No. 10-218

In The Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Montana

BRIEF OF THE NATIONAL WILDLIFE FEDERATION; THE NATURE CONSERVANCY; DELAWARE NATURE SOCIETY; ENVIRONMENTAL LEAGUE OF MASSACHUSETTS; INDIANA WILDLIFE FEDERATION; LOUISIANA WILDLIFE FEDERATION; MONTANA WILDLIFE FEDERATION; NATURAL RESOURCES COUNCIL OF MAINE; NORTH CAROLINA WILDLIFE FEDERATION; NORTH DAKOTA WILDLIFE FEDERATION; CITIZENS FOR PENNSYLVANIA'S FUTURE; SOUTH CAROLINA WILDLIFE FEDERATION; SOUTH DAKOTA WILDLIFE FEDERATION; TENNESSEE WILDLIFE FEDERATION; VERMONT NATURAL RESOURCES COUNCIL; WEST VIRGINIA RIVERS COALITION; WISCONSIN WILDLIFE FEDERATION; MONTANA TROUT UNLIMITED; OREGON COUNCIL TROUT UNLIMITED; RIVER MANAGEMENT SOCIETY; UTAH STREAM ACCESS COALITION AND WESTERN RESOURCE ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI*

Amici are organizations dedicated to the protection of natural resources and activities that depend on those resources. Amici represent members who comprise a substantial number of America's conservationists, paddlers, anglers, and hunters. All of amici have a strong and demonstrated interest in the ability of states, in their sovereign capacity, to protect water resources.

The National Wildlife Federation ("NWF") is a national, non-profit corporation working to protect the ecosystems that are most critical to native wildlife in order to ensure a healthy wildlife legacy for future generations. Founded in 1936, NWF is headquartered in Virginia and has regional offices across the country. NWF has approximately four million members and supporters nationwide. NWF members fish, hunt, and observe wildlife, and use wetlands, streams, rivers, and lakes for recreation and aesthetic enjoyment.

The Nature Conservancy ("TNC") is a non-profit corporation founded in 1951 whose mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. TNC is the largest private owner of conservation land in the United States – over 2.6 million acres – much of which includes riparian lands. Through ownership of riparian lands or in

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* The parties have filed letters with the Clerk indicating blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

partnership with others, TNC has protected over 5,000 river miles. TNC's nearly 4,000 staff members work in 50 states and 39 countries. Because of its scientific expertise and wide-ranging strategic partnerships, TNC is considered the leading global freshwater conservation organization.

The Delaware Nature Society; Environmental League of Massachusetts; Indiana Wildlife Federation; Louisiana Wildlife Federation; Montana Wildlife Federation; Natural Resources Council of Maine; North Carolina Wildlife Federation; North Dakota Wildlife Federation; Citizens for Pennsylvania's Future (PennFuture), South Carolina Wildlife Federation; South Dakota Wildlife Federation; Tennessee Wildlife Federation; Vermont Natural Resources Council; West Virginia Rivers Coalition and Wisconsin Wildlife Federation are state-based non-profit organizations affiliated with the National Wildlife Federation. All are dedicated to the conservation of fish and wildlife and their habitat including, in particular, the rivers and lakes upon which fish and wildlife depend. They are committed to a science-based, watershed approach to management of fish, wildlife, and water resources, and to preserving opportunities for recreation in and on the waters subject to the public trust.

Montana Trout Unlimited ("MTU") and Oregon Council Trout Unlimited ("OCTU") are affiliates of Trout Unlimited, a national non-profit corporation founded over 50 years ago with more than 140,000 volunteers organized into about 400 chapters from Maine to Alaska. OCTU has 2,836 members in five chapters, each formed around a watershed; MTU has thirteen river-based chapters, comprised of approximately 3,400 volunteer members. MTU's and

OCTU's members are avid anglers dedicated to the conservation, protection, and restoration of wild and native trout and salmon in their watersheds.

The River Management Society ("RMS") is a national non-profit professional organization. The mission of the Society is to support professionals who study, protect, and manage North American rivers. Dedicated to holistic river management, its diverse membership includes federal, state, and local agency employees, educators, researchers, consultants, organizations and citizens. The objective of RMS is to advance the profession of river management by providing managers, researchers, educators and others a forum for sharing information about the appropriate use and management of river resources. RMS builds its organization with a broad base of expertise in all aspects of river management and stewardship including an ecosystem approach to recreation, water quality, riparian health, and watershed management.

The Utah Stream Access Coalition ("the Coalition") is a Utah non-profit corporation with over 1,000 members. The Coalition's mission includes restoring and preserving the public's right to use Utah's public waters for recreational and other lawful purposes, and securing recognition that the title to the beds of all navigable waters is in the state of Utah in trust for the people. The Coalition is currently involved in litigation in the Utah state courts seeking a determination that the Weber River, the site of commercial log drives in the late 1800s and early 1900s, meets the federal navigability for title test.

Western Resource Advocates ("WRA") is a regional organization dedicated to protecting the

West's land, air and water. Founded in 1989, and headquartered in Boulder, Colorado, WRA works in eight states of the interior West (Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, and Wyoming). Core program areas include creating a clean energy future and curtailing climate change, defending public lands and iconic landscapes from the impact of energy development, and protecting rivers and water supplies. WRA staff, members, and supporters rely on western rivers for working, fishing, recreating, researching, and aesthetic enjoyment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to address the proper test for determining navigability for title, which governs whether a state holds title to waters and submerged lands under the Equal Footing doctrine. *See* Pet. i; 131 S. Ct. 3019 (2011).

