

No. 10-218

In The
Supreme Court of the United States

—◆—
PPL MONTANA, LLC,
Petitioner,
v.
STATE OF MONTANA,
Respondent.

—◆—
**On Writ of Certiorari to the
Supreme Court of the State of Montana**

—◆—
**BRIEF OF *AMICI CURIAE* CALIFORNIA
SPORTFISHING PROTECTION ALLIANCE,
BIG BLACKFOOT RIVERKEEPER, NORTH COAST
RIVERS ALLIANCE, AND KLAMATH FOREST
ALLIANCE IN SUPPORT OF RESPONDENT**

—◆—
STEPHAN C. VOLKER*
JOSHUA A.H. HARRIS
JAMEY M.B. VOLKER
M. BENJAMIN EICHENBERG
LAW OFFICES OF STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, California 94612
Telephone: (510) 496-0600
Facsimile: (510) 496-1366
svolker@volkerlaw.com
**Counsel of Record*
Attorneys for Amici Curiae
California Sportfishing Protection
Alliance, Big Blackfoot Riverkeeper,
North Coast Rivers Alliance, and
Klamath Forest Alliance

TABLE OF CONTENTS

	Page
INTERESTS OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT.....	4
I. NAVIGATION	4
A. The Definition of Navigability Has Been and Should Continue to Be Broadly Construed	6
1. The Party Challenging a State’s Sov- ereign Property Rights Bears the Burden of Proof	6
2. Commercial Use Includes All Sus- ceptible Uses at Statehood and Should Be Liberally Construed	7
B. Navigability-in-Fact, Rather than Nav- igability Segment-by-Segment, Is the Correct Test	7
1. The Court’s Navigability-in-Fact Test – Relied on by the Montana Supreme Court – Is More Than 100 Years Old and Its Application Has Not Changed.....	8
2. Under the Navigability-in-Fact Test, Courts Determine the Navigability of and Title to the Whole River, Not Just Particular Loci in Quo	10

TABLE OF CONTENTS – Continued

	Page
3. Under the Navigability-in-Fact Test, Interruptions in Navigable Rivers Do Not Defeat State Title	13
4. Petitioner’s Segment-by-Segment Approach Would Destroy Settled Property Rights Expectations.....	17
C. Public Policy Favors Public Ownership of All But the Most Obviously Non-Navigable Waterways.....	18
II. TAKINGS	21
III. DUE PROCESS	28
IV. PREEMPTION.....	30
CONCLUSION.....	32

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936).....	27
<i>Barney v. Keokuk</i> , 94 U.S. 324 (1876).....	10
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972).....	25
<i>Brewer-Elliott Oil & Gas Co. v. United States</i> , 260 U.S. 77 (1922).....	12
<i>Brinkerhoff-Faris Trust & Savings Co. v. Hill</i> , 281 U.S. 673 (1930).....	26
<i>Broad River Power Co. v. South Carolina</i> , 281 U.S. 537 (1930).....	30
<i>Chandler v. Florida</i> , 449 U.S. 560 (1981).....	28
<i>Fox River Paper Co. v. Railroad Comm'n</i> , 274 U.S. 651 (1927).....	26, 30
<i>Great Northern Railway Co. v. Sunburst Oil & Refining Co.</i> , 287 U.S. 358 (1932)	26
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U.S. 261 (1997).....	5, 18
<i>Idaho v. U.S.</i> , 533 U.S. 262 (2001).....	6
<i>Illinois Central Railroad Co. v. Illinois</i> , 146 U.S. 387 (1892).....	13
<i>Jean v. Nelson</i> , 472 U.S. 846 (1985).....	27
<i>Kaiser Aetna v. U.S.</i> , 444 U.S. 164 (1979)	24, 25
<i>Leo Sheep Co. v. United States</i> , 440 U.S. 668 (1979).....	17, 18

