

THE SUPREME COURT AND THE *PPL MONTANA* CASE:  
EXAMINING THE RELATIONSHIP BETWEEN NAVIGABILITY  
AND STATE OWNERSHIP OF SUBMERGED LANDS

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The United States Supreme Court held in *PPL Montana v. Montana* held that the State of Montana did not own the beds beneath certain rivers and, therefore, rejected the State’s claim that the power company owed it millions of dollars in “back rent” for the use of the riverbeds as sites for ten of its hydroelectric power plants. The Montana Supreme Court, which had ruled in favor of the State, declared that even if portions of a river were not navigable for commercial purposes because of physical conditions, the entire river would be treated as navigable if commercial traffic could bypass the non-navigable segments by utilizing land routes instead. On appeal, the Supreme Court rejected this approach to navigability, distinguishing between the tests of navigability that were traditionally used to determine federal regulatory jurisdiction in admiralty and commerce clause cases, and the test of navigability that had should be used to determine title to submerged lands under the equal footing doctrine. This Article discusses the concept of navigability and its use as a means of determining the ownership of tidelands and the beds of rivers, lakes and streams. It also examines the *PPL Montana* case and concludes that the Court was correct to reaffirm its traditional segment-by-segment test under which ownership of beds beneath non-navigable portions of a river would not be transferred to a state upon its admission to the Union.

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## I. INTRODUCTION

Last February, the United States Supreme Court decided *PPL Montana v. Montana*,<sup>1</sup> unanimously reversing a decision by the Montana Supreme Court that had held that certain segments of the Missouri, Madison, and Clark Fork rivers in Montana were navigable.<sup>2</sup> The Supreme Court also declared that the State of Montana did not own the beds beneath these rivers and therefore rejected Montana's claim that the PPL Montana power company owed the state millions of dollars in "back rent" for the use of the riverbeds as sites for some of its hydroelectric power plants.<sup>3</sup>

The Montana Supreme Court had declared that a river would be regarded as navigable for title purposes if it was susceptible of serving as "a channel for commerce."<sup>4</sup> Under this approach, even if portions of a river were not navigable for commercial purposes because of physical conditions, the entire river would be treated as navigable if commercial traffic could bypass the non-navigable segments by utilizing land routes instead.<sup>5</sup> Under this reasoning, the court held that Montana acquired title to the beds beneath both the navigable and the non-navigable segments of the rivers at the time of statehood.<sup>6</sup>

On appeal, the Supreme Court rejected this approach to navigability, distinguishing tests of navigability that were traditionally used to determine federal regulatory authority from the test that had been used to determine title to submerged lands under the equal footing doctrine.<sup>7</sup> The Court stated that the test employed by the Montana court was well-suited for determining the scope of federal regulatory power, which could and should adapt to physical and technological changes, but such

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<sup>1</sup> 132 S. Ct. 1215 (2012).

<sup>2</sup> *Id.* at 1235.

<sup>3</sup> *Id.*

<sup>4</sup> See *PPL Montana v. Montana*, 229 P.3d 421, 446 (Mont. 2010).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 449.

<sup>7</sup> See *PPL Montana*, 132 S. Ct. at 1231-32.

a test was not appropriate for use in title cases.<sup>8</sup> Instead, the Court concluded that navigability, and therefore, title to submerged beds, should be determined on a tract-by-tract basis.<sup>9</sup>

This Article will discuss the concept of navigability and its use as a means of determining who owns tidelands and the beds of rivers, lakes, and streams. This will involve an examination of the various tests of navigability, as well as consideration of the equal footing doctrine and the public trust doctrine. This Article will also analyze the *PPL Montana* case and evaluate the Court's reasoning.

Part II covers the equal footing doctrine and the public trust doctrine. Both of these principles played an important role in the *PPL Montana* decision. The equal footing doctrine dictates that newly admitted states are admitted to the Union with the same rights and powers as the original thirteen states.<sup>10</sup> Since the original states succeeded to the English Crown's title to the tidelands and the beds beneath other navigable waters, other states would also acquire title to submerged lands beneath navigable waters when they achieved statehood.<sup>11</sup> On the other hand, the equal footing doctrine would not apply to submerged lands beneath non-navigable waters, which would continue to be owned by the United States or its successors in interest.<sup>12</sup> A second concept known as the public trust doctrine provides that the states hold the tidelands and the beds beneath freshwater rivers and lakes in trust for their citizens in order to protect public rights to navigation, fishing, and recreation.

Part III discusses navigability as the basis for federal regulation under admiralty law and the Commerce Clause. Admiralty jurisdiction, in accordance with the English practice, was originally confined to tidal waters. However, as Part III points out, by the middle of the nineteenth century, the Court formulated a "navigability-in-fact" test that extended federal admiralty jurisdiction to all fresh waters that were capable of serving as channels for foreign or interstate commerce. Several decades later, the Court adopted a similar approach to define the extent of federal power under the Commerce Clause.

Part IV sets forth the test of navigability for title purposes. As Part II discusses, after the American Revolution, the original thirteen states obtained title to the tidelands and other submerged lands within their

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<sup>8</sup> *Id.* at 1232.

<sup>9</sup> *Id.* at 1230.

<sup>10</sup> See *Pollard v. Hagan*, 44 U.S. 212, 223 (1845).

<sup>11</sup> See *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

<sup>12</sup> See *Oklahoma v. Texas*, 258 U.S. 574, 591-92 (1922).

borders.<sup>13</sup> Under the equal footing doctrine, when the various territories attained statehood, they also acquired title to tidelands<sup>14</sup> and the beds beneath navigable rivers and lakes.<sup>15</sup> At the same time, submerged lands beneath non-navigable waters continued to be owned by the federal government or its successors in interest.<sup>16</sup> The Supreme Court has traditionally relied on the “navigability-in-fact” test to determine the navigability of non-tidal waters for title purposes.<sup>17</sup> However, the version of this test that is used for title purposes differs in some respects from the version that is used to determine the scope of federal admiralty or Commerce Clause regulation. Although the river or lake does not have to actually been used for “trade or travel,”<sup>18</sup> under the navigability-for-title test, it must be susceptible of such use in its natural condition.<sup>19</sup> In addition, the river or lake must be capable of use for *commercial* navigation, but not necessarily foreign or interstate commerce. Finally, title to submerged lands is determined as of the date of statehood and is not affected by any subsequent changes in the navigable capacity of the river or lake.<sup>20</sup>

Part V analyzes the *PPL Montana* case. Affirming a lower court judgment for the State of Montana, the Montana Supreme Court held that the waters of the Missouri, Madison, and Clark Fork Rivers were navigable and, therefore, that the beds of these rivers belonged to the state.<sup>21</sup> In reaching this conclusion, the Montana court adopted a test of navigability-in-fact that resembled the approach employed by the Supreme Court in admiralty and Commerce Clause regulation cases. Under this approach, as long as the rivers served as “channels of commerce,” it did not matter if some portions were non-navigable.<sup>22</sup> However, the United States Supreme Court rejected this approach and adopted a segment-by-segment test under which ownership of beds

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<sup>13</sup> See *Martin v. Waddell*, 41 U.S. 367, 416 (1842).

<sup>14</sup> See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484-85 (1988); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 285 (1894); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845).

<sup>15</sup> See *Utah v. United States*, 403 U.S. 9, 12 (1971); *United States v. Holt State Bank*, 270 U.S. 4, 579 (1926); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

<sup>16</sup> See *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 591-92 (1922).

<sup>17</sup> See, e.g., *United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922).

<sup>18</sup> See *Utah v. United States*, 403 U.S. 9, 12 (1971); *United States v. Utah*, 283 U.S. 64, 82 (1931).

<sup>19</sup> See *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

<sup>20</sup> *Id.* at 57.

<sup>21</sup> See *PPL Montana*, 229 P.3d at 449.

<sup>22</sup> *Id.* at 446.

beneath non-navigable portions of a river would not be transferred to a state upon its admission to the Union.<sup>23</sup>

## II. THE EQUAL FOOTING AND THE PUBLIC TRUST DOCTRINES

The law with respect to the ownership of submerged lands is a complex synthesis of three concepts: navigability, the equal footing doctrine, and the public trust doctrine. The concept of navigability will be more thoroughly discussed in Part III. In essence, the state owns the beds beneath navigable waters while the beds beneath non-navigable waters may be privately owned. For purposes of determining ownership of submerged lands, navigable waters include waters that are subject to the ebb and flow of the tides as well as waters that are capable of supporting customary forms of commercial activity. The equal footing doctrine provides that, as a matter of federal constitutional law, new states take title to the beds beneath navigable waters when they are admitted to the Union. The public trust doctrine provides that, as a matter of state law, the state holds title to the submerged lands beneath navigable waters in trust for the benefit of the public and cannot alienate these lands except to promote public uses such as navigation and commerce.

### A. The Equal Footing Doctrine

At the end of the Revolutionary War, the thirteen original states succeeded to the proprietary rights and governmental powers of the English Crown.<sup>24</sup> As such, they assumed ownership of the beds beneath tidal (and later) navigable fresh waters.<sup>25</sup> In the nineteenth century, the Supreme Court in a series of cases declared that when other states were subsequently admitted to the Union, they also acquired ownership of submerged lands beneath tidal and navigable waters within their borders.<sup>26</sup> This became known as the equal footing doctrine.<sup>27</sup> The Supreme Court first set forth this principle in *Pollard v. Hagan*<sup>28</sup> in 1845. The plaintiffs in that case sought to eject the defendants from

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<sup>23</sup> See *PPL Montana*, 132 S. Ct. at 1235.

<sup>24</sup> See *Martin v. Wadell*, 41 U.S. 367, 416 (1842).

<sup>25</sup> *Id.* at 410.

<sup>26</sup> See, e.g., *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 85 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 583 (1922); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Knight v. United States Land Ass'n*, 142 U.S. 161, 183 (1891); *Weber v. Harbor Comm'rs*, 85 U.S. 57, 65-66 (1873).

<sup>27</sup> For a further discussion of the equal footing doctrine, see Paul Constable, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263, 1279-83 (1996).

<sup>28</sup> 44 U.S. 212 (1845).

certain former tidelands in Mobile Bay.<sup>29</sup> The plaintiffs based their claim to the property on a patent from the federal government that was authorized by a statute enacted in 1836.<sup>30</sup>

The Court observed that Alabama was ceded to the United States by the State of Georgia in 1802.<sup>31</sup> The Georgia deed of cession was almost identical to a deed executed by Virginia in 1784 which transferred its territory north of the Ohio River to the United States.<sup>32</sup> Both deeds provided that any states formed out of these territories would have “the same rights of sovereignty, freedom, and independence as the other states.”<sup>33</sup> Thus, the Court declared that “[w]hen Alabama was admitted to the union on an equal footing with the original states, she succeeded to all rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of cession . . . .”<sup>34</sup> According to the Court, when the United States accepted this cession of territory, it agreed to hold all “public lands” in trust for the benefit of future states that would be created out of it.<sup>35</sup> The Court then considered whether the federal government had the power to alienate any of these “public lands” prior to statehood. The Court observed that the purpose of transferring territory by the original states to the federal government was to help the federal government pay for debts incurred during the Revolutionary War and also to eventually create new states out this territory.<sup>36</sup> However, the Court declared that it would be inconsistent with both the Constitution and the terms of the deeds of cession for the federal government to sell tidelands within these territories to private persons.<sup>37</sup>

The plaintiffs in *Pollard* argued that the federal government’s ownership of the tidelands beneath Mobile Bay was not based on the cession from Georgia, but instead derived from the kingdom of Spain.<sup>38</sup> According to the plaintiffs, the King of Spain owned these submerged lands and transferred them to the United States by the Treaty of San

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<sup>29</sup> *Id.* at 219.

<sup>30</sup> *Id.* at 219.

<sup>31</sup> *Id.* at 221.

<sup>32</sup> *Id.*

<sup>33</sup> *Pollard*, 44 U.S. at 221.

<sup>34</sup> *Id.* at 223.

<sup>35</sup> *Id.* at 222-23.

<sup>36</sup> *Id.* at 224.

<sup>37</sup> *Id.*

<sup>38</sup> *Pollard*, 44 U.S. at 220. For a discussion of the extensive litigation that occurred over the validity of Spanish land grants in western Florida, southern Mississippi and Alabama, and eastern Louisiana between 1820 and 1850, see Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1300-15 (2009).

Lorenzo el Real in 1795.<sup>39</sup> However, the Court concluded that this treaty merely demarcated the boundaries between the two countries and did not purport to cede any territory.<sup>40</sup> Although Spain did claim some parts of southern Alabama and Mississippi as part of its colony of West Florida, the United States never acknowledged this claim and proceeded to occupy this territory in 1813.<sup>41</sup> Finally, the Court concluded that a compact between the United States and Alabama, when that state was admitted to the Union did not constitute a transfer of state-owned tidelands to the United States, but instead merely confirmed that the federal government retained certain regulatory powers over the navigable waters of the state.<sup>42</sup> Therefore, the Court upheld the lower court's judgment in favor of the defendants.<sup>43</sup>

The equal footing doctrine was subsequently reaffirmed in *Shively v. Bowlby*.<sup>44</sup> The case involved a dispute over certain lands in Astoria, Oregon, located below the high water mark of the Columbia River.<sup>45</sup> John Bowlby and W.W. Parker, the plaintiffs in the case, traced their title to a deed, executed in 1876, from the State of Oregon.<sup>46</sup> The statute allowed littoral owners to purchase adjacent tidelands in order to make improvements on them.<sup>47</sup> Acting in reliance on their deed from the state, the plaintiffs built a commercial wharf that extended several hundred feet to the channel of the Columbia River for the purpose of receiving and discharging freight from oceangoing ships.<sup>48</sup> The defendants, John Shively and his wife, derived their title from the federal government under the Oregon Donation Act of 1850.<sup>49</sup> The defendants contended that they had acquired certain property, including the tidelands in question, from the federal government in 1854.<sup>50</sup> The Oregon courts held in favor of the plaintiffs.<sup>51</sup> Relying on the reasoning in *Martin v. Wadell*,<sup>52</sup> the Supreme Court held that states admitted since the adoption of the Constitution had the same rights as the original states in the tidelands and the beds beneath navigable waters within

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<sup>39</sup> *Pollard*, 44 U.S. at 225-26.

<sup>40</sup> *Id.* at 226.

<sup>41</sup> *Id.* at 227-28.

<sup>42</sup> *Id.* at 229-30.

<sup>43</sup> *Id.* at 230.

<sup>44</sup> 152 U.S. 1 (1894).

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.* at 3-4.

<sup>47</sup> *Id.* at 55 n.1.

<sup>48</sup> *Id.* at 53.

<sup>49</sup> *Shively*, 152 U.S. at 2.

<sup>50</sup> *Id.* at 2-3.

<sup>51</sup> *Id.* at 9.

<sup>52</sup> 41 U.S. 367 (1842).

their territory.<sup>53</sup> Furthermore, the Court observed that “the title and dominion of the tide waters, and the lands under them, are held by the United States for the benefit of the whole people, and . . . in trust for the future states.”<sup>54</sup> Thus, the Oregon Donation Act did not pass any title to land below the high water mark.<sup>55</sup> For this reason, the Court affirmed the judgment of the Oregon Supreme Court in favor of the plaintiffs.<sup>56</sup>

State ownership of the tidelands under the equal footing doctrine was also implicated in *Knight v. United Land Association*.<sup>57</sup> The plaintiffs in that case traced their title to a grant from the State of California, while the defendant based his title on a grant from Mexico to the pueblo of San Francisco.<sup>58</sup> The California Supreme Court held in the plaintiffs’ favor.<sup>59</sup> The Supreme Court declared that when the United States acquired the California territory from Mexico in 1848, it acquired title to both tidelands and uplands.<sup>60</sup> While the federal government’s title to uplands was absolute, it normally held the tidelands in trust for the future states that would be created from that territory.<sup>61</sup> However, when the United States acquired California from Mexico by treaty, it had agreed to protect property interests previously granted by the Mexican and Spanish governments.<sup>62</sup> Consequently, the Court reasoned that the defendants were entitled to prevail if the property in question was included within the pueblo grant.<sup>63</sup> After reviewing some of the prior litigation involving the pueblo grant, the Court concluded that the defendant’s title was valid and reversed the decision of the California Supreme Court.<sup>64</sup>

The equal footing doctrine is not confined to tidelands; it also applies to the beds beneath navigable fresh waters. For example, in *Barney v. Keokuk*,<sup>65</sup> a riparian owner sued the City of Keokuk, Iowa, objecting to the construction of wharves and levees on reclaimed land along the Mississippi River that had been dedicated to it for street purposes.<sup>66</sup> Upholding the right of the City, acting on behalf of the public to

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<sup>53</sup> *Shively*, 152 U.S. at 26.