The case presents issues of great importance to amici and their members. As this Court's decisions emphasize, ownership of navigable waters and the lands beneath them has traditionally been regarded as a central aspect of state sovereignty because these resources serve vital public interests. Long before the founding of the United States, public trust principles have protected citizens' rights to engage in commerce and enjoy fisheries in navigable waters. The basic premise of the Equal Footing doctrine is that ownership of navigable waters and their submerged lands is an essential attribute of statehood; a state deprived of that ownership would not share fully in what it means in our constitutional system to be a state.

In many states, the public trust extends beyond commerce, navigation, and fisheries to a variety of other public values such as protecting natural ecosystems and providing opportunities for recreation. State governments' ability and responsibility to protect these values, and the public's ability to enjoy them, depend upon a stable and rational test for determining navigability for title.

The rule advocated by petitioner PPL Montana, LLC ("PPL"), which affirmatively promotes highly fragmented ownership of rivers and other waterbodies, would interfere with consistent resource management and likely impair the public's interests in the management and protection of these valuable resources. Amici fully recognize that neither federal ownership nor private ownership of river resources is inherently incompatible with protecting river resources; but a rule of fragmentation like that urged here is certain to harm public interests and interfere with the practical needs of river management.

As we explain below, the test urged by PPL – which would eliminate state ownership of river segments that had to be portaged at statehood – is inconsistent with longstanding precedent and would destabilize title to rivers and their beds that has long been considered soundly vested in the states. Fragmenting ownership in this way would impair the states' ability to protect fisheries and river ecosystems and provide public access for recreation.

Contrary to PPL's rendition, the Montana Supreme Court correctly applied this Court's decisions setting forth the test for navigability for title. It is instead PPL and its supporters that urge

the Court to abandon its traditional inquiry – whether a waterbody serves as a highway for commerce – and embrace instead a new test that would be difficult to administer and would invite piecemeal challenges that would fragment state ownership of navigable waters.

As we demonstrate below, the Montana Supreme Court's consideration of evidence of log drives was consistent with settled precedent, which recognizes that such activities were a central mode of commerce throughout much of the country at the time many states were admitted to the Union, and can establish that a river served as a "channel of useful commerce" at statehood.

The Montana court also properly considered post-statehood recreational use as evidence of a river's susceptibility to use as a highway of commerce at statehood. Allowing such proof of "susceptibility" is particularly important to enforcing the Constitution's Equal Footing doctrine, given the sparse populations and undeveloped economies of many states upon their entry into the Union, as well as the evolution of commerce since that time.

ARGUMENT

I. THE RULE THAT STATES OWN THE NAVIGABLE WATERS AND THE LANDS BENEATH THEM IS DEEPLY ROOTED AND SERVES VITAL SOVEREIGN AND PUBLIC INTERESTS

A. State Ownership of Navigable Waters and the Lands beneath Them Is Central to State Sovereignty

PPL discusses the Equal Footing doctrine as if it were a disfavored common-law technicality or a historical relic, to be applied grudgingly, without regard to the doctrine's purposes or history. But state ownership of navigable rivers and riverbeds is deeply ingrained in both state and federal law. This Court has repeatedly emphasized that the doctrine serves state and public interests of the highest order, and the Court has rejected narrow and restrictive approaches similar to those advocated by PPL here.

This Court has explained that

> lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States,* 482 U.S. 193, 195 (1987). The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Lessee of Waddell,*

> 16 Pet. 367, 410 (1842). Then, in *Lessee of Pollard v. Hagan,* 3 How. 212 (1845), the Court concluded that States entering the Union after 1789 did so on an "equal footing" with the original States and so have similar ownership over these "sovereign lands." *Id.,* at 228-229.

Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 283 (2001). Thus, states' title to navigable waters and the lands submerged beneath them "is 'conferred … by the Constitution itself.'" *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374 (1977). *See also Pollard*, 44 U.S. (3 How.) at 230 ("To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.").

The Equal Footing doctrine extends to waters that were navigable in fact at the time of a state's admission to the Union. *See United States v. Utah*, 283 U.S. 64, 76 (1931). Rivers are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel in water." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). Navigability does not depend on the particular mode of use of a waterway, but instead on whether "the stream in its natural and ordinary condition affords a channel for useful commerce." *Utah*, 283 U.S. at 76 (quoting *United States v. Holt State Bank*, 270 U. S. 49, 56 (1926)). In *Utah*, for example, the Court accepted statehood-era evidence

of navigation on various stretches of the Green and Colorado Rivers by timber rafts, rowboats, flatboats, steamboats, motorboats, barges and scows, "some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying, and mining operations." *Id.* at 79, 82.

B. Sovereign Title to Navigable Waters Derives from their Vital Public Benefits

The Equal Footing doctrine flows from the recognition that navigable waters and their submerged lands implicate exceptionally important public interests, and that that states are trustees of these resources for the benefit of their citizens. As early as 1842, the Court held that the "public trust doctrine" – the "absolute right," vested in the people of the new republic, to "to all their navigable waters, and the soils under them" – defeated an oyster harvester's claim to own the land below the high water mark of Raritan Bay. *Martin v. Lessee of Waddell,* 16 Pet. 367, 410 (1842). This Court's elaboration of the Equal Footing doctrine in *Shively v. Bowlby*, 152 U.S. 1, 26 (1894), followed from the longstanding public trust character of submerged lands. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (referring to *Shively* as the "seminal case in American public trust jurisprudence") (citation omitted).

The states hold title to navigable waters and the lands under them in their sovereign capacity "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892).