TABLE OF AUTHORITIES – Continued

	Page
<i>Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs</i> , 113 U.S. 33 (1885).....	27
<i>Lyng v. Northwest Indian Cemetery Protective Assn.</i> , 485 U.S. 439 (1988).....	27
<i>Martin v. Waddell</i> , 41 U.S. 367 (1842).....	8
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985).....	31
<i>Oklahoma v. Texas</i> , 258 U.S. 574 (1922).....	12
<i>Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.</i> , 429 U.S. 363 (1977).....	5, 26
<i>Phillips Petroleum Co. v. Mississippi</i> , 484 U.S. 469 (1988).....	9, 11
<i>Pollard v. Hagan</i> , 44 U.S. (3 How.) 212 (1845).....	9, 21
<i>Shively v. Bowlby</i> , 152 U.S. 1 (1894).....	13
<i>St. Anthony Falls Water Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.</i> , 168 U.S. 349 (1897).....	7, 14
<i>Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.</i> , 130 S.Ct. 2592 (2010).....	<i>passim</i>
<i>The Daniel Ball</i> , 77 U.S. 557 (1870).....	4, 5, 7, 9
<i>The Montello</i> , 87 U.S. 430 (1874).....	7, 10, 14
<i>Three Affiliated Tribes of Fort Berthold Reser- vation v. Wold Engineering, P.C.</i> , 467 U.S. 138 (1984).....	27
<i>Tidal Oil Co. v. Flanagan</i> , 263 U.S. 444 (1924)....	26, 30

TABLE OF AUTHORITIES – Continued

	Page
<i>U.S. v. Appalachian Elec. Power Co.</i> , 311 U.S. 377 (1940).....	7, 14
<i>U.S. v. Cress</i> , 243 U.S. 316 (1917).....	25
<i>U.S. v. Holt State Bank</i> , 270 U.S. 49 (1926).....	7, 9, 10
<i>U.S. v. Rio Grande Dam & Irrigation Co.</i> , 174 U.S. 690 (1899).....	11
<i>U.S. v. Utah</i> (“ <i>Utah I</i> ”), 283 U.S. 64 (1931)	<i>passim</i>
<i>Utah Div. of State Lands v. United States</i> , 482 U.S. 193 (1987).....	5
<i>Utah v. United States</i> (“ <i>Utah II</i> ”), 403 U.S. 9 (1971).....	9
<i>Webb’s Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980).....	25
<i>Whitehouse v. Illinois Central R. Co.</i> , 349 U.S. 366 (1955).....	27
<i>Wisconsin Pub. Serv. Corp. v. FPC</i> , 147 F.2d 743 (1945).....	7

STATE CASES

<i>Brown v. Chadbourne</i> , 31 Me. 9 (1849)	15
<i>PPL Montana, LLC v. State of Montana</i> , 355 Mont. 402 (2010).....	10, 12, 16, 23, 31

STATE STATUTES

Mont. Code Ann. § 70-28-109	29
-----------------------------------	----

INTERESTS OF THE *AMICI CURIAE*¹

Amici are environmental organizations with significant experience in studying, managing and protecting natural and developed river resources in the states of California, Oregon, and Montana. They are the California Sportfishing Protection Alliance, Big Blackfoot Riverkeeper, North Coast Rivers Alliance, and Klamath Forest Alliance (collectively, “Western Conservation Organizations”). *Amici* are not affiliated with any party to this action, and write solely to offer an environmental perspective on the significant issues of public ownership and use of the nation’s waterways at stake in this dispute.

Amicus California Sportfishing Protection Alliance (“CSPA”) is a non-profit public benefit corporation organized under the laws of California to preserve California’s public-trust fishery resources and enforce the state and federal laws that protect them. CSPA’s members use northern California rivers for sport and commercial fishing, aesthetic enjoyment, nature study, boating, and swimming, and are concerned about the adverse effect that privatization of public trust resources could have on California rivers and their fish and wildlife.