<sup>54</sup> *Id.* at 49 (internal quotations omitted).

<sup>55</sup> *Id.* at 49-50.

<sup>56</sup> *Id.* at 58.

<sup>57</sup> 142 U.S. 161 (1891).

<sup>58</sup> *Id.* at 162-63.

<sup>59</sup> *Id.* at 189.

<sup>60</sup> *Id.* at 183.

<sup>61</sup> *Id.*

<sup>62</sup> *Knight*, 142 U.S. at 183-84.

<sup>63</sup> *Id.* at 184.

<sup>64</sup> *Id.* at 189.

<sup>65</sup> 94 U.S. 324 (1876).

<sup>66</sup> *Id.* at 336-37.



promote navigation and commerce on the River, the Court rejected the argument that navigability, and thus the scope of the equal footing doctrine, was limited to tidal waters.<sup>67</sup> According to the Court, while *Martin v. Waddell* and other cases involved tidewaters, these cases nevertheless set out principles that were also applicable to navigable fresh waters.<sup>68</sup> In the Court's words:

Since this [C]ourt . . . has declared that the Great Lakes and other navigable waters of the country, above as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amendable to the admiralty jurisdiction, there seems no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.<sup>69</sup>

The Court concluded by holding that any title to land below the original ordinary high water mark that the riparian owner might claim by virtue of the City's reclamation efforts was nothing more than "a bare legal title, subject to the public easement and use, not only for street purposes, but for the purposes of wharves, landings, and levees."<sup>70</sup>

Although the federal government normally holds the beds beneath navigable waters in trust for future states prior to statehood, Congress may convey them into private ownership in response to "some international duty or public exigency."<sup>71</sup> However, when deciding whether or not such a conveyance has been made, a court must begin with a strong presumption against the conveyance of sovereignty submerged lands.<sup>72</sup> *Montana v. United States*<sup>73</sup> illustrates the strength of this presumption. In that case, the United States sought to quiet title to the bed of the navigable Big Horn River in Montana.<sup>74</sup> The submerged lands in question were located within boundaries of the Crow Tribe Reservation.<sup>75</sup> The Crow Tribe wished to prohibit non-members of the Tribe from fishing and duck hunting in the river.<sup>76</sup> The plaintiffs maintained that the United States conveyed the bed of the Big Horn

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<sup>67</sup> *Id.* at 337-38.

<sup>68</sup> *Id.* at 338.

<sup>69</sup> *Id.*

<sup>70</sup> *Barney*, 94 U.S. at 339-40.

<sup>71</sup> See *Holt State Bank*, 270 U.S. at 55.

<sup>72</sup> See *United States v. Oregon*, 295 U.S. 1, 14 (1935).

<sup>73</sup> 450 U.S. 544 (1981).

<sup>74</sup> *Id.* at 546.

<sup>75</sup> *Id.* at 547.

<sup>76</sup> *Id.*

River to the Crow Tribe when it established the Reservation by treaty prior to Montana's admission to the Union.<sup>77</sup> The State of Montana contended that the river was navigable and the submerged lands beneath it passed to Montana when it achieved statehood.<sup>78</sup> On appeal, the Court agreed that title to the bed of the Big Horn River passed to Montana when it became a state.<sup>79</sup>

The Supreme Court acknowledged that Congress could transfer submerged lands beneath navigable waters prior to statehood "in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory."<sup>80</sup> Nevertheless, the Court concluded that even though the establishment of an Indian Reservation could be considered an "appropriate public purpose," justifying the congressional conveyance of a riverbed, no "public exigency" existed at the time which would have required Congress to depart from its longstanding policy of reserving the beds beneath navigable waters for the benefit of future states.<sup>81</sup>

Although the presumption invoked by the Court in *Montana v. United States* is a strong one, it has been overcome in some cases, as illustrated by *Choctaw Nation v. Oklahoma*.<sup>82</sup> The controversy in *Choctaw Nation* arose when the State of Oklahoma leased a portion of the bed of the Arkansas River for oil and gas exploration.<sup>83</sup> The Cherokee Nation claimed ownership of the riverbed and sued to recover royalties obtained from the leases.<sup>84</sup> Later, the Choctaw and Chickasaw Nations made similar claims to those portions of the bed of the Arkansas River that lay within their Reservations.<sup>85</sup> The district court held in favor of Oklahoma, and this decision was affirmed by a federal appeals court.<sup>86</sup>

All of the parties agreed that the Arkansas River was navigable below its juncture with the Grand River.<sup>87</sup> However, the Cherokee and Choctaw Tribes argued that the United States had conveyed the riverbed

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<sup>77</sup> *Id.* at 550-51.

<sup>78</sup> *Montana*, 450 U.S. at 551.

<sup>79</sup> *Id.* at 556-57.

<sup>80</sup> *Id.* at 551 (quoting *Shively*, 152 U.S. at 48).

<sup>81</sup> *Id.* at 556.

<sup>82</sup> 397 U.S. 620 (1970).

<sup>83</sup> *Id.* at 621.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 621-22.

<sup>86</sup> See *Choctaw Nation v. Oklahoma*, 402 F.2d 739, 748 (10th Cir. 1968).

<sup>87</sup> *Choctaw Nation*, 397 U.S. at 633.

to them by a series of treaties during the nineteenth century.<sup>88</sup> The Court began its discussion of the case with a review of these treaties, focusing on the 1830 Treaty of Dancing Rabbit Creek between the United States and the Choctaws and the 1835 Treaty of New Echota with the Cherokees.<sup>89</sup> Both treaties conveyed a large part of Oklahoma to these Indian tribes.<sup>90</sup> The treaties provided metes and bounds descriptions of the territory being transferred and made no mention of the portion of the Arkansas River that ran through the Indian land.<sup>91</sup>

The Court invoked a rule of construction that favored the Indian claims. According to the Court:

The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians' favor.<sup>92</sup>

Applying this rule of construction, the Court concluded that the entire Arkansas River below its confluence with the Grand River was within the territory conveyed to the Cherokee and Choctaw Nations by the 1830 and 1835 treaties,<sup>93</sup> thereby reversing the decisions of the lower courts.<sup>94</sup>

However, in a more recent decision, *Utah v. United States*,<sup>95</sup> the Court upheld the applicability of the equal footing doctrine. The case involved a dispute between the United States and the State of Utah over the ownership of certain submerged lands beneath Utah Lake.<sup>96</sup> Utah brought suit to quiet title and to enjoin the United States from entering into oil and gas leases for lands beneath the lake.<sup>97</sup> The federal district court granted summary judgment in favor of the United States<sup>98</sup> and the circuit court affirmed.<sup>99</sup>

Utah Lake, a 150 square mile freshwater lake located about thirty miles south of Salt Lake City, drained into the Jordan River and then

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<sup>88</sup> *Id.* at 626-30.

<sup>89</sup> *Id.* at 626.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 628-30.

<sup>92</sup> *Choctaw Nation*, 397 U.S. at 630-31.

<sup>93</sup> *Id.* at 635.

<sup>94</sup> *Id.* at 636.

<sup>95</sup> 482 U.S. 193 (1987).

<sup>96</sup> *Id.* at 195.

<sup>97</sup> *Id.* at 200.

<sup>98</sup> *See Utah v. United States*, 624 F. Supp. 622, 629 (D. Utah 1983).

<sup>99</sup> *See Utah v. United States*, 780 F.2d 1515, 1525 (10th Cir. 1985).

flowed northward into the Great Salt Lake.<sup>100</sup> It was undisputed that Utah Lake was navigable; however, the parties disagreed about the effect of a “reservation” of the lakebed and some of the land around it by the federal government prior to statehood.<sup>101</sup> In 1888, Congress enacted a law that authorized the United States Geological Survey (“USGS”) to select potential sites for reservoirs to be used for purposes of irrigation and flood control.<sup>102</sup> The Act also provided that the federal government would withdraw these sites from purchase by settlers.<sup>103</sup> In 1889, the USGS designated Utah Lake and a two-mile area around the lake as a potential reservoir site.<sup>104</sup> Although the 1888 statute was repealed two years later,<sup>105</sup> the 1890 legislation preserved reservations made by the USGS under the earlier Act.<sup>106</sup>

The issue before the Court on appeal was whether Congress could defeat the rights of a future state prior to statehood by “reserving” the beds beneath navigable waters to itself for future federal projects or whether Congress could only override the equal footing doctrine by conveying these submerged lands to a third party.<sup>107</sup> Relying on the reasoning of *Shively v. Bowlby*,<sup>108</sup> the Court concluded that the Property Clause gave Congress the power to acquire land within a territory to implement other powers conferred on it by the Constitution.<sup>109</sup> At the same time, the Court acknowledged that it would not “infer that [C]ongress intended to defeat a future State’s title to land under navigable waters ‘unless the intention was definitely declared or otherwise made very plain.’”<sup>110</sup> Although a congressional intent to defeat state rights could be clearly shown by a conveyance of submerged lands to a third party, the Court refused to infer such intent from a reservation alone.<sup>111</sup>

Turning to the facts of the case, the Court observed that the purpose of the USGS’s reservation of the area around the lake was not intended to affect the future state of Utah’s ownership of the lake bed; rather, it was merely intended to restrict settlement on the upland areas around

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<sup>100</sup> See *Utah v. United States*, 780 U.S. 193, 198 (1987).

<sup>101</sup> *Id.* at 198-99.

<sup>102</sup> Sundry Appropriations Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526 (repealed 1890).

<sup>103</sup> *Utah v. United States*, 482 U.S. at 198-99.

<sup>104</sup> *Id.* at 199.

<sup>105</sup> Sundry Appropriations Act of Aug. 30, 1890, ch. 837, 26 Stat. 371 (1890).

<sup>106</sup> *Utah v. United States*, 482 U.S. at 199.

<sup>107</sup> *Id.* at 200-01.

<sup>108</sup> 152 U.S. 1, 48 (1894).

<sup>109</sup> See *Utah v. United States*, 482 U.S. at 201.

<sup>110</sup> *Id.* at 201-02 (quoting *Holt State Bank*, 270 U.S. at 55).

<sup>111</sup> *Id.* at 202.

the lake so that the lake could be used as a future reservoir site.<sup>112</sup> The practice of “segregating” certain portions of the public domain from sale around Utah Lake dated back as far as 1856 and provided no evidence of a congressional intent to defeat the future state’s rights under the equal footing doctrine.<sup>113</sup> Consequently, the Court held that title to the bed of Utah Lake passed to Utah in 1896 when it was admitted to the Union.<sup>114</sup>

Finally, it is interesting to note that the equal footing doctrine can sometimes work against the interests of a state rather than in its favor. *United States v. Texas*<sup>115</sup> illustrates this principle. This case involved a dispute between the United States and Texas over certain submerged lands along the Texas coast.<sup>116</sup> These lands were located below the ordinary low water mark and extended three marine leagues into the Gulf of Mexico.<sup>117</sup> Much of the land had been leased to oil companies and both parties claimed the revenues from these leases.<sup>118</sup> The parties agreed that the United States and other countries recognized the three-league boundary that Texas claimed between 1836 and 1845 while it was an independent nation.<sup>119</sup> Texas argued that it retained its former international boundary when it was admitted to the Union.<sup>120</sup> The Court concluded that the equal footing doctrine prohibited Texas from retaining rights in the marginal sea that other states did not have.<sup>121</sup>

The Court began by declaring that the equal footing doctrine was concerned with ensuring that all of the states had equal political rights and sovereignty.<sup>122</sup> Furthermore, the Court pointed out that ownership of the beds of navigable waters within a state was closely connected with its sovereign powers of government and, therefore, title to these beds ordinarily passed to states upon their admission to the Union.<sup>123</sup> According to the Court:

For that reason, upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the

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<sup>112</sup> *Id.* at 206.

<sup>113</sup> *Id.*

<sup>114</sup> *Utah v. United States*, 482 U.S. at 209.

<sup>115</sup> 339 U.S. 707 (1950).

<sup>116</sup> *Id.* at 709.

<sup>117</sup> *Id.* at 711. One marine league is 3.45 English statute miles. *Id.* at 714 n.5. Thus, three marine leagues would be equal to 10.35 English statute miles.

<sup>118</sup> *Id.* at 709.

<sup>119</sup> *Id.* at 711.

<sup>120</sup> *United States v. Texas*, 339 U.S. at 711.

<sup>121</sup> *Id.* at 715.

<sup>122</sup> *Id.* at 716.

<sup>123</sup> *Id.* at 717.

state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.<sup>124</sup>

At the same time, the Court also concluded that the equal footing doctrine required Texas to surrender its title to the seabed below the ordinary low water mark when it entered the Union.<sup>125</sup> In the Court's view, when Texas ceased to be an independent nation upon her admission to the Union, she became a state on an equal footing with her sister states.<sup>126</sup> As a result, some aspects of the former republic's sovereignty were transferred to the United States, including its claim to the marginal sea.<sup>127</sup> Only then would the coastal boundaries of the new state be the same, both with respect to the federal government and with respect to the rest of the states.<sup>128</sup>

In summary, the equal footing doctrine provides that new states enter the Union with the same sovereign powers as the original thirteen states.<sup>129</sup> This principle also applies to the ownership of tidelands and submerged lands beneath navigable lakes and streams.<sup>130</sup> Because the original states retained the submerged lands beneath navigable waters within their borders when they entered the Union,<sup>131</sup> the equal footing doctrine required that new states also be given title to these submerged lands within their territory as well.<sup>132</sup> Although most of the earlier cases involved tidelands,<sup>133</sup> the Supreme Court has since extended the equal footing doctrine to the beds of navigable fresh waters as well.<sup>134</sup> The equal footing doctrine also imposed an obligation on the federal government to hold title to submerged lands beneath navigable waters in its territories for the benefit of future states.<sup>135</sup> This meant that the federal government could not convey these "sovereignty lands" into private ownership under most circumstances. The Court did recognize that such conveyances were valid in order to carry out some international duty or to respond to a public exigency.<sup>136</sup> Even so, the

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<sup>124</sup> *Id.*

<sup>125</sup> *United States v. Texas*, 339 U.S. at 717-18.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 718-19.

<sup>128</sup> *Id.* at 719.

<sup>129</sup> *See Pollard*, 44 U.S. at 222-23.

<sup>130</sup> *Id.* at 228-29.

<sup>131</sup> *See Martin v. Waddell*, 41 U.S. 367, 410 (1842).

<sup>132</sup> *See Pollard*, 44 U.S. at 223.

<sup>133</sup> *See, e.g., Shively v. Bowlby*, 152 U.S. 1 (1894); *Knight v. United Land Ass'n*, 142 U.S. 161 (1891); *Pollard v. Hagan*, 44 U.S. 212 (1845).

<sup>134</sup> *See Montana v. United States*, 270 U.S. 544 (1981); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Barney v. Keokuk*, 94 U.S. 324 (1876).

<sup>135</sup> *See Pollard*, 44 U.S. at 222-23.

<sup>136</sup> *See Holt State Bank*, 270 U.S. at 55.

Court cautioned that those who based their title on a conveyance from the federal government prior to statehood had to overcome a strong presumption against the claim that the government intended to convey sovereignty lands.<sup>137</sup>

### B. The Public Trust Doctrine

While the states generally own the beds beneath the navigable waters within their borders, the nature of this ownership differs from that of ordinary private property. The public aspect of this ownership is reflected in the trust principle, which upholds the public's right to use the waters above these submerged lands for navigation, fishing, and recreation.<sup>138</sup> Although there were earlier parallels in ancient Roman law,<sup>139</sup> the modern public trust doctrine traces its origins back to English common law.<sup>140</sup> The English common law distinguished between the proprietary rights of the King and the rights of the public in tidal waters.<sup>141</sup> The proprietary rights of the King to the soil itself were referred to as the *jus privatum*.<sup>142</sup> Unauthorized structures on the foreshore or the beds beneath tidal waters could be seized or removed as purprestures.<sup>143</sup> However, the King's *jus privatum* was subject to the public right of fishing and navigation known as the *jus publicum*.<sup>144</sup>

In the United States, the public trust doctrine evolved through a series of nineteenth century decisions by state and federal courts.<sup>145</sup> *Martin v. Waddell*,<sup>146</sup> one of the first Supreme Court cases to discuss the public trust doctrine, involved a dispute over certain oyster beds in the Raritan River in the township of Perth Amboy, New Jersey.<sup>147</sup> The plaintiff based his claim to the beds on two charters that were issued by Charles

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<sup>137</sup> See *Montana*, 270 U.S. at 556; *United States v. Oregon*, 295 U.S. 1, 14 (1935). But see *Choctaw Nation*, 397 U.S. at 632.