While the public character of submerged lands dated back to English common law and earlier, American law "enhanced and extended" that principle – by, among other things, extending sovereign title to navigable streams and lakes not subject to the tides. *Coeur d'Alene Tribe*, 521 U.S. at 284. The interests of the sovereign and the public in navigable waters were especially acute here because of inland waterways' central place in the growth and commerce of the young nation and in the survival of its people. *See Barney v. Keokuk*, 94 U.S. 324, 338 (1876) ("[P]ublic authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience."); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Canal Comm'n v. People ex rel. Tibbits*, 5 Wend. 423, 460 (N.Y.1830) ("Had the common law originated on this continent we should never have heard of the doctrine that fresh water rivers are not navigable above the flow of the tide").[1]

States' public trust doctrines, and state statutes effectuating public trust principles, continue to safeguard the uses historically protected – commerce, navigation and the fishery – as well as

[1] *See also* 43 U.S.C. § 1311(a)(1) (Submerged Lands Act provision declaring it to be "in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources" be confirmed and vested in the states).

rights of public access. Many state judicial decisions have held that the public trust embraces protection of other public values, such as water conservation, protection of aquatic ecosystems, and recreation.[2]

Because state ownership of navigable waters and their submerged lands carries with it a variety of protections for the public interest in water resources, the navigability for title question has significant implications for the public at large.

A ruling for PPL here could have repercussions even beyond unsettling state titles, insofar as a number of states have adopted the navigability for title test to determine the right to recreational uses of rivers. State ownership of streambeds under the navigability for title test is often a critical element of state law regarding public recreational rights to rivers and streams. *See* 4 *Water and Water Rights*, §30.01(a) ("The public right to use water in place frequently is founded upon state sovereign ownership of navigable waters and the land beneath them."); *see also* A. Dan Tarlock, *The Law of Water Rights and Resources*, at 494 (2011); Robin K. Craig, *A Comparative Guide to the Eastern Public Trust*

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[2] *See* 4 Waters and Water Rights § 30.02(a) (Robert E. Beck, *et al.*, eds.. 2010) (overview of the public trust doctrine); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. Colo. L. Rev. 331, 379 (1998) (describing trust protection for recreational and ecological values associated with navigable waters); Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 Tul. Envtl. L.J. 315, 377 (2009); *see also In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000); *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983); *United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d. 457 (N.D. 1976).

Doctrines: Classifications of States, Property Rights, and State Summaries, 16 Penn. State Envtl. L.J. 1 (2008); Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology Law Q. 53 (March 2010); *Arkansas v. McIlroy*, 268 Ark. 227, 595 S.W.2d 659 (1980).[3]

Particularly in states where the federal navigability for title test directly governs public recreational rights, a federal standard that segments rivers into "navigable" and "non-navigable" according to what obstacles may have existed on a river is to place fishermen and boaters in the untenable position of having to decide when, in a given circumstance, a river is open to use and when it is not. *See Northwest Steelheaders Ass'n v. Simantel*, 112 P.3d 383 (Ore. App. 2005) (rejecting criminal trespass claims against anglers who had fished on section of John Day River on which navigability and state ownership were disputed), *review denied*, 12 P.3d 65 (Ore. 2005). The likely result will be

[3] In other states, including Montana, navigability for title does not determine the public's right to access rivers for fishing and boating; that right is governed by a more liberal standard. *See Montana Coalition for Stream Access v. Curran*, 683 P.2d 163, 170 (Mont. 1984). It is, of course, well within a state's authority to determine its citizens' recreational access to the state's waterways. *See id.* ("Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes."). But even in such states, losing ownership of sections of rivers and their submerged lands would work a significant restriction in state authority and the loss of statutory protections and public trust obligations uniquely applicable to state-owned lands.

escalating conflict between members of the public and the purported "owners" of the river.

II. PPL'S PROPOSED TEST IS INCONSISTENT WITH PRECEDENT

PPL's central submission is that a proper understanding of the navigability for title test would have focused only on the natural obstructions on the Missouri and Clark Fork Rivers and denied navigability because those segments themselves were not navigated by vessels – despite the acknowledged fact that pre-statehood travelers and traders portaged around these obstructions to continue their progress along the river. *See* PPL Br. 15-16, 40, 41. The United States, as amicus, urges that the obstructed reaches (including the Great Falls themselves) and any other river obstacles that needed to be portaged, must be excised from the title that passes to the state under the Equal Footing doctrine. *See* U.S. Br. at 7 ("Although portaging may connect *navigable* segments into a continuous highway for commerce, portaging around a non-navigable segment does not make *that* segment navigable for title purposes.") (emphasis in original).

The path-marking decisions of this Court do not point PPL's way. Navigability for title is governed by the "navigability in fact" test articulated in *The Daniel Ball*, and consistently applied in Equal Footing doctrine cases. Under that test,

> [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce*, over which trade and travel are or may be

> conducted in the customary modes of trade and travel on water.

77 U.S. at 563 (emphasis added). The *Daniel Ball* test is uncongenial to PPL's segmentation argument here; for under the test articulated by the Court, what becomes "public" or state-owned is the *river*, not *segments* of the river.

This Court's decisions have been marked by practical recognition of the widely varying conditions under which different states entered the Union and the inequity of diminishing a state's sovereign entitlement because it was sparsely populated or economically undeveloped at statehood.[4] Thus, the Court has made clear that it suffices if a river was *susceptible* to serving as a channel of commerce, *see Utah*, 283 U.S. at 76, and has refused to impose rigid limits on the types of activity that can establish that a river served as a useful channel of commerce, *see id*.; *St. Anthony Falls Water Power v. St. Paul Water*

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[4] Census figures suggest how extraordinarily sparsely populated the Western territories were on the eve of statehood. The 1890 Census, conducted the year Idaho and Wyoming joined the Union, and the year after Montana did, reported the following populations for these enormous states (each one of which covers an area far larger than all of New England): Idaho – 84,385; Montana – 132,159; Wyoming – 60,705. U.S. Census Office, Report on Population of the United States at the Eleventh Census, Part I, lxviii (1895). The population density for the three states was 1.0, 0.91, and 0.62 persons per square mile, respectively, *see id*. at xxxv, a tiny fraction of the density of most of the original states a century earlier. The census for 1850, conducted a year after California became a state, tallied 92,597 (not counting Native Americans), yielding a population density of 0.49 persons per square mile. U.S. Census Office, Abstract of Census Legislation of the United States, 1790 to 1850 Inclusive xxxiii (1853).

