



DEPARTMENT OF THE ARMY
NORTH CENTRAL DIVISION, CORPS OF ENGINEERS
536 SOUTH CLARK STREET
CHICAGO, ILLINOIS 60605

NCDOC

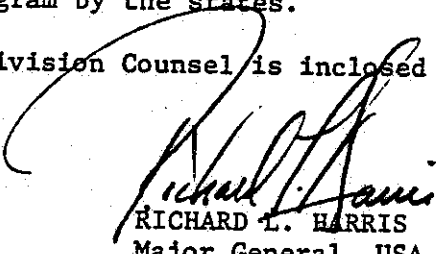
27 June 1980

SUBJECT: Navigability Determination - Kankakee River
in Illinois and Indiana

District Engineer, Chicago

1. The subject report has been reviewed and I have determined that the Kankakee River from its mouth to Baums Bridge at mile 84 is navigable water of the United States.
2. For miles 5.5 to mile 84 this determination is based solely on historical commerce, therefore Clean Water Act Section 404 jurisdiction over miles 5.5 to mile 84 can be transferred to the states upon adoption of an approved Section 404 program by the states.
3. The opinion of the Division Counsel is inclosed for your files.

1 Inc
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RICHARD L. HARRIS
Major General, USA
Division Engineer

DISPOSITION FORM

For use of this form, see AR 340-15, the proponent agency is TAGCEN.

REFERENCE OR OFFICE SYMBOL

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SUBJECT

Opinion of Division Counsel - Navigability of the Kankakee River in Illinois and Indiana

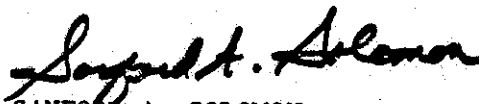
TO NCDCO

FROM NCDOC

DATE 26 June 1980 CMT 1

SOLOMON/jrw/6336

1. The Report of Findings (Determination of Navigability) of the Kankakee River in Illinois and Indiana has been reviewed and its conclusion that the river is navigable from its mouth to Baums Bridge at mile 84 is supported by the evidence.
2. The reports of survey are the most reliable evidence about the river because they were based on physical examination of the river and information obtained from local interests and were prepared for the purpose of recommending the expenditure of large amounts of public funds. The reports describe the commercial traffic and improvements of the lower reach of the river in Illinois. They also indicate that the river was navigated by several steamboats for about 120 miles above Momence, Illinois. This small amount of commercial navigation is sufficient to warrant a determination of navigability from the mouth of the river to Baums Bridge (mile 84).
3. The sporadic use of the upper part of the Kankakee River from South Bend, Indiana by explorers is not a sufficient use of the river to justify a determination of navigability. Use of the upper part of the river above mile 84 (mile 120 before straightening of the river) by fur trappers and early settlers is extremely doubtful because the river was shallow and narrow, and the sinuous river required travel of 250 miles to travel 83 miles. The river did not connect major population centers which generated traffic and the existence of the swamp inhibited settlement and human habitation.



SANFORD A. SOLOMON
Division Counsel



DEPARTMENT OF THE ARMY
CHICAGO DISTRICT CORPS OF ENGINEERS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

REPLY TO
ATTENTION OF:

25 JUN 1980

NCCCCO-R

SUBJECT: Report of Findings (Determination of Navigability),
Kankakee River, Illinois and Indiana

Division Engineer, North Central

1. Inclosed is the report of findings and opinion of the District Counsel (in duplicate) for the Kankakee River, Illinois and Indiana. The report has been prepared in accordance with Title 33 Code of Federal Regulations 329 and in recognition of the lawsuit brought by the Attorney General for the State of Illinois. This determination is based solely on historical commerce, and therefore Clean Water Act Section 404 jurisdiction over the river between mile 5.5 and mile 84 can be transferred to the states upon adoption of an approved Section 404 program.

2. I have concluded that the Kankakee River, Illinois and Indiana is legally a navigable water of the United States from its mouth in Grundy County, Illinois to the place in Porter County, Indiana, where Baum's Bridge crosses it. (Inclosure 2, K.)

a. A thorough historical study of navigation on the Kankakee River has been made, yielding numerous accounts and documents which describe the nature and extent of navigation. Above Baum's Bridge, Indiana, adequate documentation of significant trade and commerce is lacking.

b. Presently, commercial navigation is limited to the lower reaches of the Kankakee River, below the Atchison, Topeka, and Santa Fe Railroad Bridge at mile 4.8. By 1880, the Kankakee Company had completed construction between the mouth of the Kankakee River and Warner's Landing, or about 21 miles of commercial channel, which subsequently were used for interstate commerce. Those improvements of the Kankakee Company have been abandoned since the turn of the century and are now in ruins. Since then, several plans to improve the commercial and recreational navigation of the Kankakee River have been proposed, but none have been constructed.

25 JUN 1960

NCCCCO-R
Division Engineer NCD

c. From the report of the District Engineer, Louisville District on possible improvements to the Kankakee River in Illinois and Indiana, it does not appear that the plan of improvement for a cross-Wabash Valley Waterway to the Great Lakes would be economically feasible.

3. Your concurrence with the inclosed document is requested.



HOWARD N. NICHOLAS
LTC, Corps of Engineers
District Engineer

Incl

1. Opinion of
District Counsel
2. Report of Findings

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SUBJECT: Report of Findings (Determination of Navigability) of the Kankakee River
in Illinois and Indiana

1. Name of Waterbody: Kankakee River, Illinois and Indiana
2. Tributary to: Illinois
3. Physical Characteristics:

- a. Type: River 1/
- b. Length: 150 miles 2/
- c. Approximate Discharge Volumes: 3/ 4/

(1) Near Wilmington, Illinois, mile 5.5, drainage area 5,150 square miles.

Average (44 years) 4,070 cfs
Maximum (July 13, 1957) 75,900 cfs
Minimum (August 1, 1936) 204 cfs

(2) At Momence, Illinois, drainage area 2,294 square miles.

Average (62 years) 1,925 cfs
Maximum (March 5, 1976) 11,900 cfs
Minimum (September 1, 16 & 17 1919) 306 cfs

(3) At Shelby, Indiana, mile 67.9, drainage area 1,779 square miles (of which 201 square miles does not contribute directly to surface runoff).

Average (56 years) 1,581 cfs
Maximum (December 21, 1927) 7,200 cfs
Minimum (January 13-15, 1954) 260 cfs

(4) Near Kouts, Indiana, mile 86.7, drainage area 1,376 square miles (of which 194 square miles does not contribute directly to surface runoff).