<sup>138</sup> See generally, Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

<sup>139</sup> See Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-64 (1970).

<sup>140</sup> See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-35 (1986).

<sup>141</sup> See Richard Ausness, *Water Rights, The Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 410-11.

<sup>142</sup> See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source of the Traditional Doctrine*, 19 ENVTL. L. 425, 430-31 (1989).

<sup>143</sup> See *Gough v. Bell*, 22 N.J.L. 441, 477 (N.J. Sup. Ct. 1850).

<sup>144</sup> See Matthew Hale, *A Treatise Relative to the Maritime Law of England in Three Parts*, reprinted in STUART MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 389-90 (1888).

<sup>145</sup> See, e.g., *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. Sup. Ct. 1821).

<sup>146</sup> 41 U.S. 367 (1842).

<sup>147</sup> *Id.* at 407.

II to his brother, James, the Duke of York in 1664 and 1674.<sup>148</sup> The defendant's claim to make exclusive use of the oyster beds was based on a statutory grant from the State of New Jersey in 1824.<sup>149</sup> The principal issue was whether the grant from King Charles, and subsequent grants from the proprietors of the East Jersey colony to private individuals, also conveyed an exclusive right to fish in adjacent tidal or navigable waters.<sup>150</sup>

The Court began with a consideration of English law and concluded that public rights to fishing and navigation in tideland areas were recognized at the time that the king held title to the beds beneath such waters. The Court found that these rights were held in public trust by the king "for the benefit and advantage of the whole community."<sup>151</sup> Consequently, it was highly likely that if the King conveyed ownership of the tidelands when he granted the territory of eastern New Jersey to the Duke of York, he would have done so subject to the same public trust that applied to tidelands in England.<sup>152</sup> Furthermore, during the colonial period, the residents of New Jersey exercised their right to take fish and shellfish from tidal waters "without opposition or remonstrance" from the colony's proprietors.<sup>153</sup> After the American Revolution, "the people of each state became themselves sovereign; and in that character [held] 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."<sup>154</sup> Consequently, the Court concluded that the plaintiff was not entitled to exclusive use of the oyster beds.<sup>155</sup>

A half century later, the Supreme Court decided *Illinois Central Railroad Company v. Illinois*, which affirmed that the public trust doctrine that applied to tidelands was also applicable to the beds of navigable fresh waters.<sup>156</sup> In that case, the State of Illinois brought suit against the defendant railroad company to determine ownership of certain reclaimed lands, as well as certain submerged lands, located in Lake Michigan within the corporate limits of Chicago.<sup>157</sup> The Illinois

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 408.

<sup>150</sup> *Id.*

<sup>151</sup> *Martin*, 41 U.S. at 412.

<sup>152</sup> *Id.* at 413.

<sup>153</sup> *Id.* at 417.

<sup>154</sup> *Id.* at 410.

<sup>155</sup> *Id.* at 418.

<sup>156</sup> 146 U.S. 387 (1892). For a discussion of the *Illinois Central* case, see Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 721-27 (1996).

<sup>157</sup> *Illinois Cent. R.R. Co.*, 146 at 433-34.



Central Railroad based its claim to virtually all of the Chicago Harbor on a grant from the Illinois Legislature that had been obtained under highly suspicious circumstances.<sup>158</sup> The litigation arose when the state legislature repealed the grant to the railroad company in 1873.<sup>159</sup>

The Court began its analysis by declaring that the State of Illinois “holds title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by common law as we have already shown; and this title necessarily carries with it control over the waters above them, whenever the lands are subjected to use.”<sup>160</sup> Moreover, the Court went on to affirm that the states held the beds below fresh water navigable lakes and streams in trust for its citizens in the same manner that it held title to tidelands:

It is a title held 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. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. . . . But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.<sup>161</sup>

To summarize, the public trust doctrine has its origins in English common law, which distinguished between the proprietary rights of the King in the tidelands, known as the *jus privatum*, and the rights of the public, known as the *jus publicum*, which included the right to fish and navigate in tidal waters.<sup>162</sup> After the American Revolution, the former

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<sup>158</sup> *Id.* at 448-49, 451-52.

<sup>159</sup> *Id.* at 449.

<sup>160</sup> *Id.* at 452.

<sup>161</sup> *Id.* at 452-53.

<sup>162</sup> See Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 189-91 (1974).

colonies states succeeded to the king's interest in submerged lands and the public trust concept became accepted in most states during the nineteenth century.<sup>163</sup> According to the public trust doctrine, a state held title to tidelands and the beds of navigable lakes and streams in trust for the citizens of that state in order to protect public rights to fishing, navigation, and recreation.<sup>164</sup> The state could not give up permanent control over lands subject to this trust though it could authorize improvements to navigation by private parties.<sup>165</sup>

### III. NAVIGABILITY FOR PURPOSES OF EXERCISING FEDERAL AUTHORITY UNDER THE ADMIRALTY AND COMMERCE CLAUSES

The Montana court in *PPL Montana* adopted a test of navigability for title purposes that resembled the approach to navigability that has traditionally been used to define the scope of federal admiralty jurisdiction and regulatory power under the Commerce Clause.<sup>166</sup> Although this navigability test was originally fairly similar to the test of navigability for title purposes, over the years it has expanded considerably in response to the growing exercise of federal regulatory power over lakes and rivers.

#### *A. Navigability for Purposes of Federal Admiralty Jurisdiction*

The Supreme Court first rejected the ebb and flow approach as a test for navigability in a series of cases involving the admiralty jurisdiction of federal courts.<sup>167</sup> In the first half of the nineteenth century, several Supreme Court decisions had adopted the English rule which limited admiralty jurisdiction to the sea and to tidally affected waters.<sup>168</sup> However, in *Genesee Chief v. Fitzhugh*,<sup>169</sup> the Court overruled these earlier decisions and concluded that federal courts could exercise

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<sup>163</sup> See, e.g., *Arnold*, 6 N.J.L. at 3-4.

<sup>164</sup> For a discussion of recent developments in the public trust doctrine, see Alexander B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 707-14 (2006); Sarah C. Smith, Note, *A Public Trust Argument for Public Access to Private Conservation Land*, 52 DUKE L.J. 629, 639-45 (2002).

<sup>165</sup> See *Illinois Cent. R.R. Co.*, 146 U.S. at 452-53.

<sup>166</sup> See *PPL Montana*, 229 P.3d at 446-47.

<sup>167</sup> See Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1097-1105 (2002); Milton Conover, *The Abandonment of the "Tidewater" Concept of Admiralty Jurisdiction in the United States*, 38 OR. L. REV. 24 (1958).

<sup>168</sup> See *United States v. Coombs*, 37 U.S. 72 (1838); *The Steamboat Orleans v. Phoebus*, 36 U.S. 175 (1837); *Hobart v. Drogan*, 35 U.S. 108 (1836); *The Steamboat Thomas Jefferson*, 23 U.S. 428 (1825).

<sup>169</sup> 53 U.S. 443 (1851).

admiralty jurisdiction in navigable fresh waters as well as tidal waters.<sup>170</sup> In *Genesee Chief*, the owners of the schooner *Cuba* brought suit against the owners of the propeller steamship *Genesee Chief*, which collided with their vessel and caused it to sink.<sup>171</sup> The accident occurred in the waters of Lake Ontario as the *Cuba* was sailing from Sandusky, Ohio to Oswego, New York.<sup>172</sup> The libellants claimed that the accident was caused by the negligence of the crew of the *Genesee Chief*.<sup>173</sup> The trial court ruled in favor of the libellants and the federal appeals court affirmed.<sup>174</sup>

On appeal, the owner of the *Genesee Chief* contended that the federal court had no authority to award damages for the alleged negligence of the ship's crew because the waters of Lake Ontario were not subject to the ebb and flow of the tides and, therefore, not navigable under the common law test of navigability.<sup>175</sup> In response, the libellant maintained that Congress had extended the scope of federal admiralty jurisdiction to the Great Lakes and their connecting waters by statute.<sup>176</sup> The Court began by declaring that federal admiralty jurisdiction derived from the Constitution, not from any particular statute.<sup>177</sup> Therefore, the Court reasoned, the statutory expansion of federal admiralty jurisdiction would only be constitutional if the Great Lakes and the navigable waters connecting them were understood to be within the scope of the federal government's admiralty jurisdiction when the Constitution was adopted.<sup>178</sup>

According to the Court, the Great Lakes and their connecting waters had always been considered to be navigable waters and, therefore, should also be subject to admiralty law as administered by the federal courts.<sup>179</sup> In support of this conclusion, the Court observed that:

These lakes are in truth inland seas. Different states border on them on one side and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets

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<sup>170</sup> *Id.* at 457.

<sup>171</sup> *Id.* at 450.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 450-51.

<sup>174</sup> *Genesee Chief*, 53 U.S. at 451.

<sup>175</sup> *Id.* at 454.

<sup>176</sup> *Id.* (citing 5 Stat. 726 (1845)). The statute in question was drafted by Justice Story. See Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1222-26 (1954).

<sup>177</sup> *Genesee Chief*, 53 U.S. at 453.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

have encountered on them, and prizes have been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other.<sup>180</sup>

The Court also pointed out that the ebb and flow of the tide did not have any inherent relationship to admiralty jurisdiction.<sup>181</sup> While acknowledging that admiralty jurisdiction was confined to tidewaters in England, this was due to the fact that only tidal waters were actually navigable in that country.<sup>182</sup> The same was also true of the original states where most navigable waters were also tidewaters.<sup>183</sup> However, two developments had occurred since that time that undermined the utility of the ebb and flow test: First, the expansion of the political boundaries of the United States resulted in the potential commercial use of large freshwater rivers and lakes as these territories were occupied and settled.<sup>184</sup> Second, the invention of the steamboat made it possible for these fresh water rivers and lakes to become highways of commerce.<sup>185</sup>

It would be impracticable under these circumstances, the Court declared, to limit admiralty jurisdiction to tidewaters:

It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.<sup>186</sup>

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<sup>180</sup> *Id.* at 453-54.

<sup>181</sup> *Id.* at 454.

<sup>182</sup> *Genesee Chief*, 53 U.S. at 454-55.

<sup>183</sup> *Id.* at 455.

<sup>184</sup> *Id.* at 457.

<sup>185</sup> *Id.* Other Supreme Court decisions of the period made this same observation. See, e.g., *The Hine v. Trevor*, 71 U.S. 555, 562 (1866); *Waring v. Clark*, 46 U.S. 441, 466 (1847) (Catron, J., concurring).

<sup>186</sup> *Genesee Chief*, 53 U.S. at 457.

Turning to the merits of the case, the Court then affirmed the lower courts' judgment for the libellants.<sup>187</sup>

The Court's holding in the *Genesee Chief* was subsequently affirmed in *Jackson v. The Steamboat Magnolia*.<sup>188</sup> The plaintiffs in the case filed a libel in federal court alleging that the defendant's vessel, the steamboat *Magnolia*, collided with their steamboat *Wetumpka*, while sailing along the Alabama River, causing it to sink.<sup>189</sup> The defendant contended that the federal court had no admiralty jurisdiction in the case because the accident occurred well upstream beyond the tide-water area.<sup>190</sup> The lower court agreed with the defendant's argument and dismissed the lawsuit.<sup>191</sup>

Arguing before the Supreme Court, the defendant attempted to distinguish the *Genesee Chief* decision by claiming that the admiralty court's jurisdiction in that case was based on a federal statute that only applied to the Great Lakes.<sup>192</sup> The Court, however, reaffirmed the principle that federal admiralty jurisdiction derived from the Constitution, not from any particular statute.<sup>193</sup> Furthermore, the Court declared, confining federal admiralty jurisdiction to tidewaters would discriminate against residents of western states whose navigable waters were not subject to the ebb and flow of the tides.<sup>194</sup> Therefore, the Court reversed the lower court and allowed to plaintiffs' claim to proceed.<sup>195</sup>

The Court's reasoning in the *Genesee Chief* and *Magnolia* decisions were reaffirmed several times during the nineteenth century.<sup>196</sup> *In re Petition of Boyer*<sup>197</sup> is of particular interest because the Court relied on the reasoning of *Genesee Chief* to conclude that federal admiralty jurisdiction extended to artificial as well as natural fresh watercourses. In that case, the owners of a canal-boat, *Brilliant*, filed a libel against a steam-powered canal-boat, the *B & C*.<sup>198</sup> The libellants sought damages arising out of collision between the two vessels on the Illinois and Lake Michigan Canal.<sup>199</sup> The *Brilliant* was struck by the *B & C* while it was

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<sup>187</sup> *Id.* at 463.

<sup>188</sup> 61 U.S. 296 (1857).

<sup>189</sup> *Id.* at 297.

<sup>190</sup> *Id.* at 297-98.

<sup>191</sup> *Id.* at 298.

<sup>192</sup> *Id.* at 300.

<sup>193</sup> *Jackson*, 61 U.S. at 300-01.

<sup>194</sup> *Id.* at 302.

<sup>195</sup> *Id.*

<sup>196</sup> *See, e.g.*, *In re Petition of Boyer*, 109 U.S. 629, 631-32 (1884); *The Eagle*, 75 U.S. 15, 21-22 (1868); *The Hine v. Trevor*, 71 U.S. 555, 566-67 (1866).

<sup>197</sup> 109 U.S. 629 (1884).

<sup>198</sup> *Id.* at 630.

<sup>199</sup> *Id.*

being towed, along with other canal-boats, by a steam canal-boat.<sup>200</sup> As a result of the collision, the *Brilliant* sank, along with her cargo.<sup>201</sup> A federal district court, sitting as an admiralty court, ruled that both vessels were at fault and that each party would have to pay half of the assessed damages.<sup>202</sup> In response, the owners of the *B & C* sought a writ of prohibition from the Supreme Court claiming that federal admiralty jurisdiction did not extend to the Canal.<sup>203</sup>

The Court acknowledged that the ninety-six-mile-long canal, which connected the Mississippi River and the Illinois River with Lake Michigan and the Chicago River, was “an artificial navigable waterway.”<sup>204</sup> Nevertheless, the Court concluded that the district court had jurisdiction over the case, stating:

[N]avigable water situated as this canal is, used for the purposes for which it is used,—a highway for commerce between ports and places in different states, carried on by vessels such as those in question here,—is public water of the United States, and with the legitimate scope of the admiralty jurisdiction conferred by the [C]onstitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a state, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the state of Illinois to another place in that state.<sup>205</sup>

Accordingly, the Court denied the defendants’ petition for a writ of prohibition and upheld the jurisdiction of the federal district court.<sup>206</sup>

In summary, federal admiralty jurisdiction extends to all waters that are capable of supporting navigation and commerce among the states and with foreign countries. It also includes tidal waters and even waters in canals and other artificial structures when they are part of an interconnected water transportation system.

#### *B. Navigability for Purposes of Federal Regulation under the Commerce Clause*

The Commerce Clause of the Constitution states that “Congress shall have the power to regulate commerce with foreign nations, and among

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *In re Petition of Boyer*, 109 U.S. at 630-31.

<sup>203</sup> *Id.* at 631.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 632.

<sup>206</sup> *Id.*

the several States, and with the Indian tribes.”<sup>207</sup> From the earliest days of the Republic, the courts agreed that the power to regulate commerce included power over the navigable waters of the United States. The Supreme Court first addressed this issue in 1824 in *Gibbons v. Ogden*.<sup>208</sup> Aaron Ogden sought to enjoin Thomas Gibbons from operating two steamboats between New York City and Elizabethtown, New Jersey.<sup>209</sup> Ogden claimed that he was the assignee of Robert Livingston and Robert Fulton, who had obtained the exclusive right from the New York Legislature to operate commercial steamboats in that state.<sup>210</sup> A state court granted the injunction and the New York Court for the Trial of Impeachments and Correction of Errors affirmed.<sup>211</sup> The defendant claimed the right to navigate in the waters along the shores of New York because he was licensed to do so pursuant to a federal statute which regulated the coastal trade.<sup>212</sup> On appeal, the Supreme Court held that commerce included navigation.<sup>213</sup> According to the Court:

All America understands, and has uniformly understood, the word “commerce,” to comprehend navigation. It was so understood, and must have been understood, when the [C]onstitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt [by the Plaintiff] to restrict it comes too late.<sup>214</sup>

The Court went on to declare that the power of Congress to regulate interstate and foreign commerce was “plenary” and, therefore, included the power to regulate shipping in waters that were within the territorial boundaries of New York.<sup>215</sup> Having concluded that Congress had the power to license coastal shipping such as that engaged in by the defendant, the Court held that New York did not have the power to restrict navigation in its waters as the plaintiff claimed.<sup>216</sup>

The first case to offer a broader test of navigability for regulatory purposes was *Daniel Ball*,<sup>217</sup> decided in 1870. The *Daniel Ball*, a 123-

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<sup>207</sup> U.S. CONST. art. I, § 8., cl. 3.