¹ All petitioners and respondents have consented to the filing of *amicus* briefs, in support of either party or of neither party. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

Amicus Big Blackfoot Riverkeeper (“BBRK”) is a non-profit organization affiliated with the internationally acclaimed Waterkeeper Alliance, a water advocacy organization fighting for everyone’s right to clean and freely accessible water. BBRK is dedicated to the protection and preservation of one of the most beautiful rivers on earth—western Montana’s Big Blackfoot River, a major tributary of the Clark Fork River. BBRK’s specific mission is to preserve and protect the Big Blackfoot River in its natural state, including what’s on the water, in the water, under the water, and near the water, both for the public’s enjoyment today and for generations to come.

Amicus North Coast Rivers Alliance (“NCRA”) is an unincorporated association of conservation leaders from throughout the north coast of California engaged in the submission of comments and expert testimony on land and water resource management issues. NCRA seeks compliance by local, state and federal agencies and private industry with state and federal environmental laws. NCRA’s members use California’s north coast rivers for fishing, boating, swimming and scientific study, and are concerned about the proper management of public trust resources and the fish and wildlife dependent on them.

Amicus Klamath Forest Alliance (“KFA”) is a non-profit public benefit corporation organized under the laws of California to promote sustainable forest ecosystems and economies in northern California and southwest Oregon through public education, advocacy and litigation. KFA’s members use the mountains,

forests, lakes and rivers of the region for nature study, fishing, boating, hiking, photography, and aesthetic enjoyment. They are concerned about the adverse effects that privatization of vital public trust resources will have on the rivers of the Cascade ranges of northern California and southwest Oregon.



SUMMARY OF ARGUMENT

The Court granted certiorari to address the navigability-in-fact test as applied by the Montana Supreme Court to determine whether the Equal Footing Doctrine grants the State of Montana title to submerged riverbed lands. Public trust principles have traditionally granted citizens of the United States the right to enjoy fisheries, conduct commerce, and transport people and goods along its navigable waters. The public's use and enjoyment of navigable waters are an essential attribute of statehood under the United States Constitution.

Public trust lands are provided with additional protections extending beyond commerce, navigation, and fisheries. Western Conservation Organizations believe that the public trust lands in their respective states also provide protection for a variety of public values, including ecosystem and fisheries protection and public recreation. It is of the utmost importance to these values that a stable, rational, and comprehensive scheme of property law apply to the entirety of the riverbeds in question. This scheme is already in

place through state ownership of the riverbeds under navigable waterways.

Highly fragmented ownership of riverbeds would lead to poor resource management and have a significant negative impact on the public trust resources that Western Conservation Organizations monitor and protect. Contrary to petitioner's contentions, the Montana Supreme Court correctly construed the navigability-in-fact test as it has been construed for hundreds of years. Any departure from the precedent represented by the Supreme Court of Montana's decision represents a major threat to settled property interests and public trust resources throughout the United States, and especially in the West. Nor is it proper to raise arguments regarding judicial takings, due process, and preemption at this stage when such arguments were waived by petitioner and, moreover, have no rational bearing on the facts currently before the Court.



ARGUMENT

I. NAVIGATION

This case affords this Court an opportunity to reaffirm nearly two centuries of jurisprudence according respect and deference to state ownership of rivers that were susceptible to commerce and travel at the moment of statehood. As this Court observed in the seminal case of *The Daniel Ball*,

The test for title navigability has been consistently described as including the following: [R]ivers 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.

Id., 77 U.S. 557, 563 (1870). The public's rights to own and utilize navigable rivers in all but the original 13 states are protected by the Equal Footing Doctrine, which holds that all lands underlying navigable waters should be considered "sovereign lands" of these states and that state ownership of them is "considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). These rights are "conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). State ownership of such lands is "infused with a public trust the State itself is bound to respect." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283-86 (1997).

