What is a Navigable Waterway for Public Access Under the Sturgeon Decision?

By Mike Sewright. With contributions by John Sturgeon

On March 26, 2019, the United States Supreme Court ruled in favor of longtime Alaskan (and SCI Alaska Chapter Life member and Director) John Sturgeon against the National Park Service. This was the second time that Court considered John's case. It is a very important decision for all Alaskans, especially hunters. The highest Court UNANIMOUSLY agreed with John in his decade-long claim that the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) exempted properties owned by the State of Alaska, Alaska Native corporations, and other non-federal owners within national parks, monuments, and preserves in Alaska from being regulated as "parklands." The high Court ruled that park regulations only apply to federally owned lands within those areas. Thus, the Nation River, a state-owned navigable waterway that flows through the Yukon-Charley Preserve, is not subject to the Park Service's regulation prohibiting use of hovercraft on waterways within the federal park system. The Court agreed Mr. Sturgeon may operate his hovercraft, as allowed by state law, on the river to reach his favored moose-hunting area upriver of the Preserve.

The Court's decision directly involved: (1) the Park Service's nearly 44-million- acres of lands under ANILCA (which the Court noted more than doubled the park system's prior nationwide size), and (2) the State of Alaska's authority over state-owned navigable waterways within those areas. However, the Court's analysis applies equally to the non-federal lands and

waters in the additional 60 million acres ANILCA set aside as federal refuges, monuments, designated wilderness, and similar areas—all defined under ANILCA as “conservation system units" (CSUs).

As the Court observed, ANILCA's creation of all of those CSUs, including park units, used exterior boundaries that enclosed State, Native corporation, and other nonfederal properties within their boundaries. The Supreme Court noted those CSU boundaries altogether enclose about a third of Alaska, but within them is “more than 18 million acres of state, Native, and private land." Those “inholdings” include State and Native lands selected under the Alaska Statehood Act of 1959 and the Alaska Native Claims Settlement Act of 1971 (ANCSA), together with private lands such as cabin sites, homesteads, lodge and mining properties, and Native allotments authorized under other laws.

The Supreme Court emphasized many of those lands are connected by Alaska's navigable waterways, which also belong to the State of Alaska under the Alaska Statehood Act. Under that Act, Alaska, like all other states that entered the Union before it, possesses, in the words of the Supreme Court, “title to and ownership of” the beds underlying its navigable waterways. Under the law which has developed in the United States over two centuries, that state ownership extends bank to bank, including the exposed sand and gravel bars. With that title, the Court observed, also comes State regulatory authority over those lands and waters, in trust for the public, for “navigation, fishing, and other public uses.”

The Supreme Court also emphasized that the navigable waterways—rivers, sloughs, streams, and lakes—are especially important in Alaska where the absence of overland highway systems causes waterways to “function as the roads of Alaska, to an extent unknown any place else in the country." The Court concluded: “So ANILCA recognized that when it came to

navigable waters—just as to [other] non-federal lands—in the new parks, Alaska should be ‘the exception, not the rule’.” The Court added: “Which is to say, EXEMPT from the Park Service's normal regulatory authority." (Emphasis added.)

Notably, John Sturgeon's case involved the Nation River, which many years before had been judicially determined a navigable waterway, from the Alaska and Canadian border to its entry into the Yukon River. Thus, the waterway’s navigability was not in question in John’s case, but for most of Alaska’s waterways, there has not been a judge’s decision, nor state and federal agreement, on whether the waterway is navigable.

Thus, the question, what constitutes a navigable waterway in Alaska?

Whether a waterway is “navigable for title" (State ownership), such as the Nation River, is a matter of federal law that has developed over two centuries. The chief rule is whether the waterway has been used or is “susceptible to use" as a route of travel for conducting commerce by customary means in the waterway's natural and ordinary physical condition as it existed at statehood (1959 for Alaska). Once that standard is satisfied, it does not matter whether a person’s particular travel is for a commercial or personal purpose. Nor, following the Sturgeon decision, does it matter whether that waterway lies— totally or partly—within a federal CSU, or exists elsewhere in Alaska.

Whether the waterway is in its “natural and ordinary" condition is rarely an issue in Alaska because natural watercourse changes after statehood, like meanders and other channel changes, such as frequently occur in Alaska's many braided rivers, are allowed under the law, and very few manmade obstructions, such as dams in the Lower 48, have been involved in Alaska.