Comm'rs, 168 U.S. 349, 359 (1897) (finding navigability based on evidence of floating "logs with shutes that are artificially prepared" even though it was argued that the stretch was not navigable "by boat"); *infra*, pp. 28-32.

This Court elaborated upon the navigability in fact test in *The Montello*, 87 U.S. 430, 439, 442-43 (1874), where it found Wisconsin's Fox River had been navigable in fact in its natural state even though the river in that condition was obstructed by several rapids and falls, necessitating portages. The Court rejected the lower court's decision against navigability, which was based "chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation." *Id*. at 442. The Court acknowledged that these obstructions made navigation difficult, but noted that even with these difficulties, "commerce was successfully carried on." *Id*. As the Court explained:

> [T]he rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country *which were so interrupted by rapids as to require artificial means to enable them to be navigated without break*. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the *best* instrumentalities for carrying on commerce, but *the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce*. If this be so the river is navigable in fact, although its navigation may be encompassed with

> difficulties by reason of natural barriers, such as rapids and sand-bars.

Id. at 443 (emphases added).

The Montello disposes of PPL's segmentation argument, because it establishes that the need to portage around an obstacle does *not* defeat navigability. *See* Montana Br. 28-31. The United States (Br. 25) attempts to dismiss *The Montello* on the ground that it was not a title case, but the *Montello* Court explicitly held, based on *The Daniel Ball* test that the United States concedes (Br. 9) governs navigability for title purposes, that the Fox River "has always been navigable *in fact*." *The Montello*, 87 U.S. at 443 (emphasis added). And this Court and lower courts have repeatedly cited *The Montello* as stating the law for purposes of navigability for title. *See* Montana Br. 30-31.

PPL bases its arguments for segmentation and excision primarily upon *United States v. Utah*, 283 U.S. 64 (1931), which it says authorizes denying navigability when there is a non-trivial obstacle to vessel passage. But this reading of the case is itself improperly segmented; it takes out of context a few passages that, read in context, are entirely unsupportive of PPL's position. As Montana explains at length, the portion of the Colorado River found non-navigable in *Utah* –- the impassable reach within Cataract Canyon – undisputedly represented a "dead end" (Montana Br. 31) to trade navigation – no one passing upriver or downriver could or did portage the canyon to engage in continued commerce on the river. *See* 283 U.S. at 77. Thus, under the settled *Daniel Ball*/*Montello* test (which the Court applied to all of the disputed

reaches in the case), the river ceased to be a useful channel or highway for commerce at that point.[5]

In contrast to the dead-end obstacle in *Utah*, there was no dead end at either the Missouri River's Great Falls or the Clark Fork's Thompson Falls; to the contrary, both were regularly portaged, and both rivers served as highways for commerce both above and below the respective falls. *See* Montana Br. 34-35. Neither *Utah*, nor any other authority, provides for a denial of navigability in such circumstances.[6]

PPL's and the United States' theory that river reaches that required a portage must be excised from state sovereign title would mean that states' ownership of navigable rivers is shot through with interruptions. Each falls, rapid, riffle, or obstacle significant enough to have required a portage would be separated out from state ownership of all of the

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[5] The *Utah* opinion bears little resemblance to PPL's rendition of it as establishing a grudging and demanding standard: The Court applied *The Montello*; it sustained navigability over numerous exceptions by the United States, including that sand bars precluded a finding of navigability; and it emphasized that susceptibility for use in commerce is sufficient, specifically, various vessels plied the segments for exploration; pleasure; the transport of passengers and supplies; and prospecting, surveying, and mining operations. 283 U.S. at 67, 82, 87.

[6] As Montana explains (Br. 35), *Oklahoma v. Texas*, 258 U.S. 574 (1922), does not support PPL's proposed rule. Nor does *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77 (1922) (cited at PPL Br. 35; US Br. 14, 18), authorize considering a river segment in isolation; the Court there found that the navigational head of the Arkansas River was downstream of the reservation lands in question, 260 U.S. at 86. Thus, the upstream, non-navigable portion was not part of a highway for commerce under the *Daniel Ball* test.

portions of the river that statehood-era boats did pass through. Given that most navigable rivers were marked by "serious obstacles to uninterrupted navigation," *The Montello*, 87 U.S. at 443, this rule would make a patchwork pattern of state and non-state ownership of rivers extremely common.

But, as Montana points out, the extreme segmentation of ownership that PPL's rule would produce – thousands of federal or private inholdings along the beds of navigable rivers – does not in fact prevail. *See* Montana Br. 39 & n. 14; *Canal Comm'n*, 5 Wend. 423, at 464 (holding that private claimant failed to show title to a waterfall in the Mohawk River).

To be sure, as *Utah* illustrates, a natural obstacle may destroy the practical utility of a river for commerce – rendering the river non-navigable upstream or downstream of the obstacle. But the navigability inquiry requires consideration of the relationship of that interruption to commerce along the river; when commerce passed around the obstacle by portage or otherwise, and continued along the river above or below the obstacle, the river is navigable, and there is no excision of the obstructed segment from the State's ownership. A "segment" of river is *only* non-navigable if it is not part of a useful channel for commerce. *See The Montello*, 87 U.S. at 442-43.