Here petitioner asks this Court to eliminate state ownership of multiple segments of the Missouri, Madison, and Clark Fork rivers in Montana so that it can avoid paying the state for petitioner's private use of the state's sovereign lands. In so doing, petitioner asks the Court to depart from centuries of settled

jurisprudence and impose a very narrow reading of the term “navigability” that requires onerous segment-by-segment analyses of each river’s navigability. Petitioner’s request that the Court rewrite the long-standing rules defining state ownership of lands underlying navigable waters should be denied, as discussed below.

A. The Definition of Navigability Has Been and Should Continue to Be Broadly Construed

1. The Party Challenging a State’s Sovereign Property Rights Bears the Burden of Proof

Petitioner argues that Montana must affirmatively demonstrate navigability. If it does not do so, according to petitioner, the riverbed must be deemed non-navigable and therefore subject to private ownership. Petitioner, however, ignores the well established presumption that favors state ownership. As the Court has explained, “[a] court deciding a question of title to the bed of navigable water must . . . begin with a *strong presumption* against defeat of a State’s title.” *Idaho v. U.S.*, 533 U.S. 262, 272-73 (2001), citation omitted, emphasis added.

2. Commercial Use Includes All Susceptible Uses at Statehood and Should be Liberally Construed

Susceptibility for commercial use is a well established test for navigability. *The Daniel Ball*, *supra*, 77 U.S. at 563, *U.S. v. Utah* (“*Utah I*”), 283 U.S. 64, 76 (1931); *U.S. v. Holt State Bank*, 270 U.S. 49, 56 (1926). This test allows and considers post-statehood evidence that shows susceptibility. *Utah I*, 283 U.S. at 82. Furthermore, the form or mode that such commerce takes is irrelevant, so long as the river is susceptible of being used as a highway for commerce. *Id.* at 76; *see also*, *St. Anthony Falls Water Power Co. v. Board of Water Com’rs of City of St. Paul, Minn.*, 168 U.S. 349, 359 (1897) (floating logs suffice); *The Montello*, 87 U.S. 430, 441 (1874) (lumber rafts suffice); *Wisconsin Pub. Serv. Corp. v. FPC*, 147 F.2d 743, 746 (1945) (same); *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940) (recreational boat use suffices).

B. Navigability-in-Fact, Rather than Navigability Segment-by-Segment, Is the Correct Test

Petitioner asks the Court to “confirm the controlling federal test for determining navigability for title purposes,” but instead it argues for the creation of a new and *incorrect* test. Petitioner’s Brief (“Pet’r Brief”) at 33. Petitioner would have the Court adopt an unprecedented “segment-by-segment approach” under which (1) courts may only determine

navigability with respect to particular “loc[us] in quo,” as opposed to the entire waterway, and (2) obstructions to navigation would require that rivers be split into navigable and non-navigable sections as short as 4.35 miles, with the states losing title to *all* non-navigable portions. Pet’r Brief at 41. Not only would adoption of such an extreme test require that the Court depart from its long-established navigability test, it would eviscerate settled expectations regarding title to and rights to use the beds under navigable waters and substantially impair the ability of states to manage their waterways for the good of the public and the environment. The Court should reject petitioner’s attempt to upend the Court’s bedrock jurisprudence on state sovereignty and the public trust. Instead, the Court should affirm that the Montana Supreme Court relied on the proper navigability-in-fact test for determining title to submerged lands.

1. The Court’s Navigability-in-Fact Test – Relied on by the Montana Supreme Court – Is More Than 100 Years Old and Its Application Has Not Changed

After the American Revolution, each of the original 13 states succeeded to the “absolute right to all of their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.” *Martin v. Waddell*, 41 U.S. 367, 410 (1842). And as early as 1845, the Court held that, upon admission to the Union, each new state

would receive the same trust ownership of lands beneath navigable waters. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). Soon thereafter, the Court established a test for the navigability of non-tidal rivers that it has adhered to since in determining state ownership of submerged lands – the “navigability-in-fact” test. In *The Daniel Ball*, more fully quoted above, the Court held that non-tidal rivers “are navigable-in-fact when they are used . . . as highways for commerce.” *Id.*, 77 U.S. at 563.

