

ORIGINAL

In the

Supreme Court of the United States

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1979
OCT 1 10 PM 3 32

NORMAN VAUGHN, LARRY J. BROUSSARD
AND FREDDIE BROUSSARD,

PETITIONERS,

v.

VERMILTON CORPORATION,

RESPONDENT.

No. 77-1819

Washington, D. C.
October 1, 1979

Pages 1 thru 42

Hoover Reporting Co., Inc.

*Official Reporters
Washington, D. C.*

546-6666

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
JOHN K. HILL, JR., ESQ., on behalf of the petitioners	3
HARRY McCALL, JR., ESQ., on behalf of the respondent	16
<u>REBUTTAL ARGUMENT OF:</u>	
JOHN K. HILL, JR., ESQ., on behalf of the petitioners	36

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-1819, Vaughn v. Vermilion Corporation.

Mr. Hill, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN K. HILL, JR., ESQ.,

ON BEHALF OF PETITIONERS

MR. HILL: Mr. Chief Justice and may it please the Court:

This matter involves a system of artificial canals in extreme southern Louisiana. Their construction was begun in 1942 and it continues to this moment. They are generally 60 feet wide by 8 feet in depth, and run from the Gulf Intracoastal Waterway on the North to the Gulf of Mexico on the South, and are--cover an area approximately 15 to 20 miles wide from east to west.

They are affected by tidal action. They connect, among other waterways, with the Gulf Intracoastal Waterway, the Freshwater Bayou Canal, the Gulf of Mexico, with Vermilion Bay on the east, and with Oyster Bayou and Rollover Bayou on the West.

They are, we believe, navigable in fact, and satisfy all tests of navigability heretofore put forward by this Court.

As far as, I believe, most of those facts--with the exception of the connection to the Gulf--that I've just recited are undisputed between the parties. It was, however,

the subject of vehement dispute in the Court below as to whether or not the actual building of these canals in fact impaired and in some cases destroyed the navigability of pre-existing natural canals in the area.

Since the case was disposed in the trial court on summary judgment, there was no opportunity for the making of much of a record on that point. Nevertheless, the petitioners submitted an affidavit in opposition to the motion for summary judgment that said, for example, that the old Freshwater Bayou which coursed from Pecan Island, Louisiana--a small municipality on a little stretch of terra firma in the middle of marshland--the old Freshwater Bayou coursed from there to the Gulf of Mexico, and was used, among other things, to transport the United States mail.

QUESTION: Counsel--counsel, if these maps are to be of any utility, it would be helpful if you'd indicate physically at the appropriate time, whenever you wish--

MR. HILL: The--

QUESTION: --what areas we're talking about.

MR. HILL: All right. The map, if Your Honors please, was offered by the Vermilion Corporation with our consent. The only general deficiency of the map is that it does not, so far as I know, show absolutely the entirety of the canal system.

The bottom of the photograph, of course, is the Gulf of Mexico. The most--

QUESTION: Well, where generally is the land area that we're talking about?

MR. HILL: Yes, Your Honor. The most prominent waterway coursing northerly from the Gulf is on the east, or right side, of the photograph, and that is Freshwater Bayou.

The most prominent entrance of the artificial system into Freshwater Bayou is shown approximately 6 inches up in the photograph from the Gulf and entering into the most prominent north-south waterway.

You will see at least three artificial canals--they are absolutely straight--approximately 6 inches to the left of the Freshwater Bayou Canal, which enter into the Gulf of Mexico.

What you cannot see in the north is the Gulf Intra-coastal Waterway.

QUESTION: Help me. What is the difference between a canal and a bayou?

MR. HILL: Being from South Louisiana and being from somewhere else.

A bayou is a small--

QUESTION: --bayous are 20 and 30 feet deep.

MR. HILL: A bayou is, generally speaking, a small, fairly slow-moving, body of water, which according to its depth, might well be called a river in other places.

Generally speaking, however, the term "bayou" refers

to that which is natural. I have never heard an artificial body of water referred to by that term in Louisiana or anywhere else, to my knowledge.

QUESTION: Well, how about--the canal is not natural, correct?

MR. HILL: The Freshwater Bayou Canal is not a--

QUESTION: A bayou canal? What in the world is that?

MR. HILL: The Freshwater Bayou Canal is a canal which was built from 1964 to 1968, generally, but not entirely, over the course of the old Freshwater Bayou.

When I refer to Freshwater Bayou, I'm referring to the old, natural body of water. Freshwater Bayou Canal, on the other hand, is not an entirely natural body of water, and it is not directly involved in this case.

QUESTION: Well, how deep are these bayou canals?

MR. HILL: Well, the artificial canals, which are the subject of this lawsuit, are generally eight feet deep. They are somewhat shallower at points, but virtually the entirety of the system is generally eight feet deep by sixty feet wide.

Now--

QUESTION: And generally speaking the basic difference between a bayou and a canal is that a bayou is natural and a canal is manmade?

MR. HILL: That's correct, Your Honor.

