throughout the term of the Subcommittee.

> [*Note – this outline currently addresses the legal framework for determining the jurisdictional status of inland waters under the Rivers and Harbors Act. The law applicable to tidal waters will be integrated in future drafts.*]

KEY ASSUMPTIONS

Statutory Text:

When analyzing case law that might help guide the work of the Subcommittee, we must keep in mind the express language of Section 404(g)(1):

> The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters **(other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher water mark on the west coast, including wetlands adjacent thereto)**, within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

We know that the term "navigable waters" used outside the parenthetical in Section 404(g)(1) was defined by Congress to mean "waters of the United States." 33 U.S.C. § 1362(7). We also know that Congress intended for the U.S. Army Corps of Engineers (Corps) to retain Clean Water Act Section 404 permitting authority over a subset of those waters within each state given the plain language of the opening clause within the parenthetical ("other than those waters"). But Congress did not provide any further insight within the text of the Clean Water Act as to what it meant by the exclusion within the parenthetical, particularly regarding the scope of the exclusion.

When interpreting a statute, courts will give effect to the ordinary meaning of the terms used at the time of enactment. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). The Subcommittee should, if possible, interpret the language used within the parenthetical with that basic rule in mind. For example, the definition of "commerce" in 1976 included "the exchange or buying and selling of commodities on a large scale involving transportation from place to place." *Webster's New Collegiate Dictionary*, 226 (G&C Merriam Co. 1976). "Transport" meant "to transfer or convey from one place to another." *Webster's New Collegiate Dictionary*, 1242 (G&C Merriam Co. 1976).

Legislative Intent:

As described in the legislative history memorandum prepared by the legal working group of the Subcommittee, the legislative history of Section 404(g)(1) suggests that Congress intended for the Corps to retain Clean Water Act Section 404 permitting authority over waters already subject to its jurisdiction under Section 10 of the Rivers and Harbors Act, commonly referred to as "navigable waters of the United States," with one exception. Congress intended to authorize states to assume Section 404 permitting over those Section 10 waters that are subject to Corps Section 10 jurisdiction based solely on their historical use in interstate commerce. To prepare this outline, it was therefore assumed that Congress was referring to Rivers and Harbors Act Section 10 waters within the parenthetical in Section 404(g)(1), minus historical use only waters.

Judicial Precedent:

We have not identified a single case specifically addressing the meaning of the parenthetical language in Section 404(g)(1). We therefore must rely on cases and other sources that define the terms used within that parenthetical to help guide the work of the Subcommittee.

The concept of "navigability" has a complicated history in this country's jurisprudence, and is used to determine the scope of federal authority over water bodies in a variety of contexts. For example, the term has been used "to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, to determine the extent of authority of the Corps of Engineers under the Rivers and Harbors Act of 1899, and to establish the limits of the jurisdiction of federal

courts . . . over admiralty and maritime cases." *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979) (internal citations omitted); *see also PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1228-29 (2012). To further complicate matters, the scope of federal power that is actually exercised over the nation's waters under the Commerce Clause varies by statute and regulatory context. *See, e.g., 1902 Atlantic Ltd. v. Hudson*, 574 F.Supp. 1381, 1392 (E.D. Va. 1983) ("The term 'navigable waters of the United States' as used in the Rivers and Harbors Act of 1899 has a substantially different, and more limited, meaning than the term as used in the Clean Water Act. In contrast to the Clean Water Act, Congress did not intend the term "navigable waters of the United States" to reach to the full extent of congressional power over commerce as granted by Article 1, Section 8 of the Constitution.") (internal citations omitted).

The authority of Congress to regulate waters under the Commerce Clause is exceedingly broad. As stated by the Supreme Court:

> In our view, it cannot properly be said that the constitutional power of the United States is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recover of the cost of improvements through utilization of power are likewise parts of commerce control.

United States v. Appalachian Power Co., 311 U.S. 377, 426 (1940). This is why the Supreme Court has counseled that the "cases that discuss Congress' *paramount* authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis[1] than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as [a] 'navigable water of the United States.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (emphasis added). Thus the Supreme Court in *Kaiser Aetna* rejected the notion "that the concept of 'navigable waters of the United States' has a fixed meaning that remains unchanged in whatever context it is being applied." *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979). Instead, the Court cautioned that "any reliance upon judicial precedent must be predicated upon a careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (internal quotations omitted) (emphasis in original); *see also National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1063 (D.C. Cir. 1979) ("NWF and the federal defendants claim several post-1899 cases demonstrate that a more expansive construction of navigable waters of the United States now prevails. Some of these

[1] Traditional commerce clause analysis focuses on the broad regulation of economic activities that have the potential to "affect" interstate commerce generally. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

cases, however, deal not with the construction of the 1899 Act but with the extent of the commerce power.").[2]

The Supreme Court later signaled a similar concern regarding the use of a common test for navigability that permeates this subject area – the "Daniel Ball" test. Whether a water body is "navigable" and subject to federal jurisdiction is frequently determined by whether it is "navigable in fact" according to a basic test articulated by the Supreme Court in 1871:

> Those rivers must be regarded as public navigable waters in law which are navigable in fact. And they are navigable in act when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. 557, 563 (1871).

Given the wide applicability of the Daniel Ball test, the Supreme Court has cautioned "that the test for navigability is not applied in the same way in [different] types of cases[,]" referring, for example, to cases arising under the Federal Power Act, Clean Water Act, and title disputes. *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1228 (2012);[3] *see also United States*

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[2] This concept was further explained by a district court in a Rivers and Harbors Act case as follows:

> [T]he term "navigable waters of the United States" as used in the Rivers and Harbors Act of 1899, was not intended by Congress to reach to the full extent of congressional power over commerce as granted under Article 1, Section 8 of the Constitution. Rather, the term has a more limited meaning, consistent with the concepts of "navigation" and 'navigability' as of 1899, the time of enactment of the Rivers and Harbors Act. The Supreme Court has explained that the concept of 'navigable waters of the United States' does not have a fixed meaning which remains unchanged in whatever context it is being applied, and that all of the Court's cases dealing with the authority of Congress to regulate navigation cannot simply be lumped into one basket. Rather, any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case."

1902 Atlantic Ltd. v. Hudson, 574 F.Supp. 1381, 1393-94 (E.D. Va. 1983) (internal citations and quotations omitted) (emphasis in original).

[3] As further explained by the Supreme Court:

> The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. It has been used as well to determine questions of title to water beds under the equal-footing doctrine. It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases.

v. Appalachian Power Co., 311 U.S. 377, 404 (1940) ("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."). In fact, courts frequently cite to the wrong line of cases to support their holdings, creating some confusion as to the applicability of particular precedent to any given factual situation. *See, e.g.*, U.S. Army Corps of Engineers, Charleston District, Navigability Study, at S-48 (1977) ("Unfortunately, courts often fail to distinguish between the tests, and instead rely on precedents which are inapplicable to the facts before them.").

To be clear, the Daniel Ball test is used, in part, to determine federal jurisdiction under Section 10 of the Rivers and Harbors Act. *See National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1062 (D.C. Cir. 1979) ("NWF and the federal defendants assert that the statutes at issue in The Daniel Ball and The Montello were not related to section 10 closely enough for us to infer that Congress, in using the same language, was carrying over these cases' construction. We disagree.");[4] *Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F.2d 1156, 1168-69 (10th Cir. 1974) (tracing history of *The Daniel Ball* and its progeny and the statutory precursors to the

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> Among the differences in application are the following. For state title under the equal-footing doctrine, navigability is determined at the time of statehood, and based on the "natural and ordinary condition" of the water. In contrast, admiralty jurisdiction extends to water routes made navigable even if not formerly so; and federal regulatory authority encompasses waters that only recently have become navigable, were once navigable but are no longer, or are not navigable and never have been but may become so by reasonable improvements. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. And, of course, the commerce power extends beyond navigation. In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. This list of differences is not exhaustive. Indeed, each application of [the *Daniel Ball*] test ... is apt to uncover variations and refinements which require further elaboration.