Since *The Daniel Ball*, the Court has consistently held that this “navigable-in-fact” test is the correct measure in determining state ownership of submerged lands. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 488-89 (1988); *Utah v. United States* (“*Utah II*”), 403 U.S. 9, 10-11 (1971); *Utah I*, 283 U.S. at 76 (1931); *Holt State Bank*, 270 U.S. at 56. The test is traditionally applied to the *entire* intrastate reach of a given waterway. Furthermore, it is applied liberally in favor of finding navigability and thus state ownership:

[T]he true test of the navigability of a stream *does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation*. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. . . . *Indeed there are but few of our fresh-water rivers which did*

not originally present serious obstructions to an uninterrupted navigation.

The Montello, 87 U.S. at 441 (emphasis added).

Petitioner claims that *The Montello* is inapplicable for determining title navigability because it “addressed *regulatory* navigability,” and thus that the Montana Supreme Court erred “by placing undue emphasis” on the case. Pet’r Brief at 42. Petitioner is wrong. The Court has repeatedly applied the principles laid down in *The Montello* to determine state title to submerged lands. *Utah I*, 283 at 76; *Holt State Bank*, 270 U.S. at 56; *Barney v. Keokuk*, 94 U.S. 324, 337 (1876). The Montana Supreme Court therefore correctly applied the navigability-in-fact test as described in *The Montello* in determining that the Montana reaches of the Madison, Clark Fork and Missouri Rivers were navigable at the time of statehood. *PPL Montana, LLC v. State of Montana*, 355 Mont. 402, 446-47, 449 (2010).

2. Under the Navigability-in-Fact Test, Courts Determine the Navigability of and Title to the Whole River, Not Just Particular Loci in Quo

Petitioner argues that the Montana Supreme Court should not have determined the navigability of and title to the full reaches of the Madison, Clark Fork and Missouri Rivers in Montana. Instead, petitioner contends that the court should have used a “segment-by-segment approach” to determine

“navigability [*only*] at the ‘locus in quo,’” *i.e.*, the sites of the various projects operated by petitioner on the three rivers. Pet’r Brief at 41. According to petitioner, “title navigability depends on the navigability not of the river as a whole but of the particular river segment at issue.” Pet’r Brief at 33. Petitioner is wrong.

“The question of whether a body of water is navigable is answered waterway by waterway, not inch by inch.” *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 490 (1988) (O’Connor, J., dissenting). Answering this question requires “determin[ing] upon the evidence, how far navigability extends” along the waterway, but it does *not* allow for segment-by-segment determinations. *Utah I*, 283 U.S. at 77; *see also, U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (even where it is generally accepted that a river is navigable, it must still be determined “at what particular place between its mouth and its source navigability ceases”). Thus, in *Utah I*, the Court reviewed the navigability of the Colorado, Green, Grand, and San Juan rivers over their *entire* reaches in Utah. *Id.* at 73-74, 90.

Petitioner misreads *Utah I* as supporting the proposition that courts may make navigability determinations on river segments as short as 4.35 miles. The issue in *Utah I* was not whether a 4.35 mile section of the Colorado River was navigable by itself. Rather, the issue with respect to that 4.35 mile stretch was the location of “the exact point at which navigability may be deemed to end [along the

Colorado River], in the approach to Cataract Canyon.” *Utah I*, 283 U.S. at 90.