Plaintiffs pursued--plaintiffs are residents of

Pecan Island, Louisiana, and, among other things, are alleged to have supplemented their incomes by shrimping in, among other places, the artificial canals prepared by the respondents.

The plaintiffs were sued under the Louisiana State trespass law by Vermilion Corporation, for, among other things, an injunction. Plaintiffs have defended by saying, in the trial court, that these waters, the waters of the artificial canal system, were impressed with a navigation servitude, and were navigable waters of the United States, and thus, that there could be no private appropriation by injunction or otherwise to keep citizens of the United States from being able to navigate same.

Secondly, petitioners defended in the trial court by saying that the mere filing of a lawsuit, and the attempted maintenance of an injunction against public exercise of the navigation servitude was, ipso facto, an obstruction under The Rivers and Harbors Act, and was prohibited.

Petitioners finally say in this Court that the Louisiana Organic Act, which states generally that the navigable waters leading into the Gulf of Mexico shall be forever free to the citizens, also applies, and prohibits the doing of that which Vermilion Corporation was allowed to do by the Louisiana State court system.

The position of the Louisiana courts is, as I read it, quite simple. The Louisiana courts find that these

artificial canals were navigable in fact; that they connected to various interstate marine highways of commerce, including the Gulf of Mexico and the Gulf Intracoastal Waterway; and that they did support, and were capable of supporting, various kinds of commerce themselves.

Nevertheless, it was the position of the Louisiana court system that a canal system, built on private property with private funds, is a private thing, period.

The questions which we believe are raised by this proceeding are: Does the navigation servitude in favor of members of the public automatically arise and exist on navigable waters of the United States? Secondly, and perhaps of somewhat less importance, but nevertheless before this Court, are the questions involving the Rivers and Harbors Act and the Louisiana Organic Act: Do they apply to preclude the respondents' essential appropriation of these canals to private use?

Finally, the question: Is an artificial canal built with private funds on private lands, but which is navigable in fact, and connected to other interstate highways of commerce, and which in its building, destroyed pre-existing natural navigable canals, a navigable waters of the United States, impressed with a navigation servitude?

QUESTION: But you say that last issue--the facts underlying the premise are in dispute?

MR. HILL: Very much.

QUESTION: You told us that earlier.

MR. HILL: Yes, sir.

QUESTION: So how can we decide that question?

MR. HILL: The point of law was simply rejected by the Louisiana court system. My--

QUESTION: But even assuming that they had.

MR. HILL: Yes, sir. I believe the decision of the Louisiana Court of Appeals Third Circuit is pointed in that regard: that it simply--that it would make no difference whether I proved that or not.

QUESTION: Well, if we rejected your first point, and then came to the last point--rejected your first two, and came to your last, we would have to remand to the Louisiana court, wouldn't we?

MR. HILL: I believe so.

QUESTION: And even if we agreed with it?

MR. HILL: I believe so.

QUESTION: Yes.

QUESTION: Well, if we agreed with him, we'd just affirm, wouldn't we?

QUESTION: No.

MR. HILL: If you agreed with the Louisiana court system in its entirety, yes, sir. But as Mr. Justice--

QUESTION: In order to remand, we'd have to disagree

with him on the last point.

QUESTION: That's right.

QUESTION: At least we would have to agree that the question which they said was a factual question, was immaterial, was material, and it would have to be found one way or the other by a trier of fact.

QUESTION: Exactly.

QUESTION: Excuse me. On that point, as I understand your theory, is that if they interfered with, say--if they built a new Canal X, and that had an impact on old Canal Y, that was--you're saying that's the factual issue--do you have an interest in the navigation on Canal Y? I wonder if you have any standing to complain about what they may have done to that other canal?

QUESTION: The bayou.

QUESTION: The bayou. I'm sorry, which was a bayou.

MR. HILL: As a member of the public, as a citizen of the United States, in whose favor the navigation servitude on navigable waters of the United States runs--

QUESTION: But isn't the complaint here about shrimp-ing in the area that's been built, rather than navigating in the area that may have been impaired?

MR. HILL: But if the pre-existing navigable waterway had impressed on it a navigation servitude, and they appropriated that servitude by destruction of that waterway, it

is our position that equitably the navigation servitude must be transferred onto the new system. And I believe there is authority for that in this Court in Philadelphia Co. v. Stimson.

QUESTION: I see. You've got a--this is a substitute for the old, and you're entitled to that; I see.

MR. HILL: Philadelphia Co. v. Stimson is 223 U.S. 605.

QUESTION: Now, Mr. Hill, your first two points at least, depend entirely on the fact that this is water, doesn't it?

MR. HILL: Yes.

QUESTION: Okay. In other words, your argument in no way asserts that if I own land two miles from an interstate highway, and build a two-mile driveway from my property to the interstate highway, that that driveway belonged to the public; or at least, that the public had open and free access to it. Would you?

MR. HILL: I would not at all, sir.

QUESTION: So it depends entirely upon the fact these are water. Because aside--except for the fact that these are water, this case is very much like my hypothetical case, isn't it?

