United States may not delegate the authority to issue a 404 permit regarding these wetlands to the State of Michigan.

Meaning of Interstate Commerce

The Menominee River adjacent to the wetlands at issue is an interstate body of water forming a boundary between the State of Michigan and the State of Wisconsin. In *Finneseth v. Carter* 712 F.2d 1041 (C.A.6 (Ky.), 1983), the Sixth Circuit Court of Appeals addressed the meaning of interstate commerce on a body of water lying in two different states. In *Finneseth,* the Court was asked to determine whether it had jurisdiction over a dispute resulting from a boat collision that occurred on Dale Hollow Lake which lies on the border of Kentucky and Tennessee. In order to determine whether there was federal jurisdiction over the dispute, the Court needed to find a number of things, including whether a wrongful injury occurred upon "navigable waters." *Finneseth* at 1043. The Court found that Dale Hollow Lake would constitute navigable waters if:

> ". . . it is used or capable or susceptible of being used as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water." *Finneseth* at 1044.

Although this definition of navigability was used to determine federal jurisdiction under admiralty law, it mirrors the non-delegability provision of 33 U.S.C. § 1344(g)(1). The Court found that Dale Hollow Lake was "used as an interstate highway for commerce" stating:

> "In this case Dale Hollow Lake clearly meets the requirement that the lake be an *interstate* highway for commerce because it straddles Kentucky and Tennessee. Because the interstate nexus is satisfied in this manner, it is not probative that maritime traffic on the lake is prevented from traveling downstream by the lockless dam." *Finneseth* at 1044.

The term "commerce" includes a wide variety of activities. The Ninth Circuit Court of Appeals determined that use of an Alaskan river for commercial recreational boating is sufficient evidence of the Water's capacity to carry waterborne commerce. *Alaska v. Ahtna, Inc.*, 891 F.2d 1404, 1405 (9th Cir. 1989). Further, the non-delegability provision of 33 U.S.C. § 1344(g)(1) does not require that a body of water be actually used in interstate commerce, only that it be "susceptible" to such use. The Supreme Court of the United States has stated:

> "Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940).

Menominee River Present Use and Susceptibility for Use to Transport Interstate Commerce

The Menominee River straddles Michigan and Wisconsin in the same way that Dale Hollow Lake straddles Kentucky and Tennessee. As found by the Sixth Circuit Court of Appeals in *Finneseth* this geographical location alone satisfies the requirement that any commerce present be interstate.