Average - None listed (period of record October, 1974 to current year)
Maximum (April 11, 1978) 4,590 cfs
Minimum (September 12, 1978) cfs

(5) At Dunn's Bridge, Indiana, mile 90.8, drainage area 1,352 square miles (of which 192 square miles does not contribute directly to surface runoff).

Average (30 years) 1,288 cfs
Maximum (October 22, 1954) 5,300 cfs
Minimum (January 25-29, 1963) 280 cfs

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(6) At Davis, Indiana, mile 110.9, drainage area 537 square miles (of which 137 square miles does not contribute directly to surface runoff).

Average (54 years) 493 cfs
Maximum (December 15, 1927) 1,700 cfs
Minimum (August 30- September 3, 1941) 154 cfs

(7) Near North Liberty, Indiana, mile 126.9, drainage area 174 square miles (of which 58.2 square miles does not contribute directly to surface runoff).

Average (27 years) 147 cfs
Maximum (October 10, 1954) 686 cfs
Minimum (September 9 & 10, 1964) 46 cfs

d. Fall Per Mile: The total fall of the Kankakee River from its headwaters to its mouth is approximately 171 feet. The average fall per mile is 1.57 feet 5/

e. Extent of Tidal Influence: None. The Kankakee River from its mouth to mile 5.5 is affected by the pool of the Dresden Island Dam on the Illinois River. 6/

f. Range Between Ordinary High and Ordinary Low Water: Not available.

The Kankakee River had its beginning long ago with a large lake of glacial meltwater located in southwestern Michigan. The melting glacier produced an enormous volume of water which overflowed a low divide near the South Bend area entering into what would later be known as the Kankakee River Valley. The outlet stream, known as the Kankakee torrent, ranged from two to ten miles in width. It eroded a channel through the lowlands of the existing valley and later became the Kankakee River.

Presently, the Kankakee River is approximately 150 miles long. Its headwaters are about three miles southwest of South Bend, Indiana. From this point, the river flows in a southwesterly direction through Indiana and into Illinois to Aroma Park at the mouth of the Iroquois River, one of its tributaries. Here, the river flows northwesterly to a location about 40 miles southwest of Chicago where it joins the Des Plaines River to form the Illinois River. It drains 3,125 square miles in Indiana and 2,155 square miles in Illinois. River depths range between 1 and 15 feet.

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The Kankakee River is divided by a limestone ledge at Momence, Illinois, 49 miles above the mouth and seven miles west of the Illinois-Indiana State line. The river and outlying areas divided by this mark have very different, natural characteristics. Below the ledge, the river runs its natural, relatively straight course alongside well defined banks. This area has an average slope of 2.47 feet per mile. The land has adequate natural drainage and is relatively free from flooding.

The upper portion of this river was originally very sinuous having a river length of 250 miles in a valley length of 90 miles. Extensive straightening of the Kankakee River occurred in the early 1900's to reduce its length to 83 river miles. (See Inclosure A). The land surrounding this river is low and flat resulting in inadequate drainage. The slope of this upper portion of the Kankakee River is 0.83 feet per mile. The average river depth at low water is about four feet. 7/

g. Description of Improvements to Navigation not Listed in Subparagraph 5:

The improvement of the Kankakee River for navigation in some portions dates back many years. In 1822, Congress passed an act granting to the State of Illinois the right of way for the Illinois and Michigan Canal. The State was without funds for construction, and in 1827 Congress granted to the State a quantity of land equal to one-half of five sections in width on each side of said canal. With the funds secured from the sale of this land, the construction of the canal began in 1836 and was completed in 1848. Following the completion of the canal it was found that an additional supply of water was required for operating the canal. The State built a dam (mile 6.0 on map) across the Kankakee River a short distance below Wilmington, and the "Kankakee Feeder" was projected from this point in a northwesterly direction, crossing the Des Plaines River on an aqueduct connecting with the Illinois and Michigan canal about 800 feet north of the Des Plaines River.

In 1847, a private company, known as The Kankakee Company, was organized for the purpose of improving the navigation of the Kankakee River and developing water power on the river. This company raised the State Dam (See inclosure B) two feet, built a lock at one end of the dam, and constructed four additional locks and dams. Dam No. 4 (mile 11.3) was 1,000 feet long and 16 feet high, masonry lock with a lift of 15 feet. Dam No. 3 (mile 10.6) at Wilmington, across main branch, south side of Alden Island; known as "Wilmington Dam" dam No. 2 (mile 10.0) north side of island, 11 feet high; masonry lock with a lift of 10 1/2 feet.

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Dam No. 1, (mile 6.1 on map) 12 feet high, masonry lock with a lift of 8 feet, three-fourths of a mile above the State dam.

These improvements provided an outlet for the Kankakee valley by water to Chicago and St. Louis. Boats were run regularly to Chicago and St. Louis every week, carrying grain and other agricultural products, and bringing back lumber, iron, coffee, sugar, salt and manufactured articles. The Kankakee Company gave up the control of the river in 1882, and, as a result, the locks and certain dams which were not utilized for water power fell into disrepair and are in ruins. 8/

The movement for improving the Kankakee River for flood control and drainage began in 1851 when the Governor of Indiana recommended a bill to the State Legislature for draining the extensive marshlands located along the river. This marsh area covered approximately 500,000 acres and consisted of vast stretches of marshlands, swamplands, and broad flood plain areas broken by ridges and islands of various sizes, and numerous lakes. It included all those marshlands along the Kankakee River from its source near South Bend (mile 150) to the Indiana-Illinois State line (mile 57 on map).

A massive improvement program was begun in 1889 to straighten bends in the Kankakee River and clean the natural channel from South Bend to the Illinois-Indiana State line. The ultimate goal of this program was to improve the drainage of the valley. The work, completed in 1917, reduced the river length in Indiana from 250 miles to 83 miles. The cost of this project totalled about \$1,200,000 and was assessed against the areas benefitting from the work.

In 1889 and 1891, the Indiana State Legislature appropriated a total of \$65,000 to lower the limestone ledge at Momence, Illinois. Local interests hoped the lowering of the Momence rock ledge would increase the drainage flow of the river. The channel excavated in 1893 was 300 feet wide, 8,649 feet long, and had a maximum depth of 2.5 feet. The \$65,000 appropriation failed to cover an obstruction of boulders just upstream from the Momence rock ledge which further hindered the riverflow. This obstruction was removed in 1927 by the Momence and Yellowhead Drainage District at a cost of \$5,000. These measures, along with extensive agricultural development in the area, reduced the Kankakee River marshlands to slightly over 30,000 acres. 9/ They are concentrated in the Beaver Lake and English Lake regions indicated on the map.