MR. HILL: The--in order for waterways to have any reason for being, and to have any usefulness, they have to be

as they were in this case. They have to literally be borne out of the public water; they have to be tied to other interstate highways of commerce, as they were in this case. They must have the public water to exist.

They, in their existence, may well affect the navigable integrity and capacity of other public waterways.

None of that is true in the case of roadways.

QUESTION: Isn't there a petition--an affidavit that this has always been open to the public?

MR. HILL: That is an ancillary disputed issue. You're quite correct about that, Mr. Justice Marshall.

QUESTION: It isn't anything more than that?
It is disputed.

MR. HILL: My point, and in one of my earlier briefs-- I don't know if it's in my brief to this Court--that is a little bit of an interesting sidelight. My point is that Louisianians, for examples, had gone on their merry way for years with people who my client's position--petitioners' positions--thinking it was generally speaking fine for them to navigate these canals or those like them; whereas people in the position of the respondents and other similarly situated have thought that they had an absolute right to keep them out.

I don't--this case has never, to my knowledge, been presented in a federal context. The only jurisprudential

dealings in it have been under the Louisiana State law.

QUESTION: It could be that the public was only there by sufferance?

MR. HILL: That is--

QUESTION: It could be.

MR. HILL: That is very confusing. We, of course--we dispute that.

The congressional power to regulate is thought to be an important issue of this case: Whether or not the standards for determination of natural waters of the United States in regulations cases under the commerce clause is the same as the standard for navigation servitude cases.

QUESTION: Or whether or not admiralty jurisdiction is applicable. Or a variety of other applications.

MR. HILL: I would concede, as primarily an admiralty lawyer, that that does present a different question for, I think, a large number of reasons. I do not, however, feel that the argument has merit, when only congressional power to regulate under the commerce clause, as applied to waterways, on the one hand, and the navigation servitude on the other, are concerned.

QUESTION: Do you think the navigable waters of the United States means navigable waters belonging to the United States, or navigable waters located anywhere in the United States?

MR. HILL: Navigable waters of the United States, as it was already said this morning, belongs to no one.

QUESTION: Well, what do you think the phrase means, was my question.

MR. HILL: Navigable--it means two things. Number one, it means navigable waters, waterways which are navigable in fact, either in their natural, ordinary condition, or--

QUESTION: Located anywhere in the United States?

MR. HILL: Located anywhere in the United States.

QUESTION: Now, certainly it doesn't mean that, if it's entirely within a single State, does it?

MR. HILL: No. If it is located entirely within a single state and connects with other bodies of water that lead to interstate waters, then it is "of the United States;" then it is in interstate commerce.

The phrase, "of the United States," I take to mean waters that are in, that burden, affect, or have something to do with interstate commerce.

I'm sorry I didn't follow the thrust of your question, but certainly I would agree with that.

The fact is, as we see it, that the navigation servitude and the congressional power to regulate waterways, are in one sense, coterminous, or are identical; until really a very few years ago, congressional regulation of waterways, to my knowledge, had, if not exclusively, at least

predominantly, one object, and that was, the protection of a public right to navigate.

Other reasons for the exercise of congressional regulatory power, as applied to waterways--for example, pollution control--are really a fairly recent consideration.

From the time of Gibbons v. Ogden, as I appreciate the law, the navigation servitude, and the congressional power to regulate waterways, have been treated as part and parcel of the same thing. If they have, and if that is correct, then we feel that the respondents' argument that there is a difference, and that a different standard should be applied, simply has no merit.

And if it has no merit, Appalachian Power v. United States, which seems to us here to apply, Appalachian Electric Power says that waterways which may be rendered navigable with reasonable improvement are navigable waterways of the United States.

We submit that there is no difference, practically and factually, between digging a canal off of the Intracoastal Waterway, or digging a canal that connects with the Gulf, and, on the other hand, artificial improvement of the new river, which in its natural state was no good for any sort of navigation whatsoever. They both require exactly the same sort of acts and expenditure of money and doing work and, generally speaking, the same sorts of human activity as are

required here, and the result is the same: a new body of water, over which interstate commerce may be transacted.

If Your Honors have no further questions, I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. McCall.

ORAL ARGUMENT OF HARRY McCALL, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. McCALL: Mr. Chief Justice, and may it please the Court:

If I may go back a moment and refer to this aerial photograph, this photograph is not part of the record. It is purely an aid to assist Your Honors in seeing what it is we're talking about.

QUESTION: There's no disagreement about it?

MR. McCALL: There is no disagreement about it, except that I would like to point out several things with respect to it.

QUESTION: We were told, Mr. McCall, that it was offered into evidence. I gather, then, it was not received in evidence?

MR. McCALL: It was not offered into evidence as I understand it, Your Honor.

QUESTION: We were told so.

MR. McCALL: I think that was a misstatement.

QUESTION: Well, I'm not saying that you told us, but what your brother told us. He said it was offered in evidence.

MR. McCALL: I don't think he meant that, because it was not offered at trial.

QUESTION: Perhaps he didn't mean it, but that's what he did say.

MR. McCALL: It is purely, as I say, an aid for oral argument.

