

Federal Definition (Black's Law Dictionary, 6th Edition)

Navigable waters

Any body of water, navigable in fact, which by itself or by uniting with other waters forms a continuous highway over which commerce may be carried on with other states or countries. In determining whether water is "navigable," the factual inquiry is whether the water has capacity of use by the public for the purpose of transportation and commerce.

Navigable waters of the United States

A body of water is "navigable water of the United States" if it is presently being used or is suitable for use for transportation and commerce, or if it has been so used or was suitable for such use in the past, or if it could be made suitable for such use in the future by reasonable improvement.

Alaska Definition (AS 38.05.965)

(13) "navigable water" means any water of the state forming a river, stream, lake, pond, slough, creek, bay sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes.

When Definitions of Navigability Conflict

If a water meets the federal definition of navigable, under the U.S. Constitution's Equal Footing Doctrine the State has title to the bed of the navigable water.

If a water meets the state definition of navigable, the State has a common law Public Trust mandate to allow an equal opportunity to access Public Trust resources (fish, wildlife, and navigable waterways) for Public Trust Uses (hunting, fishing, genetic diversity). Alaska codified this common law doctrine in its constitution. This is the conflict the State has with offering a rural subsistence preference: the opportunity to access is not equal.

Note that the State definition is more liberal. If a waterway meets the state definition of navigable, then the State has a Public Trust responsibility. However, if it does not meet the federal definition of navigable, the federal Equal Footing Doctrine provision that grants title to the bed does not apply.

Management of Navigable Waters in DENA

In terms of management, what this means for us is:

1. we need only be concerned with navigable waters by the federal definition
2. even if a water within DENA is navigable by the federal definition and thus the State has title; under U.S. v. Brown, Minnesota v. Block, and Kleppe v. New Mexico, DENA has authority to regulate these waters.