PPL Montana, LLC v. Montana, 132 S.Ct. 1215, 1228-29 (2012) (internal citations and quotations omitted).

[4] As explained by the D.C. Circuit:

> Our discussion of the history of section 10 has revealed several factors relevant to the application of the phrase "navigable waters of the United States" to Devils Lake. First, on at least two occasions the Supreme Court held explicitly under other statutes that these words required an interstate by water. Second, this construction of the phrase was brought to the attention of the House during debates over the 1890 Act. Third, in a contemporaneous application of this statute, the Attorney General quoted the language of earlier Supreme Court opinions [including The Daniel Ball] and adopted it as the test under the 1890 Act. Finally, Congress, in adopting the 1899 Act, simply translated existing law almost verbatim into the section in force today and by this action intended no substantive changes.

National Wildlife Federation v. Alexander, 613 F.2d 1054, 1061-62 (D.C. Cir. 1979).

Rivers and Harbors Act of 1899); [5] *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979) (same).[6] But to prepare this outline, given the cautionary guidance of the Supreme Court in *Kaiser Aetna* and *PPL Montana*, care has been taken to rely on cases arising under the Rivers and Harbors Act wherever possible. That is not to say that cases arising under different statutory contexts would be inapplicable or unhelpful when analyzing the assumability of a particular waterbody under Section 404(g)(1),[7] but this outline assumes for clarity (and some brevity) that Rivers and Harbors Act cases are applicable to the Subcommittee's charge given the legislative history referenced above.

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[5] As explained by the Tenth Circuit:

> We realize that the construction of 'navigable water of the United States' made in The Daniel Ball and The Montello may be viewed as involving a statute depending on the admiralty power, while the Rivers and Harbors Act is an exercise of power under the commerce clause. Nevertheless, The Daniel Ball was a landmark decision and its interpretation of 'navigable water of the United States … was well settled at the time of the enactment of the 1899 statute. It was the interpretation given to "navigable water of the United State" as used in the 1890 Rivers & Harbors Act, a predecessor of the 1899 Act…. When Congress uses words in a statute without defining them, and those words have a judicially settled meaning, it is presumed that Congress intended them to have that meaning in the statute. We may assume that the Congress was aware of these decisions and of the interpretation which they had placed upon the phrase "navigable water of the United States" so that if it had intended the Act of 1899 to employ a broader definition, it would have manifested such an intention by clear and explicit language. In the absence of any such language it should not be assumed that any such departure was intended.

Hardy Salt Co. v. Southern Pacific Transp. Co., 501 F.2d 1156, 1168 (10th Cir. 1974) (internal quotations and citations omitted).

[6] As explained by the Eighth Circuit:

> Since the Rivers and Harbors Act of 1899 was an exercise by Congress of its power under the Commerce Clause, we agree with the District Court that the extent of federal regulatory jurisdiction under the Act is to be determined in accordance with the basic test set forth in The Daniel Ball. The extent of federal regulatory power under s 10 of the Act, under which the Corps claims jurisdiction in the instant case, is limited to navigable waters of the United States. Since this is the precise phrase which was defined by the Supreme Court in The Daniel Ball, and which was used in that case and others to describe the reach of the federal commerce power over navigable waters prior to the enactment of the first Rivers and Harbors Act in 1890, we must assume that Congress intended the phrase to have the meaning which it had acquired in contemporary judicial interpretation.

Minnehaha Creek Watershed District v. Hoffman, 597 F.2d 617, 622 (8th Cir. 1979) (internal citations and quotations omitted).

[7] *See, e.g., State of Alaska v. United States*, 754 F.2d 851 (9th Cir. 1985) (recognizing the *Kaiser Aetna* warning to consider the context of other cases before relying on them, and explaining why it applied non-title cases to help resolve a title dispute).

Purpose of the Rivers and Harbors Act:

Given the guidance in *Kaiser Aetna* and *PPL Montana* to consider the purpose for which "navigability" was implicated in any particular case, the following bullet points provide some brief background on the history and development of the Rivers and Harbors Act.

- "The history of federal control over obstructions to the navigable capacity of our rivers and harbors goes back to Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8, 8 S.Ct. 811, 815, 31 L.Ed. 629, where the Court held 'there is no common law of the United States' which prohibits 'obstructions' in our navigable rivers. Congress acted promptly, forbidding by s 10 of the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, 'the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity' of any waters of the United States. The 1899 Act followed a report to Congress by the Secretary of War, which at the direction of Congress, 29 Stat. 234, contained a compilation and revision of existing laws relating to navigable waters. The 1899 Act was said to contain 'no essential changes in the existing law.'" *United States v. Republic Steel Corp.*, 362 U.S. 482, 485-86 (1960).

- "It is argued that 'obstruction' means some kind of structure. The design of s 10 should be enough to refute that argument, since the ban of 'any obstruction,' unless approved by Congress, appears in the first part of s 10, followed by a semicolon and another provision which bans various kinds of structures unless authorized by the Secretary of the Army.

  The reach of s 10 seems plain. Certain types of structures, enumerated in the second clause, may not be erected 'in' any navigable river without approval by the Secretary of the Army. Nor may excavations or fills, described in the third clause, that alter or modify 'the course, location, condition, or capacity of' a navigable river be made unless 'the work' has been approved by the Secretary of the Army. There is, apart from these particularized invasions of navigable rivers, which the Secretary of the Army may approve, the generalized first clause which prohibits 'the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity' of such rivers. We can only conclude that Congress planned to ban any type of 'obstruction,' not merely those specifically made subject to approval by the Secretary of the Army. It seems, moreover, that the first clause being specifically aimed at 'navigable capacity' serves an end that may at times be broader than those served by the other clauses. Some structures mentioned in the second clause may only deter movements in commerce, falling short of adversely affecting navigable capacity. And navigable capacity of a waterway may conceivably be affected by means other than the excavations and fills mentioned in the third clause. We would need to strain hard to conclude that the only obstructions banned by s 10 are those enumerated in the second and third clauses. In short, the first clause is

aimed at protecting 'navigable capacity,' though it is adversely affected in ways other than those specified in the other clauses." *United States v. Republic Steel Corp.*, 362 U.S. 482, 485-468-87 (1960).

- "[T]the legislative history supports the view that the [Rivers and Harbors] Act was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures. In part, the Act was passed in response to this Court's decision in *Willamette*…. There the Court held that there was no federal common law which prohibits obstructions and nuisances in navigable rivers. Although *Willamette* involved private parties, the clear implication of the Court's opinion was that in the absence of specific legislation no party, including the Federal Government, would be empowered to take any action under federal law with respect to such obstructions. The Act was intended to enable the Secretary of War to take such action." *California v. Sierra Club*, 451 U.S. 287, 294-95 (1981) (internal citations and quotations omitted).

- "In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country, even against any state action. It is true there have been frequent decisions recognizing the power of the state, in the absence of congressional legislation, to assume control of even navigable waters within its limits, to the extent of creating dams, booms, bridges, and other matters which operate as obstructions to navigability. The power of the state to thus legislate for the interests of its own citizens is conceded, and until in some way congress asserts its superior power, and the necessity of preserving the general interests of the people of all the states, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).

- "This act declares that 'the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited.' Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of state statutes, it is obvious that congress meant that thereafter no state should interfere with the navigability of a stream without the condition of national assent…. [I]ts only purpose, as is obvious, was to affirm that as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government. It was an exercise by congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams; and various sections in this statute … provide for the

mode of asserting that control." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708-09 (1899) (construing Rivers and Harbors Act of 1890).

- "Furthermore, promoting and protecting navigation was the dominant theme of the [Rivers and Harbors] Act …." *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1297 (5th Cir. 1976).