And so that Your Honors will know what it is we are talking about, I am informed that the dimensions of this are approximately 10 miles to a side. And the principal aspect of this, to which we would respectfully invite the Court's attention, is the number of canals which deadend. And that is explained by the fact that the great majority of these canals were dredged for the purpose of mineral development.

The nature of the land here, which, as you can see, is on the Gulf Coast--it is swamp land--is such that it is not possible to get a drilling rig, other than by floating it in. And this explains the shape of the shape of these canals, and the fact that they all terminate at some point.

The only canal which was dredged by the engineers is, as counsel has pointed out, that canal which extends on the righthand side of the photograph in pretty much a straight line, and was taken--has taken the place--it's known as

Freshwater Bayou Canal. And it, to a large extent, takes the place of the former Freshwater Canal.

QUESTION: For the purposes of this case, Mr. McCall, would it make any difference whether the canals were dredged for oil rigs or steamboats?

MR. McCALL: Not in the least, Your Honor. Not in the least. Except to this extent: As long as it is understood that the dredging of these canals was accomplished for private purposes for the use of the land.

In no sense, with the exception of the Freshwater Bayou Canal, which I have mentioned, were they dredged for general use. They are there either to gain access to oil well locations, to trap lines, access to hunting leases, and places like that. But other than that, Your Honor is quite right; it makes no difference.

QUESTION: Mr. McCall, with respect to the canal that was dredged to replace a pre-existing bayou, you don't challenge their right to use that canal, do you?

MR. McCALL: No, sir. That's a public canal.

QUESTION: Yes.

MR. McCALL: That was dredged by the Corps of Engineers pursuant to a servitude which we gave them for that purpose. But that canal is not at issue in this case.

QUESTION: Where does that canal go?

MR. McCALL: That canal goes from the Gulf of Mexico,

which shows at the bottom of the map, to Vermilion Bay, which is up to the right and off the map; off the photograph.

QUESTION: Vermilion Bay is part of the ocean?

MR. McCALL: It's a bay from the Gulf of Mexico, and to that extent, it is part of the ocean; yes, Your Honor.

QUESTION: If private funds had dredged that canal, suppose the canal had never reached Vermilion Bay, but private funds dredged it and extended it to Vermilion Bay. Would you be making the same argument about that canal?

MR. McCALL: We would be making--you mean the same argument we're presently making about that canal, or about our other canals?

QUESTION: Yes, could you keep the public out of that canal?

MR. McCALL: We contend, Your Honor, that we were entitled to keep the public out of that canal. I qualify that--

QUESTION: What about--would Congress have the power to require you to let the public in, say for a price?

MR. McCALL: Oh, I have no question about that. I think Congress' power is paramount if it can show a public purpose, it can appropriate just about anything it wants, provided they pay for it.

QUESTION: Would they have to pay you for it?

MR. McCALL: In our opinion, they would, Your Honor.

QUESTION: So you would say that Congress could not pass a statute that required you to let the public into these--this canal system that is presently at issue?

MR. McCALL: That's precisely our position, Your Honor.

QUESTION: Mr. McCall, what about the factual dispute referred to by the Louisiana Court of Appeals on page A10 of the petition, where they say that the defendants contend there is a factual dispute, and the factual dispute is that artificial waterways destroyed the navigability of the surrounding natural waterways?

Now the Court of Appeals, as I understood, said Louisiana law does not make that factual dispute material in the legal sense. But there is that factual dispute between you and your opponent, is there not?

MR. McCALL: We do not concede, Your Honor, that there does exist such a factual dispute.

The basis is that dispute is the affidavit which appears at 54 of the--54A of the Appendix. And if Your Honors will examine that affidavit carefully, bearing in mind that affidavits are not drafted by the clients, but by counsel, you will observe that that affidavit does not create an issue of fact.

Look particularly at the last paragraph of this affidavit. Prior--I'm sorry.

QUESTION: What page?

MR. McCALL: Page 54A of the Appendix, Mr. Justice Powell.

If you will examine the last paragraph of that affidavit, it begins: "Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system," et cetera.

The law of Louisiana is quite clear. When you're opposing a motion for summary judgment, you must make an affidavit that fairly meets the affidavits, or the representations made by the moving party, and it must be made on personal oaths.

QUESTION: But that isn't the answer that the Louisiana Court of Appeals gave. They treated it, as I read their opinion, as a permissible affidavit, and simply said legally it was insufficient.

MR. McCALL: Well, may I come to that?

QUESTION: Sure.

MR. McCALL: And I think I should, since Your Honor has asked the question.

The answer which the Court of Appeals gave in Louisiana is to be found in an earlier decision by the courts of Louisiana, the Supreme Court of Louisiana, which is cited, I believe, in both briefs, in Ilhenny v. Broussard, that

was a case involving another situation wherein access was sought to private canals. And what the court held there was that even though it were established that there had been destruction of, or impediment to the use of, an existing canal, that would not of itself give the public the right to use the canals which had effected that destruction or substitution.