<sup>208</sup> 22 U.S. 1 (1824).

<sup>209</sup> *Id.* at 1-2.

<sup>210</sup> *Id.* at 2.

<sup>211</sup> *Id.* at 3.

<sup>212</sup> *Id.* at 2-3.

<sup>213</sup> *Gibbons*, 22 U.S. at 190.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 197, 211.

<sup>216</sup> *Id.* at 221.

<sup>217</sup> 77 U.S. 557 (1870).

ton steamship, was engaged in the transportation of passengers and cargo along the Grand River between Grand Rapids and Grand Haven in the state Michigan.<sup>218</sup> The United States filed a libel against the vessel, alleging that it had failed to comply with federal inspection and licensing laws.<sup>219</sup> The vessel's owners claimed that the waters of the Grand River were not navigable waters of the United States.<sup>220</sup> On appeal, the Court reiterated its conclusion in the *Genesee Chief* that fresh water rivers and lakes could be navigable even though they were not subject to the ebb and flow of the tides.<sup>221</sup> The Court then enunciated the following test for navigability:

“Those 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.”<sup>222</sup>

During the course of the nineteenth century, the Court affirmed the powers of the federal government over navigable waters. For example, in *Pennsylvania v. Wheeling & Belmont Bridge Company*,<sup>223</sup> the Court upheld the power of Congress to authorize the construction and maintenance of a bridge across the Ohio River even though it obstructed traffic on the river.<sup>224</sup> A similar issue arose in *Gilman v. Philadelphia*,<sup>225</sup> where the owner of a wharf objected to the construction of a bridge across the Schuylkill River, whose elevation was such that it would prevent sailing ships with tall masts from using the wharf.<sup>226</sup> Even though navigation on the river would be obstructed, the Court observed that “bridges, which are connecting parts of turnpikes, streets, and railroads, are means of transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs.”<sup>227</sup> However, the Court added that the state was free to authorize the bridge as long as Congress had not seen fit to regulate the construction of bridges along the river.<sup>228</sup>

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<sup>218</sup> *Id.* at 558.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 559.

<sup>221</sup> *Id.* at 563.

<sup>222</sup> *Daniel Ball*, 77 U.S. at 563.

<sup>223</sup> 59 U.S. 421 (1855).

<sup>224</sup> *Id.* at 430.

<sup>225</sup> 70 U.S. 713 (1865).

<sup>226</sup> *Id.* at 721.

<sup>227</sup> *Id.* at 729.

<sup>228</sup> *Id.* at 732.



The power of the federal government to construct improvements to navigation was upheld in *South Carolina v. Georgia*.<sup>229</sup> In that case, the federal government obstructed one channel on the Savannah River in order to route shipping through another channel.<sup>230</sup> The Court upheld this decision, declaring that the United States “may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close over any other channel to their passage.”<sup>231</sup>

In the twentieth century, disputes about the scope of federal regulatory powers under the Commerce Clause often arose in connection with license applications to the Federal Power Commission by hydroelectric power companies. One of the first cases to consider the extent of federal power in this context was *Ashwander v. Tennessee Valley Authority*.<sup>232</sup> In *Ashwander*, the Tennessee Valley Authority (“TVA”) purchased certain substations, transmission lines, and other property from the Alabama Power Company.<sup>233</sup> As part of this transaction, Alabama Power agreed to purchase “surplus power” produced by the TVA’s Wilson Dam, which was located on the Tennessee River.<sup>234</sup> A number of Alabama Power shareholders objected to the contract, arguing that the TVA did not have the constitutional authority to enter into it.<sup>235</sup> The shareholders contended that the TVA’s authority to construct and operate the Wilson Dam arose from Congress’s powers under its war and commerce powers.<sup>236</sup> Consequently, the shareholders reasoned that the TVA could do nothing with respect to the Dam that did not promote national defense or improve navigation.<sup>237</sup>

The Court observed that the Tennessee River was navigable even though shoals, reefs, and rapids obstructed navigation at various points.<sup>238</sup> Nevertheless, the Court declared that “[it was] not at liberty to conclude either that the river is not susceptible of development as an important waterway, or that Congress has not undertaken that development, or that the construction of the Wilson Dam was not an appropriate means to accomplish a legitimate end.”<sup>239</sup> Having

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<sup>229</sup> 93 U.S. 4 (1876).

<sup>230</sup> *Id.* at 11.

<sup>231</sup> *Id.* at 11-12.

<sup>232</sup> 297 U.S. 288 (1936).

<sup>233</sup> *Id.* at 315.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 322.

<sup>236</sup> *Id.* at 326-27.

<sup>237</sup> *Ashwander*, 297 U.S. at 326-27.

<sup>238</sup> *Id.* at 328.

<sup>239</sup> *Id.* at 329-330.

concluded that the TVA had the constitutional power to construct and operate the Wilson Dam, the Court went on to conclude that the surplus power produced by the Dam was property of the federal government that it could dispose of by selling to Alabama Power.<sup>240</sup> Therefore, the Court upheld the validity of the contract despite the fact that it did not directly affect navigation.<sup>241</sup>

In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,<sup>242</sup> the Supreme Court held that an applicant did not necessarily have to comply with state regulations in order to obtain a federal license from the Federal Power Commission (“FPC”).<sup>243</sup> The power company proposed to construct a hydroelectric dam on the Cedar River near Moscow, Iowa.<sup>244</sup> The Court found that the proposed power plant would significantly affect navigation on the Cedar, Iowa, and Mississippi Rivers.<sup>245</sup> Consequently, there was no doubt that the power company had to obtain a license from the FPC.<sup>246</sup> However, the State of Iowa, which was opposed to the project, contended that the FPC could not issue a license unless the applicant first obtained a state permit.<sup>247</sup> The Court rejected the State’s claim, declaring that:

To require the petitioner to secure the actual grant to it of a State permit under § 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the ‘comprehensive’ planning which the Act provides shall depend on the judgment of the Federal Power Commission or other representatives of the Federal Government.<sup>248</sup>

Accordingly, the Court ruled that the FPC should continue with the licensing proceedings even though the applicant had not obtained a state permit for the proposed project.<sup>249</sup>

*United States v. Rio Grande Dam & Irrigation Company*<sup>250</sup> was one of the first cases to extend the scope of the federal government’s

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<sup>240</sup> *Id.* at 335-37.

<sup>241</sup> *Id.* at 340.

<sup>242</sup> 328 U.S. 152 (1946).

<sup>243</sup> *Id.* at 182-83.

<sup>244</sup> *Id.* at 157-58.

<sup>245</sup> *Id.* at 163.

<sup>246</sup> *Id.*

<sup>247</sup> *First Iowa Hydro-Electric Coop.*, 328 U.S. at 164.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 182-83.

<sup>250</sup> 174 U.S. 690 (1899).

regulatory powers beyond traditional navigable waters. In that case, the United States sought injunctive relief to prevent the defendant from constructing a dam across the Rio Grande River in order to appropriate water for irrigation, municipal, and manufacturing uses.<sup>251</sup> The parties agreed that the Rio Grande was not navigable in the area of New Mexico where the dam was to be constructed.<sup>252</sup> The New Mexico territorial court held that because the river was not navigable, the federal government had no authority to prevent the construction of the dam.<sup>253</sup> The United States contended that it had the power to protect the navigable character of the river downstream where it was in fact navigable. To support this claim, the United States relied on a provision of the Rivers and Harbors Act<sup>254</sup> which prohibited unauthorized obstructions to the navigable capacity of any waters over which the United States had jurisdiction.<sup>255</sup>

On appeal, the Court acknowledged that Congress had consented to the replacement of the common law natural flow doctrine by the prior appropriation system which allowed persons to divert water from a river or stream in order to put it to a beneficial use on non-riparian land.<sup>256</sup> However, the Court refused to concede that Congress would have authorized appropriators to divert water from non-navigable tributaries in such a way as to impede the navigability of the navigable waters into which they flowed. The Court stated that:

To hold that [C]ongress, by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which united into a navigable water course, and so destroy the navigability of that water course in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated.<sup>257</sup>

The Court concluded that it was proper for the United States to enjoin construction of the dam under the Rivers and Harbors Act because its prohibition against obstructions was not limited to obstructions on navigable waters, but also extended to any obstruction, such as the one contemplated by the defendant, that tended “to destroy the navigable

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<sup>251</sup> *Id.* at 701.

<sup>252</sup> *Id.* at 698.

<sup>253</sup> *Id.* at 696.

<sup>254</sup> 26 Stat. 454 § 10 (1890).

<sup>255</sup> 174 U.S. at 707-08.

<sup>256</sup> *Id.* at 706. For a discussion of the prior appropriation system, see Waters & Water Rights §§ 12.01-12.02 (Robert E. Beck, ed.) (3d ed. 2009); Richard C. Ausness, *Water Rights, The Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 418-21 (1986).

<sup>257</sup> *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. at 706.

capacity of one of the navigable waters of the United States.”<sup>258</sup> Accordingly, the Court remanded the case back to the lower courts to determine whether the proposed appropriation of water from the Rio Grande would “substantially diminish the navigability of that stream within the limits of present day navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish.”<sup>259</sup>

It should also be noted that waters that were formerly navigable in fact will continue to be treated as navigable for purposes of federal Commerce Clause regulation. For example, in *Economy Light & Power Company v. United States*,<sup>260</sup> the United States sought to enjoin a power company from constructing a dam across the Des Plaines River near Joliet, Illinois without obtaining permission from Congress and various federal officials.<sup>261</sup> The lower courts agreed that the river was navigable and that construction of the dam violated federal law.<sup>262</sup>

The Court observed that the dam site was located just above the point where the Des Plaines River joins the Kankakee River to form the Illinois River.<sup>263</sup> It was undisputed that there was no evidence of commercial navigation on the river within living memory.<sup>264</sup> On the other hand, the Court pointed out that the river had once been part of an interstate fur trading network up until about 1825.<sup>265</sup> The river ceased to be used for this purpose after that time because fur trading activities moved westward and physical changes affected the river’s navigability.<sup>266</sup> The Court affirmed that if a river had the capacity to support commercial activity in its natural state, then Congress could act to preserve it “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.”<sup>267</sup>

The Court has also held that a river that was not navigable in its normal state would be considered to be navigable for purposes of federal regulation under the Commerce Clause if it could be made navigable with reasonable improvements.<sup>268</sup> *United States v. Appalachian Electric Power Company* involved a dispute between the

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<sup>258</sup> *Id.* at 708.

<sup>259</sup> *Id.* at 710.

<sup>260</sup> 256 U.S. 113 (1921).

<sup>261</sup> *Id.* at 115.

<sup>262</sup> *Id.* at 115-16.

<sup>263</sup> *Id.* at 116.

<sup>264</sup> *Id.* at 117.

<sup>265</sup> *Econ. Light & Power Co.*, 256 U.S. at 117.

<sup>266</sup> *Id.* at 117-18.

<sup>267</sup> *Id.* at 123.

<sup>268</sup> *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940).

FPC and a power company that wished to construct a dam on the New River near Radford, Virginia.<sup>269</sup> Initially, the FPC had made a finding that the river was non-navigable, but that “the project would affect the interests of interstate and foreign commerce,” and therefore found that the power company must be subject to a license from the FPC before beginning construction on the dam.<sup>270</sup> At a later hearing, however, a minority of the FPC found that the river was navigable, but the majority maintained that the FPC’s jurisdiction was proper on its original basis.<sup>271</sup> The power company, on the other hand, claimed inferentially that the river was not navigable at the location of the proposed dam and, consequently, the FPC had no authority to require the company to seek a license.<sup>272</sup> When the power company began construction on the dam in 1934, the United States sought an injunction to prevent it from proceeding any further without first obtaining a license from the FPC.<sup>273</sup> Both the district court and a federal appeals court concluded that the New River was not navigable in its natural state and refused to grant the injunction.<sup>274</sup>

The Court began with an analysis of the concept of navigability and its relation to federal regulatory powers under the Commerce Clause. According to the Court, navigability “is not to be determined by a formula which fits every type of stream under all circumstances and all times.”<sup>275</sup> Accordingly, the Court cautioned that it did “not purport now to lay down any single definitive test.”<sup>276</sup> Instead, the Court declared that it must “draw from the prior decisions in this field and apply them, with due regard to the dynamic nature of the problem, to the particular circumstances presented by the New River.”<sup>277</sup> The Court then considered whether a determination of navigability should focus solely on the river in its “natural or ordinary condition” as set forth in *Daniel Ball*.<sup>278</sup> The Court observed that natural or ordinary conditions referred to the volume of water in the river as well as the gradient and the regularity of flow.<sup>279</sup> However, it declared that the potential availability for navigation must also be considered.<sup>280</sup> Therefore, a watercourse that

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<sup>269</sup> *Id.* at 398.

<sup>270</sup> *Id.* at 399-400.

<sup>271</sup> *Id.* at 400-01.

<sup>272</sup> *Id.* at 400.

<sup>273</sup> *Id.* at 401.

<sup>274</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 403.

<sup>275</sup> *Id.* at 404.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 406-07.

<sup>279</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 407.

<sup>280</sup> *Id.*

was otherwise suitable for navigation should be treated as navigable even though artificial aids were necessary to make it actually usable for commercial navigation.<sup>281</sup> Furthermore, the Court stated that it was not “necessary that the improvements should be actually completed or even authorized.”<sup>282</sup> The only limit on this bootstrapping definition of navigability was that the improvements must be “reasonable.”<sup>283</sup> The Court acknowledged that reasonableness involved a “balance between cost and need at a time when the improvement would be useful.”<sup>284</sup> Finally, the Court pointed out that navigability for purposes of regulating commerce was not static as it was for title purposes, but could evolve or develop in accordance with changes in the nature of commerce and navigation.<sup>285</sup>

The Court started with a detailed description of the New River and the history of commercial activity in the vicinity of the dam site. The New River originated in western Virginia near the North Carolina border and flows northward some 250 miles to Kanawha Falls, West Virginia. From there, the river, now called the Kanawha, flowed another 100 miles northwest to Point Pleasant, West Virginia, where it joined the Ohio River.<sup>286</sup> The Court noted that the entire area below Kanawha Falls was broken and mountainous.<sup>287</sup> The Court focused on three contiguous sections of the river: (1) a twenty-eight-mile stretch between Allisonia and Radford; (2) a fifty-nine-mile stretch from Radford to Wiley’s Falls; and (3) a twenty-four-mile stretch from Wiley’s Falls to Hinton, West Virginia.<sup>288</sup> The evidence revealed that the portions of the river above and below the Radford-Wiley’s Falls section had been improved in the nineteenth century and were used to transport lumber, tobacco, pig iron, and other products in keelboats to various railroad depots.<sup>289</sup> The critical stretch of river where the defendant’s proposed dam was located had not been improved and navigation would have been impeded along portions of the river by boulders and rapids; nevertheless, there was some sporadic commercial traffic along this part of the river between the Civil War and the coming of the Norfolk & Western and Chesapeake & Ohio Railroads to the area

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 408.

<sup>283</sup> *Id.* at 407-08.

<sup>284</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 407-08.

<sup>285</sup> *Id.* at 408-09.

<sup>286</sup> *Id.* at 410.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 411.

<sup>289</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 411-12.

in the 1880s.<sup>290</sup> This led the Court to conclude that “the evidence of actual use of the Radford-Wiley’s Falls section for commerce and for private convenience, when taken in connection with its physical condition make it quite plain that by reasonable improvement the reach would be navigable for the type of boats employed on the less obstructed sections.”<sup>291</sup> Accordingly, the Court determined that the entire New River was navigable.<sup>292</sup>

*Kaiser Aetna v. United States*<sup>293</sup> illustrates the principle that non-navigable waters may be subject to federal regulation if they become connected to navigable waters. That case involved a dispute between the United States and the lessees of the Hawaii Kai Marina.<sup>294</sup> The marina was created from the Kuapa Pond, a 523-acre lagoon. Early Hawaiians had connected the lagoon to Maunalua Bay on the Pacific Ocean by means of sluice gates and used it as a fishpond.<sup>295</sup> When Kaiser Aetna acquired the property in 1961, the plaintiff dredged Kuapa Pond to create a marina and built a residential subdivision around it.<sup>296</sup> Later, with the acquiescence of the United States Army Corps of Engineers, the defendant dredged an eight-foot channel between Kuapa Pond and Maunalua Bay in order to enable boats from the marina to obtain access to the bay.<sup>297</sup>

In 1972, however, the Corps of Engineers changed its position and informed Kaiser Aetna that it would have to obtain a permit if it decided to engage in any future dredging, filling, or excavation operations in the marina and that it would also have to allow public access to the marina.<sup>298</sup> Kaiser Aetna challenged this decision, but a lower court concluded that the waters of the marina became navigable waters of the United States, and therefore became subject to federal regulation under the Rivers and Harbors Act when the waters became connected to Maunalua Bay.<sup>299</sup> The federal appeals court agreed with the lower court.<sup>300</sup> On appeal, the Supreme Court agreed that Kuapa Pond had

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<sup>290</sup> *Id.* at 415-16.