Petitioner’s reliance on *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922) and *Oklahoma v. Texas*, 258 U.S. 574 (1922) to support its “locus in quo” approach likewise fails. Pet’r Brief at 38-39. Neither of these cases involves non-navigable segments *within* a navigable river. Rather, the issue in both cases was whether the riverbeds at issue were located above or below the font of river navigability. In *Brewer-Elliott*, the Court determined that the river beds at issue were located in the non-navigable upper reaches of the Arkansas River above “the head of navigation[, which] is and was the mouth of the Grand River.” 260 U.S. at 86. In *Oklahoma*, the Court addressed the similar issue of “how far up the [Red River] navigability extended,” and found that the beds at issue were located in the non-navigable reaches of the river above the head of navigation. 258 U.S. at 584.

In sum, the Montana Supreme Court was correct in determining navigability for title with respect to the *entire* Montana reaches of the Madison, Clark Fork and Missouri rivers. *PPL Montana, LLC*, 355 Mont. at 449.

3. Under the Navigability-in-Fact Test, Interruptions in Navigable Rivers Do Not Defeat State Title

Petitioner argues that “the Montana Supreme Court [improperly] rejected ‘a piecemeal classification of navigability – with some stretches declared navigable and others declared non-navigable.’” Pet’r Brief at 40 (quoting *PPL Montana, LLC*, 355 Mont. at 441). Petitioner contends that interruptions of navigability in the middle of navigable rivers defeat state title to those obstructed regions. Petitioner is wrong again.

The Court has made clear that “the navigable waters and the soils under them . . . *shall not be disposed of piecemeal to individuals as private property*, but shall be held for the purpose of being ultimately administered and dealt with for the public benefit by the State.” *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894). Petitioner’s suggested “segment-by-segment” approach would directly contravene this mandate and violate the Public Trust Doctrine by allowing private parties to take ownership of the beds under all river segments that were non-navigable at statehood. With alternating sections of public and private ownership, the “people of the State[s] [would be prevented from] enjoy[ing] the navigation of the waters, carry[ing] on commerce over them, and hav[ing] liberty of fishing therein *freed from the obstruction or interference of private parties.*” *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452 (1892).

The Court has heretofore protected the public's rights in the navigable waters and the lands underneath them by rejecting the "segment-by-segment" approach proffered by petitioner, and holding instead that state title to the beds of navigable rivers extends to obstructed areas encompassed within them. As the Court stated in *The Montello*:

Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.

87 U.S. at 443; see also, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 409 n.34 (1940) ("[t]here has never been doubt that the navigability referred to in [*Utah I* and *The Montello*] was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents"); *St. Anthony Falls Water Power Co. v. Board of Water Commissioners*, 168 U.S. 349, 359 (holding that the Mississippi River was navigable in fact throughout the stretch that includes St. Anthony Falls, even though "the river at this point was not navigable at ordinary stage of

water for half a mile below [the falls . . . and] was not navigable immediately above the falls”); *Brown v. Chadbourne*, 31 Me. 9, 23 (1849) (holding that a river is navigable in fact despite “rocks falls and other obstructions” and that a “rigid and severe” test of navigability “would annihilate the public character of all our fresh rivers, for many miles of their course”).

Petitioner cites *Utah I* as “exemplif[ying] the segment-by-segment approach” because it “dealt separately with stretches within [the specific river sections at issue] that had distinct topographical characteristics.” Pet’r Brief at 36-37. Yet of the four rivers whose navigability the Court determined in *Utah I*, the lone river “segment” that the Court addressed separately from the rest of the river was the 36- to 40-mile Cataract Canyon stretch on the Colorado River. The only reason the Court analyzed the Cataract Canyon segment separately was because it presented the anomalous case of being so long and forbidding as to preclude all potential commercial passage, *including by portage*. Indeed, as the United States admits, “Cataract Canyon could not be fully portaged, at least not without bypassing the canyon altogether.” United States’ Brief (“U.S. Brief”) at 23-24 (citing Report of the Special Master at 126-27, *Utah II*, 283 U.S. 64 (No. 14, Original)).