And the reasoning for that was that the whole matter of navigable waterways was given over by Congress to the Secretary of War and delegated by him to the Corps of Engineers. And what they said was that the recourse which anyone has, if he had any in a situation such as that, was to the Corps of Engineers; and that unless and until the Corps acted on this matter, that there was nothing to come before the Court.

And it was with reference to that decision that the Court of Appeals in this case held that if that were a fact, if that fact were established, that then this would not be dispositive, because it was first requisite that these respondents--or these petitioners; I stand corrected--these petitioners should make application to the Corps of Engineers to declare that this was a waterway which had been obstructed.

And I think it is quite clear, under the Rivers and Harbors Act, that it is the duty of the engineer to enforce the provisions of that Act, and where there has been any sort

of impediment or any sort of action contrary to the provisions of the Act, it is incumbent on the engineers to act.

And that, I think, is the answer which the Court of Appeals of Louisiana gave.

Is that responsive to Your Honor's question?

QUESTION: Yes it is.

MR. McCALL: Let me say that I mentioned the other aspect of it because I think it is desirable--that is, the insufficiency of the affidavit--because I think it is desirable for this Court to understand that no real issue of fact has been created by this affidavit, under our Louisiana procedures.

But I think the substantial answer which lies in the holding of the Court of Louisiana in Ilhenny v. Broussard.

Now, if I may, Your Honors, let me say that I think the critical question, and the critical area of inquiry in this case is: What are we talking about when we're talking about navigable bodies of water?

It is our contention that the power of Congress under the commerce clause over navigable waters is one thing. The navigation servitude is quite another.

The navigation servitude--

QUESTION: Well, you're separating the Rivers and Harbors Act, for example, from the other questions; is that part of it?

MR. McCALL: Well, the Rivers and Harbors Act--

QUESTION: Pollution control, for example, or impediments to navigation.

MR. McCALL: We are separating them in this sense, Mr. Chief Justice, which is, that as we appreciate it, Congress' power to enact the Rivers and Harbors Act stems from the commerce clause; and it is in the exercise of its power under the commerce clause that it does legislate with respect to pollution, to flood control, to recreation, to those matters on which Congress has legislated.

But what we say, and we believe that this is central to the whole controversy here, that the so-called servitude of navigation is only one aspect of Congress' power over navigable waters generally.

So coming back to a question which was addressed by one of Your Honors to counsel, what is a navigable water? We would suggest to Your Honors that the answer to that depends on what your inquiry is. Because if you're talking about the servitude of navigation, that is one thing. If you're talking about, say, flood control, or if you're talking about something like that, it is another.

QUESTION: If you're talking about--first, if you're talking about a navigational servitude, that has nothing to do with congressional action. And the second query is, if you're talking about congressional power under the commerce clause. Isn't that what you mean?

MR. McCALL: Precisely, Your Honor.

When I say, however, that it has nothing to do with it, I would accept counsel's statement that Congress' power, through the commerce clause, over navigation, as it were, protects the servitude--

QUESTION: But there exists a servitude with or without congressional action?

MR. McCALL: Precisely. And that servitude is fairly precisely defined in a number of decisions of this Court.

QUESTION: And we were told in the earlier case that this stems from the common law of England adopted by the colonies of the United States and carried forward as a matter of national impact in our--the commerce clause of our Constitution.

But it has nothing to do with congressional power under the commerce clause; isn't that correct?

MR. McCALL: Precisely. That is--

QUESTION: I mean, that's your point?

MR. McCALL: That is our point, and we believe that that is important to the resolution of the issues raised in this case.

Now, the servitude of navigation is not coextensive with Congress' power over commerce. It is limited. In the servitude of navigation is, with relation to streams which are naturally navigable, or as the phrase is sometimes used,

in their normal or natural condition.

Now the distinction is important for this reason: that when Congress acts through its delegate, the Corps of Engineers, with respect to the area covered by the servitude of navigation, no compensation is necessary. And the reason for that is, that the riparian owner has rights in that part of the stream which is covered--or the bank which is covered--by the servitude of navigation, which is an imperfect right. He has a qualified title.

And the qualification to that title is that the national power of Congress may appropriate that portion of the stream which is subject to the servitude of navigation without any compensation whatsoever.

Conversely, however, although there may be areas which are beyond the reach of the servitude of navigation, they may be appropriated by Congress in its exercise of its power over commerce; for example, flood control or something like that. But it must then pay just compensation.

I think that possibly the best illustration of that is in the United States against Kansas City Light Company case. That was a case, Your Honors will recall, where there was a flood control or a dam which was constructed. And the consequence of that was that the water backed up. And the water backed up not only as to the banks of the river, that portion covered by the navigable servitude, but it backed up well

beyond that onto fast land. And the holding of that case was that compensation was due, to the extent that fast land was covered by the waters which had backed up.

I think that one case--and there are several like that--illustrates possibly more clearly than any other the limits of the servitude of navigation.

Now, coming back to this proposition that the servitude of navigation extends to waters in their natural and normal condition. It is true that this Court and other courts have, on occasion, said that waters which may be in their normal or natural state are subject to reasonable improvements.