Contrary to PPL's contentions, the Montana Supreme Court carefully examined, and adhered to, the precedents of this Court. *See* 53a-62a. It did not, as PPL charges, adopt a casual "whole river" test that would find navigability whenever any part of the river supported commerce. And aspersions on the state court's motives are as unwarranted here as

such aspersions would be against a federal court adjudicating a claim of ownership by the United States.[7]

III. PPL'S FRAGMENTED ANALYSIS OF NAVIGABILITY FOR TITLE WOULD INTERFERE WITH THE PUBLIC TRUST AND IMPAIR STATES' ABILITY TO MANAGE NATURAL RESOURCES

In addition to being inconsistent with this Court's precedents, PPL's proposed approach would be highly problematic for the public interests the Equal Footing doctrine is intended to safeguard. PPL tellingly makes no serious attempt to explain its favored segmentation approach in terms of the purposes and policies of the Equal Footing doctrine.

The Equal Footing doctrine is built upon a recognition that navigable waters serve vital public interests, particularly commerce, navigation, and fisheries, that state governments exist to protect. While rivers may lack the unrivalled economic importance they had in 18th- and much of 19th-century America, rivers' economic importance remains great – and includes not only transportation of persons and goods from point to point, but also enormously valuable uses such as sport fishing, whitewater rafting, canoeing and a host of other

[7] Skepticism about state courts' ability to resolve submerged lands claims is hard to square with *Coeur d'Alene Tribe*, which required a federally recognized Indian Tribe to go to Idaho state court to resolve its federal law-based claims of ownership to a lakebed. 521 U.S. at 288.

recreational activities.[8] Moreover, scientific study has only broadened our understanding of the critical roles rivers play in sustaining entire ecosystems – a function that has prompted a further set of state laws and programs to protect these public resources.[9]

A rule that chopped up sovereign title to rivers wherever waterfalls, rapids, sand bars, vegetation, or myriad other natural obstacles required Statehood-era travelers to portage would directly undermine those interests. It would invite third-party "owners" (and claimants) to engage in activities in rivers without regard to the public interest in these resources and fragment the trust responsibility over the river.

It would be hard to design a rule more inimical to effective river resource management than one that extracted from state ownership every place along a river that 19th-century navigators had to portage. It is now widely understood that fragmented management authority can seriously frustrate efforts to protect fisheries, aquatic ecosystems, water

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[8] In 2006, anglers in the United States spent $26.3 billion on freshwater fishing trips and equipment. *See* U.S. Fish & Wildlife Service & U.S. Census Bureau, National Survey of Fishing, Hunting and Wildlife-Associated Recreation 10 (2006).

[9] *See*, *e.g.*, Lawrence L. Master, *et al.*, eds., *Rivers of Life: Critical Watersheds for Protecting Freshwater Biodiversity* 14-15 (TNC 1998) ("Freshwater habitats provide for many of our fundamental needs: water for drinking and irrigation, food in the form of fishes and waterfowl; and in-stream services such as flood control, transportation, recreation and water quality protection. Health river systems retain water and buffer the effects of storms, reducing the loss of life and property to floods. Naturally vegetated streamside riparian zones help trap sediments and break down nonpoint source pollutants.").

quality, and other natural resources and amenities.[10] A large body of scientific literature supports the proposition that, to the extent possible, ecosystems should be managed in a holistic, landscape-scale manner, and administrative fragmentation should be avoided.[11] The extreme fragmentation resulting from the approach PPL and its amici propose would impede effective natural resource management.

Excising from state ownership river reaches that at statehood contained waterfalls, rapids, sandbars and other obstacles is all the more problematic because such features often have exceptional importance in terms of public trust values. For example, reaches punctuated by navigational

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[10] *See, e.g.*, Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 Envtl. L. 973, 981-1003 (1995) (discussing imperatives for watershed-based approaches to river management); J. A. Stanford, *et al.*, *Ecological Connectivity in Alluvial River Ecosystems and its Disruption by Flow Regulation*, 11 Regulated Rivers: Research & Mgt. 105, 116 (1995) ("Resource managers must become 'conservators of ecological connectivity'"); N. Leroy Poff, *et al.*, *The Natural Flow Regime: A Paradigm for River Conservation and Restoration*, 47 Bioscience 769, 769-70 (1997) (explaining that water resources management has suffered from "fragmented responsibility," making it "difficult, if not impossible, to manage the entire river ecosystem").

[11] Karen A. Poiani, *et al.*, *Biodiversity Conservation at Multiple Scales: Functional Sites, Landscapes, and Networks*, 50 Bioscience 133, 134 (2000) ("a growing appreciation of the enormous complexity and dynamic nature of ecological systems led to the concept of ecosystem management, wherein success is best assured by conserving and managing the ecosystem as a whole"); Norman L. Christensen, *et al.*, *The Report of the Ecological Society of America on the Scientific Basis for Ecosystem Management*, 6 Ecological Applications 665, 669 (1996); John Copeland Nagle, *et al.*, The Law of Biodiversity and Ecosystem Management (2d ed. 2006).

obstructions such as boulders, sandbars or logjams that may have made boat passage hazardous or impossible often create the pools, riffles and other geomorphic areas that are vital habitats for fish and other species. *See* J.D. Allan, *Landscapes and Riverscapes: The Influence of Land Use On Stream Ecosystems*, 35 Ann. Rev. Ecol. Evol. Syst. 257, 260 (2004); Kurt D. Fausch, *et al.*, *Landscapes to Riverscapes; Bridging the Gap Between Research and Conservation of Stream Fishes*, 52 Bioscience 483, 483 (2002).[12] These features are critical to the maintenance of river ecosystems, and they are especially important to the health of aquatic species.[13] Moreover, reaches that might have required portage at statehood may be especially important for recreation and scenic enjoyment. *See* Montana Br. 39 (citing example of Niagara Falls);

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[12] *See also* Timothy J. Beechie, *et al.*, *Process Based Principles for Restoring River Ecosystems*, 60 Bioscience 209, 209-211 (2010) (noting that fish are highly adapted to natural, dynamic processes such as erosion, channel migration, and recruitment of woody debris); Burchard H. Heede, *et al.*, *Hydrodynamic and Fluvial Geomorphological Processes: Implications for Fisheries Management and Research*, 10 N. Am. J. Fisheries Mgmt. 249 (1990).