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4. Nature and Location of Significant Obstructions to Navigation in Portions of the Waterbody Used or Potentially Capable of Use in Interstate Commerce:

There are currently a total of 2 dams on the mainstem of the Kankakee River in Illinois that obstruct the movement of navigation. None of these dams have locks. These dams are at Wilmington, Illinois (mile 10.6) and Kankakee, Illinois (mile 32). A dam was once located at Aroma Park, Illinois (mile 38.1). It is no longer in existence. A rock ledge at Momence, Illinois also obstructs navigation.

The State of Indiana made two appropriations totalling \$65,000 for cutting down the rock ledge at Momence. The channel as completed in 1893 was 8,649 feet long, 300 feet wide, and 2 1/2 feet deep. 10/

There is a total of 68 highway and railroad bridges over the Kankakee River from mile 126.9 downstream to mile 2.2 (see inclosure C). The U. S. Coast Guard does not currently consider the Kankakee River navigable and does not regulate the construction of bridges.

5. Authorized Projects:

a. Nature, condition and location of any improvements made under Projects Authorized by Congress: None.

6. Past or Present Interstate Commerce:

a. General Types, Extent, and Period in Time:

Use of the Kankakee River for navigation dates back to pre-settlement times. In 1679, accompanied by Father Louis Hennepin, explorer La Salle came down the Kankakee River from what is now South Bend, Indiana. With his twenty-eight men and eight canoes he portages five miles from the St. Joseph River to the Kankakee River. On this voyage La Salle paddled west as far as the present site of Peoria, Illinois on the Illinois River. 12/

In 1721, Father Charlevoix visited the source of the Kankakee River. 13/ There are numerous accounts of expeditions to the Illinois country which utilized the St. Joseph - Kankakee portage route as a door to the Mississippi valley. Careful examination of artifacts such as Father Hennepin's map (See inclosure D) reveal several portages which may have been used by La Salle's party. Several years later, Father Hennepin wrote of the expedition. "We embarked on the 3rd of December, being three and thirty men in eight canoes, and having left the Lake of the Illinois (Lake Michigan), went up the River Miamis (St. Joseph River), which we had founded before. We made about five

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and twenty leagues to the southwest, but could not discover the place where we were to land, and carry our canoes and equipage into the River of the Illinois, which falls into that of Meschasipi (Mississippi River); we had already passed the place of the Portage, but not knowing whereabouts we were, we thought fit to stay there, to expect M. La Salle, who was landed to view the country; we staid a great while, and seeing, he did not come, I went very far into the woods with two of our men, who fired their guns to give him notice of the place where we were. The next day I went up the river myself, but hearing nothing of him, I came back, and found our men very much perplexed, fearing he was lost." 14/ Considering the fact that several portage routes were available to the early explorers, the extent of their use of the Kankakee River for that purpose has not been clearly defined.

In 1780, a Frenchman names La Balme raised a party of French from Cahokia, near St. Louis, and set out on the Illinois and Kankakee to raid the British post at Detroit. The party went only as far as the British trading post at the Kankakee - St. Joseph portage, driving off the traders and taking their supplies. They then headed south along the lake shore. 15/

The nature and extent of trade utilizing the Kankakee River can only be estimated. Prior to 1825, the basin was inhabited by Indians, predominantly of the Pottawatomí tribe. Much of the basin at that time was in the "Grand Marsh." This marsh began near the northern border of Starke County in the now drained English Lake region and extended downstream to Momence, Illinois. This marsh area contained some 500,000 acres and had an abundance of fish, game, and fur bearing animals. French fur trappers began to come into the area in about 1825, and the first white settlers in this basin settled in La Porte County in 1829. 16/ The great Kankakee Marsh to the south handicapped the movement of people from that direction. This marsh was from three to five miles wide, and the depth of its water was from one to four feet deep for eight or nine months of each year. Few people ever saw the Kankakee River except in times of severe droughts or in the winter when the marsh was frozen over. The region's first historian wrote that "so far as any ordinary access to it from this county (Lake) is concerned it is like a fabulous river, or one the existence of which we take on trust." As a result, immigrants from the more southern parts of Indiana and Ohio chose the easier routes along the Michigan Road or up the Wabash River into the tier of counties east of Porter and Lake. The late removal of the Indians also delayed the area's settlement for a time. 17/

Small village settlements and trading posts began to develop around the edges of the Grand Marsh in about 1832, and the first sawmills and grain mills were established in 1836. With the westward movement of white settlers, the final removal of the Pottawatomies by the U. S. Government occurred in the summer of 1838, though the lands of the Pottawatomies had been ceded to the U. S. six years earlier in 1832. 18/

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In the early days trapping and fur trading were an important activity. The early French fur traders were friendly with the Indians and much trading occurred between these two groups. Many professional hunters were attracted to the Grand Marsh area because of its abundant wildlife. These hunters harvested a large amount of wildlife for Chicago and New York markets. 19/

In a telephone conversation with Dr. Loyal Fields, a noted historian, it was learned that "the Kankakee River was used extensively by the Indians and fur traders for transportation." He said "they would portage to the Kankakee River from the St. Joseph River at South Bend, Indiana." 20/

Alfred H. Meyer, in The Kankakee "Marsh" of the Northern Indiana and Illinois, reprinted from Papers of the Michigan Academy of Science, Arts & Letters, Vol. XXI, 1935, pub. 1936, p.360-361, states that the Kankakee, with the St. Joseph portage, provided a strategic connecting link in the Great Lakes-Mississippi route of the early French explorers, fur traders, and missionaries. Marion Isaacs, in The Kankakee: River of History, p. 6, quotes Father Hennepin, recorder for the La Salle Expedition of 1679 as saying that "the Kankakee River is navigable for dugouts within a hundred paces from its sources." Several of her examples of navigation of the Kankakee are contained in Fay Folsom Nichols' The Kankakee: Chronicle of an Indiana River and Its Fabled Marshes (Brooklyn, N. Y.: Theo. Gaus' Sons, 1965). These include a journey by log canoe by Amasa C. Washburn in 1831; the transportation of the household goods of Dr. Calvin Tilley in a "good sized row boat", and the rafting of logs down the river by a man named Sawyer who operated a saw mill. The Kankakee marsh was renowned as a hunting area, and many clubs and individuals operated boats on the river, as the Indians had done. 21/