But I would pose to your Honors a question of how construction of a canal, on what was formerly fast land, could possibly be considered to be reasonable improvement?

QUESTION: Reasonable improvement of navigation; is that what you're saying?

MR. McCALL: Of the stream itself, or of the navigability of the stream, yes, sir; that is the point.

QUESTION: Well, it's conceivable, isn't it, that you could have a navigable stream 20 feet wide, and the Corps of Engineers would decide that it would be a better navigable stream if it were 40 feet wide. And as a result they would have to take 10 feet of fast land off of each side of the stream.

Now, in a case like that, I take it they would have

to pay compensation?

MR. McCALL: We would so contend, Your Honor, and we believe the cases so dictate.

Now, the point of the navigation servitude is that if I, for example, have my grist mill on the bank of that stream, and the engineers take part of that stream and set it back so that I can't have my grist mill anymore, they must compensate me for my mill, but they don't have to compensate me for the fact that I can no longer use the power from that stream.

And that, it seems to us, is one of the most critical aspects of this case; that what we're talking about here is, is there a servitude of navigation on these artificially constructed canals.

The record is quite clear that these canals were all constructed on private lands, by private individuals, with private funds.

QUESTION: Mr. McCall, can I interrupt you for a second?

MR. McCALL: Of course, Your Honor.

QUESTION: In Mr. Justice Rehnquist's question about adding 20 feet to a canal, or to a navigable stream, the extra 20 feet that were added would be navigable and would be subject to the servitude, would they not?

MR. McCALL: It would--it would indeed.

QUESTION: So your definition of naturally navigable waters wouldn't really be adequate to cover that extra 20 feet?

MR. McCALL: That would come within "reasonable improvement," as I appreciate it, Your Honor.

QUESTION: But that isn't the question here, whether this is a reasonable improvement.

MR. McCALL: Well, we take the position--and we believe it's a sound one--that where you dig your canal from scratch, so to speak, that you're not reasonably improving the navigability of a stream.

QUESTION: Of course, all these have always been hooked up to navigable waters. So they just enlarged what started out as a lesser body of navigable waters. Isn't that it?

MR. McCALL: No, sir. That's not correct. These canals--there was nothing where these canals were before. If you will examine this plat, you will observe that the shape of these canals is such that it is quite clear that they were artificially created. They go in straight lines. They don't follow any sort of contour.

QUESTION: Didn't they always hook up to some navigable bayou or canal? In other words, how would you have gotten the equipment into them?

MR. McCALL: Well, yes, in the same way that my driveway in my country estate--

QUESTION: Right.

MR. McCALL: --connects with the highway. Because that's the whole purpose of it.

Now, if I may--call it if you will a digression. I would like to address the suggestion that is made by counsel that we have done is, that we have destroyed or impaired the useability of existing streams, which ties in a little bit with your question, Mr. Justice Stevens.

And we would say as to that that there is nothing in the record to support that contention. The deposition which was given by Mr. Donohue, who is the manager of respondent, is to the effect that the only stream which has--only body of water or bayou--which has been interfered with is the former Freshwater Bayou, which has been replaced by the canal which the Corps of Engineers constructed.

And I would refer your Honors to Freshwater Bayou Canal, which is the wide canal coming from the Gulf proceeding up--this photograph is oriented with North at the top--goes up North, and just at the juncture with the canal which goes off to the left, Your Honors will see this obviously natural waterway which was Freshwater Bayou.

Now, Freshwater Bayou, as can be seen from that, is no longer useable, but not by reason of any canal constructed by the respondent, but purely by construction of the engineers' canal, Freshwater Bayou canal, to which, as I said

in an earlier question, public access is given.

QUESTION: But this gets back to the Louisiana Court of Appeals' statement that--at least the defense claimed, whether factually correctly or otherwise--that your system of artificial waterways destroyed the navigability surrounding natural water.

And they didn't reject that as saying it's factually untrue. They said, whether factually true or not, it doesn't make any difference under Louisiana law.

MR. McCALL: I must confess that that is correct.

QUESTION: And--or under federal law.

MR. McCALL: They did say that. But my point is, that had they chosen to have done so, they could have gone further and said, that is not a sufficient factual issue, to present this to it for disposition.

What they said instead was, that pretermittting the question of whether there is such an issue, it would not make any difference as a matter of law.

QUESTION: Right.

MR. McCALL: Precisely as Your Honor has said.

QUESTION: That even if the defendants are correct about that. Even if the petitioners in this case are correct, is what the Court of Appeals said.

QUESTION: Yes, that's correct, Your Honor. They did say that.

QUESTION: So it's nonetheless the same.

MR. McCALL: That's what the opinion reads.

QUESTION: Right.

MR. McCALL: But as I say, we say that beyond that, that there is no such issue, and that whereas this is what the Court said, that the Court could just as well have said, there is no such issue.

QUESTION: Yes, but it didn't.

MR. McCALL: Quite right. And I won't labor that point, because I think that's quite clear, that they did not say that.