[13] An example is the bull trout, which occurs in the Clark Fork and is listed as a threatened species by the U.S. Fish and Wildlife Service. Bull trout need deep runs with unembedded boulder and cobble substrates, and pools with large woody debris. Scientists advocate maintaining natural connections and a diversity of complex habitats over a large spatial scale to maintain dispersal of bull trout populations. C.C. Muhlfeld, *et al.*, *Seasonal Movement and Habitat Use by Subadult Bull Trout in the Upper Flathead River System, Montana*, 25 N. Am. J. of Fisheries Mgmt. 797, 797 (2005). These management approaches may be taken to scale to benefit not just the bull trout but an entire ecosystem.

Mont. Code Ann. § 1-1-501 (depiction of Great Falls on Montana's state seal). Thus, quite apart from its dissonance with this Court's precedents, PPL's rule is a particularly undesirable one from the perspective of states' sovereign ability to pursue a rational natural resources policy. *Cf. Pollard*, 44 U.S. (3 How.) at 230 (emphasizing importance of ownership of navigable rivers to "numerous and important" state powers).

A rule that fragmented ownership and management authority over navigable rivers among states, the federal government, and private parties would be likely to create jurisdictional and policy conflicts. Fish and wildlife, of course, move freely across property lines and jurisdictional boundaries, but a patchwork of management regimes is likely to disserve even shared management goals. Furthermore, managing fragmented lands is expensive and inefficient – a point that federal agencies frequently make when they pursue policies designed to minimize fragmentation.[14]

Finally, there is real irony in PPL's efforts to invoke interests in stability of title and settled expectations. *See*, *e.g.*, PPL Br. 47, 57; Br. of Creekside Coalition, *et al.* 11-12, 24-27. For it is PPL

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[14] *See* Melanie Tang, *SNPLMA, FLTFA, and the Future of Public Land Exchanges*, 9 Hastings W.-N.W. J. Envtl. L. & Pol'y 55, 59 (2002) ("Increasingly since 1981, both the [Bureau of Land Management (BLM)] and the [U.S. Forest Service] have 'used exchanges to dispose of fragmented parcels of land to consolidate land ownership patterns to promote more efficient management of land and resources.'") (citation omitted); BLM, Land Exchange Handbook H-2200-01 at 1-1 (characterizing land exchanges as an "important tool to consolidate ownership for more effective management") (Aug. 31, 2005); *id.* at 11-1 to 11-2 (discussing assembled land exchanges).

that seeks an abrupt change in the law of navigability. A rule inviting challenges to state title whenever intermittent obstacles required Statehood-era travelers and traders to portage would impose massive burdens on states to defend titles long thought to be settled. As noted above, such a rule would invite conflicts between public users of navigable rivers and riparian owners who believe that a waterfall, rapid, or riffle along the shore ousts public ownership of portions of the river passing their land.

Such a new rule would present serious problems of proof – especially daunting if, as PPL insists, it would be the State's burden to show that a particular reach was *not* portaged in statehood days. *See* PPL Br. 54; *but cf*. U.S. Br. 20 n. 11. Whether trappers or traders portaged around a particular rocky reach of river more than a century ago is likely to be extremely difficult and costly to determine. Evidence whether travelers ran or portaged a particular river segment is likely to become even sparser over time.

Because of these difficulties, and the sheer volume of property at issue, PPL's proposed test would impose massive burdens on state governments, and would divert state resources toward defending title to isolated pieces of their sovereign lands.

IV. PPL'S OTHER ATTACKS ON THE MONTANA SUPREME COURT'S LEGAL ANALYSIS ARE UNFOUNDED

Although most of its attention is devoted to advocating the segmentation theory, PPL also challenges certain other features of the Montana Supreme Court's decision, including its reliance on evidence concerning log drives and evidence of post-statehood recreational use to demonstrate navigability for title. But these arguments are similarly mistaken.

A. The Montana Supreme Court Properly Relied upon Evidence of Log Drives as Evidence of Navigability

The Montana Supreme Court was well within the mainstream of settled legal opinion when it relied on evidence of log drives, an especially important commercial use of rivers in nineteenth century America, in considering the navigability of the Madison and Clark Fork Rivers.

From the mid-1800s to the early 1900s, many rivers across the northern half of the Nation served as vital highways of commerce for the logging industry. *See* Robert E. Pike, Tall Trees, Tough Men (2000) (New England); Earl E. Brown, Commerce on Early American Waterways (2010) (Mid-Atlantic); Malcolm Rosholt, The Wisconsin Logging Book, Palmer Publications (1980) (Midwest); William H. Wroten, The Railroad Tie Industry in the Central Rocky Mountain Region: 1867-1900 (Ph. D. thesis, U. Colo. 1956) (Rocky Mountains); Heritage Research Center, Montana Navigable Water Study (submitted to Montana Department of State Lands December 1986); Montana Br. 12-13.