<sup>291</sup> *Id.* at 416-17.

<sup>292</sup> *Id.* at 418-19.

<sup>293</sup> 444 U.S. 164 (1979).

<sup>294</sup> The marina was part of an “ahupua’a” or land grant that eventually became the property of Princess Bernice Pauahi Bishop, a descendant of King Kamehameha I. The Bishop Estate leased a 6000-acre portion of the ahupua’a to the defendant, Kaiser Aetna. *Id.* at 167.

<sup>295</sup> *Id.* Water entered the lagoon from the ocean through the sluice gates during high tide and flowed out again during low tide. *Id.* at 166.

<sup>296</sup> *Id.* at 167.

<sup>297</sup> *Kaiser Aetna*, 444 U.S. at 167.

<sup>298</sup> *Id.* at 168.

<sup>299</sup> *Id.* at 168-69.

<sup>300</sup> 378 F.2d 378 (9th Cir. 1978).

now become part of the navigable waters of the United States and was thus subject to federal regulation.<sup>301</sup> However, the Court declared that the Corps had no authority to require Kaiser Aetna to provide public access to the marina unless the government paid compensation.<sup>302</sup>

#### IV. NAVIGABILITY FOR TITLE PURPOSES

The English “ebb and flow” rule was adopted by most of the colonies.<sup>303</sup> However, in the first half of the nineteenth century, a number of state courts concluded that this approach was unsuitable for the United States with its large number of navigable, inland freshwater rivers and streams.<sup>304</sup> Consequently, courts abandoned the English rule and concluded that the state should hold title to the beds of all waters that were navigable-in-fact, regardless of whether these waters were subject to the ebb and flow of the tide.<sup>305</sup>

As the navigability-in-fact test displaced the common law ebb and flow approach, questions arose about the ownership of tidelands that were located beneath non-navigable waters. A majority of state courts concluded that the ebb and flow test was not entirely displaced, but continued to control in such cases.<sup>306</sup> Accordingly, these courts ruled that the states continued to retain title to tidelands beneath non-navigable waters.<sup>307</sup> On a number of occasions, the United States Supreme Court also suggested that the states owned the tidelands within their borders regardless of whether they were covered by navigable waters.<sup>308</sup> The Court finally resolved the question once and for all in *Phillips Petroleum Company v. Mississippi*.<sup>309</sup>

The *Phillips Petroleum* case involved a dispute over certain tideland areas in southwestern Mississippi near the Gulf Coast.<sup>310</sup> Plaintiffs

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<sup>301</sup> *Kaiser Aetna*, 444 U.S. at 172-73.

<sup>302</sup> *Id.* at 174-80.

<sup>303</sup> *Id.* at 181.

<sup>304</sup> See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 286 (1997) (discussing cases in various states rejecting the “ebb and flow” test).

<sup>305</sup> See, e.g., *Young v. Harrison*, 6 Ga. 130 (Ga. 1849); *Bullock v. Wilson*, 2 Port. 436 (Ala. 1835); *Spring v. Russell*, 7 Me. 273 (Me. 1831); *Wilson v. Forbes*, 13 N.C. 30 (N.C. 1828); *Cates v. Wadlington*, 12 S.C.L. 580 (S.C.L. 1822); *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810).

<sup>306</sup> See, e.g., *Wright v. Seymour*, 10 P. 323, 324-26 (Cal. 1886); *State v. Pinckney*, 22 S.C. 484, 507-09 (S.C. 1885); *Simons v. French*, 25 Conn. 346, 352-53 (Conn. 1856).

<sup>307</sup> See *Wright*, 10 P. at 326-27; *Pinckney*, 22 S.C. at 507-08; *Simons*, 25 Conn. at 352-53.

<sup>308</sup> See, e.g., *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *Appleby v. City of New York*, 271 U.S. 364, 381 (1926); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892); *Knight v. United States Land Ass'n*, 142 U.S. 161, 183 (1891); *McReady v. Virginia*, 94 U.S. 391, 394 (1877); *Weber v. Harbor Comm'rs*, 85 U.S. 57, 65 (1873).

<sup>309</sup> 484 U.S. 469 (1988).

<sup>310</sup> See *Cinque Bambini P'ship v. State of Mississippi*, 491 So. 2d 508, 510 (Miss. 1986).



Cinque Bambini and other property owners traced their title to about 2400 acres of tidelands back to Spanish land grants made prior to statehood.<sup>311</sup> In 1977, the Mississippi Mineral Lease Commission leased the Cinque Bambini property to Saga Petroleum.<sup>312</sup> The plaintiffs then brought suit against the State to revoke the leases and to confirm their title.<sup>313</sup> The Mississippi Supreme Court ruled that about forty-two acres were public trust lands that had been acquired by the state from the federal government at the time of statehood.<sup>314</sup> The United States Supreme Court granted the property owner's petition for *certiorari* to review the Mississippi court's decision.<sup>315</sup>

Mississippi contended that it had acquired title to all of the tidelands within its borders under the equal footing doctrine at the time of statehood in 1817.<sup>316</sup> The property owners maintained that Mississippi did not acquire title to tidelands beneath non-navigable waters under the equal footing doctrine.<sup>317</sup> Instead, they argued that under the equal footing doctrine, the state only acquired title to submerged land beneath navigable waters but not to lands beneath tidal waters unless these waters were navigable in fact.<sup>318</sup>

The Court began by observing that, "[t]he new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and the lands under them, within their respective jurisdictions."<sup>319</sup> The Court then proceeded to examine the status of tidelands within the original colonies and concluded that they all followed the English rule that tidelands were owned by the sovereign.<sup>320</sup> The Court then addressed the argument that under federal law, ownership of submerged lands was based on navigability-in-fact rather than the existence of tidal influence. The Court acknowledged that navigability-in-fact was the appropriate basis for determining ownership to the submerged lands beneath fresh waters; however, it maintained that the rule was otherwise in the case of tidelands.<sup>321</sup>

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<sup>311</sup> *Id.* at 511. Spain claimed portions of southern Mississippi and Alabama as part of its Florida colony. Spain eventually relinquished her claim to the area when it was ceded to the United States, along with the rest of Florida, by treaty in 1819. See Michael H. Hoffheimer, *Mississippi Courts 1790-1868*, 65 MISS. L.J. 99, 102 n.9 (1995).

<sup>312</sup> *Cinque Bambini P'ship*, 491 So. 2d at 510.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 514.

<sup>315</sup> See *Phillips Petroleum v. Mississippi*, 479 U.S. 1084 (1987).

<sup>316</sup> See *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 472 (1988).

<sup>317</sup> *Id.* at 475.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 474 (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)).

<sup>320</sup> *Phillips Petroleum*, 484 U.S. at 475-76.

<sup>321</sup> *Id.* at 479-80.

To support this conclusion, the Court relied heavily on *Mann v. Tacoma Land Company*.<sup>322</sup> In that case, the plaintiff accepted scrip from the federal government in exchange for surrendering his claim to certain lands in California purportedly granted by the Mexican government prior to 1848.<sup>323</sup> This gave him the right to use the scrip to acquire a comparable amount of unoccupied and unappropriated public lands belonging to the United States.<sup>324</sup> The plaintiff then proceeded to claim certain “tide flats” or “mud flats” located in Commencement Bay near Tacoma, Washington.<sup>325</sup> This property was covered by two to four feet of water during high tide, but was entirely exposed during low tide.<sup>326</sup> In spite of this, the Court concluded that title to these tidelands was transferred as public trust lands to the State of Washington upon its admission to the Union in 1889.<sup>327</sup> Consequently, it held that these tidelands were not federal “public lands” subject to appropriation by private individuals.<sup>328</sup> Following the reasoning of the *Mann* decision, the Court in *Phillips Petroleum* rejected the plaintiffs’ argument that only tidelands beneath navigable waters were subject to the public trust and, therefore, not normally subject to private ownership.<sup>329</sup> Accordingly, the Court affirmed the Mississippi Supreme Court’s decision in favor of the State.<sup>330</sup>

Nevertheless, the federal courts rejected the ebb and flow test as the *sole* test for title in the nineteenth century, just as they did for purposes of admiralty jurisdiction and Commerce Clause regulation.<sup>331</sup> For example, in *Packer v. Bird*,<sup>332</sup> the Supreme Court held that the Sacramento River in California was navigable for a considerable distance above the tidewater area.<sup>333</sup> Consequently, the Court rejected the plaintiff’s contention that a patent from the United States to property bounded by the river extended to the middle of the stream and included an island in the middle of the stream.<sup>334</sup> The Court adopted the *Daniel Ball* navigability-in-fact test because it felt that the ebb and flow test

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<sup>322</sup> 153 U.S. 273 (1894).

<sup>323</sup> *Id.* at 285.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 283.

<sup>326</sup> *Id.* at 273.

<sup>327</sup> *Mann*, 153 U.S. at 284.

<sup>328</sup> *Id.*

<sup>329</sup> *Phillips Petroleum*, 484 U.S. at 483-84.

<sup>330</sup> *Id.* at 484-85.

<sup>331</sup> See Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of the Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 801-03 (2010).

<sup>332</sup> 137 U.S. 661 (1891).

<sup>333</sup> *Id.* at 662.

<sup>334</sup> *Id.* at 666.

was inappropriate for a nation with large freshwater rivers and streams.<sup>335</sup> As the Court pointed out, “[i]t is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them.”<sup>336</sup>

In the twentieth century, the Court addressed a number of additional issues associated with the navigability-in-fact test. In *Oklahoma v. Texas*<sup>337</sup> the state of Oklahoma invoked the Supreme Court’s original jurisdiction to resolve a dispute over title to the bed of the Red River.<sup>338</sup> Oklahoma asserted title to the entire riverbed; Texas claimed the southern half; and the United States, in its own right and on behalf of certain Indian allottees, maintained that it owned most of the bed because the river was not navigable.<sup>339</sup> The controversy was exacerbated by the fact that valuable oil and gas deposits had been discovered beneath portions of the riverbed.<sup>340</sup> In an earlier opinion, the Court concluded that the boundary between Texas and Oklahoma was the southern bank of the Red River;<sup>341</sup> therefore, *Oklahoma v. Texas* was solely concerned with the respective rights of Oklahoma and the federal government and its allottees.<sup>342</sup>

The Court observed that the Red River originates in the Panhandle area of northwestern Texas and ultimately flows into the Mississippi River in eastern Louisiana.<sup>343</sup> Of its 1300-mile length, about 550 miles of the Red River are in Louisiana and Arkansas, another 540 miles form part of the border between Texas and Oklahoma, while the remaining portion of the river is wholly in Texas.<sup>344</sup> The principal area in dispute was a forty-three-mile stretch located near the Texas border, about 410 miles upstream from the eastern boundary of Oklahoma.<sup>345</sup>

Oklahoma claimed that the Red River was navigable along its entire border with Texas.<sup>346</sup> Consequently, under the equal footing doctrine, the state acquired title to the bed of the river at the time of statehood.<sup>347</sup> In response, the Court applied the *Daniel Ball* navigability-in-fact test to

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<sup>335</sup> *Id.* at 667.

<sup>336</sup> *Id.*

<sup>337</sup> 258 U.S. 574 (1922).

<sup>338</sup> *Id.* at 579.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 579-80.

<sup>341</sup> See *Oklahoma v. Texas*, 256 U.S. 70 (1921).

<sup>342</sup> See *Oklahoma v. Texas*, 258 U.S. at 582.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 583.

<sup>347</sup> *Oklahoma v. Texas*, 258 U.S. at 583.

determine if the Red River was actually navigable and concluded that rainfall patterns and physical topography prevented the river from being navigable in the western half of the state.<sup>348</sup> The evidence was somewhat more ambiguous with regard to the eastern part of the state. Although there were occasional attempts at commercial navigation on the river during periods of high water, the Court ultimately found that the eastern part of the Red River was “neither used, nor susceptible of being used, in its natural and ordinary condition as a highway for commerce.”<sup>349</sup> Since no part of the Red River in Oklahoma was navigable, the Court held that title to the riverbed did not pass to the state upon its admission to the Union.<sup>350</sup> The Court also concluded that the United States did not convey title to the riverbed to the Kiowa, Comanche, or Apache Indians when it established a Reservation for them in 1867.<sup>351</sup>

*Brewer-Elliott Oil & Gas Company v. United States*<sup>352</sup> involved a suit by the United States on its own behalf and as trustee for the Osage Indian Tribe against a number of oil companies who had leased portions of the bed of the Arkansas River from the state of Oklahoma.<sup>353</sup> The trial court ruled that the river had always been non-navigable and that the federal government had conveyed the bed of the river up to the channel to the Osage Tribe prior to statehood.<sup>354</sup> The federal appeals court affirmed title in the Osage Tribe, noting that the United States had the power to convey the bed of the Arkansas River to the Osage Indians in 1872, whether the river was navigable or not.<sup>355</sup> In response, Oklahoma argued that the Arkansas River was navigable and, therefore, the federal government held title to the riverbed in trust for the citizens of the future state and did not have the power to convey the riverbed to the Indian Tribes.<sup>356</sup>

On appeal, the Supreme Court affirmed that the validity and effect of an act done by the United States is a federal question.<sup>357</sup> Furthermore, “[t]he title of the Indians grows out of a federal grant when the Federal government had complete sovereignty over the territory in question.”<sup>358</sup> Therefore, the Court concluded that federal, not state, law must

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<sup>348</sup> *Id.* at 587-88.

<sup>349</sup> *Id.* at 591.

<sup>350</sup> *Id.* at 591-92.

<sup>351</sup> *Id.* at 592-98,

<sup>352</sup> 260 U.S. 77 (1922).

<sup>353</sup> *Id.* at 79.

<sup>354</sup> *Id.* at 79-80.

<sup>355</sup> 270 F. 100 (8th Cir. 1920).

<sup>356</sup> *Brewer-Elliott Oil & Gas Co.*, 260 U.S. at 83.

<sup>357</sup> *Id.* at 87.

<sup>358</sup> *Id.*

determine the navigability of the Arkansas River.<sup>359</sup> Accordingly, the Court applied the *Daniel Ball* formula to determine whether the Arkansas River was navigable or not.<sup>360</sup> Under this test, the Court found that the Arkansas River became navigable near Fort Gibson, Oklahoma, which was located some distance downstream from the Osage Reservation.<sup>361</sup> Since the river was not navigable at the point where the bed was granted to the Osage Tribe, the Court determined that the land in question must necessarily belong to the Osage Tribe and not the State of Oklahoma.<sup>362</sup> For this reason, the Court affirmed the decision of the appeals court.<sup>363</sup>

*United States v. Holt State Bank*<sup>364</sup> illustrates the fact that navigability for title purposes is determined at the time of statehood. In that case, the United States brought a quiet title action against various landowners whose title was derived from the State of Minnesota.<sup>365</sup> The land in question was part of the bed of Mud Lake, a 5000-acre lake located on the former Red Lake Indian Reservation.<sup>366</sup> Prior to 1889, the Reservation had been occupied by the Chippewa Indians.<sup>367</sup> The Chippewa Indians agreed to convey most of the Reservation back to the United States in 1889 so that the land could be opened to settlement by homesteaders.<sup>368</sup> In return, the federal government agreed to place the proceeds of all land sales in trust for the benefit of the Chippewas.<sup>369</sup>

Congress authorized Mud Lake to be drained in accordance with state drainage laws and the drainage project was completed in 1912.<sup>370</sup> The United States claimed ownership of the lakebed and planned to sell it for the benefit of the Chippewas.<sup>371</sup> The defendants, whose title derived from the homestead patents, contended that as litoral owners they owned portions of the lakebed adjacent to their upland property under state law.<sup>372</sup> The United States contended that Mud Lake was not navigable and, therefore, it acquired title to the lakebed from the Chippewas in 1889.<sup>373</sup> The litoral owners, on the other hand,

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 86.

<sup>361</sup> *Brewer-Elliott Oil & Gas Co.*, 260 U.S. at 86.