“Customary means" are by those types of watercraft customarily used at statehood or, as the courts have ruled, their post-statehood equivalents. As the Ninth Circuit Court of Appeals determined in its landmark decision 30 years ago involving the navigability of Alaska's Gulkana River, the fact that watercraft evidenced to be used on the river after statehood included “minor improvements" over similar small watercraft used at statehood is insignificant. A more complete explanation is in the judicial decisions applying that standard to Alaska waterways:

The Doyon case in 1979 was probably the first of those decisions, ironically for John Sturgeon involving the Nation and Kandik rivers in Interior Alaska. The federal government sought to charge thousands of acres underlying those two rivers against Doyon Corporation's land entitlement under ANCSA, based on the federal assertion those rivers are nonnavigable. Doyon and the State appealed, claiming the rivers are navigable and thus already in State ownership as of statehood. The judges deciding the case agreed with them. The judges relied on occasional travel on the rivers by some trappers before statehood (a commercial use) and a few short-lived trips by small boat supplying a U.S. border-clearing crew early in the century (another commercial use). That use was by canoes, “pole boats”, and similar small craft capable of carrying 1,000 pounds poled and lined upstream for weeks with much difficulty, then rapidly descending in a few days downstream with the current. The judges also considered as relevant to the rivers' navigability the use before and after statehood by hunters (much like John Sturgeon), using small motorboats with “liftable motors" allowing them to “travel over shallows" and “canoes with engines powered from six to ten horses" and use by “jet boats [and] airboats". Such personal use could, with the addition of a paid guide (as is required at least with most nonresident hunts), also constitute commercial travel, thus meeting the “susceptibility" requirement. Citing U.S. Supreme Court case law developed over two centuries, the judges in the

Doyon decision also agreed that “Although rapids, shallow waters, sweepers, and log jams make navigation difficult in both rivers, the evidence shows that these impediments do not prevent navigation," including through stretches where “one may have to pole or line a boat over shallow places"—sometimes where just “several inches of water flowed over the gravel bars" or “obstructions block[ed] the channel completely." From photos of the rivers' navigable headwaters at the Alaska/Canadian border, the streams appear as small as or smaller than Campbell Creek running through the center of Anchorage.

In a subsequent case, a judge in 1983 determined the glacier-fed, highly braided Matanuska River to be navigable from the vicinity of the Matanuska Glacier to the river's entry into Cook Inlet. This was another case in which the federal government sought to charge broad river channel acreage against an Alaska Native corporation's entitlement under ANCSA. In that case the primary commercial evidence was the use by river-rafting companies, such as Nova River Runners, boating sightseeing passengers for a fee since the 1970s downstream from near the Glacier—using loaded inflatable rafts with a draft of about six inches through shallow waters with high rapids and Class IV to V waters. Testimony demonstrated that, owing to the river's braided nature, lengthy sections of the river were less than a foot deep, those sections could quickly change due to active channel shifting, and in some sections rafts had to be dragged in less than six inches of water, in at least one instance for 100 feet. Small motorboats, jet boats, and airboats were also used on the river in sections “generally requiring six to eight inches of water" but only “three to four inches" for “short distances" over gravel bars using a motor lift. The judge also listed the testimony of an Athabascan witness who, “as a boy of nine in 1916… traveled up the summer trail," which then existed in the vicinity of the present Glenn Highway, on a hunting trip with another boy and two adult men to just below the Matanuska Glacier. The

judge noted: “Having been successful, the men sewed three of the moose skins together and stretched them over a birch pole frame. The finished boat was 18 feet in length with paddles for maneuvering. The hunting party [with its boat and subsistence meat] then put in at Gravel Creek" and descended to Matanuska Landing, near the mouth of the Matanuska River. The federal government characterized that use as “personal," not “commercial." [Try telling that to any Alaskan relying on subsistence meat as a commercial equivalent to high-priced store-bought goods.]

Probably the most important case, according to the federal courts and the federal government, involved the popular Gulkana River in interior Alaska. The United States chose the Gulkana as its “test case” for what constitutes navigability in Alaska. The Gulkana case had been brought by the State of Alaska in federal court to contest another federal attempt to charge river acreage against an Alaska Native corporation’s ANCSA entitlement. The federal government lost. Citing extensive U.S. Supreme Court and other federal case law, the U.S. District Court Judge concluded in 1987 that the Gulkana River is navigable. That decision was appealed by the losing parties to the U.S. Ninth Circuit Court of Appeals (which decides federal law on the West Coast unless overruled by the U.S. Supreme Court). The Ninth Circuit Court of Appeals agreed in 1989 that the Gulkana River is navigable. That Court noted that, whereas the river was chiefly used before statehood by hunters and fishermen for their personal use, using small watercraft with load capacities up to 1,000 pounds, “Since the 1970s it has been possible to take guided fishing and sightseeing trips" on the river using similarly-sized powerboats and inflatable rafts, for an average fare of “$150 per passenger." The Court expressly rejected “as unpersuasive” the opposition’s argument that the purpose of those trips was “recreational.” It instead concluded: “To deny that this use of the River is commercial because it relates to the recreation industry is to

employ too narrow a view of commercial activity." It further held that the commercial transport which had developed post-statehood out of the once personal use was indeed “conclusive evidence" of the river's susceptibility to commercial use at statehood and that “the watercraft customary at statehood could have at least supported commercial activity of the type carried on today, with minor modifications."