- "That the United States has sovereign power to remove obstructions to interstate and foreign commerce is the main purpose which this [Rivers and Harbors] Act fulfills." *United States v. Ohio Barge Lines, Inc.*, 432 F.Supp. 1023, 1027 (W.D. Pa. 1977) (citing *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925)).

- "The purpose behind 33 U.S.C. § 403 is to ban from the navigable waters all obstructions not affirmatively authorized by Congress and to forbid the placement of undesirable structures in the navigable waters, except as recommended by the Chief of Engineers and authorized by the Secretary of the Army." *United States v. Seda Perez*, 825 F.Supp. 447, 451 (D.P.R. 1993).

- "The dominant theme of the Rivers and Harbors Act was the promotion and protection of navigation. Although the intent and purpose of Congress in enacting Section 10 was to insure free navigability of interstate commerce, Congress did not intend to extend federal regulatory jurisdiction to every spot of navigable water in the country." *1902 Atlantic Ltd. v. Hudson*, 574 F.Supp. 1381, 1395-96 (E.D. Va. 1983) (internal citations and quotations omitted).

- "Why the Congress limited the Rivers and Harbors Act to navigable waters is no insoluble mystery. Although the Constitution does not mention navigable waters, it vests in Congress the power to 'regulate commerce with foreign nations and among the several states.' Since much of the interstate commerce of the 19th century was water borne, it was early held that the commerce power necessarily included the power to regulate navigation. To make this control effective Congress was deemed empowered to keep navigable waters open and free and to provide sanctions for interference. The Rivers and Harbors Act of 1899 was an exercise of that power." *United States v. Holland*, 373 F.Supp. 665, 669 (M.D. Fla. 1974) (internal citations omitted).

KEY CONCEPTS AND TERMS

General Test:

There is a two part test for determining whether a water body is a "navigable water of the United States" subject to jurisdiction under the Rivers and Harbors Act. First, the water

must be navigable in fact. Second, it must form a highway, either by itself or in connection with other waters, over which commerce may be carried on with other states or countries.

- "A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Daniel Ball*, 77 U.S. 557, 563 (1871).

- "This court held in the case of *The Daniel Ball*, that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And a river is a navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water." *The Montello*, 87 U.S. 430, 439 (1874).

- "The Daniel Ball test is bipartite: first, the body of water must be navigable in fact; and second, it must itself, or together with other waters, form a highway over which commerce may be carried on with other states." *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 622-23 (8th Cir. 1979).

- "It was not until 1870 that a case required the Supreme Court to define navigable waters of the United States. In The Daniel Ball and The Montello, the Court interpreted the term as limiting the application of the statutes to vessels on waterways forming part of a continuous interstate water highway.

  ….

  [The Court in The Daniel Ball] explained what Congress meant when it employed the phrase 'navigable waters of the United States.' First, the waterways must be navigable in fact; that is, they must be capable of being used for commerce. Second, they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from navigable waters of the States, when they form in their ordinary

condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.
….

NWF and the federal defendants assert that the statutes at issue in The Daniel Ball and The Montello were not related to section 10 closely enough for us to infer that Congress, in using the same language, was carrying over these cases' construction. We disagree." *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1058-59, 1062 (D.C. Cir. 1979) (internal citations omitted).

- "The test of navigability has been stated and restated by the federal courts for the last one hundred years. Navigability has been defined in countless ways but its essential elements have remained constant. The District Court here properly identified these elements: A navigable waterway of the United States must (1) be or have been (2) used or susceptible of use (3) in the customary modes of trade and travel on water (4) as a highway for interstate commerce." *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 450 (6th Cir. 1982).

- "A waterway is regarded as 'navigable water of the United States' within the meaning of § 10 of the Rivers and Harbors Act if it 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. Thus, the waterway must form, either by itself or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 64 F.3d 630, 634 (11th Cir. 1995) (internal quotations and citations omitted).

Navigable in Fact Concepts and Terms:

A water is "susceptible of being used" for commerce if it is "capable" of use. A water need not be currently used in commerce to be subject to Rivers and Harbors Act jurisdiction.

- "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. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." *The Montello*, 87 U.S. 430, 441 (1874).

- The Fox River "has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce, in the only mode in which commerce could be

conducted, before the navigation of the river was improved." *The Montello*, 87 U.S. 430, 443 (1874).

- "By way of further clarification and as a further refinement of the test laid down in *The Daniel Ball,* the Court [in *The Montello*] stated that, 'the true test 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 the river, rather than the extent and manner of that use.'" *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 32 (N.D. Ga. 1972).

- "In determining the navigability of a waterway, the true criterion is capability rather than the manner and extent of use." *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, 815 (D. Del. 1973).

Commercial navigation on a water can be seasonal, and can be interrupted by occasional natural obstructions or portages.

- "[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. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market." *The Montello*, 87 U.S. 430, 441 (1874).

- "The learned judge of the court below rested his decision against the navigability of the Fox River below the De Pere Rapids chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. This is true, and these obstructions rendered the navigation difficult, and prevented the adoption of the modern agencies by which commerce is conducted. But with these difficulties in the way commerce was successfully carried on, for it is in proof that the products of other States and countries were taken up the river in its natural state from Green Bay to Fort Winnebago, and return cargoes of lead and furs obtained. And the customary mode by which this was done was Durham boats." *The Montello*, 87 U.S. 430, 442 (1874).

- "Navigability, in the sense of the law, is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921).

- In *The Montello*, "notwithstanding the fact that before the improvements there were obstructions to an unbroken navigation, which rendered the navigation difficult and

prevented the adoption of modern agencies, commerce was successfully carried on …." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921).

- In *The Montello*, "[t]he Court also for the first time recognized that obstructions rendering navigation difficult would not defeat a finding of navigability where commerce was nevertheless successfully being conducted." *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 32 (N.D. Ga. 1972).

- "The use of navigable streams may be limited to travel during seasonal water level fluctuations. Moreover, a river is still navigable despite occasional natural obstructions or portages." *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 449 (6th Cir. 1982) (internal citations and quotations omitted).

- "Navigability also is not destroyed because a watercourse is interrupted by occasional natural obstructions or portages, nor need navigation be open at all seasons of the year, or at all stages of the water." *Gollatte v. Harrell*, 731 F.Supp. 453, 459 (S.D. Ala. 1989).

Occasional or exceptional use of a water for commerce is not sufficient to render it subject to Rivers and Harbors Act jurisdiction.

- "The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899).

- "Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899).

- "It is a safe inference from these and other cases to the same effect which might be cited, that the term, 'navigable waters of the United States,' has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress to regulate such waters is not expressly granted in the Constitution, but is a power incidental to the express 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;' and with reference to which the observation was made by Chief Justice Marshall, shall, that 'it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not

extend to or affect other states.'" *Leovy v. United States*, 177 U.S. 621, 632 (1900) (internal citations omitted).

- *But compare United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 35 (N.D. Ga. 1972) (internal quotations and citations omitted):

  "The mere fact that a river will occasionally float logs, poles and rafts downstream in times of high water does not make the river navigable and, it is not, however, as Chief Justice Shaw said, every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed 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. Instead, with one exception, the principle that a river is navigable when it is used or is susceptible for use in its ordinary condition as a highway of commerce has been consistently followed by the federal courts. That exception is Leovy v. United States, 177 U.S. 621, 20 S.Ct. 797, 44 L.Ed. 914 (1900), where the Court, in reviewing a criminal conviction under the predecessor statute to 33 U.S.C. § 401, more narrowly defined the term 'navigable waters of the United States,' to include only those waters where commerce is of a substantial and permanent character. Therefore, the waterway must be susceptible for use as a channel of useful commerce and not merely capable of exceptional transportation during periods of high water."

- "However, where commercial use or susceptibility of use is sporadic and ineffective, the river is not navigable. A waterway is not navigable when its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water." *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 449 (6th Cir. 1982) (internal quotations and citations omitted); *see also Gollatte v. Harrell*, 731 F.Supp. 453, 459 (S.D. Ala. 1989) ("However, susceptibility of use as a highway for commerce should not be confined to exceptional conditions or short periods of temporary high water.") (internal quotations omitted).