<sup>362</sup> *Id.* at 87.

<sup>363</sup> *Id.* at 89.

<sup>364</sup> 270 U.S. 49 (1926).

<sup>365</sup> *Id.* at 52-53.

<sup>366</sup> *Id.* at 52.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Holt State Bank*, 270 U.S. at 52.

<sup>370</sup> *Id.* at 53.

<sup>371</sup> *Id.* at 52.

<sup>372</sup> *Id.* at 54.

<sup>373</sup> *Id.*

maintained that Mud Lake had been navigable at the time of statehood and that they succeeded to the State of Minnesota's title when the lake was drained.<sup>374</sup> The federal district court ruled in favor of the defendant landowners and this decision was affirmed on appeal, effectively determining that Mud Lake was navigable.<sup>375</sup>

On appeal, the Supreme Court began by declaring that navigability for title purposes was a matter of federal, not state, law.<sup>376</sup> The Court also reiterated the principle that "streams and lakes which are navigable-in-fact must be regarded as navigable in law" and that streams and lakes are considered to be navigable-in-fact "when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of travel on water."<sup>377</sup> With this test in mind, the Court observed that before it was drained, Mud Lake was three to six feet deep.<sup>378</sup> Because much of the area was swampy, early visitors and settlers found it convenient to use the lake as a means of traveling from one point to another instead of going by land.<sup>379</sup> The Mud River passed through the lake and flowed into the Thief River and ultimately to the Red River and Canada.<sup>380</sup> In light of this evidence, the Court agreed that Mud Lake had been navigable when Minnesota was admitted to the Union.<sup>381</sup> Furthermore, there was no evidence that the United States intended to convey the beds beneath Mud Lake, or any other body of navigable water, when it set aside land for the Chippewa Indians prior to statehood.<sup>382</sup> Consequently, the Court confirmed title in the defendant landowners.<sup>383</sup>

*United States v. Utah*<sup>384</sup> involved a suit by the United States to quiet title to portions of the beds of certain rivers in Utah.<sup>385</sup> The rivers in question were the Green River, which flowed in a southwesterly direction from northern Wyoming and Colorado into the Colorado River, the Colorado River itself, which originated in Colorado and flowed southeast into Arizona, and the San Juan River, which flowed westward from New Mexico to the Colorado River in southeastern

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<sup>374</sup> *Holt State Bank*, 270 U.S. at 54.

<sup>375</sup> *Id.* at 54-55.

<sup>376</sup> *Id.* at 55-56.

<sup>377</sup> *Id.* at 56.

<sup>378</sup> *Id.*

<sup>379</sup> *Holt State Bank*, 270 U.S. at 57.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 57.

<sup>382</sup> *Id.* at 58-59.

<sup>383</sup> *Id.* at 59.

<sup>384</sup> 283 U.S. 64 (1931).

<sup>385</sup> *Id.* at 71.

Utah.<sup>386</sup> Prior to 1921, that part of the Colorado River above its junction with the Green River was known as the Grand River.<sup>387</sup> The United States claimed that portions of these rivers were not navigable and, therefore, their beds were ceded to it by Mexico in 1848 by the Treaty of Guadalupe-Hidalgo.<sup>388</sup> The State of Utah maintained that the rivers were navigable and that it had acquired title to their beds in 1896 when Utah became a state.<sup>389</sup>

The Supreme Court appointed a special master to take evidence and compile a report.<sup>390</sup> The master concluded that about ninety-five miles along the Green River were navigable; about seventy-nine miles of the Grand River were navigable; and about 150 miles of the Colorado River within the boundaries of Utah were navigable.<sup>391</sup> On the other hand, the master found about forty miles of the Colorado River south of the confluence between the Grand River and the Green River were not navigable and also concluded that the San Juan River was not navigable above its confluence with the Colorado River.<sup>392</sup> Both parties objected to some of the special master's findings with respect to the status of the Green, Grand, and Colorado Rivers.<sup>393</sup>

The Court prefaced its analysis of the navigability issue by pointing out that “[t]he question of navigability is thus determinative of the controversy, and that is a federal question.”<sup>394</sup> The Court then considered the navigability of the three rivers under the navigability-in-fact test. The Court observed that the Green River above the area in question fell 2000 feet in 387 miles, causing “many difficult and dangerous rapids.”<sup>395</sup> However, beginning at the junction with the San Juan River to the junction between the Green and the Grand Rivers, the slope was much more gradual and the river averaged about three feet in depth.<sup>396</sup>

The Grand River fell about 560 feet over a ninety-four-mile stretch between Grand Junction, Colorado and to Castle Creek, Utah, where the section in controversy began.<sup>397</sup> Although the river flowed through steep canyons, the fall became pronounced after that point and there was

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<sup>386</sup> *Id.* at 77.

<sup>387</sup> *Id.* at 73.

<sup>388</sup> *Id.* at 71-72.

<sup>389</sup> *United States v. Utah*, 283 U.S. at 72.

<sup>390</sup> *Id.* at 72-73.

<sup>391</sup> *Id.* at 73-74.

<sup>392</sup> *Id.* at 74.

<sup>393</sup> *Id.* at 74-75.

<sup>394</sup> *United States v. Utah*, 283 U.S. at 75.

<sup>395</sup> *Id.* at 77.

<sup>396</sup> *Id.* at 77-78.

<sup>397</sup> *Id.* at 78.

evidence that this portion of the river had been used to transport lumber rafts and other craft.<sup>398</sup> The Colorado River flowed for about 190 miles from the confluence of the Grand and Green Rivers to the Arizona-Utah border.<sup>399</sup> The special master found that the river was non-navigable from the junction of these two rivers down to the end of Cataract Canyon.<sup>400</sup> Through this canyon, the river dropped about eleven feet per mile through a series of “high and dangerous rapids.”<sup>401</sup>

The United States based its claim that the rivers were non-navigable largely on the fact that there was very little historical evidence of navigation by Indians, fur traders, or early explorers.<sup>402</sup> However, the special master pointed out that the rivers had been used by various watercraft, “including row-boats, flat-boats, steam-boats, motor-boats, a barge and scows,” for exploration, recreation, and for transporting passengers and supplies in connection with prospecting, surveying, and mining operations.<sup>403</sup> All of these uses suggested that the rivers had the potential to be used for commercial navigation.<sup>404</sup> In other words, the potential of the river or stream for future commercial use was relevant to the question of navigability.<sup>405</sup>

Finally, the Court considered whether various impediments could prevent a river from being navigable. These impediments included debris, ice, floods, low flow, rapids, and sandbars.<sup>406</sup> The Court noted that the special master had determined that the rivers carried a considerable amount of logs, driftwood, and other debris during floods and other periods of high water.<sup>407</sup> However, these conditions did not seriously impair navigation.<sup>408</sup> Ice was also not a serious obstacle to navigation because periods of ice were shorter than in many navigable rivers in the Northeast.<sup>409</sup> Floods and periods of high flow did occur as the result of snowmelt in the surrounding mountains, but the special master found them also to be of relatively short duration.<sup>410</sup> The special master acknowledged that there were rapids on portions of the Grand and Colorado Rivers, but concluded that they were not significant

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<sup>398</sup> *Id.* at 78-79.

<sup>399</sup> *United States v. Utah*, 283 U.S. at 79.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 79-80.

<sup>402</sup> *Id.* at 81.

<sup>403</sup> *Id.* at 82.

<sup>404</sup> *United States v. Utah*, 283 U.S. at 82.

<sup>405</sup> *Id.* at 83.

<sup>406</sup> *Id.* at 84-87.

<sup>407</sup> *Id.* at 84.

<sup>408</sup> *Id.*

<sup>409</sup> *United States v. Utah*, 283 U.S. at 84.

<sup>410</sup> *Id.*



enough to impede navigation by properly designed motorboats.<sup>411</sup> Furthermore, the special master determined that none of these rapids required portage of either boats or cargo.<sup>412</sup> Finally, the special master acknowledged that there were shoals and sandbars in all of the rivers and that they could be hazardous to navigation.<sup>413</sup> However, the Court cited its opinion in *The Montello* for the proposition that a river can be navigable-in-fact even though “its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars.”<sup>414</sup> Accordingly, the Court concluded that disputed portions of the three rivers were navigable.<sup>415</sup>

In *Utah v. United States*,<sup>416</sup> the Court held that *Daniel Ball*'s navigability-in-fact test applied to lakes as well as rivers and streams.<sup>417</sup> Utah and the United States both claimed title to certain shorelands around the Great Salt Lake.<sup>418</sup> Utah maintained that the lake was navigable and, therefore, it had acquired title to the lakebed from the United States at the time of statehood.<sup>419</sup> The Court appointed a special master to consider the issue of navigability and he concluded that the lake was indeed navigable.<sup>420</sup> In its review of the special master's findings, the Court reaffirmed the applicability of the *Daniel Ball* test of navigability for title purposes and surveyed the history of navigation on the lake before and after statehood. In doing so, the Court acknowledged that due to lack of settlement in the area at that time, evidence of commercial navigation was not extensive.<sup>421</sup> However, local ranchers used boats and barges to transport livestock to and from islands in the lake.<sup>422</sup> In addition, a boat known as the *City of Corinne* transported passengers and freight around the lake from 1871 until 1881.<sup>423</sup> Another boat transported salt from various salt works along the lake to a railroad terminus.<sup>424</sup>

Even though the evidence indicated that navigation was sporadic and minimal during this period, the Court agreed with the special master that

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<sup>411</sup> *Id.* at 84-85.

<sup>412</sup> *Id.* at 85.

<sup>413</sup> *Id.*

<sup>414</sup> *United States v. Utah*, 283 U.S. at 86-87 (quoting from *The Montello*, 87 U.S. 430, 443 (1874)).

<sup>415</sup> *Id.* at 89.

<sup>416</sup> 403 U.S. 9 (1971).

<sup>417</sup> *Id.* at 11.

<sup>418</sup> *Id.* at 9.

<sup>419</sup> *Id.* at 9-10.

<sup>420</sup> *Id.* at 10.

<sup>421</sup> *Utah v. United States*, 403 U.S. at 11.

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 11-12.

<sup>424</sup> *Id.* at 12.

it was sufficient to show that “the Lake was physically capable of being used in its ordinary condition as a highway for floating and affording passage to water craft in the manner over which trade and travel was or might be conducted in the customary modes of travel on water at that time.”<sup>425</sup> Consequently, the Court approved a decree in Utah’s favor proposed by the special master.<sup>426</sup>

Finally, there are also several opinions on the subject by federal courts of appeals that are worth considering. One of these cases, *Oregon v. Riverfront Protection Association*,<sup>427</sup> involved the navigability of the McKenzie River, a tributary of the Willamette River in Oregon.<sup>428</sup> In this case, the State of Oregon brought suit to determine the navigability of a portion of the McKenzie River.<sup>429</sup> Oregon maintained that the river was navigable and that it owned the riverbed; the defendants were riparian owners who claimed ownership to the thread of the stream by virtue of patents from the federal government.<sup>430</sup> The trial court ruled that the river was not navigable, but this holding was reversed on appeal.<sup>431</sup>

Oregon sought to prove that the river was navigable at the time of statehood by showing that it was used to transport logs during the late nineteenth and early twentieth centuries.<sup>432</sup> One issue that the court addressed was whether a river could still be considered navigable if commercial navigation was difficult.<sup>433</sup> The court concluded that the river was susceptible to commercial use by the logging industry even though it took logging crews thirty to fifty days, and sometimes much longer, to complete a log drive down the thirty-two-mile stretch of river in question.<sup>434</sup> The logs required constant attention and logjams sometimes had to be broken up with dynamite.<sup>435</sup> In addition, excessive rainfall caused flooding, while too little rainfall exposed gravel bars, boulders, and shoals.<sup>436</sup> However, despite these obstacles, thousands of logs were driven down the river during this period.<sup>437</sup> The court also observed that the seasonal nature of the log drives did not affect the

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<sup>425</sup> *Id.*

<sup>426</sup> *Utah v. United States*, 403 U.S. at 12-13.

<sup>427</sup> 672 F.2d 792 (9th Cir. 1982).

<sup>428</sup> *Id.* at 793.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 793-94.

<sup>431</sup> *Id.* at 793.

<sup>432</sup> *Oregon v. Riverfront Prot. Ass’n*, 672 F.2d at 795-96.

<sup>433</sup> *Id.* at 795.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Oregon v. Riverfront Prot. Ass’n*, 672 F.2d at 795.

river's navigability. The log drives were not "occasional," as in the *Rio Grande Dam* case, but occurred on a regular basis between April and June over a seventeen-year period.<sup>438</sup> Finally, the court rejected the claim that temporary measures taken by the loggers, such as the construction of crude "wing dams," altered the ordinary and natural condition of the river.<sup>439</sup> Instead, it determined that these measures may have "facilitated the transport of logs on the McKenzie, but they did not improve the river."<sup>440</sup> Consequently, the court concluded that the river was navigable in its natural and ordinary condition at the time of statehood.<sup>441</sup>

In *Alaska v. Ahtna, Inc.*,<sup>442</sup> the Ninth Circuit Court of Appeals held that evidence of recreational use could be used to prove that a river was navigable-in-fact for commercial purposes.<sup>443</sup> In that case, the State of Alaska challenged a decision by the Bureau of Land Management ("BLM") to convey a thirty-mile portion of the bed of the Gulkana River to Ahtna, Inc., a Native American regional corporation, pursuant to the Alaska Native Claims Settlement Act.<sup>444</sup> Alaska claimed that the river was navigable and, therefore, belonged to the state under the equal footing doctrine.<sup>445</sup> The federal district court ruled that the river was navigable and that BLM's conveyance was invalid.<sup>446</sup>

The Gulkana River originated near Paxton, Alaska and flowed southward through tundra, spruce forests, and lakes to the Copper River, which in turn emptied into the Gulf of Alaska.<sup>447</sup> As early as the 1940s, hunters and fishermen traveled along the river in sixteen- to twenty-four-foot fiberglass and aluminum boats, which had the capacity to carry approximately 1000 pounds.<sup>448</sup> In the 1970s, an industry emerged in the area to provide guided fishing and sightseeing tours along the river, using aluminum powerboats and inflatable rafts.<sup>449</sup> According to the court, this industry currently employed more than 400 hundred persons.<sup>450</sup>

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<sup>438</sup> *Id.*

<sup>439</sup> *Id.* at 795-96.

<sup>440</sup> *Id.* at 796.

<sup>441</sup> *Id.*

<sup>442</sup> 891 F.2d 1401 (9th Cir. 1989).

<sup>443</sup> *Id.* at 1405.

<sup>444</sup> 43 U.S.C. §§ 1601-1629 (2000).

<sup>445</sup> *Alaska v. Ahtna, Inc.*, 891 F.2d at 1403.

<sup>446</sup> See *Alaska v. United States*, 662 F. Supp. 455, 467-68 (D. Alaska 1987).

<sup>447</sup> *Alaska v. Ahtna, Inc.*, 891 F.2d at 1402.

<sup>448</sup> *Id.* at 1403.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

Several questions were raised on appeal. The first was whether the *Daniel Ball* test required evidence of actual commercial use on a river at the time of statehood in order to prove navigability. The appeals court confirmed that under that test, a river must be *susceptible* of commercial use at the time of statehood, but that evidence of actual use, while highly probative, was not required to satisfy the *Daniel Ball* test.<sup>451</sup> In addition, the court declared that a river's use "need not be without difficulty, extensive, or long and continuous" for a river to be considered navigable-in-fact.<sup>452</sup> Furthermore, the court concluded that it did not matter that the river had almost exclusively been used for recreational purposes.<sup>453</sup> First of all, evidence of recreational uses could be used to prove a river's susceptibility for commerce.<sup>454</sup> Secondly, the court agreed that the recreational uses could be deemed commercial in nature when commercial enterprises developed along the river to provide services and equipment to recreational users.<sup>455</sup> Finally, the court rejected the claim that the United States had reserved the beds of navigable portions of the lower Gulkana River for itself prior to statehood.<sup>456</sup> For these reasons, the court held that title to the riverbed passed to Alaska when it achieved statehood.<sup>457</sup>

It can be seen from the foregoing discussion that the rules for determining title to submerged lands are complex. After more than 150 years of decisions by the United States Supreme Court, several principles have emerged. First, when the original thirteen states became independent, they succeeded to the interests of the English Crown, including ownership of tidelands and other submerged lands.<sup>458</sup> Second, under the equal footing doctrine, when territories attained statehood, they acquired title to tidelands<sup>459</sup> and the beds beneath navigable rivers and lakes<sup>460</sup> within their borders. Submerged lands beneath non-navigable waters continued to be owned by the federal government or its successors in interest.<sup>461</sup>

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<sup>451</sup> *Id.* at 1404.