Here, by contrast, Montana adduced evidence of the navigability of the *entire* reach of the Missouri, Clark Fork and Madison rivers in Montana, because the entirety of those reaches was susceptible of riverborne commerce, including portages, at the moment

of statehood. *PPL Montana, LLC*, 355 Mont. at 439. There is no evidence of anything but “short interruption[s] of navigability” on the three rivers. *Utah I*, at 77. For example, the primary river segment petitioner highlights as being non-navigable at statehood is the 17-mile Great Falls Reach of the Missouri River. Pet’r Brief at 40, 42. Yet not only is that stretch *less than half as long* as the portion of the Colorado River deemed non-navigable in *Utah I* (Cataract Canyon), it *was successfully portaged decades prior to statehood* by the Lewis and Clark expedition, thus providing an uninterrupted highway for commerce. *PPL Montana, LLC*, 355 Mont. at 440. By contrast, and distinguishing the present case from *Utah I*, Cataract Canyon was impassable *even by portage*.

The Court’s precedents and the evidence here make clear that the Montana Supreme Court’s “whole-river” navigability determination for the Montana sections of the Missouri, Clark Fork and Madison rivers was entirely correct despite the putative existence of non-navigable stretches on those rivers at statehood. The Court should not now veer from the long-established rule that interruptions in navigable rivers do not defeat state title. Instead, it should reject petitioner’s attempts to eviscerate these bed-rock principles of state sovereignty and thereby protect the public trust.

4. Petitioner’s Segment-by-Segment Approach Would Destroy Settled Property Rights Expectations

Petitioner and the United States both claim that the “inconsistent outcomes that would inevitably arise [from a whole-river approach to determining navigability for title purposes] would dramatically undermine ‘the special need for certainty and predictability where land titles are concerned.’” Pet’r Brief at 36 (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979)); U.S. Brief at 18 (also quoting *Leo Sheep*, 440 U.S. at 687-88). Petitioner and the United States have it backwards. As noted, the Court and other courts throughout the United States have consistently applied a whole-river, navigability-in-fact approach since at least the 1800s. Yet petitioner and the United States *have not identified a single “inconsistent outcome”* that has arisen from the application of the traditional navigability-in-fact test over that period of more than 100 years.

To the contrary, and as discussed below, it is basic common sense that certainty and predictability regarding the title to a riverbed are much greater where a court determines the navigability of the entire river expanse in a single ruling rather than determining the navigability of bits and pieces of the river over the course of hundreds of years. Indeed, it is for precisely this reason that the Court granted certiorari in *Leo Sheep*, where it recognized the benefit of clarifying “property rights in 150 million acres of land in the Western United States” in one fell

swoop. 440 U.S. at 678. So too here, determining navigability of a river in unitary fashion assures that commerce and recreation will be protected throughout the river's length. As highways of commerce, rivers must be accessible from the beginning to the end of the passage used for public transport. Otherwise, piecemeal privatization of tiny segments would defeat the fundamental purpose of the river – to provide public access from one end of the waterway to the other.

C. Public Policy Favors Public Ownership of All But the Most Obviously Non-Navigable Waterways

The Court's decision in this case could have far reaching effects on state ownership of riverbeds across the nation and consequently on the public's access to and use of the nation's rivers for fishing, boating, recreating, and for commerce. The public's rights to access its state's river system and to use and enjoy the public trust resources therein are fundamental and ancient rights, with roots reaching back to English common law and the Magna Carta. *Idaho*, 521 U.S. at 284. Any significant limitation on these rights thus would violate centuries of established public rights.

As discussed above, the Court has historically applied a broad interpretation of the term "navigability" and a presumption of state ownership of navigable waterways. *Idaho*, 521 U.S. at 283-86

(establishing a “strong presumption of state ownership” to protect states’ “sovereign interests”). This presumption ensures that each state’s citizens will not be stripped of their long-standing rights to use and enjoy public trust resources in navigable rivers.