With reference to the St. Joseph - Kankakee portage, the Reverend John Mason Peck's Gazeteer of Illinois states that navigation for small craft can be effected through the Kankakee and St. Joseph Rivers. 22/ In "The Traveller's Guide; or Pocket Gazeteer of the United States"; Morse, Jedidiah and Morse, 1826 stated that in times of high water, boats pass from the Kankakee to the St. Joseph River. 23/ In the Indiana Gazeteer, 18-9, E. Chamberlain states that the Yellow River, a tributary of the Kankakee River, can be navigated 30 or 40 miles during high water. The Yellow River enters into the Kankakee River near English Lake, Indiana, approximately river mile 101. 24/

There were two main portage routes from the St. Joseph to the Kankakee River. One route was from the St. Joseph River to Grapevine Creek (now Geyer Ditch) in Section 36, Town of Warren, St. Joseph County, Indiana then to Kankakee River. The other route was to portage directly into the Kankakee River in Section 20, Town of Portage, St. Joseph County, Indiana. 25/

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The idea of draining the river's submarginal lands probably first occurred to the early settler because of the inaccessibility of the stream itself. Only at far-distant spots, and at times of great drought or extreme cold, could the bogs and sloughs be traveled so as to reach the river. 26/

In 1850, Congress transferred Federal swamp lands to the State for sale to the settlers. The land could be purchased for \$1.25 an acre. The money was to be used for drainage purposes to convert the marsh to farmland. Several ditches were dug with the funds derived from the sale of swamp land. However, not until the turn of the 20th century was drainage at all effective along the river. This was accomplished by straightening and deepening the Kankakee River by means of floating dredges from the headwaters to the Illinois-Indiana state line. 27/

In 1866, a company was organized and known as the Indian Island Sawmill Company. They constructed a sawmill on the island, located in the Kankakee Marsh, and had it in operation soon after. In 1868 John Bissell and Ira Cornell built a steamer and named it White Star for the purpose of transporting lumber and cord wood downstream to Momence, Illinois, and other points along the river where they could sell their products. In the early 1870's the steamer and flat boats were sold to a Momence party for use as a pleasure boat. 28/

In 1878, James Lillie built the Minnie Lillie to haul sand from the Iroquois River to the State Hospital. A few years after the steamboat was converted to a pleasure boat. Another steamboat, the Margaret, was built by Captain W. T. Gougar. It was also used as an excursion boat. 29/

In the 1870's and 80's, Momence had a variety of watercraft operating generally between points up the river and over the State line in Indiana. Generally, boats operating out of Momence carried cargoes of wood, lumber and building stone as well as necessary supplies to the smaller camps - situated up river. The name of some of those camps and their approximate locations are shown on the drawing included in this report. (See inclosure K). There was a considerable business up river in the early days which was handled almost exclusively by the boats. The Morning Star owned by H. H. Baldwin, was one of the oldest boats on the river at Momence and was operated during the middle 1870's up into the 1880's. It used to operate on the river between Momence and Thayer's Landing, Indiana (mile 66.). Its cargoes were mainly lumber and wood. Other boats on the river were the Dewdrop owned by the Eugene Ice Company, the Domino, the Union Chief, the Red Bird owned by Uncle Sid Vail, and the Morning Star owned by Captain Silas Sink. The Morning Star owned and operated by Captain Silas Sink was 45 feet in length with a 10 foot beam and a side wheeler. For years Captain Sink used to ply between Momence and certain spots on the upper Kankakee, in Indiana. Captain Sink also navigated the Kankakee to the retreat at Beaver's Lake and Thayer's Landing carrying supplies to hunters and carrying out game that was shot. 30/ A large steam boat also made regular trips to Baum's Bridge (mile 84) in Indiana. 31/

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The construction of locks and dams across the Kankakee River by the Kankakee Company created a navigable channel in Illinois. Regular weekly trips were made to Chicago by two shippers, E. D. Small and Company of Wilmington, Illinois and Stephen Manford of Reed Township, Will County, Illinois. They operated small steamers which were used in towing barges to and from Chicago. In 1872, he and his sons built the first grain elevators on the Kankakee River. They were large storage warehouses built on the high river bank. The barges tied up along the bank below and were loaded by gravity flow from the bins on top of the bank. 32/ These docks were 15 miles northwest of Kankakee, Illinois. The one on the south side of the river was called Manford's Landing. The one on the north side of the river was referred to as Warner's Landing. 33/ There were located at about mile 20. See the inclosed drawing.

On 22 March 1924 Senate Bill 2904 was introduced to declare that portion of the Kankakee River, Illinois between the point where the Illinois Central Railroad bridge (mile 32) crosses the river and the point in Will County, where the Atchison, Topeka and Santa Fe Railroad bridge (mile 5) crosses the river non-navigable. On 22 April 1924, the Secretary of War reported to the Chairman, Committee on Commerce, United States Senate that the river had been extensively improved by State and private agencies in the interest of navigation and for other purposes. The river was used by the public in the past and possibly could be used in the future because of the improvements being made to the Illinois River. He recommended that the bill was not desirable and not be considered favorably. (See inclosure E).

In the District Engineer's report to the Chief of Engineers dated 29 March 1924, he stated that the river had been improved from its mouth to Warner's Landing. Prior to 1884, two or three small steamers navigated that portion of the river lying above Momence. In 1879 Major Jared A. Smith made a survey of the Kankakee River and stated in his report that it was navigable during low water for small light draft steamers for a distance of 120 miles, or upstream to Baum's Bridge, then called Eaton's Bridge located at mile 120, before canalization of the river was performed. (See inclosure F).

On 1 July 1926, the Office of the Chief of Engineers, in a letter to the Executive Secretary, Federal Power Commission, Washington, D. C. stated that 89% of the Kankakee River was navigable and that the river was navigable from Momence, Illinois to Baum's Bridge. (See inclosure G).

On 15 February 1932, the Chicago District Engineer recommended that the Kankakee River be considered navigable to the junction of the Kankakee and Yellow Rivers at English Lake, Indiana at mile 101. 34/ (See inclosure (G.1). On 2 March 1932, the Upper Mississippi Valley Division Engineer stated that he could find no historical evidence that the Kankakee River ever constituted a route or highway of interstate commerce. He recommended that the head of practical navigation be considered by the Department as at mile 5.5, the upper limit of beneficial effect of the normal pool of the Dresden Island Dam. The Chief of Engineers concurred with the Division Engineer's recommendation on 1 April 1932. The Corps of Engineers has considered mile 5.5 to be the head of navigation since that time. 35/

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Currently, the Kankakee River is used only by pleasure boats. Power boats are restricted mainly to the lower reaches of the river and the area behind the dams at Kankakee and Wilmington, Illinois. Upstream of the Kankakee Dam, at Aroma Park, Illinois, there is one marina that contains 20 slips. 36/ There are several places along the river that rent small boats. There are also boat races during the Labor Day weekend at Kankakee, Illinois. 37/ There were a few occasions when larger boats traveled up the Kankakee River. The Corps of Engineers Tender Channahon traveled up the river to about mile 4 to remove tree stumps that were a hazard to recreational craft. 38/ An amphibious hovercraft also traveled up the Kankakee River a short distance breaking ice on the river. 39/ A deck barge was also brought up the river in 1976 during construction of the new County Line Bridge at the Grundy-Will County Line.