<sup>452</sup> *Alaska v. Ahtna, Inc.*, 891 F.2d at 1404.

<sup>453</sup> *Id.* at 1405.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at 1405-06.

<sup>457</sup> *Alaska v. Ahtna, Inc.*, 891 F.2d at 1406.

<sup>458</sup> See *Martin v. Wadell*, 41 U.S. 367, 416 (1842).

<sup>459</sup> See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484-85 (1988); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284-85 (1894); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845).

<sup>460</sup> See *Utah v. United States*, 403 U.S. 9, 12 (1971); *United States v. Holt State Bank*, 270 U.S. 9, 54-55 (1926); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

<sup>461</sup> See *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922); *Oklahoma v. Texas*, 258 U.S. 574, 591-92 (1922).

The Supreme Court has emphasized that navigability for title purposes is determined by federal law, not state law.<sup>462</sup> The Court has traditionally relied on the *Daniel Ball* “navigability-in-fact” test to determine the navigability of non-tidal waters for title purposes.<sup>463</sup> However, the version of this test that is used for title purposes differs in some respects from the version typically used to determine the scope of federal admiralty or Commerce Clause regulation. For example, although the river or lake does not have to actually been used for “trade or travel,”<sup>464</sup> it must be susceptible of such use *in its natural condition*.<sup>465</sup> Therefore, artificial improvements that subsequently transform a non-navigable river or lake into a navigable one will not affect ownership of the bed. This contrasts with the Court’s approach in other cases, where rivers and streams may be treated as navigable for regulatory purposes if they can be made navigable with reasonable improvements.<sup>466</sup> Another requirement is that the river or lake must be capable of use for *commercial* navigation. However, this commercial use does not have to occur year round; it can be seasonal in nature.<sup>467</sup> In addition, the fact that commercial navigation is difficult because of rapids, sand bars, and other impediments does not preclude a river from being considered navigable under the *Daniel Ball* test.<sup>468</sup> Finally, ownership is determined as of the date of statehood. Changes in the condition of the river or lake after that time do not have any effect on the state of the title.<sup>469</sup> Finally, rivers and streams may be navigable in some sections but not in others.<sup>470</sup> In those portions of a river that are navigable, the states would own the beds under the equal footing principle.<sup>471</sup> However, the United States or its successors-in-interest would own the beds beneath the non-navigable portions.<sup>472</sup>

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<sup>462</sup> See *Utah v. United States*, 403 U.S. 9, 10-11 (1971); *United States v. Utah*, 283 U.S. 64, 75-76 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926).

<sup>463</sup> See, e.g., *United States v. Utah*, 283 U.S. 64, 76 (1931); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 87, 89 (1922).

<sup>464</sup> See *Utah v. United States*, 403 U.S. 9, 11-12 (1971); *United States v. Utah*, 283 U.S. 64, 82 (1931).

<sup>465</sup> See *Oklahoma v. Texas*, 258 U.S. 574, 591 (1922).

<sup>466</sup> See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940).

<sup>467</sup> See *Oregon v. Riverfront Prot. Ass’n*, 672 F.2d 792, 795 (9th Cir. 1982).

<sup>468</sup> See *United States v. Utah*, 283 U.S. 64, 86-87 (1931).

<sup>469</sup> See *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926).

<sup>470</sup> See *United v. Utah*, 283 U.S. at 72-74.

<sup>471</sup> *Id.* at 89.

<sup>472</sup> See *Oklahoma v. Texas*, 258 U.S. 574, 591-92 (1922).

V. THE *PPL MONTANA* CONTROVERSY

*PPL Montana v. Montana*<sup>473</sup> represents the most recent attempt by the United States Supreme Court to clarify the issue of navigability for title. Finding in favor of the private landowner, the Court rejected the expansive test of navigability proposed by the State of Montana and reaffirmed that navigability for title purposes should be determined on a segment-by-segment basis.

*A. Facts and Procedural History*

PPL Montana owns and operates ten dams/hydroelectric power plants on the Missouri, Madison, and Clark Fork rivers.<sup>474</sup> Five of these facilities are located along the Great Falls Reach of the Upper Missouri River and two other power plants have been constructed upstream on the Stubbs Ferry area of that river.<sup>475</sup> The power company also operates two additional hydroelectric plants on the Madison River.<sup>476</sup> These nine facilities are known collectively as the Missouri-Madison Project.<sup>477</sup> In addition, PPL Montana maintains a power plant on the Thompson Falls area of the Clark Fork River.<sup>478</sup> This facility is called the Thompson Falls Project.<sup>479</sup>

PPL's hydroelectric power plants were all located in the beds of what were thought to be non-navigable rivers.<sup>480</sup> PPL or its predecessor, the Montana Power Company, had maintained facilities on these riverbeds for many years, and in some cases, for over a century.<sup>481</sup> Throughout this period, PPL leased these beds from their apparent owner, the United States government, and various state agencies participated in federal licensing proceedings in connection with the Missouri-Madison and Thompson Falls Projects.<sup>482</sup>

As mentioned earlier, the power plants in question are located on three different rivers: the Missouri, the Madison, and the Clark Fork. The Missouri and Madison Rivers are on the eastern side of the Continental Divide, while the Clark Fork River is on the western side. The Madison River joins with the Jefferson and Gallatin Rivers at Three Forks, Montana to form the Upper Missouri River. The Missouri flows

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<sup>473</sup> 132 S. Ct. 1215 (2012).

<sup>474</sup> See *PPL Montana*, 132 S. Ct. at 1225.

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *PPL Montana*, 132 S. Ct. at 1225.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

through seven states before reaching the Mississippi River just north of St. Louis. The Clark River empties into the Columbia River system which flows into the Pacific Ocean.

The dispute over ownership of the riverbeds began in 2003, when the parents of some Montana schoolchildren brought suit in federal court against PPL Montana, alleging that its hydroelectric plants were located on school trust lands.<sup>483</sup> The State of Montana eventually joined the suit, but it was ultimately dismissed for lack of subject matter jurisdiction in 2005.<sup>484</sup> Shortly thereafter, PPL Montana filed a declaratory action in state court seeking to prevent the State from demanding compensation for the power company's use of the beds.<sup>485</sup> In response, Montana filed a counterclaim contending that it owned the riverbeds in question and could charge the power companies rent for the use of the beds.<sup>486</sup> Concluding that the rivers in question were navigable, the trial court granted summary judgment in the State's favor and ruled that PPL Montana must pay the State almost \$41 million for use of the riverbeds between 2001 and 2007.<sup>487</sup> The lower court's decision on the navigability issue was affirmed on appeal by the Montana Supreme Court.<sup>488</sup>

#### *B. The Montana Supreme Court's Decision*

The principal issue before the Montana Supreme Court was whether the lower court erred in granting the state's motion for summary judgment. However, the appellate court resolved to discuss the following substantive issues as well: (1) the proper test to determine navigability for purposes of title; (2) whether the submerged lands occupied by PPL Montana were school trust lands; (3) whether use of these submerged lands was included in the right to appropriate water for a beneficial use; (4) whether PPL Montana could raise any affirmative defenses; (5) whether the Hydroelectric Resources Act ("HRA") applied to the Thompson Falls and Madison-Missouri Projects; and (6) whether the lower court calculated the damages owed by PPL Montana correctly.<sup>489</sup>

The Montana court decided the second issue in favor of PPL Montana, holding that submerged beds beneath navigable waters were

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<sup>483</sup> See *PPL Montana, LLC v. Montana*, 229 P.3d 421, 426 (Mont. 2010).

<sup>484</sup> *Id.* at 427.

<sup>485</sup> *Id.*

<sup>486</sup> *Id.* at 428.

<sup>487</sup> *Id.* at 443.

<sup>488</sup> *PPL Montana, LLC*, 229 P.3d at 461.

<sup>489</sup> *Id.* at 443.

not school trust lands. However, the court then concluded that the beds were subject to the public trust doctrine. As such, they could not be transferred into private ownership except pursuant to general legislation or upon payment of full market value to the state. The court ruled in the state's favor on the remaining issues. For example, the court rejected PPL Montana's claim that the right to appropriate water to produce hydroelectric power carried with it an incidental right to use state land for this purpose.<sup>490</sup> The court also held that the state's claim to compensation for the power company's use of public trust lands was not barred by the statute of limitations applicable to private landowners.<sup>491</sup> In addition, the court determined that the state Hydroelectric Resources Act, which governed leases of state-owned lands, was not preempted by the Federal Power Act.<sup>492</sup> Finally, the Montana court gave its approval to the methodology by which the lower court calculated the compensation to which the state was entitled from PPL Montana for the use of state lands from 2000 to 2007.<sup>493</sup>

However, the most important issue before the Montana court was that of navigability. First, the court concluded that it was proper for two of the state's expert witnesses to rely on historical works, newspapers, and periodicals to support their conclusion that the rivers in question had been navigable at the time of statehood.<sup>494</sup> The court observed that all of these sources would not be excluded at trial under the hearsay rule, but rather would be admissible as self-authenticating documents.<sup>495</sup> It also noted that other courts had allowed the parties to rely upon historical sources to determine navigability for title when evidence of navigability was based on events or conditions that occurred in the distant past.<sup>496</sup>

The court also considered whether the lower court had applied the correct test of navigability to determine title.<sup>497</sup> The Montana Supreme Court observed that the lower court had allowed evidence of present-day usage to prove that a river was susceptible at the time of statehood of being used in the future as a channel for commerce.<sup>498</sup> In addition, the lower court had ruled that a river could be navigable even though

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<sup>490</sup> *Id.* at 450-51.

<sup>491</sup> *Id.* at 451-52.

<sup>492</sup> *Id.* at 452-54.

<sup>493</sup> *PPL Montana, LLC*, 229 P.3d at 454-61.

<sup>494</sup> *Id.* at 445-46.

<sup>495</sup> *Id.*

<sup>496</sup> *Id.* at 446 (citing *Conn. Light & Power Co. v. Fed. Power Comm'n*, 557 F.2d 349, 354-46 (2d Cir. 1977)); *Montana Power*, 185 F.2d at 498.

<sup>497</sup> *PPL Montana, LLC*, 229 P.3d at 446.

<sup>498</sup> *Id.*



portages were necessary to circumvent falls, rapids, or other obstructions.<sup>499</sup> The Montana Supreme Court affirmed the lower court's version of the test of navigability for title.<sup>500</sup> Quoting from *United States v. Utah*<sup>501</sup> and *The Montello*,<sup>502</sup> the Montana Supreme Court declared that the concept of navigability for title purposes had been liberally construed by the United States Supreme Court.<sup>503</sup> Thus, the court held that to be navigable, a river does not have to be actually used for navigation at the time of statehood as long as is susceptible of supporting commerce.<sup>504</sup> Furthermore, relying on language from *The Montello*, the court declared that the existence of portages and other obstructions would not preclude a finding of navigability.<sup>505</sup> Finally, the court stated that when considering whether a river is susceptible of acting as a "channel for commerce," the Supreme Court had construed commerce very broadly.<sup>506</sup> In particular, the court determined that "emerging or newly-discovered forms of commerce" can be applied retroactively to determine navigability.<sup>507</sup> For this reason, it concluded that present-day usage of a river could be relevant to whether it was navigable at the time of statehood.<sup>508</sup>

The court rejected PPL Montana's claim that the lower court erred in granting summary judgment to the state because there were genuine issues of material fact on the issue of navigability with respect to each of the rivers in question.<sup>509</sup> In addition, the court rejected PPL Montana's claim that the rivers were not navigable because of the existence of obstructions.<sup>510</sup> In the case of the Missouri River, the Montana court declared that falls and rapids along the river did not prevent the Lewis and Clark expedition from traversing it by means of portage when necessary.<sup>511</sup> In the case of the Clark Fork and Madison Rivers, the court discounted the findings of PPL Montana's experts because they were based on "conclusory" statements contained in a federal district court decree and a report by the United States Corps of

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<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> 283 U.S. 64 (1931).

<sup>502</sup> 87 U.S. 430 (1870).

<sup>503</sup> *PPL Montana*, 229 P.3d at 446 (citing *Utah*, 283 U.S. at 76; *The Montello*, 87 U.S. at 441).

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> *Id.* at 446-47.

<sup>508</sup> *PPL Montana*, 229 P.3d at 447 (citing *Ahtna*, 891 F.2d at 1404-05).

<sup>509</sup> *Id.*

<sup>510</sup> *Id.* at 447-48.

<sup>511</sup> *Id.*

Engineers.<sup>512</sup> According to the court, there was no factual support for the conclusions reached in these documents.<sup>513</sup> The court also rejected the conclusion of another expert witness that dams constructed on the Madison River since statehood had enhanced its navigability, declaring instead that evidence of present-day recreational uses on the river was sufficient to establish that it was susceptible for use as a channel of commerce at the time of statehood.<sup>514</sup>

Finally, the Montana court rejected PPL Montana's argument that an entire river could not be classified as navigable for title purposes if particular stretches of it were non-navigable due to its physical characteristics.<sup>515</sup> The court acknowledged that the United States Supreme Court had considered the navigability of certain sections of a river as opposed to the river as a whole.<sup>516</sup> However, the court declared that the Court had confined this approach to "long reaches" of the river whose navigability was at issue.<sup>517</sup>

### *C. The United States Supreme Court's Opinion*

PPL Montana appealed to the United States Supreme Court and the Court granted *certiorari* in 2011.<sup>518</sup> After hearing oral arguments in October, 2011, the Court issued an opinion in February, 2012, unanimously reversing the judgment of the Montana Supreme Court.<sup>519</sup> The Court reviewed the English ebb and flow test of navigability for title purposes and its eventual displacement in the United States by the *Daniel Ball* navigability-in-fact approach.<sup>520</sup> The Court also discussed the equal footing doctrine and the difference between the tests of navigability for title purposes and the test for purposes of determining the scope of congressional power under the Commerce Clause.<sup>521</sup>

One of the first issues before the Court involved the effect of non-navigable segments and overland portage on a river's navigability for title purposes. The Montana Supreme Court had concluded that long stretches of a river could be classified as navigable even though portions of it were non-navigable because of shoals, sandbars, or rapids.<sup>522</sup>

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<sup>512</sup> *Id.*

<sup>513</sup> *PPL Montana*, 229 P.3d at 448.

<sup>514</sup> *Id.*

<sup>515</sup> *Id.* at 449.

<sup>516</sup> *Id.* at 448.

<sup>517</sup> *Id.* (quoting *United States v. Utah*, 283 U.S. at 77).

<sup>518</sup> 131 S. Ct. 3019 (2011).

<sup>519</sup> See *PPL Montana, LLC*, 132 S. Ct. 1215, 1222 (2012).

<sup>520</sup> *Id.* at 1226-27.

<sup>521</sup> *Id.* at 1228-29.

<sup>522</sup> See *PPL Montana*, 229 P.3d at 449.

However, the Court disagreed with the Montana Supreme Court's conclusion, relying in large part on *United States v. Utah*.<sup>523</sup> The Court observed that in the *Utah* case, which involved a dispute over a 189-mile stretch of the Colorado River, the Court had upheld the special master's finding that first four-mile portion was navigable, the next thirty-six miles were not navigable and the remaining 149-mile portion of the river was navigable.<sup>524</sup> The Court also pointed out that in *Brewer-Elliott Oil & Gas Company v. United States*,<sup>525</sup> it had found the segment of the Arkansas River in dispute was not navigable even though a nearby segment of the river downstream was navigable.<sup>526</sup> Finally, the Court noted that it had separately assessed the navigability of the Red River both above and below the Washita River in *Oklahoma v. Texas*,<sup>527</sup> before concluding that both segments of the river were non-navigable.<sup>528</sup> Thus, the practice of evaluating the navigability of segments of a river, rather than the river as a whole, was clearly supported by judicial precedent.<sup>529</sup>

The Court also concluded that segmentation could be justified on policy grounds. According to the Court, allowing private ownership of the beds beneath navigable waters would enable riparian owners to construct improvements on the riverbeds and thereby interfere with the public's right to use navigable waters as a highway for commerce.<sup>530</sup> Therefore, it was better to vest ownership of these submerged lands in the state in order to avoid conflicts between public and private interests.<sup>531</sup> However, the Court reasoned that if a particular segment of a stream was not navigable at the time of statehood, commerce would not be possible at that point and there would be no need to protect the rights of the public.<sup>532</sup> Accordingly, there would be no need to vest ownership of the beds beneath non-navigable waters in the state.<sup>533</sup>

The Court declared that practical considerations also supported a segmentation approach for determining a river's navigability. First of all, the physical conditions that determine navigability vary significantly

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<sup>523</sup> 283 U.S. 64 (1931).