The Ninth Circuit Court observed that a full quarter-mile of the Gulkana River area at issue diminished to a foot deep during low-flow season when much of the boat traffic occurred, but otherwise ignored the issue—beyond repeating established U.S. Supreme Court law that the waterway's use “need not be without difficulty, extensive, or long and continuous" for it to be navigable. On that point the Ninth Circuit Court quoted from another of its decisions seven years before wherein it found an Oregon river navigable where used to transport logs to market “even though shallow areas and sand bars made the transport difficult." Indeed, that opinion the Court cited arising out of Oregon reveals the great amount of difficulty the courts will accept for navigability to be shown. That case involved no boats but driving logs, solely downstream, on trips commonly lasting 30-50 days over the 32-mile stretch of river at issue and nearly constant handling and dragging of the logs across gravel bars and shoals with difficulty, often for days, including using teams of horses and even dynamite on occasion.

Accordingly, it can be concluded that virtually all rivers, streams, lakes, and other waterways in Alaska should be deemed navigable, as long as boatable— even with difficulty and despite obstructions—using the types of small watercraft discussed in this article, and even if used for personal travel and uses. Alaska history has shown various uses, such as reaching hunting and fishing areas, Native allotments, lodges, and other destination points—or for simply sightseeing or enjoying travel on the river—are uses susceptible to becoming— and most likely

will become— commercialized, through hunting and fishing guides, river rafting companies, etc. Indeed, such a commercial industry has developed on Alaska's waterways in recent years to a level perhaps unimaginable several years ago—reaching, or offering to reach, virtually every river, stream, slough, and lake in Alaska— including those within the exterior boundaries of the national parks and other federal CSUs—as tourists and Alaskans alike seek to experience the wilderness and grandeur Alaska has to offer upon the State's water "roads."

As can also be concluded from the foregoing discussion, federal agencies, including the National Park Service, have a history of opposing recognition of Alaska's waterways as navigable or as State inholdings promoting public access uncontrolled by federal authority. Indeed, given the public use rights announced in the U.S. Supreme Court's recent Sturgeon decision, there is some concern federal agencies might resist recognizing Alaska waterways as navigable to an even greater degree, since those waterways have now been officially recognized by the Supreme Court as inholdings within CSU boundaries, not subject to regulations adopted by federal agencies for management of the CSUs. Regulations adopted by federal agencies for management of the CSUs have no authority off of federally- owned lands.

Such federal resistance to recognizing navigability appears to have legal limits, however. For example, in a written decision of the U.S. District Court for Alaska on May 3, 2016—just three years ago—the Court found the federal government acted in bad faith by refusing to apply the Gulkana River precedent and other binding Ninth Circuit and U.S. Supreme Court decisions to another navigability lawsuit brought by the State. The Court concluded such refusal by the federal government was, using the Court's word, "frivolous" and ordered it to pay the State's litigation expenses.

In summary, John Sturgeon's persistence in his lawsuit paid huge dividends with a great victory for all Alas-kans, re-opening public access upon Alaska's many navigable waterways that Alaskans correctly believed Congress protected in the Alaska Statehood Act and ANILCA. But continued diligence will likely be required—by those Alaskan users, the State of Alaska, and Alaska's elected and appointed officials both within Alaska and in Washington, D.C. Special thanks go to those ANCSA corporations and SCI's national legal team who, together with the State of Alaska and other public interest organizations, supported John's own attorneys' legal arguments in Court filings. John also thanks those many organizations and individuals—including SCI, Alaska Outdoor Council, Wild Sheep Foundation, and Ed and Cathy Rasmuson in Anchorage and Craig Compeau and his team in Fairbanks— who personally contributed and raised significant funds to help John cover his 1.2 million dollar expenses incurred over a decade championing his case for all Alaskans—and Alaska visitors—all the way up to the U.S. Supreme Court, not once but twice.

Michael Sewright, J.D., has resided in Alaska since childhood, several years before statehood. He has been an Alaska attorney for over 40 years. Much of that time he served in the State of Alaska's Department of Law, handling navigability cases, among other matters, including the Gulkana River and Matanuska River cases discussed in this article. He is a Life member and Director of the SCI Alaska Chapter. Published Winter 2020 in Hunter's Access