- "In the late Eighteenth Century military expeditions transported supplies up the rivers to several forts in southwestern Ohio. As many as thirty-two men could have been required to pull a loaded flatboat upstream. Military use of the rivers through great quantities of manpower was not the customary mode of travel for settlers and farmers of the time. This use of the rivers by military expeditions does not prove the susceptibility of use for interstate commerce." *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 451 (6th Cir. 1982).

- "No meaningful argument can be made that the Chattahoochee River is *presently* being used or is susceptible for commercial navigation. The uncontradicted testimony clearly reveals that current boat travel on the river is limited to very light sporting craft such as canoes, kayaks and rubber rafts, drawing no more than a few inches of water, and that even these floating devices often scrape the rocky bed of the river. While pleasure boating can sometimes indicate a river's susceptibility for commercial use, the type of craft and persons presently using, and enjoying, the river demonstrates that the river's main appeal lies in the frequent excitement one encounters in 'running the rapids,' observing the 'white water,' and having short interims of 'good water' upon which to relax. It would be an affront to the public's intelligence to classify the river *presently* suitable for any kind of commercial navigation." *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 34 (N.D. Ga. 1972) (internal quotations and citations omitted) (emphasis in original).

- "A closer question exists when discussing whether the river has been used or was suitable for commercial use in the *past.* With the exception of the gold dredging barge, and two or three ferries operating upon the river, the government has shown no other prior use of the river in the subject section. Even though a small amount of traffic compared to the available commerce of the region is sufficient, the existence of ferries is no more an example of commercial use than the presence of a bridge or railroad trestle whose primary purpose is to avoid the river rather than to employ it as a means for trade and transportation. Similarly, the barge is but an isolated and exceptional example of a person using the river for a few miles primarily along his own property, to extract gold-bearing silt from the river bed. While there are cases in which a slightly more substantial history of commercial use has failed to result in a finding of navigability, no case known to the court has gone so far as to hold that one verified example, such as we have here, is sufficient to demonstrate navigability under law. Consequently, the stretch of the river presently under consideration was neither used nor susceptible for use as a highway of commerce in the *past.*" *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 35 (N.D. Ga. 1972) (internal quotations and citations omitted) (emphasis in original).

Water-borne vessels of any kind can be used to demonstrate the commercial use of a water.

- "[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted….

  It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway…. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast

commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river." *The Montello*, 87 U.S. 430, 441-42 (1874).

- "[P]leasure boating can sometimes indicate a river's susceptibility for commercial use …." *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 34 (N.D. Ga. 1972) (citing *United States v. Utah*, 283 U.S. 64, 82 (1931), to support this proposition).

    - This case is but one example of many where courts in Rivers and Harbors Act cases have cited to non-Rivers and Harbors Act cases for support. The *State of Utah* case involved a title dispute involving the bed of several rivers in Utah. Under the principles of *Kaiser Aetna* and *PPL Montana*, we should consider the underlying context of a case before relying on it in the Rivers and Harbors Act context. Here, the court acknowledged that recreational use could demonstrate susceptibility for use, but recognized the underlying need to demonstrate commercial use as well, so it is clear the court understood the general principles of Rivers and Harbors Act jurisprudence. In addition, the concept is in line with the general position articulated in *The Montello* – "vessels of any kind" can be used to demonstrate navigability.

- "Lack of commercial traffic is no bar to a conclusion of navigability where personal and private use of boats demonstrates the availability of a waterway for the simpler types of commercial traffic." *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, 815 (D. Del. 1973).

"Ordinary condition" under the original Daniel Ball test meant the natural condition of the water.

- "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. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." *The Montello*, 87 U.S. 430, 441 (1874).

- "The Circuit Court of Appeals, in passing upon the question of navigability, correctly applied the test laid down by this court in The Daniel Ball and The Montello; that is, the test whether the river, in its natural state, is used, or capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921) (internal citations omitted).

- "In the Montello, the question was whether Fox river, in the state of Wisconsin, was a navigable water of the United States within the meaning of acts of Congress. Originally there were rapids and falls in the river, but these had been obviated by locks, canals, and dams, so as to furnish an uninterrupted water communication for steam vessels of a considerable capacity. It was argued that although since these improvements the river might be considered as a highway for commerce conducted in the ordinary modes, it was not so in its natural state, and therefore not navigable under the decision in The Daniel Ball. The court, accepting navigability in the natural state of the river as the correct test, proceeded to show that, before the improvements resulting in an unbroken navigation, and when a few portages were necessary, a large and successful interstate commerce had been carried through the river by means of Durham boats….

  Proceeding to say that notwithstanding the fact that before the improvements there were obstructions to an unbroken navigation, which rendered the navigation difficult and prevented the adoption of modern agencies, commerce was successfully carried on …." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122-23 (1921) (internal citations omitted).

The "ordinary condition" limitation in the original Daniel Ball test has been modified and expanded to include use of a water in its natural condition or through reasonable improvement.

- "To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural or ordinary conditions' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in section 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use. The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable, a waterway remains so. This is no more indefinite than a rule of navigability in fact as adopted below based upon 'useful interstate commerce' or 'general and common usefulness for purposes of trade and commerce' if these are interpreted as barring improvements. Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." *United States v. Appalachian Power Co*., 311 U.S. 377, 407-08 (1940) (internal citations omitted).

- An argument could be made that *Appalachian Power* is of tenuous application in the Rivers and Harbors Act context under the principles of *Kaiser Aetna* and *PPL Montana*, discussed above in the "key assumptions" section of this outline. It is a case arising under the Federal Power Act, a broader application of federal regulatory power under the Commerce Clause than the Rivers and Harbors Act. *See, e.g.*, 16 U.S.C. § 797(e) (provision of the Federal Power Act authorizing the federal government to undertake projects to improve navigation in and develop power from any stream or other body of water over which Congress has authority under the commerce clause); *United States v. Appalachian Power Co*., 311 U.S. 377, 424 (1940) ("Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through section 9 of the Rivers [and] Harbors Act of 1899 prohibiting construction without Congressional consent and through section 4(e) of the present Power Act."). In fact, the Court in *Appalachian Power* based its reasonable improvement decision in large part on direction from Congress in the Federal Power Act, which defined "'navigable waters' as those 'which either in their natural *or improved condition*' are used or susceptible to use." *United States v. Appalachian Power Co*., 311 U.S. 377, 407 (1940) (citing section 3 of the Federal Power Act) (emphasis added). This is precisely the type of case the *Kaiser Aetna* Court warned subsequent courts to consider, for precedential purposes, "the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (emphasis in original) (internal quotations omitted).

  The Subcommittee, however, can rely on the *Appalachian Power* "reasonable improvement" test in its deliberations regarding the scope of Section 10 jurisdiction and state assumption of Section 404 permitting authority for two reasons. First, and most importantly, we can reasonably infer that Congress intended to adopt the reasonable improvement test articulated by *Appalachian Power* in the state assumption analysis authorized by Section 404(g)(1). Congress specifically used the terms "natural condition" and "by reasonable improvement" in the text of Section 404(g)(1). We can presume Congress was aware of the contemporary meaning of those terms at the time it enacted the 1977 amendments. *See, e.g., Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939) ("we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary"). Second, circuit and district courts since the *Appalachian Power* decision – whether appropriate or not – have widely accepted the "reasonable improvement" test in the Rivers and Harbors Act context. *See, e.g., Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447,

449 (6th Cir. 1982) ("A river is navigable if it can be made useful through reasonable improvements."); *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 33-34 (N.D. Ga. 1972) (recognizing the reasonable improvement test).

Natural condition refers to the volume of water, gradients, and flow in a water's natural state.