<sup>524</sup> *PPL Montana*, 132 S. Ct. at 1229 (citing *United States v. Utah*, 283 U.S. at 90).

<sup>525</sup> 260 U.S. 77 (1922).

<sup>526</sup> *PPL Montana*, 132 S. Ct. at 1229 (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. at 86).

<sup>527</sup> 258 U.S. 574 (1922).

<sup>528</sup> *PPL Montana*, 132 S. Ct. at 1229 (citing *Oklahoma v. Texas*, 258 U.S. at 587-91).

<sup>529</sup> *Id.*

<sup>530</sup> *Id.* at 1230.

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> *PPL Montana*, 132 S. Ct. at 1230.

over the course of a river, particularly in the western United States.<sup>534</sup> For example, the Court noted that the Missouri River “runs for over 2,000 miles out of steep mountains, through canyons and upon rocky beds, over waterfalls and rapids, and across sandy plains, capturing runoff from snow melt and farmland rains alike.”<sup>535</sup> Moreover, these changes in physical conditions provide an accurate basis for determining the beginning and end of a particular segment.<sup>536</sup> Thus, the location of a change in the gradient of the Colorado River and the location of a tributary that contributed to the flow of the Red River enabled the Court to distinguish the point at which the navigability of these rivers changed.<sup>537</sup>

Finally, the Court pointed out that riparian landowners used a segmentation approach to determine ownership of their respective portions of a riverbed.<sup>538</sup> In fact, the Montana courts employed the same approach to divide up the underlying riverbeds in the *PPL Montana* case in order to determine how much rent the electric power company owed the state for the use of its property for hydroelectric dam sites.<sup>539</sup>

In addition, the Court rejected Montana’s argument that segmentation should not be applied in cases where a river was subject to “short interruptions” of navigability.<sup>540</sup> The Montana court had observed that in *United States v. Utah*, the Court had declared that the case was concerned with “long reaches with particular characteristics of navigability or non-navigability” rather than “short interruptions.”<sup>541</sup> Since the *Utah* Court applied a segment-by-segment approach to navigability to the “long reaches” of the Colorado River that were involved in that case, the Montana court assumed that it would not apply a segmentation approach to “short interruptions.”<sup>542</sup> However, the Supreme Court rejected this logic and concluded that a segmentation approach should be applied in all cases except possibly to “*de minimis*” interruptions of navigability.<sup>543</sup> Although the Court left open the question of what exactly would constitute a *de minimis* interruption of navigability, it declared that a comparison between the length of the non-navigable segment and the length of the overall length of the river

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<sup>534</sup> *Id.*

<sup>535</sup> *Id.*

<sup>536</sup> *Id.*

<sup>537</sup> See *United States v. Utah*, 283 U.S. 64, 77-80 (1931); see also *Oklahoma v. Texas*, 258 U.S. 574, 589 (1922).

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> *Id.* at 1230-31.

<sup>541</sup> *PPL Montana*, 229 P.3d at 449 (quoting *United States v. Utah*, 283 U.S. at 77).

<sup>542</sup> *Id.*

<sup>543</sup> *PPL Montana*, 132 S. Ct. at 1230.

would not be proper.<sup>544</sup> Rather, the focus should be on factors that were more relevant to ownership and title, such as the “inadministrability of parcels of exceedingly small size, or worthlessness of parcels due to overdivision.”<sup>545</sup> The Court concluded its analysis of this issue by pointing out that one of the areas in dispute, the non-navigable Great Falls reach, was not *de minimis* under this test since its value as a site for hydroelectric power generation facilities, according to the State of Montana, amounted to millions of dollars.<sup>546</sup>

The Court then considered the relationship of portage to the issue of navigability for purposes of title. The Montana court had concluded that the Great Falls reach was navigable for title purposes because rapids and other obstructions could be overcome by transporting boats or cargo around them by a land route.<sup>547</sup> In doing so, the court relied heavily on the accounts of Lewis and Clark who transported their supplies and canoes about eighteen miles overland in order to avoid rapids on the Great Falls reach.<sup>548</sup> The Montana court also relied on *The Montello*<sup>549</sup> for the proposition that a river can still be navigable even though portage around obstructions is sometimes necessary, as long as it can serve as a highway for commerce.<sup>550</sup> However, the Supreme Court responded by reasoning that the Montana court’s reliance on *The Montello* was misplaced.<sup>551</sup> According to the Court, *The Montello* decision was concerned with whether the river in question was “navigable water of the United States” for regulatory purposes.<sup>552</sup> For this purpose, a river was considered navigable if it “forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other states or foreign countries in the customary modes in which such commerce is conducted by water.”<sup>553</sup> Thus, commercial transport did not have to be entirely by water; the “highway of commerce” could have land-based segments also as long as the overall route enabled goods to be transported from one state to another.<sup>554</sup> However, this was not the case when navigability was used to determine title because those portions of a river

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<sup>544</sup> *Id.* at 1231.

<sup>545</sup> *Id.* at 1230-31.

<sup>546</sup> *Id.* at 1231.

<sup>547</sup> See *PPL Montana*, 229 P.3d at 447, 449.

<sup>548</sup> *PPL Montana*, 132 S. Ct. at 123; see also, *PPL Montana*, 229 P.3d at 447.

<sup>549</sup> 87 U.S. 430 (1874).

<sup>550</sup> *PPL Montana*, 229 P.3d at 446.

<sup>551</sup> *PPL Montana*, 132 S. Ct. at 1231.

<sup>552</sup> *Id.*

<sup>553</sup> See *The Montello*, 87 U.S. at 439 (citing *The Daniel Ball*, 77 U.S. 557 (1870)).

<sup>554</sup> *PPL Montana*, 132 S. Ct. at 1232.

that required portage were by definition non-navigable.<sup>555</sup> Since the seventeen-mile Great Falls reach required portage, the Court concluded that it must not be navigable for title purposes.<sup>556</sup> In addition, the Court found that portions of the Clark Fork River were probably not navigable either.<sup>557</sup>

The next issue was whether it was appropriate for the Montana court to rely on evidence of present-day recreational use to determine that the Madison River was navigable. The Court cautioned that evaluating navigability for title purposes must be based on the natural condition of the river at the time of statehood and it must concern itself with the river's susceptibility for use in "trade or travel."<sup>558</sup> Evidence of present-day use might be relevant to whether a river was capable of commercial navigation at the time of statehood.<sup>559</sup> However, a party who relies on present-day usage to prove navigability for title purposes must show that present-day watercraft "are meaningfully similar to those in customary use for trade and travel at the time of statehood" and the physical condition of the river has not changed significantly since statehood.<sup>560</sup> The Court concluded that the Montana court had made these findings of fact before relying on evidence of present-day usage to conclude that the Madison River was navigable for title purposes.<sup>561</sup>

Addressing the recreational use issue, the Court found that recreational fishing boats, such as inflatable rafts, lightweight canoes, and kayaks commonly made use of the river.<sup>562</sup> However, there was no evidence that the modern watercraft now navigating the Madison River were similar to the vessels that would have been used for trade or travel at the time of statehood.<sup>563</sup> In particular, the Court observed, the Montana court had not made any determination about whether modern recreational boats could "navigate waters much more shallow or with rockier beds than the boats customarily used for trade and travel at statehood."<sup>564</sup> In addition, the Court concluded that the Montana court had ignored evidence that the physical condition of the river had changed significantly since the time of statehood.<sup>565</sup> Specifically, the state court discounted evidence by PPL Montana's expert witness that

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<sup>555</sup> *Id.*

<sup>556</sup> *Id.*

<sup>557</sup> *Id.* at 1232-33.

<sup>558</sup> *Id.* at 1233.

<sup>559</sup> *PPL Montana*, 132 S. Ct. at 1233.

<sup>560</sup> *Id.*

<sup>561</sup> *Id.* at 1234.

<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> *PPL Montana*, 132 S. Ct. at 1234.

<sup>565</sup> *Id.*

dams constructed across the river may have smoothed out its flowage patterns, causing it to become “less torrential” in high flow periods and less shallow in low flow periods.”<sup>566</sup> This evidence suggested that the river might be easier to navigate at the present time than it was at the time of statehood.<sup>567</sup>

Finally, PPL Montana presented evidence that physical changes in the river had made present-day navigation easier than it had been at the time of statehood.<sup>568</sup> The Montana court had apparently discounted this evidence because it reasoned that the river did not have to be navigable at all times of the year.<sup>569</sup> The Court agreed, but pointed out that periods of navigability could not be so brief that commercial use of the river was practical.<sup>570</sup> For these reasons, the Court held that evidence of present-day recreational use in this case was not sufficient to establish navigability for title purposes.<sup>571</sup>

The last issue before the Court was the potential effect of its holding on the public trust doctrine. Montana contended that denying the State’s title to the riverbeds in question impaired its ability to protect the public’s right to fishing, navigation, and other recreational uses through the exercise of the public trust doctrine.<sup>572</sup> In response, the Court distinguished between the equal footing doctrine and the public trust doctrine. The Court pointed out that the equal footing doctrine was based on federal constitutional law principles.<sup>573</sup> In contrast, the public trust doctrine was a principle of state law and was therefore not dependent on federal law.<sup>574</sup> According to the Court, states were free to determine the scope of the public trust doctrine within their borders independently of ownership of riverbeds.<sup>575</sup>

#### *D. The Significance of the PPL Montana Decision*

In *PPL Montana*, the Court settled several troublesome issues involving the relationship between navigability and the ownership of submerged lands. First, it reaffirmed the traditional test of navigability for title set forth in *Oklahoma v. Texas*,<sup>576</sup> *United States v. Holt State*

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<sup>566</sup> *Id.*

<sup>567</sup> *Id.*

<sup>568</sup> *Id.*

<sup>569</sup> *PPL Montana*, 132 S. Ct. at 1234.

<sup>570</sup> *Id.*

<sup>571</sup> *Id.*

<sup>572</sup> *Id.*

<sup>573</sup> *Id.* at 1235.

<sup>574</sup> *PPL Montana*, 132 S. Ct. at 1235.

<sup>575</sup> *Id.*

<sup>576</sup> 258 U.S. 574 (1922).

*Bank*,<sup>577</sup> *United States v. Utah*,<sup>578</sup> and *Utah v. United States*.<sup>579</sup> In doing so, the Court rejected the more expansive navigability test adopted by the Montana court. Second, the Court held that navigability and, therefore, ownership of submerged lands, should be determined on a segment-by-segment basis. This holding contrasted with the more holistic approach proposed by the Montana court. Finally, the Supreme Court acknowledged that the states did not necessarily have to own the beds beneath lakes and streams in order to protect public rights or the environment. The public trust doctrine and traditional state police powers were adequate for this purpose.

The Montana Supreme Court and the United States Supreme Court disagreed about which test of navigability to apply in order to determine title to submerged beds. Based on its interpretation of the Supreme Court's holding in *The Montello*, the Montana court declared that a river would be characterized as navigable-in-fact, including those portions that were actually not navigable, if the river as a whole served as a channel for commercial traffic. Thus, the river retained its navigable character even though rapids and other physical conditions required travelers to leave the river and transport themselves and their goods around these obstructions. In contrast, the Supreme Court reaffirmed the traditional test of navigability for title based on the following principles: First, the river or lake must be capable of *commercial* navigation using customary modes of travel. Second, this capability for commercial navigation must be based on the *natural* condition of the lake or river. Third, the capacity for navigation is determined once and for all at the time of statehood.

The Court was correct in concluding that the Montana court's approach, which was based on the *Montello* test of navigability for purposes of federal regulatory power under the Commerce Clause, was not an appropriate test for determining ownership of riverbeds. The *Montello* test was formulated to support an expansive test of federal regulatory power. Consequently, the *Montello* test suggested that lakes and rivers that were not presently navigable could become so as the result of changes in physical conditions or manmade improvements to navigation. In contrast, the United States Supreme Court's approach is better suited for defining property rights. In particular, the conclusion that a river or lake's capacity for navigation is determined at the time of statehood is appropriate so that changes in navigable capacity that occur after statehood will not affect property rights in the bed.

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<sup>577</sup> 270 U.S. 49 (1926).

<sup>578</sup> 283 U.S. 64 (1931).

<sup>579</sup> 403 U.S. 9 (1971).



The Montana court and the Supreme Court also differed in their treatment of segmentation. Relying on its interpretation of *United States v. Utah*,<sup>580</sup> the Montana court declared that a segmentation approach might be applied to “long reaches” of a river, but that it should not be applied to “short interruptions” of navigability.<sup>581</sup> However, the Supreme Court opted for a more liberal view of segmentation. According to the Supreme Court, the principal justification for the Montana court’s approach was that it would be easier for the state to protect the public right of navigation along a predominantly navigable stream if private landowners were prevented from acquiring property rights in the streambed.<sup>582</sup> However, the Court concluded that if riparian owners built obstructions on the riverbed, the states could protect navigation and commerce through the exercise of their police power.<sup>583</sup> The Court also pointed out that physical considerations supported a more liberal approach to segmentation.<sup>584</sup> According to the Court, physical conditions that affected navigability might vary significantly over the length of a river and these physical conditions would allow for navigable and non-navigable segments to be identified with relative ease.<sup>585</sup> The Court was also skeptical of the notion that the existence of “worthless or inadministrable” portions of the riverbed would make it difficult to determine ownership of these submerged lands under the equal footing doctrine.<sup>586</sup>

Finally, the *PPL Montana* decision raises the question of whether there is any real connection of navigability, ownership of submerged lands, and the protection of public rights in rivers, lakes, and streams. The Montana court reasoned that a navigability test that vested ownership of submerged lands in the state would enable it to better protect against the creations of obstructions by private owners. The Supreme Court, on the other hand, reasoned that state ownership was not necessary to protect the rights of the public. Recently, Professor Robert Adler has written that navigability, especially navigability for commercial purposes, is less relevant in the twenty-first century than it was in the nineteenth. While commercial navigation along America’s rivers is still important to the nation’s economy, it is a poor proxy for other public values such as water supply, biodiversity and habitat, fish and wildlife protection, recreational use, flood control, and pollution

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<sup>580</sup> 283 U.S. 64 (1931).

<sup>581</sup> *PPL Montana*, 229 P.3d at 448-49.

<sup>582</sup> *PPL Montana*, 132 U.S. at 1230.

<sup>583</sup> *Id.*

<sup>584</sup> *Id.*

<sup>585</sup> *Id.*

<sup>586</sup> *Id.* at 1231.

assimilation.<sup>587</sup> Instead, Professor Adler suggests that the public trust doctrine and related concepts, rather than navigability (and title to submerged lands) are more useful tools to enable states to protect these other public interests.

In the final analysis, the dispute between the State of Montana and the power company was not so much about protecting navigability as it was about money. The hydroelectric dams obstructed “navigation” on the Missouri, Clark Fork, and Madison Rivers. It was also obvious that, whatever the outcome of the case, no one expected the dams to be removed. The only issue was whether PPL Montana would have to pay the state millions of dollars to continue to operate these facilities. The Supreme Court’s adoption of a segmentation approach ensured that PPL Montana would not have to pay twice for the privilege of operating power plants on these rivers.

## VI. CONCLUSION

In its recent decision in *PPL Montana v. Montana*, the United States Supreme Court distinguished between the tests of navigability that were used to determine federal regulatory jurisdiction in admiralty and Commerce Clause cases, and the test of navigability that has been used to determine title to submerged lands under the equal footing doctrine.<sup>588</sup> The Court stated that the navigability test used to determine the scope of federal regulatory power was not appropriate to determine the title to submerged lands under the equal footing doctrine.<sup>589</sup> Instead, the Court concluded that navigability and title to submerged beds should be determined under the traditional rule that focused on a river or lake’s capacity for commercial navigation at the time of statehood. In addition, the Court ruled that such determinations should be made on a tract-by-tract basis.<sup>590</sup> In doing so, the Court advanced the interests of the federal government and private landowners at the expense of the states. While at first blush the *PPL Montana* decision appears to represent a defeat for environmental interests, in reality it may be viewed as an acknowledgement that concepts like the public trust doctrine are better suited to protect water resources, fish and wildlife, recreation, and water quality than navigability or state ownership of submerged lands.

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<sup>587</sup> See ROBERT W. ADLER, *THE ANCIENT MARINER OF CONSTITUTIONAL LAW: THE DECLINING ROLE OF NAVIGABILITY* 6-7 (2012).

<sup>588</sup> See *PPL Montana*, 132 S. Ct. at 1231-32.

<sup>589</sup> *Id.* at 1232.

<sup>590</sup> *Id.* at 1230.