There was some commercial fishing on the Kankakee River. Mr. Russell Gumm of Ottawa, Illinois and Mr. George Phillips (deceased) operated a small fishing barge on the river up to mile 5. They only made this run a few times removing carp and buffalo fish. 40/

The Indiana Legislature in 1961 declared that the Kankakee River is a navigable stream throughout its course in Indiana. 41/

7. Potential Use for Interstate Commerce, If Applicable:

a. If in natural condition:

In its present condition, the Kankakee River could not be used in its entirety for commercial navigation. Shallow channel conditions, dams without locks and restrictive bridges impede navigation.

It appears, that without improvements, the lower basin of the Kankakee River could be navigated by a commercial barge and tow to mile 4.7. The horizontal clearance between support piers of the Santa Fe railroad bridge at mile 4.8 is 50 feet. Shallow channel conditions and large boulders in the river restrict navigation to pleasure boats from this point to the Wilmington Dam. 42/ The channel in the Kankakee River above Momence, however, maintains a depth of about 4 feet at low water up to Baum's Bridge in Indiana, mile 84. This reach of the Kankakee River is popular with pleasure boatists.

b. If improved:

As a result of a survey of the Kankakee River made in 1867, it was suggested by Mr. James Worrall, who made the survey, that the river be improved by locks and dams as far as Momence, Illinois. (See Annual Report of Chief of Engineers, 1868 inclosure H). In 1876 Major G. L. Gillespie (Annual Report 1876 inclosure I) and in 1879, Major Jared A. Smith reported adversely on the project.

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Major Smith also gave a description of the river for 120 miles above Momence and stated that during the low water season the river for this distance was navigable for small, light draft steamers. The depth of the water was reported as generally 5 feet, or more, and nowhere less than 2 feet except on the rock ledge at Momence. 43/

On November 4, 1884, Captain James Post (See inclosure J) submitted a preliminary examination report, dealing principally with the proposed removal of the rock ledge at Momence. He reported the river as being unworthy of improvement if commerce alone was considered, but that its improvement was desirable in the interest of agriculture. Previous to the time of Captain Post's report, two or three small steamers navigated that portion of the river lying above Momence, but at the time of his report they had ceased to run, and there had been no river commerce above or below Momence during the preceding two years. 44/

The Kankakee Company had proposed to construct a navigable channel on the Kankakee River from the mouth of the river to the Illinois-Indiana State line. These improvements were constructed only in the lower reaches of the river creating a navigable channel to mile 21. The proposed improvements above mile 21 were never constructed. 45/

In 1967, the State of Illinois, Bureau of Water Resources, as part of their report on the Kankakee River Basin Study, a Comprehensive Plan for Water Resource Development, recommended the development of a recreational waterway on the Kankakee River. The waterway improvements would extend from the mouth of the river approximately 60 miles upstream to the Illinois-Indiana State line. The plan would consist of a series of locks and dams to provide slack water navigation. The improvements would provide a channel having a minimum depth of 5 feet and a minimum width of 60 feet, except for where a rock cut will be required at Momence, Illinois. At that point, the minimum channel width will be 50 feet with a minimum depth of 3 feet at extreme low water. No action has been taken on this plan to date. 46/

The State of Illinois, Kankakee River Basin Task Force in their final report to the Governor of Illinois concluded that it is in the best interest of the State of Illinois to maintain the Kankakee River as a low density recreation and scenic river. They recommended that Illinois adopt a policy of maintaining the Kankakee River in the most natural conditions possible. 47/

In August 1972, the U. S. Army Corps of Engineers, Louisville District published a Reconnaissance Report on Investigation of Navigation Facilities from the Ohio River System to Lake Erie and Lake Michigan (Cross Wabash Valley Waterway).

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This report was published in response to several resolutions by the House and Senate Committees on Public Works. The initial report was published as House Document 100, Seventy Third Congress, Report of the Chief of Engineers on the Wabash River and tributaries. The study considered the feasibility of constructing a barge canal from the Ohio River to Lake Michigan and Lake Erie. The alternative routes connecting Lake Michigan to the Ohio River utilized portions of the Kankakee River. 48/

The route to Lake Michigan at Gary, Indiana would follow the Wabash River to its junction with the Tippecanoe River, then follow the Tippecanoe for 7 miles, then it would cross the divide to the Kankakee River, follow the Kankakee River west of Dunn's Bridge to the confluence of Crooked Creek and proceed north to Burn's Harbor, Indiana. The other route to Lake Michigan would follow the Wabash River to its junction with the Vermillion River and its north fork for 39 miles, then cross a divide to the Iroquois River, then follow the Iroquois River to the Kankakee River, follow the Kankakee River to its junction with the Illinois Waterway and to Lake Michigan at Chicago, Illinois. 49/

The study concluded that the cost of constructing a waterway extending from the Ohio River to Lake Michigan and/or Lake Erie via the Wabash Valley and adjacent streams would exceed the benefits to be derived therefrom by a wide margin. The District Engineer recommended that no further study be made of these proposals. The Division Engineer, Ohio River Division concurred in the District Engineer's recommendation on November 6, 1972. 50/

8. Nature of Jurisdiction Known to Have Been Exercised by Federal Agencies, If Any.

The Corps of Engineers has considered the Kankakee River a navigable water of the United States to mile 5.5 since 1 April 1932. In addition, the Corps of Engineers has issued permits for construction above that point, under Section 10 and Section 404. On 15 February 1932 the Chicago District Engineer recommended to the Upper Mississippi Valley Division Engineer that the Kankakee River be considered a navigable water of the United States from its mouth upstream to the present junction of the Yellow and Kankakee Rivers at English Lake, Indiana. The District Engineer's recommendation was based on the fact that the Kankakee River in Illinois had been improved for navigation from the Des Plaines River to a point 12 miles above Wilmington, Illinois. A survey conducted by the Corps of Engineers in 1867 found that the river for 120 miles, up to Baum's Bridge, Indiana, was navigable for small, light draft steamers. Prior to 1884 two or three small steamers navigated that portion of the river above Momence. On 2 March 1932, the Division Engineer recommended that the head of navigation be at mile 5.5, the upper limit of beneficial effect of the normal pool of Dresden Island Dam. He found no evidence to prove the

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Kankakee River, in its natural state, ever constituted a route or highway for interstate commerce. There have been no improvements for navigation authorized by Congress. The improvements for navigation were made by private interests for private gain and not by the State of Illinois. There was not any use of the river for commercial navigation at the time his report was written. The Chief of Engineers concurred with the Division Engineer's recommendation. 51/ Since that time the Corps of Engineers has issued permits up to mile 5.5 and beyond, under Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act of 1977.