- "Natural or ordinary conditions refers to volume of water, the gradients and the regularity of the flow." *United States v. Appalachian Power Co*., 311 U.S. 377, 407 (1940).

- "[T]the phrase 'natural and ordinary conditions' was held [in *Appalachian Power*] to mean only volume of water, gradient and regularity of flow." *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 35-36 (N.D. Ga. 1972) (internal citations omitted).

What constitutes "reasonable improvement" is context-dependent, and requires a balancing between the cost of and the need for the improvement at the time the improvement would be required. Reasonable improvements need not be completed or even authorized to be considered in this analysis.

- "The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful." *United States v. Appalachian Power Co*., 311 U.S. 377, 407-08 (1940) (internal citations omitted).

- "Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. Although navigability to fix ownership of the river bed or riparian rights is determined as the cases just cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable. There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents. The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the

existing power over commerce." *United States v. Appalachian Power Co*., 311 U.S. 377, 408-09 (1940) (internal citations omitted).

- "In light of the Supreme Court's admonition in *Appalachian* that a determination of what constitutes reasonable improvements will depend upon a balancing of cost and need at a time when the improvement would be useful, the court notes and rejects the Corps' legal conclusion that the river is navigable today because it could have been made navigable in 1880. In other words, recognizing that the river in 1880 was not susceptible to commercial transportation, the Corps is attempting to engraft the "future improvement" criterion upon the test of past susceptibility. Clearly, the question, properly phrased, is whether a presently non-navigable river can be made navigable in the future through the implementation of reasonable improvements. The issue is *not,* as the Corps of Engineers apparently believes, whether at some time in the past the river could have been sufficiently improved to meet the then needs of the area. The court is without evidence as to the present need of the Atlanta area for such an avenue of commerce, and, similarly, has no knowledge as to how much it would cost to make the river available for commercial traffic. Absent a more thorough showing of these two crucial factors, the court cannot balance the opposing interests involved in accordance with the mandate of the Supreme Court." *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 35-36 (N.D. Ga. 1972) (emphasis in original).

    - *But compare Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 64 F.3d 630, 634 (11th Cir. 1995) (emphasis added): "Therefore, if a waterway at one time was navigable in its natural or improved state, *or was susceptible to navigation by way of reasonable improvement*, it retains its navigable status even though it is not presently used for commerce, or is presently incapable of use because of changed conditions or the presence of obstructions."

Waters that once were used to transport commerce among the states do no lose their status as navigable waters of the United States through disuse, changed conditions, or artificial obstructions.

- "We concur in the opinion of the Circuit Court of Appeals that a river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. And we agree that the provisions of section 9 of the Act of 1899 (30 Stat. 1151) apply to such a stream. The act in terms applies to 'any … navigable river, or other navigable water of the United States'; and, without doing violence to its manifest purpose, we cannot limit its prohibition to such navigable waters as were, at the

time of its passage, or now are, actually open for use. The Desplaines river, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation. Improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the states. If they are to be abandoned, it is for Congress, not the courts, so to declare. The policy of Congress is clearly evidenced in the act of 1899, and, in the present case at least, nothing remains but to give effect to it." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921).

    - Note that this case created the historical use component of the current definition of "navigable waters of the United States" used by the Corps and the courts to define the scope of jurisdiction under the Rivers and Harbors Act. But as explained in the legislative history memorandum, Congress did in fact intend to permit states to assume responsibility for issuing Section 404 permits in those waters notwithstanding their status as Section 10 jurisdiction waters.

- "Once a waterway is found to be navigable, it remains so. Therefore, if a waterway at one time was navigable in its natural or improved state, or was susceptible to navigation by way of reasonable improvement, it retains its navigable status even though it is not presently used for commerce, or is presently incapable of use because of changed conditions or the presence of obstructions." *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 64 F.3d 630, 634 (11th Cir. 1995).

- "Under the historical use test of navigability a river is 'indelibly navigable.' That is, a river is navigable as a matter of law if it has ever been navigable. For a river to be considered a navigable water of the United States, it is sufficient that the river has been used as a commercial highway even though it no longer is or can be used as such." *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 449-50 (6th Cir. 1982) (internal citation omitted).

Following *Economy Light* and *Appalachian Power*, the "navigable in fact" prong of the Daniel Ball test for Rivers and Harbors Act jurisdiction includes an analysis of past, current and future use.

- "With due regard to the liberality frequently accorded the federal regulatory powers, the court notes the well reasoned analysis and summarization of the "*Appalachian* guidelines" … wherein the following threefold test of navigability was deduced,

  > ... if (1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past,* or (3) it could be made suitable for use in the *future* by reasonable improvements.

  This synopsis of *Appalachian* has been cited with approval and followed by [multiple] courts and, because of its obvious relevance to the present dispute, will guide further consideration of the Chattahoochee River. *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 34 (N.D. Ga. 1972) (emphasis in original).

- "Indeed under guidelines laid down in *Appalachian* a waterway is navigable and subject to federal regulation if (1) it is *presently* being used or is suitable for use, or (2) it has been used or was suitable for use in the *past,* or (3) it could be made suitable for use in the *future* by reasonable improvements for transportation and commerce." *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, 815 (D. Del. 1973).

- "The rule of navigable in fact, though unchanged, has been refined over the years. In *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940), the Supreme Court described three ways that navigability may be established: (1) present use or suitability for use; (2) suitability for future use with reasonable improvements; or (3) past use or suitability for past use." *Gollatte v. Harrell*, 731 F.Supp. 453, 458 (S.D. Ala. 1989).

Rivers and Harbors Act jurisdiction must be based on the actual or potential use of a water for commerce.

- "It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed 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.'" *The Montello*, 87 U.S. 430, 442 (1874).

- "The trial judge instructed the jury as follows: 'What is a navigable water of the United States? It is a navigable water which, either of itself, or in connection with other water, permits a continuous journey to another state. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another state from the state in which you start on that journey, that is a navigable water of the United States. It is so called in contradistinction to waters which arise and come to an end within the boundaries of the state…. But, if from the

water in one state you can travel by water continuously to another state, and the water is a navigable water, then it is a navigable stream of the United States…. If it was navigable, and connected with waters that permitted a journey to another state, then it is a navigable water of the United States….'

If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states….

…. Indeed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi river on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed 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….
….

It is plain, therefore, that the attention of the jury was not directed at all to the question of any existing interstate commerce, and that the learned judge was of opinion, and so ruled, that the physical possibility of passing by a boat out of Red Pass into the Mississippi river constituted the pass a navigable water of the United States." *Leovy v. United States*, 177 U.S. 621, 632-35 (1900) (internal citations omitted).

- "But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes." *Leovy v. United States*, 177 U.S. 621, 633 (1900).

- "The Supreme Court has emphasized repeatedly that a navigable waterway of the United States must be of practical service as a highway of commerce. A navigable river is one of general and common usefulness for purposes of trade and commerce. The Rivers and

Harbors Act protects the Nation's right that its waterways be utilized for the interests of the commerce of the whole country. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and acts of Congress have in view is *the promotion and protection of commerce in its international and interstate aspect,* and a practical construction must be put on these enactments as intended for such large and important purposes." *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 449-50 (6th Cir. 1982) (internal citations and quotations omitted) (emphasis in original).

Interstate Highway Requirement:

Rivers and Harbors Act jurisdiction requires an interstate connection over which water-borne commerce can be transported between the states and with other countries.

- "[W]e are still in doubt whether the Fox River has any such connection with other waters as to form with them a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. It can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters, such a highway. If it form such a highway, the case presented is directly within the ruling made in the case of the steamer *Daniel Ball*, decided at the present term. If, however, the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State …." *The Montello*, 78 U.S. 441, 415 (1870).

- "Although the definition of 'navigability' laid down in The Daniel Ball has subsequently been modified and clarified, its definition of 'navigable water of the United States,' insofar as it requires a navigable interstate linkage by water, appears to remain unchanged." *Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F.2d 1156, 1167 (10th Cir. 1974).