But addressing this question--and again, we would respectfully refer your Honors to our brief--the testimony which is submitted by Mr. Donohue is that there were no obstructions of existing canals by any--or existing bayous--by any canal constructed by the respondent.

There is considerable silting up of the entrances to what were formerly openings to the Gulf, by virtue which of silt which comes from the Atchafalaya River.

I believe one of the members of the Court asked where this is. If you will examine the small, very small, map of Louisiana which is on the bottom in the margin, it will be seen that this is slightly to the West of the center of the coast of Louisiana, and lies about, I'm told, 40 miles west of the mouth of the

The currents there are such that the silt which is brought down by the Atchafalaya River has deposited large amounts in front of this land, and has caused obstruction to reaching the Gulf through it.

Now, let me just say--I think I'm running a little bit short on my time--let me say that it should be borne in mind that these canals do not form, in any sense, a means of interstate commerce. They do not in any sense form a continuing passage from a place in one state to another; or indeed, a body of water which is normally used, or is capable of use, for interstate commerce.

As appears from this aerial photograph, and as was testified, these canals serve no purpose other than to serve points within the respondents' property.

QUESTION: Well, that's the present use.

MR. McCALL: That's correct.

QUESTION: But if they are connected with the Gulf of Mexico and the--what's it called?--the waterway--

MR. McCALL: Intracoastal Waterway.

QUESTION: Intracoastal Waterway, they certainly could serve a utility as avenues of interstate commerce, if somebody wanted to get in a small boat, with a draft of less than eight feet, he could go from anyone of these canals anywhere.

MR. McCALL: Well, it depends on what you mean by

that, Your Honor.

They do not connect the Gulf with the intracoastal waters. If you wanted to go from, say, a well location out through the Freshwater Bayou Canal, out into the Gulf or into the Intracoastal Waterway, you could do that.

But all of these canals, without exception, deadend. None of them connect a body of water which carries on commerce with another body.

QUESTION: Well, then what's this case about? I thought it was conceded that they--that these canals did give access to interstate waters.

MR. McCALL: They do at one end. But I'll tell you what this case is about, and I appreciate the opportunity of doing so.

This case is about the desire of these petitioners to fish and shrimp in the private canals of respondent. The claim is cloaked in the guise of seeking to exercise their right of navigation, which is normally available for people in commerce.

But that's not what this case is about. What they want is, they want to come in and harvest shrimp and fish in our canal.

QUESTION: --what these petitioners may want to do, but if they're correct, and it's open to the public for general navigation, then I'd understood that the facts of the

matter are, and as I look at this map my understanding is confirmed, that some of these canals have access to interstate waterways.

MR. McCALL: Only through Freshwater Bayou.

QUESTION: Well, whatever it's through.

MR. McCALL: I beg your pardon?

QUESTION: Whatever it's through.

MR. McCALL: Yes, they end up--

QUESTION: The Freshwater Bayou Canal is in interstate--

MR. McCALL: They--indirectly you can get from each one of these to the Gulf.

QUESTION: Right, and you can get from the Gulf to anywhere.

MR. McCALL: That's correct. But when you get there, or when you start, where are you coming from? You're coming from an oil well location. You're coming from a tapping line, or something like that.

But it cannot be denied that ultimately you can get from these to a public water.

QUESTION: Right.

MR. McCALL: But the point, if I may conclude very briefly and simply, that what we're talking about here is the so-called servitude of navigation which we're convinced does not apply to an artificially--completely artificially--

created body of water. It's applicable only to waters which are in their natural condition, or have been improved to a reasonable extent.

If there are no other questions, Your Honors, thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hill, do you have something further?

REBUTTAL ARGUMENT OF JOHN K. HILL, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HILL: Yes, Mr. Chief Justice.

It is, admittedly, not at all the province of this Court to deal with whether or not there is a practical dispute. Nevertheless, the Court should be aware that, as part of the record, I believe it's either pages 44 or 45 of Mr. John Donohue's deposition, there is an indication that the old, natural body of water, Freshwater Bayou, did course all the way from Pecan Island to the Gulf, and was once open from Pecan Island to the Gulf.

Second, although not part of the record, there is mentioned in the Government's amicus, at page 32--the footnote on page 32--that the Corps of Engineers--a Corps of Engineers report on this matter indicates that when plans were submitted to the Corps by the ancestors, in title of the Vermilion Corporation, first to build their canals, that those plans showed artificial canals which were planned and designed to

intersect old, natural bodies of water.

QUESTION: If you have--if you have freshwater bodies of water which are not subject to federal servitude, but are linked on either end, so that they do ultimately connect with interstate water, does that alter the status of the freshwater pond, lake, whatever it may be?

MR. HILL: In other words, if one had, regardless of this argument, a body of water that was connected on both ends to waterways which in turn were part of the system of interstate marine commerce?

I think those would be, if Your Honor please, navigable waters in the United States burdened with a navigation servitude.

If they are also in and of themselves navigable, in fact.

QUESTION: Well, of course, they wouldn't be putting-- chances are, they wouldn't be putting canals in on either end if they weren't navigable.