The United States Coast Guard does not exercise jurisdiction over the construction of bridges on any portion of the Kankakee River. They have not prepared a navigability study on the river. 52/

The Federal Energy Regulatory Commission (formerly Federal Power Commission) lists the Kankakee River in their October, 1938 report as previously improved for navigation but abandoned since 1882. There is currently no licensed project on the river. 53/

9. State of Federal Court Decisions Relating to Navigability of the Waterbody, If Any:

Refer to opinion of District Counsel section attached to this report.

10. Remarks:

The Kankakee River in Illinois and Indiana has historically been used for navigation. The Indians of the Kankakee River basin and the early settlers surely made some use of the river to transport furs, supplies and other goods. Interstate commerce between Indiana and Illinois was demonstrated by the lumber camps in the Beaver Lake region and their shipments downstream to Momence.

In recent times, use of the Kankakee River for commercial navigation has been limited to the lower reaches of the river below the Atchison, Topeka and Santa Fe Railroad Bridge at mile 4.8.

Recreational boating and sport fishing is actively participated in above and below Momence.

Several plans to improve the river either for commercial or recreational navigation have been proposed for the river in both states in the past. It does not appear that these plans are economically feasible.

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11. Recommendations:

It is therefore, recommended that the Kankakee River, in Illinois and Indiana from its mouth upstream to Baum's Bridge at mile 84, Porter County, Indiana, be declared a navigable water of the United States.

This determination is based solely on historical commerce, therefore Clean Water Act, Section 404 jurisdiction over the river between mile 5.5 and mile 84 can be transferred to the states upon adoption of an approved Section 404 program.



HOWARD N. NICHOLAS
LTC, Corps of Engineers
District Engineer

Incl
As stated

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1. United States Geological Survey, Quadrangle Sheet, North Liberty, Indiana, 1958.
2. U. S. Army Engineer District, Chicago, Report of Review, Review of Kankakee River, Illinois and Indiana on Flood Control, 31 July 1941.
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4. U. S. Geological Survey Water-Data Report IN-78-1, Water Resources Data for Indiana, Water Year 1978, p.282-283, p.286 & p.289-292.
5. OP. Cit., Report of Review, 1941.
6. U. S. Army Engineer Division, Upper Mississippi Valley, Navigability of Waterway - United States (Kankakee River, Illinois and Indiana), March 2, 1932.
7. U. S. Army Engineer District, Chicago, Kankakee River, Indiana, Levee Study, Williams Levee (Indiana State Line to Monon Railroad), December 1979, p.3-5.
8. U. S. Army Engineer District, Chicago, 15 February 1932, Navigability of the Kankakee River, Illinois and Indiana, paragraph 16.
9. OP. Cit., Corps of Engineers Levee Study, 1979, p.8.
10. House Document No. 784, 71st Congress, 3rd Session, 1931.
11. Telephone interview with Mr. William Flahart and Lt. Knee, U. S. Coast Guard, January 10, 1980.
12. Kankakee Valley Post-News, Birth of Kankakee Township Follows Close Behind Nation, Wesley Meyer, 1977.
13. Mary Jean Houde and John Klasey, "Of the People," A Popular History of Kankakee County, 1968.
14. From an account of La Salle's 1679 expedition written by Father Louis Hennepin 20 years after the fact.
15. OP. Cit., "Of the People".
16. U. S. Department of Agriculture, U. S. Department of the Interior and State of Indiana, Kankakee River Basin, Indiana, November 1976, p.IV-1.

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By Powell A. Moore, 1959.
18. OP. Cit., Kankakee River Basin, Indiana.
19. IBID.
20. Telephone interview with Dr. Loyal Fields, Assistant Curator,
Northern Indiana Historical Society, February 1, 1980.
21. August 7, 1974 letter from Martha E. Wright, Reference Librarian
Indiana Division, Indiana State Library.
22. OP Cit., "Of the People".
23. August 2, 1974 letter from Mr. Tom Runer, Reference Librarian,
Indiana Historical Society Library.
24. IBID.
25. February 12, 1980 letter and map from Dr. Loyal Fields, Assistant
Curator, Northern Indiana Historical Society.
26. "The Kankakee", Fay Folsom Nichols, Chapter 16, p.187.
27. The Post-Tribune, August 11, 1977, p.4
28. J. Lorenzo Werich, Pioneer Hunters of the Kankakee, 1920.
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30. "Up 'Til Now, A Scrapbook History, Old and New," compiled by the
Kankakee County Historical Society, January 28, 1951.
31. Forty-Sixth Congress, Second Session, Senate Document Number 107.
32. "Up 'Til Now, A Scrapbook History, Old and New", compiled by the
Kankakee County Historical Society, May 7, 1961.
33. "Up 'Til Now, A Scrapbook History, Old and New", compiled by the
Kankakee County Historical Society, May 14, 1961.

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References

34. 15 February 1932 Navigability Report to the Division Engineer, St. Louis, Missouri.
35. 1 April 1932 concurrence of the Chief of Engineers with the Chicago District's findings.
36. Telephone interview with Ms. Sharon Culkins, Culkins Marina, May 16, 1978.
37. Telephone interview with Mr. Gene Schneider, Vice Commodore, Kankakee Valley Boat Club, February 6, 1980.
38. Telephone interview with Mr. Russell Carlock, Corps of Engineers, Joliet Project Office, May 16, 1978.
39. IBID.
40. Telephone interview with Mr. Russell Gumm, Ottawa, Illinois May 17, 1978.
41. An Act declaring that portion of the Kankakee River that flows from the Michigan border to the Illinois border a navigable stream.
42. Telephone interview with Mr. Russell Carlock, Corps of Engineers, Joliet Project Office, February 7, 1980.
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44. IBID.
45. State of Illinois, Department of Public Works and Buildings, Bureau of Water Resources, Kankakee River Basin Study: A Comprehensive Plan for Water Resources Development, 1967.
46. IBID.
47. State of Illinois, Kankakee River Basin Task Force, Final Report to the Governor, April, 1978, p.3.