- "We conclude that a navigable water of the United States within the meaning of Sections 9, 10 and 13 of the Rivers and Harbors Act must be construed in lien with the interpretation in The Daniel Ball, as contemplating such a body of water forming a continued highway over which commerce is or may be carried on with other states or foreign countries, by water. Thus we must hold that the District Court did not err in dismissing the federal claims of Hardy and Morton founded on the Act." *Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F.2d 1156, 1169 (10th Cir. 1974).

- "The Corps of Engineers contends, however, that federal regulatory jurisdiction under the Rivers and Harbors Act does not require that a body of water be part of an interstate waterway system, as long as it is a segment of a commercial highway, which may consist of water, rail or road connections. The Corps contends that since Lake Minnetonka and the upper portion of Minnehaha Creek have interstate road and rail connections, this is enough to make them 'navigable waters of the United States' for the purposes of regulatory jurisdiction under the Act.

  We disagree. Although the first prong of The Daniel Ball test has been broadened in later Supreme Court decisions, the second prong of this test, requiring a navigable interstate linkage by water, has remained unchanged. In United States v. The Montello, 78 U.S. (11 Wall.) 411, 20 L.Ed. 191 (1871), the Supreme Court unequivocally stated: 'If, however, the river is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the state, then it is not a navigable water of the United States, but only a navigable water of the state….'" *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 623 (8th Cir. 1979).

- "Thus, the Court in The Montello not only reiterated The Daniel Ball's requirement that there be an interstate connection by water but also refused to decide the case until that connection was proved….

  …. In other words, the Supreme Court stated that commerce on waters lacking an interstate connection by water could be interstate commerce but that any statute using the words 'navigable waters of the United States' would be construed as applying only to waters with such a connection. Thus, while confirming congressional power over all waterways usable in interstate commerce, the Court in The Montello held that Congress had stopped short of exercising its full authority by virtue of its having restricted the statutes' coverage to navigable waters of the United States." *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1059-60 (D.C. Cir. 1979).

- "The principal question before us is whether Congress, by employing the words 'navigable waters of the United States' in section 10, intended the provisions of that section to govern, on the one hand, all waterways within the United States that can sustain interstate commerce or, on the other hand, only those waterways that connect with others so as to form an uninterrupted water highway crossing state lines. The parties agree, as do we, that Congress has the power to reach all waters that may be used in, or the use of which can affect, interstate commerce. The issue thus is whether the 1899 Act reaches all these waters or only those that by themselves or by joining with others cross

state borders." *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1058 (D.C. Cir. 1979).

- "We … conclude that Congress in 1890 and 1899 meant to limit section 10 to those waters usable in interstate commerce that connect with other waters so as to form a continuous interstate waterway. Therefore, Devils Lake is not a navigable water of the United States and is outside the scope of section 10." *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1062 (D.C. Cir. 1979).

- "NWF and the federal defendants also point to congressional action (and inaction) in 1976 on the definition of navigable waters of the United States. They claim that by addressing the question of the term's scope and not correcting new regulations promulgated by the Corps, Congress acquiesced in a construction that abandons the interstate connection requirement.

  For many years the Corps' regulations did not define navigable waters of the United States. Instead, they simply quoted the language of The Daniel Ball and stated that authoritative interpretation lay with the courts. In 1972, however, the Corps promulgated a new rule that more precisely defined the term:

  > Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

  .... On the question of the water's interstate nature, the new regulations provided that although a physical connection 'with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes would make its interstate character clear, it would not be 'necessary that there be a physically navigable connection across a state boundary.'
  ….

  Although one can conclude, as NWF and the federal defendants would have us do, that congressional inaction implies approval,… we do not believe that Congress's failure to correct all the problems it has found with the Corps' new regulations suggests ratification of the provisions it has not yet addressed. Rather, we believe its voiced dissatisfaction with them indicates disagreement." *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1063-65 (D.C. Cir. 1979) (internal citations omitted).

- "NWF and the federal defendants claim several post-1899 cases demonstrate that a more expansive construction of navigable waters of the United States now prevails. Some of these cases, however, deal not with the construction of the 1899 Act but with the extent of the commerce power. We must keep in mind that The Daniel Ball and The Montello held only that the acts passed by Congress did not reach intrastate waterways lacking an interstate connection by water. They did not confine congressional power to reach these bodies of water. Indeed, The Montello suggested that Congress could go further if it desired. All the other cases dealt only with whether particular rivers were navigable in fact, a matter stipulated here. They did not discuss the issue of interstate connection. NWF and the federal defendants have pointed to no case that has expanded the term by dropping the requirement of an interstate connection by water in the absence of an expressly broader statutory definition." *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1063 (D.C. Cir. 1979) (internal citations omitted).

Ebb and Flow of the Tide

[To be added.]

SPECIFIC EXAMPLES

Grand River, Michigan. *The Daniel Ball*, 77 U.S. 557, 564 (1871).

- "From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power."

Fox River, Wisconsin. *The Montello*, 87 U.S. 430, 443 (1874).

- "From what has been said, it follows that Fox River is within the rule prescribed by this court in order to determine whether a river is a navigable water of the United States. It has always been navigable in fact, and not only capable of use, but actually used as a highway for commerce, in the only mode in which commerce could be conducted, before the navigation of the river was improved. Since this was done, the valuable trade prosecuted on the river, by the agency of steam, has become of national importance. And emptying, as it does, into Green Bay, it forms a continued highway for interstate commerce."

Rio Grande, New Mexico. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899).

- "Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox river, which was considered in The Montello, in which was an abundant flow of water and a general capacity for navigation along its entire length, and, although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream, in its ordinary condition, susceptible of use for general navigation purposes. We are not, therefore, disposed to question the conclusion reached by the trial court and the supreme court of the territory, that the Rio Grande, within the limits of New Mexico, is not navigable."

Red Pass, Louisiana. *Leovy v. United States*, 177 U.S. 621, 627, 637 (1900).

- "It is conceded that Red Pass is not a natural stream, but is in the nature of a crevasse, caused by the overflow of water from the Mississippi river…. As respects navigation through Red Pass, there was some evidence, on the part of the government, that small luggers or yawls, chiefly used by fishermen to carry oysters to and from their beds, sometimes went through this pass; but it was not shown that passengers were ever carried through it, or that freight destined to any other state than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it….
  ….

  [O]ur conclusion, upon the record now before us, is that Red Pass, in the condition it was at the time when this dam was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce …."

Desplaines River, Illinois. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 117, 124 (1921).

- "The District Court found that there was no evidence of actual navigation within the memory of living men, and that there would be no present interference with navigation by the building of the proposed dam. The Circuit Court of Appeals did not disturb this finding. But both courts found that in its natural state the river was navigable in fact, and that it was actually used for the purposes of navigation and trading in the customary way, and with the kinds of craft ordinarily in use for that purpose on rivers of the United States, from early fur-trading days (about 1675) down to the end of the first quarter of the nineteenth century. Details are given in the opinion of the Circuit Court of Appeals, and need not be repeated. Suffice it to say that there was a well-known route by water, called the Chicago-Desplaines-Illinois route, running up the Chicago river from its mouth on Lake Michigan to a point on the west fork of the south branch; thence westerly by water

> or portage, according to the season, to Mud Lake, about two miles; thence to the Desplaines near Riverside, two miles; thence down the Desplaines to the confluence of that river with the Kankakee, where they form the Illinois river; thence down the Illinois to its junction with the Mississippi….
> ….
>
> The Desplaines river, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation. Improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the states."

Chattahoochee River, Georgia. *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F.Supp 25, 29-30, 36 (N.D. Ga. 1972).

- The Chattahoochee River … is an interstate waterway over 400 miles in length running in a generally southwesterly direction from its source in northeast Georgia, to the Georgia-Alabama state lines where it bends to a generally southerly direction….