Log drives arrived in the Rocky Mountains in the 1860s with the construction of the transcontinental railroad, which needed 2,400 wooden "ties" for every mile of track. Wroten, *supra*. Log drives were also vital to the mining industry in the West, supplying prop timbers for mine shafts and tunnels, and cordwood to make charcoal for ore smelters. *See* Charles S. Peterson, *et al*., A History of the Wasatch–Cache National Forest (report submitted to the U.S. Dept of Agriculture 1980); Gregory C. Crampton, *et al*., The Navigational History of Bear River— Wyoming, Idaho, Utah (U. of Utah 1975).

This country abolished the European practice of allowing riparian landowners and local authorities to extract tolls and duties from loggers driving the river. Brown, *supra*. Beginning as early as 1771, laws declared many eastern American rivers to be "public highways." *Id*. This principle extended into the Midwest by virtue of the Northwest Ordinance which declared that "[t]he navigable waters leading into the Mississippi and the Saint Lawrence, and the carrying places between, shall be common highways, and forever free, . . . without any tax, impost, or duty therefor." Northwest Ordinance, Art IV (adopted 1787), 1 Stat. 52 (1789). In the 1800s, Western territories adopted laws recognizing rivers as public highways, often for the specific purpose of protecting public log driving rights. For example, in 1872 the Colorado Territory adopted a law stating that "it shall be lawful for any person . . . to float and all kinds of timber . . . down any of the streams of this Territory . . . ." Colo. Gen. L. § 1856 (1872). *See also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 431-38 (1989). Early case law in the West also

recognized this public right. *See Idaho Northern R. Co. v. Post Falls Lumber & Mfg.*, 119 P. 1098, 1101 (Idaho 1911) ("Any stream in which logs will go by the force of water is navigable.") (quoting and endorsing standard from Oregon decisions).

When Montana and the other Rocky Mountain states entered the Union in the late 1800s, log driving was not just a common commercial use of the waterways; it was vital to the Nation's development. Not surprisingly, modern state and federal court decisions in the West have relied on a history of log drives to find that rivers meet the federal navigability for title test. *See Oregon Div. State Lands v. Riverfront Protection Ass'n,* 672 F.2d 792 (9th Cir. 1982) (McKenzie River in Oregon); *State v. Bunkowski,* 503 P.2d 1231 (Nev. 1972) (Carson River in Nevada); *Montana Coalition for Stream Access*, 682 P.2d 163 (Dearborn River in Montana, ultimately decided on state law grounds); *see also* 33 CFR § 329.6 (regulatory definition of navigability includes commercial log drives). The leading modern treatise discussion of navigability for title concludes that "[t]he use of water to drive logs to market qualifies." 4 Waters and Water Rights, § 30.01(d)(3)(C).

B. Evidence of Post-Statehood Recreational Uses Can Support Navigability in Fact at Statehood.

Since title to the lands beneath navigable waters passes to a State upon its admittance to the Union, the navigability of a State's rivers must be determined as of that date. *Utah*, 283 U.S. at 75. PPL has challenged the Montana Supreme Court's use of post-statehood evidence, claiming that such evidence is only permissible under narrow

circumstances, namely, when "conditions of exploration and settlement explain the infrequency or limited nature of [actual] use." Br. at 45 (quoting *Utah*, 283 U.S. at 82). PPL's assertion, however, ignores key language in the opinion. Nor has any subsequent court read the language PPL quoted to limit post-statehood evidence in the way PPL advocates.

In *Utah*, the Court confirmed that rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are *or may be* conducted in the customary modes of trade and travel on water." 283 U.S. at 76 (quoting *The Daniel Ball*, 77 U.S. at 563 and citing *Holt State Bank*, 270 U.S. at 56) (emphasis added); *accord The Montello*, 87 U.S. at 441 ("[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, *or may be*, conducted") (emphasis added). Neither in *The Daniel Ball* nor in *Holt State Bank* did the Court limit the "susceptible of being used" phrase in the manner PPL claims.

Utah did not hold that "[e]vidence of 'susceptibility to use' . . . is rarely relevant to whether a river was navigable at statehood," PPL Br. at 43, or that such evidence is "irrelevant[] outside the context of remote and undeveloped rivers." *Id.* Rather, the Court held that "[t]he extent of existing commerce is not the test." 283 U.S. at 82. In the section of the opinion PPL relies upon, the Court did not prescribe a general limitation on the consideration of a river's susceptibility to use, but confirmed the appropriateness of considering

susceptibility in the circumstances of the case at hand:

> In view of past conditions, the government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. . . . The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce *as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources*. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

283 U.S. at 83 (emphasis added). *Utah* makes clear that the navigability inquiry is not confined to the specific kinds of activities or vessels that were present at statehood. *See also Alaska v. United States,* 662 F. Supp. 455, 463 (D. Alaska 1987), *aff'd sub nom. Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). Courts determining navigability for title after *Utah* have not construed the phrase "susceptible of use" narrowly. *See*, *e.g.*, *Ahtna*, 891 F.2d at 1405.

The only limitations on consideration of post-statehood evidence are that the physical characteristics of the body of water must be similar to those present at statehood, and the vessels employed in post-statehood uses must be comparable to vessels available at the time of statehood. When physical characteristics have changed since statehood to make river *more* amenable to

navigation, *i.e.*, to enable post-statehood uses that would not have been possible at statehood, evidence of those post-statehood uses ordinarily will not support a finding of title navigability. *N.D. ex rel. Bd. of Univ. and Sch. Lands v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) (finding river non-navigable because of changed physical characteristics of river, in spite of evidence of modern use of canoes comparable to boats in use at statehood); *see also Ahtna*, 891 F.2d at 1405 (finding river navigable based on modern uses where parties had stipulated that physical conditions of the river had not changed since statehood). Courts have also considered the characteristics of the post-statehood watercraft, specifically, their draft (hull depth in water) and their weight-bearing capacity. *Id.* (finding weight-bearing capacity of contemporary boats comparable to those used at time of statehood).