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51. U. S. Army Corps of Engineers, Office of the Chief of Engineers, Navigable Status of the Kankakee River, Illinois and Indiana, April 1, 1932.
52. Telephone conversation with Mr. William Flahart and Lt. Richard Knee, United States Coast Guard, Second District, St. Louis, Missouri and Lt. Commander Terrence Edwards, United States Coast Guard, Washington, D. C., January 10, 1980.
53. Telephone conversation with Mr. Ronald Lesniak, Federal Energy Regulatory Commission, Chicago, Illinois, January 15, 1980.

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Inclosures:

- A. Map of Kankakee River in Indiana before canalization
- B. Map of Kankakee River in Illinois and Indiana accompanying Major Jared Smith's Report, 1879
- C. Kankakee River Bridge Data: House Document 784, 1931., Corps of Engineers Survey, 1945; Chicago District Data, 1980
- D. Map and Account of the La Salle Expedition to the Illinois country, by Father Louis Hennepin, c. 1699
- E. Senate Bill 2904, 22 March 1924
- F. Annual Report of the Chief of Engineers, 1879
- G. 1 July 1926 letter from the Chief of Engineers to the Federal Power Commission
- H. Annual Report of the Chief of Engineers, 1868
- I. Annual Report of the Chief of Engineers, 1876
- J. Annual Report of the Chief of Engineers, 1884
- K. Drawing of the Kankakee River Basin, Illinois and Indiana, 1980

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1. The facts are adequately set out in the accompanying Report of Findings and will not be repeated herein; mention, however, will be made of certain aspects which are relevant to the question of navigability.
2. The Kankakee River is an interstate stream; at the present time it has an approximate total length of 150 miles. The upper portion, totally within the State of Indiana, comprises approximately 90 miles from its source near South Bend, Indiana, to the Indiana-Illinois state line. The portion in Illinois, about 59 miles in length, extends from the Indiana-Illinois state line flowing westerly to the confluence of the Kankakee and Des Plaines Rivers near Joliet, Illinois, to form the Illinois River, a heavily travelled commercial waterway connecting the Great Lakes systems with the Mississippi River systems and with ultimate connections to the seas.
3. Historically, the Kankakee River was used by early explorers, trappers, fur traders, etc. as an artery between Lake Michigan and connecting with the other mid-west rivers via the Illinois River, the Mississippi River, etc. Near the upper end of the Kankakee River a portage was utilized to cross over to or from the St. Joseph River which flows into Lake Michigan at St. Joseph and Benton Harbor, Michigan. The historical traffic utilized the early types of water craft then in use including canoes, bateaux or other frontier craft. The evidence of such early usage is of record.

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4. Not surprisingly, the early historical usage of the Kankakee River is somewhat similar to that of the Des Plaines River with which it joins. Both rivers involved use of an historical portage by explorers, trappers, fur traders, etc. as a connecting link for the passage via other streams between Lake Michigan and the Illinois River. Both the Kankakee and the Des Plaines Rivers contain major shoal areas in some stretches.
5. The Congressional Act of 26 March 1804, Chap. 35, Sect. 6, 2 Stat. 277, 279-280, provided "that all the navigable rivers, creeks, and waters, within the Indiana territory, shall be deemed to be and remain public highways."
6. At one time a private company built a series of four locks and dams as well as a lock at the then existing Wilmington dam on the lower reaches of the Kankakee River in Illinois making a direct water link to mile 21 for vessels up to 100 feet long and 17 feet wide. This is described in the Report of Findings (hereinafter referred to as the report) which also describes the straightening of the river in Indiana.
7. These improvements provided an outlet for the Kankakee Valley by water to Chicago and St. Louis. Boats were run regularly to Chicago and St. Louis every week, carrying grain and other agricultural products, and bringing back lumber, iron, coffee, sugar, salt and manufactured articles. The Kankakee Company gave up the control of the river in 1882, and, as a result, the locks and certain dams which were not utilized for water power fell into disrepair and are now in ruins.

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8. As the result of a survey of the Kankakee River made in 1867, it was suggested by Mr. James Worrall, who made the survey, that the river be improved by locks and dams as far as Momence, Illinois (Annual Report of Chief of Engineers, 1868, page 466). In 1876, Major G. L. Gillespie, and in 1879, Major Jared A. Smith, reported adversely on the project. Major Smith also gave a description of the river for 120 miles above Momence and stated that during the low water season the river for this distance was navigable for small, light draft steamers. The depth of the water was reported as generally five feet, or more, and nowhere less than two feet except on the rock ledge at Momence.

9. Captain James C. Post's 4 November 1884 preliminary examination report dealt principally with the proposed removal of the rock ledge at Momence. He considered the river as being unworthy of improvement if commerce alone was considered, but that its improvement was desirable in the interest of agriculture. Previous to the time of his report, two or three small steamers navigated that portion of the river lying above Momence, but at the time of his report (1884) they had ceased to run, and there had been no river commerce above or below Momence during the preceding two years.

10. During dry periods the Kankakee River below Momence has a depth of one foot or even less over some of the rapids. In its present condition it is, therefore, not continuously navigable, even for light draft commercial boats. However, in the Economy Light & Power Company case

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on the Des Plaines River, in 1921 the Supreme Court said:

"Navigability, in the sense of the law, is not destroyed because the watercourse 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". (256 U.S. 113)

11. In 1932 the Chicago District office made a navigability study of the Kankakee River. The study made reference to the approximately eleven (11) years earlier decision in 1921 by the U.S. Supreme Court in the Economy Light and Power case which had been considered by that court on two (2) occasions. In that case the dam in question on the Des Plaines River was to be located just above its junction with the Kankakee River. In 1932 the Chicago District personnel were also engaged in completing construction of the Illinois Waterway. Their study included a recommendation that the Kankakee be considered a navigable water of the United States up to English Lake, about 101 miles above its mouth. Because of the staff's familiarity with the subject at the time of the study (1931) their views, as documented, could be considered as entitled to considerable weight.

12. The Report of Findings points out, however, that on 2 March 1932 the Division Engineer, Upper Mississippi Valley Division, at St. Louis, Missouri, disagreed and recommended the head of practicable navigation be considered by the War Department as at mile 5.5. On 1 April 1932 the Chief of Engineers concurred in the Division recommendation. The Corps of Engineers has considered mile 5.5 to be the head of navigation since that time.

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13. The long history of administrative determinations within the Corps of Engineers on the question of the navigability of the Kankakee River is indicative of the different interpretations to which this is susceptible. However, as stated by the U.S. District Court on 28 July 1975 in the Chapman case (discussed hereinafter) pertaining to this river:

"The question of navigability must be determined by the objective facts, not by the opinion of the Corps of Engineers or of the Secretary of War".