  The defendant's property is located at approximately mile 306 on the river. The river near the defendant's property is quite shallow and the current is swift. Peachtree Creek, Morgan Falls Dam and Buford Dam are located at miles 300.54, 312.62 and 348.82 respectively.

  Columbus, Georgia (mile 170.7) was the head of steamboat navigation in the early 1800's, and bateaux (flat bottomed boats) could carry 70 bales of cotton from Franklin, Georgia (mile 239.9) to West Point, Georgia (mile 201.4). No other commercial craft has ever navigated the river above Columbus.

  In the 1890's, a gold dredging, flat bottom, barge operated for three to five years on the river adjoining the barge owner's property in what is now Fulton and Gwinnett Counties. Around the turn of the century, raft-type ferries would traverse the river at several points. The barge and the ferries would use poles, ropes and the current as their means of locomotion, and would draw no more than two feet of water.

  Evidence of farmers and moonshiners using the river to transport their wares is scant, and, if true, appears without specificity as to location and frequency.

> Presently, only light pleasure craft, *e. g.,* canoes, kayaks, rubber innertubes and rafts, drawing only a few inches of water, can and do float down the river.
>
> No craft of any kind has ever proceeded upstream due to the rapid current and frequent obstructions.
>
> The topography of the river and surrounding property reveals a hill bound region between Roswell, Georgia (mile 323.7) and Atlanta (mile 306.2) with perpendicular rock cliffs on both sides of the water. The fall is very great, the current is rapid, and the channel is filled with projecting rock. The river alternately expands and contracts and follows a generally winding course through what remains a greatly wooded territory.
>
> There are an unknown number of rapids, shoals or similar obstructions in the area here concerned….
>
> The gradient of the river between those areas of interference appears to be rather uniform and regular….
>
> The only admissible evidence as to the quantity of water involved, indicates that peak flows are of short duration while minimum flows are of longer duration. In addition, the release of water from Buford Dam significantly alters the water flow at different times of the week.
> ….
>
> The West Point Dam (under construction 30 miles south of Franklin, Georgia), the Morgan Falls Dam and the Buford Dam do not have locks which would permit through navigation by any vessel.
> ….
>
> Under the law as it now exists, the evidence does not meet the necessary minimal requirements found sufficient by other judicial tribunals. As much as the court sympathizes with the obvious and worthwhile purpose underlying the institution of this action, the application of common sense to the facts presented herein demands a finding that the Chattahoochee River between Peachtree Creek and Buford Dam is not a navigable water of the United States."

Great Salt Lake, Utah. *Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F.2d 1156, 1166, 1169 (10th Cir. 1974).

- "At trial Morton offered in evidence newspaper articles as ancient documents in support of its claim that the Great Salt Lake is a 'navigable water of the United States.' These

articles, published in the late 1800's, described a flow of commercial navigation across the Lake up the Bear River to Corinne, Utah, an important rail center at the time. Although the Bear River flows interstate, no offer of proof was made to the effect that it was navigable interstate. Instead, Hardy and Morton say that they proved that the Great Salt Lake is a navigable water of the United States by demonstrating that it served as a link in the conduct of interstate commerce, namely as a conduit for the transport of goods which were subsequently shipped interstate via rail from Corinne.

….

We conclude that a navigable water of the United States within the meaning of Sections 9, 10 and 13 of the Rivers and Harbors Act must be construed in lien with the interpretation in The Daniel Ball, as contemplating such a body of water forming a continued highway over which commerce is or may be carried on with other states or foreign countries, by water. Thus we must hold that the District Court did not err in dismissing the federal claims of Hardy and Morton founded on the Act. Their offer of proof was insufficient to demonstrate that the Great Salt Lake is a navigable water of the United States within the meaning of the statute, showing only navigability within Utah to the railhead."

Lake Minnetonka and Minnehaha Creek, Minnesota. *Minnehaha Creek Watershed District v. Hoffman*, 597 F.2d 617, 619-20, 623 (8th Cir. 1979).

- "Lake Minnetonka is a natural lake, navigable in fact, lying entirely within Hennepin County, Minnesota. The total surface area of the lake is approximately 22.5 square miles. The lake's depth averages forty feet, although there are isolated spots with depths up to one hundred feet. No permanent tributaries empty into Lake Minnetonka. The lake's single outlet is Minnehaha Creek, which flows eastward from Gray's Bay for approximately 20-22 miles, until it empties into the Mississippi River.

  Prior to settlement of the area surrounding the lake in the mid-19th century, Indians, navigated the lake by canoe. In 1852, a dam and sawmill were constructed on Minnehaha Creek at Minnetonka Mills, a short distance from where Lake Minnetonka flows into Minnehaha Creek. After the construction of this dam, the lake's water level increased sufficiently to allow the navigation of steam-powered boats and the flotation of logs on the lake. Steamers were used for the carriage of passengers and mail across the lake until 1926. Grain and lumber were shipped or floated on the lake to distribution points, where they were then shipped by rail. Beginning in 1890 and continuing thereafter, Lake Minnetonka was a thriving resort area, with North American and foreign tourists using the lake as a means of transportation from one shore point to another.

  Present use of Lake Minnetonka is primarily recreational, by both local residents and travelers from other states. Centers of urban population around the lake include the

towns of Mound, Excelsior and Wayzata. Rail service to shoreline communities is provided by the Burlington Northern and the Chicago and Northwestern Railroads.

The flow of Minnehaha Creek, is intermittent; during a large part of the summer and fall, the flow is inadequate to permit the passage of any form of navigation. There is no history of navigation on the creek of either a private or a commercial nature. Navigation on that portion of the creek between Lake Minnetonka and Minnetonka Mills was rendered impossible by the construction of a dam at the source of the creek at Gray's Bay in 1897.

….

The Corps of Engineers contends, however, that federal regulatory jurisdiction under the Rivers and Harbors Act does not require that a body of water be part of an interstate waterway system, as long as it is a segment of a commercial highway, which may consist of water, rail or road connections. The Corps contends that since Lake Minnetonka and the upper portion of Minnehaha Creek have interstate road and rail connections, this is enough to make them "navigable waters of the United States" for the purposes of regulatory jurisdiction under the Act. We disagree."

Devils Lake, North Dakota. *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1055. 1066 (D.C. Cir. 1979).

- "Devils Lake is located entirely within the State of North Dakota. Its surface covers approximately 34,000 acres. No stream, river, or other waterway flowing into or out of the lake crosses North Dakota's border with another state or with Canada or connects with any other body of water so as to form a continuous interstate or international water course. Devils Lake is navigable in fact, although its current uses are recreational; for example, fishing, boating, water skiing, and hunting. Many of those using the lake for these recreational purposes come from outside North Dakota.

  ….

  With an interstate connection by water being a prerequisite for regulation under section 10 of the 1899 Act and with Devils Lake lacking such a connection, we must conclude that Devils Lake is not a navigable water of the United States within the meaning of the statute."

Great Miami River, Ohio. *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 450-51 (6th Cir. 1982).

- "A more complete statement of the evidence produced at trial shows that the elements of navigability are present. Like many larger rivers in the Mississippi River system, the Great Miami River afforded predictable albeit not always dependable use during spring

high water fluctuations. Downstream flatboat travel was the customary mode of travel in the early 1800's and the Great Miami River was no exception. Finally, the Great Miami River was used as a commercial highway to float goods from southwestern Ohio to New Orleans. The record establishes inescapably that the Great Miami River was navigable as a matter of law from its mouth to Mile 117.

The Corps has failed to prove that the Great Miami River from Mile 117 to Mile 153.5 and its tributaries are navigable as a matter of law. Evidence of commercial navigation on the rivers in southwestern Ohio was primarily of a general and non-specific character. The District Court did not err in its factual or legal conclusions that the upper portion of the River and the tributaries were not navigable.