PPL also maintains that *recreational use* may not be considered as evidence supporting a finding of navigability. Br. at 49. There is no merit to that proposition, however, and courts have frequently accepted evidence of recreational use of a body of water in determining navigability for title purposes. *See* U.S. Br. at 31 & n.16 (acknowledging this point).

Contrary to PPL's claim that the Court in *Utah v. United States* "went out of its way to avoid placing any weight on recreational use," Br. at 51, the Court in that 1971 decision expressly cited an "excursion boat" in its survey of the evidence supporting a finding of navigability, 403 U.S. at 12; *accord Utah*, 283 U.S. at 82 (characterizing evidence of post-statehood activity of boats, including "some [used] for pleasure," as "properly received" by the special master and as "relevant upon the issue of the

susceptibility of the rivers to use as highways of commerce" at the time of statehood); *Ahtna*, 891 F.2d at 1405 (finding that guided fishing and sightseeing trips qualify as commercial activity for purposes of establishing navigability for title); *North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982) (finding evidence of uses including modern recreational canoe use to support title navigability because such use was a "viable means of transporting people and goods" at the time of statehood), *rev'd on other grounds sub nom. Block v. N.D.,* 461 U.S. 273 (1983); *Northwest Steelheaders Ass'n*, 112 P.3d at 391-92 (finding navigability for title based in part by recreational use); *Defenders of Wildlife v. Hull*, 18 P.3d 722, 734-35 (Ariz. Ct. App. 2001).

Where courts have found waters non-navigable in spite of evidence of recreational uses, the reason has not been that the uses were recreational, but that they were "demonstrably ineffective," *United States v. Oregon*, 295 U.S. 1, 23 (1935), or that they occurred in river conditions that differed significantly from those present at the time of statehood. *North Dakota*, 972 F.2d at 240 (finding river non-navigable because river's physical characteristics changed, in spite of evidence of modern use of canoes comparable to boats in use at statehood).

In *United States v. Oregon*, the Court determined the navigability in fact of three small lakes and the two waters that connected them, finding that all but one "disappear completely or become negligible during a dry season." 295 U.S. at 16. The fifth measured less than two feet in depth over half its area and in the summer was largely "made up of

small lakes or ponds, separated by mud or dry land." *Id.* at 17. Most of the areas covered by water were also covered with thick vegetation. *Id.* Based on these conditions, the Court found "impracticable" the two activities offered as evidence of navigability, trapping and boating. *Id.* at 20-22. Trappers had to operate largely by wading, and boaters had to get out and pull their craft frequently, encountering "impenetrable" vegetation and a "labyrinth of channels" that they had to mark with flags to return safely. *Id.* Thus, the Court did not reject evidence of uses because of their "recreational" character, as PPL maintains, Br. at 50, but because the physical characteristics of the waters could not support those uses. Of course, in the territories, activities such as fishing, hunting, rafting, and canoeing, which are primarily recreational today, were often essential for subsistence and basic commerce.

Likewise, the remaining cases PPL cites do not support the claim that "courts have routinely found evidence of recreational use insufficient to establish title navigability." *Id.* In the first of the two early-twentieth century appellate decisions PPL invokes, the court found Big Lake non-navigable despite the use of "canoes, skiffs, and dugouts." *Harrison v. Fite*, 148 F. 781, 786 (8th Cir. 1906). The court made this finding, however, not because these uses were recreational, but because of the physical characteristics of the lake and the river: the lake was "largely a tangled jungle, choked with willows, aquatic growth, and dead trees and stumps," and during most of the year the lake bed was visible and used as pasture. *Id.* The water body at issue in *North American Dredging Co. of Nevada v. Mintzer*, 245 F.297, 299 (9th Cir. 1917), was a channel cutting

through a tidal salt marsh; the court emphasized that the bottom of the channel was "practically exposed" at low tide, rendering navigation of any sort possible only during times of high water. Neither decision, then, rested on the "recreational" character of the uses.

Further, *Harrison* and *American Dredging* predate the Court's key decisions on navigability for title, *United States v. Utah* and *Utah v. United States*, as well as more recent decisions within the same circuits that expressly upheld the relevance of recreational use to title navigability determinations. *North Dakota*, 671 F.2d at 278; *Ahtna*, 891 F.2d at 1405. *Harrison* and *American Dredging*, then, and not *Ahtna*, 891 F.2d at 1405, are best understood as "outliers," Br. for Petitioner at 52, and do not support the contention that recreational uses may not provide evidence of navigability for title.[15]

In sum, evidence of recreational use is sanctioned, not forbidden, by previous court decisions. Where courts have found waters non-navigable, it was not because the uses were recreational, but because the physical characteristics of those waters rendered any navigation impracticable. Recreational uses may support a finding of navigability for title, and post-

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[15] In addition to *Harrison* and *American Dredging*, PPL cites to two state court cases. In both cases, the courts focused on the inland lakes' lack of any connection with any other body of water. *Taylor Fishing Club v. Hammett*, 88 S.W. 2d 127, 129-30 (Tex. Civ. App. 1935); *State v. Aucoin*, 20 So. 2d 136,160 (La. 1944). Furthermore, in *Aucoin* the physical characteristics of the lake made navigation impracticable. 20 So. 2d at 160 (finding that boats often became bogged down and had to be dragged through the mud of lake "surrounded by cypress swamps and impassable prairie").

statehood recreational uses such as sport fishing, whitewater rafting, and canoeing are properly considered as evidence of a waterway's navigability.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

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