14. The test of navigability had been judicially expanded by the Supreme Court in the case of Economy Light & Power Company v. United States of America, 256 U.S. 113 (1921); here the test of navigability is stated as:

". . . 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. Navigability, in the sense of the law, is not destroyed because the watercourse 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."
Id. at 121-22.

The Court held that a river which had not been used for commercial purposes for 100 years was subject to federal regulatory jurisdiction since

". . . 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." Id. at 123.

Thus, a waterbody which was once navigable in its natural or improved state is navigable in law even though it is not presently used, or is incapable

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of use, for commerce. (See below for citations to litigation re the Economy Light & Power Company)

15. The navigability test was again expanded by the Supreme Court to include waterways which, although traditionally considered nonnavigable, might be made navigable with reasonable improvements. In United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), the court stated that in determining navigability it is necessary to consider the feasibility of interstate use of the waterway after any reasonable improvements which might be made upon it. The Court further noted that once it has been found to be navigable, a waterway remains so.

16. The District Court's Decision in Linda Chapman v. U.S., No. 73-C-2881, is dated 28 July 1975. This involved an alleged wrongful death at a dam across the Kankakee River at Wilmington, Illinois. The court recites that it had heard the evidence on the issue of liability and had considered the documents which were admitted into evidence and the post hearing memoranda filed by the parties. The court in its findings states:

"The jurisdiction of the Federal Government under the Admiralty Act is determined by whether or not a waterway is capable of being used for purposes of commerce. It does not matter what type of commerce can be conducted or

FOOTNOTE:

Citations to cases relating to the proposed dam on the Des Plaines River just above its confluence with the Kankakee River:

The People v. Economy Light & Power Co., 241 Ill. 290 (26 Oct 1909)

Illinois v. Economy Light & Power Co., 234 U.S. 497 (22 June 1914)

Economy Light & Power Co. v. U.S., 256 F. 792 (21 Jan 1919)

Economy Light & Power Co. v. U.S., 256 U.S. 113 (11 April 1921)

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what natural obstructions are presented. The Montello, 87 U.S. 430, 441, (1874). Such activities as floating of logs, and colonial trade by fur merchants make a river navigable. Wisconsin Public Service Corp. v. Federal Power Commission, 147 F. 2d 743, 745, (7th Cir. 1945), c.d. 325 U.S. 880 (1944). Furthermore, once a waterway is in fact navigable, it normally remains so. United States v. Appalachian Power Co., 311 U.S. 377, 408 (1940); Economy Light & Power Co. v. United States, 256 U.S. 113, 123, (1921)."

17. The District Court further continued:

"The plaintiff's evidence shows that the Kankakee River was used by fur traders and subsequently by freight boats and other forms of navigation as recently as 1882. The Federal government has authorized bridges and utility lines to cross in such a way that the river could be used for commercial purposes. Furthermore, a bill was introduced in the United States Senate in 1924 to declare the river non-navigable but it failed to pass after the Secretary of War recommended against it. The fact that the Corps of Engineers once determined that the river was non-navigable at Wilmington is a contrary administrative decision, but it is not conclusive. See United States v. United States Steel Corp., 482 F. 2d 439, 452-453 (7th Cir. 1973). The question of navigability must be determined by the objective facts, not by the opinion of the Corps of Engineers or of the Secretary of War."

18. The District Court further stated:

"The decision in Economy Light & Power Co. v. United States, supra, involved the Des Plaines River which is shorter and drains less area than the Kankakee River. The Des Plaines and the Kankakee Rivers join at a point about five miles downstream from Wilmington to form the Illinois River. The court found that the Des Plaines River was navigable, by virtue of fur trading and subsequent activities, but had fallen into disuse in this respect for a period of 100 years."

The court then stated it believed the same result must pertain to the Kankakee River for much the same reasons as were stated by the U.S. Supreme Court with respect to the comparable Des Plaines River. The court then found and concluded that the Kankakee River was navigable at the point of the decedent's accident.

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19. In two decisions, dated 20 August 1976 and 1 May 1978, respectively, the United States Court of Appeals for the Seventh Circuit had occasion to consider the subject of the Kankakee River in Illinois in case entitled Linda Chapman v. United States of America, Nos. 75-2162 & 75-2163. The net effect of these Decisions relative to the issue of navigability was that the court found the Kankakee River at this point to be a navigable water of the United States. The latter decision was issued after a nine judge In Banc hearing on oral argument. The court stated:

"We hold that a recreational boating accident does not give rise to a claim within the admiralty jurisdiction when it occurs on waters that, although navigable for purposes of Congress' power under the commerce clause, Economy Light & Power Co. v. United States, supra, 256 U.S. at 118, et seq., are not in fact used for commercial navigation and are not susceptible of such use in their present state."

20. The aforementioned decisions by the United States Court of Appeals for the Seventh Circuit in the Chapman case supported the determination by the District Court that the Kankakee River was navigable at the point on the Kankakee in Illinois where the accident occurred.

21. Viewed in the light of the 1921 U.S. Supreme Court decision in the Des Plaines River case (Economy Light & Power Co. v. U.S., 256 U.S. 113) and the decisions in the Chapman cases aforementioned, the Kankakee River should be considered a navigable water of the United States. It would appear that the only question to be decided is the determination of the head of navigation.

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22. On 20 February 1979, the United States District Court for the Southern District of Illinois in Case No. P-Civ-76-0045 involving the People of the State of Illinois, Plaintiff v. Martin Hoffman, Secretary of the Army, Corps of Engineers, the Chief of Engineers, and other Defendants, on the Mackinaw River, Illinois, entered Judgment Orders Directed to Federal and to Non-Federal Defendants, the parties having stipulated and agreed to the entry thereof. The Judgment Order Directed to Federal Defendants provided, among other things, that from that date forward, the rivers and streams set forth in Attachment A thereto will be considered navigable by the Corps of Engineers and thus covered by the permit requirements of 33 U.S.C. Section 403 and other federal laws governing navigable waters. Attachment A stated:

"Pursuant to the Judgment Order to which this Attachment A is appended, the following streams are agreed to by the Corps of Engineers and are declared by the Court to be navigable within the meaning of federal laws governing navigable waters, and thus subject to the various statutory requirements governing such waters including, but not limited to, 33 U.S.C. § 403:

CHICAGO CORPS DISTRICT

...
14. Kankakee River"

Informal advice recently received through Corps of Engineers channels was that the Department of Justice considered that

and ". . . the effect of the Order is limited to activities and structures solely within the State of Illinois. . . ."

"The Order applies only to those Illinois waters listed in Attachment A."