The Corps' determination of navigability of the Greenville Creek and the Great Miami River from Mile 117 to Mile 153.5 rests on early military expeditions. In the late Eighteenth Century military expeditions transported supplies up the rivers to several forts in southwestern Ohio. As many as thirty-two men could have been required to pull a loaded flatboat upstream. Military use of the rivers through great quantities of manpower was not the customary mode of travel for settlers and farmers of the time. This use of the rivers by military expeditions does not prove the susceptibility of use for interstate commerce. The Great Miami River from Mile 117 to Mile 153.5 and the Greenville Creek are not, therefore, navigable waters of the United States.

Evidence to support navigability on Loramie Creek consisted of Dr. Johnson's testimony for the Corps. Dr. Johnson testified that two keelboat lines were established on the Great Miami and Maumee Rivers in 1809 and 1819. He produced no specific instances of keelboat use on Loramie Creek nor of the success of the lines. Evidence suggested that these keelboat lines included portages of six, twelve, or one hundred fifty miles. Additionally, Dr. Johnson admitted that keelboat commerce on these rivers was 'limited.' The District Court concluded from this sparse record that keelboat use was 'sporadic,' 'minimal,' and 'uniformly unsuccessful.' Without specific evidence of successful commercial navigation on the Loramie Creek, by keelboats or otherwise, we cannot find that the Creek was used as a highway for interstate commerce. The Loramie Creek is not a navigable waterway of the United States.

The Corps demonstrated at trial no specific instances of navigation on the Mad and Stillwater Rivers. The Corps' claim of navigability rests in part on Eighteenth Century Indian and fur trader use of rivers throughout Ohio and the Midwest. For additional support the Corps points to the extensive use of flatboats on the Great Miami River from 1800 to 1830. Without specific evidence of commercial use of the rivers or their susceptibility of use, like the District Court, we decline to hold that the Mad and Stillwater Rivers are navigable as a matter of law.

Fisheating Creek, Florida. *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 64 F.3d 630, 634-35 (11th Cir. 1995).

- "Fisheating Creek empties into Lake Okeechobee. Until the late 1880s, no navigable water passage existed between Lake Okeechobee and either the Atlantic Ocean or the Gulf of Mexico. Fisheating Creek's only link to interstate commerce lies through Lake Okeechobee. Thus, it could not be navigable as a matter of law before the late 1880s, whether or not internally navigable, because no water route linked the creek with other states or countries.

  The parties agree that Cowbone Marsh has been occluded from at least 1940. Lykes contends that Cowbone Marsh has always presented a barrier to travel on Fisheating Creek. The Corps, on the other hand, argues that a channel existed through Cowbone Marsh through 1929, disappearing sometime before 1940. Because it is uncontroverted that Cowbone Marsh has blocked travel on Fisheating Creek since at least 1940, and because the creek had no water link to interstate commerce until the late 1880s, the critical period in this case is between the late 1880s and 1940. In reviewing the district court's factual findings and its application of law to those findings, we are concerned with whether Fisheating Creek was susceptible to commerce during that period.

  The centerpiece of this litigation has been Cowbone Marsh, which is located some six miles, as the crow flies, from the mouth of the creek at Lakeport. The district court found that Cowbone Marsh has been a non-navigable marsh for hundreds of years, without any defined or navigable channel. The Corps contends that the district court clearly erred in finding that Cowbone Marsh had always been a barrier to navigation in Fisheating Creek. The Corps argues that certain evidence clearly shows that Cowbone Marsh was once navigable.

  The Corps points first to a map prepared by George Preble, who led a military exploratory expedition up Fisheating Creek in 1842. The Corps contends that Preble's map indicates that a channel existed through Cowbone Marsh because Preble drew a solid line indicating a channel through what appears on the map to be Cowbone Marsh. Therefore, the Corps contends that Preble's map supports a finding of navigability.

  However, as the district court noted, Preble's account of his journey up Fisheating Creek does not necessarily support a finding of navigability. Preble proceeded upstream from Fort Center, through Cowbone Marsh, to what is now referred to as the Sand Lake area. Preble reported that on his way up the creek, when the party reached what was probably Cowbone Marsh, they proceeded with great difficulty, pushing the canoes through the weeds, and hauling the canoes over two troublesome places. On the return trip through what was probably Cowbone Marsh, the Preble party had little difficulty with the

haulovers; however, after the two haulovers, they had to search for a significant length of time to find the creek.

The district court found that this account supported a finding that Cowbone Marsh was not navigable in 1842. Although we recognize that navigability is not destroyed by occasional obstructions or portages, the district court did not clearly err in concluding that Preble's account shows that travel through Cowbone Marsh was very difficult in 1842. Moreover, we note that Preble's expedition took place in 1842, over 40 years before Lake Okeechobee was linked with the Atlantic or the Gulf. Thus, the probative value of Preble's account is not as high as the Corps asserts."

Lewis Creek, Alabama. *Gollatte v. Harrell*, 731 F.Supp. 453, 459-60 (S.D. Ala. 1989).

- "Here, the plaintiffs offered no proof that Lewis Creek is navigable because of its suitability for future use with reasonable improvements—the second test for determining navigability established by the Supreme Court in *Appalachian Electric.* Consequently, the first and third tests for determining navigability are the ones that concern the court here.

  The evidence adduced at trial demonstrates that Lewis Creek, in its natural and ordinary condition, is not used nor is it capable of being used as an avenue for trade or commerce. The Creek is impassable by even the smallest boat from the point where it crosses the Southern Railroad on the defendant's property to the point where it empties into Three Rivers Lake, except during periods of extremely high water, which do not occur with any degree of regularity and only last when they occur for relatively short periods of time. These periods of high water occur when the water level of the Tombigbee River rises to such an extent that the adjoining bottomlands, through which Lewis Creek meanders, flood. During these periods of high water, the banks of Lewis Creek are themselves covered with water, and at places it is difficult to follow the run of the Creek because it is not clearly discernible from other open areas of the bottomlands. The navigational obstacles encountered on Lewis Creek during periods of ordinary water range from such obstructions as fallen timber, beaver dams and sandbars to places at which the Creek itself becomes so shallow or so narrow as to prevent passage by boat at all. At the present time, Lewis Creek is not a stream over which, in its ordinary condition, trade and travel can be or is being conducted in the customary modes of trade and travel on water. Its present use for any purposes of transportation is exceptional, and only in times of temporary high water caused by flooding of the Tombigbee River. One of the defendants' own witnesses testified that at such a time he had removed hogs by boat that had been trapped by the floodwaters. The width, depth and ordinary flow of water of the Creek, absent the influence of the River, is simply insufficient to render it navigable in fact.

The evidence adduced at trial also demonstrates that Lewis Creek was never used nor was it ever capable of being used in the past as an avenue for trade or commerce. In its original state, Lewis Creek did not connect with Three Rivers Lake to form a continuous waterway to the Tombigbee River. At one time on property that is presently owned by the Harrells, the Creek turned back north and eventually branched into numerous small fingers, which, in turn, dissipated in the bottomlands. Around the turn of the century, a sawmill called Cochran Lumber Company was located south of the Creek and east of the Railroad on another owner's property. During this period, Cochran Lumber Company constructed a ditch from the point where the Creek in its natural state turned back north to a point just west of where the Creek empties into Three Rivers Lake. The purpose of the ditch was to make possible what had hitherto been impossible: the floating of timber down the Creek from its mill to the River. This effort, however, proved unsuccessful and ultimately was abandoned because even with the construction by Cochran Lumber Company of a lock or damn located roughly where the ditch began, there never was an adequate supply of water to float the lumber down the Creek, except in times of unusually high water, which did not occur with sufficient regularity to justify using the Creek as a means to transport timber in any form. For this reason, Cochran Lumber Company ultimately moved its mill north of the Creek and west of the Railroad right-of-way in order to have easy access to transport by rail. In short, Lewis Creek was never regularly used to transport timber; nor has it ever been suitable for such use even with the improvements made by Cochran Lumber Company."