MR. HILL: That's correct, but there is--there is--

QUESTION: That converts the state riparian interests into a federal, by that linkage.

MR. HILL: The riparian interest, not in its entirety.

QUESTION: It becomes subject to federal servitude.

MR. HILL: The waterway does. The waterway does,

yes. But not--I think, for example, the swamp, the creek, and its derelictions and all would still be covered by state law.

If the navigation servitude, as it does, exists for the benefit of the people of the United States--and I believe one of the older cases in the jurisprudence of this Court, Illinois Central v. State of Illinois, which is cited in my brief, indicates that it does.

That does not require the Corps of Engineers for its execution. Furthermore, it seems to me almost ludicrous to say that a private party can sue another private party to keep him out of what may be navigable waterways, and if that private party is precluded from defending his lawsuit, because he previously had not gone to the Corps of Engineers to declare the waterway open.

That is the thrust of Mr. McCall's argument. We were sued. We had to defend a lawsuit. We defend by saying the right of use existed before this lawsuit was brought, and does not begin to form a core to execute.

The navigation servitude has never been the subject of restrictions and prohibitions by virtue of the action of the Fifth Amendment on it for the simple reason that the navigation servitude on navigable waters, however created, is something that the people already had.

QUESTION: Well, that's almost tautological, in light of cases like Kansas City Light, isn't it? Because they

have been--the government has been required to pay compensation. And perhaps you can say, it's because the navigational servitude didn't extend that far.

But certainly there are limits to which Congress can't go beyond, without paying money for taking land.

MR. HILL: I agree with that. But when--unlike the Kansas City Light case, when the private owner of land takes it upon himself to create a system of waterways--how?--by tying them into navigable waters of the United States, then he has, by his own act, caused a navigation servitude to be impressed upon the waters.

He does not lose ownership of his land, of the land underlying it. And that, it seems to me, is a crucial difference. Nobody forces a Vermilion Corporation or an Exxon Company USA to dig canals which are, A, navigable in themselves, and B, which tie into other interstate marine highways of commerce, and which owe their very existence to the water, and the gradients, and the levels of flow that they get from navigable waters.

QUESTION: But if the Appalachian Power Company test is correct, then a river which is not at all capable of being navigated at the present time, and which no private riparian owner has indicated any intent to improve, to make navigable, is nonetheless subject to the navigational servitude.

So it can't be just a question of whether the owner

chooses to tie into a navigational system.

MR. HILL: I--with all due respect to you, sir--
I think that those are two questions.

When the owner elects to build the canals, once the canals are built, Appalachian--the Appalachian test no longer applies. And the most traditional--the oldest tests apply.

In other words, once--our point is, once he chooses to build those canals, once having done so, the canals by their very existence, become impressed with a navigation servitude. And if they are in that state.

QUESTION: It's just an alternate way in which a navigational servitude can be acquired as compared to the Appalachian Power?

MR. HILL: I think so.

QUESTION: If that's true--if that's true, how was it that in the early years of the 19th Century, before the coming of the railroad, when this country was literally honeycombed with canals--at least the Eastern part of it--because that was the method of interstate travel, how were people allowed to charge tolls on those canals that were built by state or local governments, or privately, by contrast to the federal government? And those tolls were charged.

MR. HILL: Those cases hold that reasonable tolls to pay for and support reasonable improvements to navigation may be done. In none of these cases, just as in none of the

bridge cases--

QUESTION: I wasn't talking about cases. I was just talking about the historical facts.

I'm interested to know there are cases, because I didn't know.

MR. HILL: There are cases which hold--indeed, even more than that, cases approving bridges over navigable waters. None of those say--

QUESTION: Well, I'm talking about canals constructed not by the federal government but by either state or local government or by private people which were connected necessarily to interstate highway, natural or artificial: How could tolls be charged if there was a free navigational servitude?

MR. HILL: Two reasons. Number one, perhaps the development of those in the United States was of somewhat more importance than it is now, simply as a matter of policy. And number two, I do not think that the charging of tolls is necessarily tantamount to a negation of the existence of a navigational servitude.

QUESTION: Well, then that's conceding that the respondent in this case could charge you a fee for shrimping, isn't it?

MR. HILL: I didn't hear your question, sir.

QUESTION: Aren't you then conceding that the respondent in this case could charge you a price for coming in

there?

MR. HILL: No, sir, I am not conceding that at all.

QUESTION: Well, don't we still have the toll houses along the old Chesapeake Canal that was privately owned by George Washington and some of his friends?

MR. HILL: I'm sure that we do. I'm not familiar with them.

But again, I do not believe that that--although I think that it's quite questionable whether or not those cases would pass muster before this Court now. Nevertheless, there was never a case that said that on those navigable waters there was not a public right to navigate.

These people do not seek to charge tolls. They seek to bar the public entirely.

QUESTION: Well, you haven't offered them any money so far, have you?

MR. HILL: We don't have a lot to offer.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:05 o'clock, p.m., the case in the above-entitled matter was submitted.]