A ruling adopting petitioner’s narrow, piecemeal reading of “navigability” would directly threaten the public’s ancient public trust rights. Such a ruling would likely spark the filing of a plethora of lawsuits by private parties looking to lay claim to riverbed resources. Not only would these speculative lawsuits instantly destabilize settled expectations, they would clog the federal court system for decades with heavily fact-dependent disputes involving thousands of river segments and potentially millions of affected land-owners and users. Moreover, if successful, these suits would permanently eliminate the public’s right to use and enjoyment of waterways that had been previously considered public property. For these reasons, petitioner’s restrictive test of navigability should be rejected. The Court should reaffirm its longstanding and consistently broad definition of title navigability in continued recognition of the historic public ownership of all watercourses that are susceptible of use by the public.

Similarly, a ruling that courts must determine on a case-by-case basis whether small segments of otherwise navigable rivers are in fact non-navigable would destroy long-settled expectations held by state governments and the public. As with a narrow

interpretation of “navigability,” a strict segment-by-segment rule would encourage private parties to file a multitude of lawsuits seeking to establish private ownership of short river segments that had always been considered state-owned lands. If successful, the resulting segmentation of ownership would result in disruption to the public’s ability to access the entirety of the river. Additionally, segmentation of ownership would make it more difficult for states to protect the public’s interests in maintaining the water quality and habitat of downstream sections of rivers and render river management excessively complicated. Accordingly, the Court should rule that under the Equal Footing Doctrine, the western states received unitary ownership of navigable rivers, including short sections that, as here, were susceptible to portages that allowed commerce to continue around obstructions that did not impede the overall navigability of the river.

Further, a broad interpretation of navigability, including a unitary test for the river as a whole, guarantees that the western states are truly on equal footing with the original 13 states in respect of riverbed ownership. Under petitioner’s theories, mountainous western states like Montana, with rivers often disrupted by navigational barriers such as rapids and waterfalls, would be significantly disadvantaged. Their sovereign rights to the beds of navigable rivers would be diminished by frequent interruptions in ownership. States with less rugged terrain like nearby Nebraska, on the other hand,

would own more extensive and comprehensive rights to their river systems. Nebraskans would thus enjoy a higher level of public access to and protection of their waterways than would Montanans. The Equal Footing Doctrine, however, requires that all states receive the same rights of sovereign ownership over navigable rivers as was attained by the original 13 colonies. *Pollard v. Hagan*, *supra*, 44 U.S. at 228-29. These rights should not be dependent on the states' topography.

The Court should resist petitioner's call to create a new riverbed ownership regime that significantly restricts state ownership of navigable rivers and the public's attendant rights to use of those rivers. Such a system is anathema to the Equal Footing Doctrine and would violate centuries-old public rights.

II. TAKINGS

Several *amici* supporting petitioner raise the specter of a judicial taking of private property for public use without compensation under the Fifth Amendment to the United States Constitution as an argument for overturning the Montana Supreme Court's decision here. There is, quite simply, no basis on the facts currently before the Court for contending that petitioner's Fifth Amendment rights have been violated. Petitioner, for instance, chose not to pursue a takings argument, presumably because such an argument is refuted by the facts. The Court's plurality opinion in *Stop the Beach Renourishment*,

Inc. v. Florida Department of Environmental Protection, 130 S.Ct. 2592 (2010) suggesting that a judicial takings rationale might apply in a sharply different context, has led *amici* to stretch the facts of the present case in the hope of obtaining a favorable ruling. *Amici*'s facile invocation of this inchoate doctrine demonstrates the dangers of this avenue for the Court's jurisprudence: warranted under the facts of a particular case *or not*, private property owners will rush to federal courts to challenge adverse state court decisions of every stripe and color.

The Takings Clause of the Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation," a proposition which necessarily presupposes the existence of private property. Put simply, absent private property, there can be no taking. See, e.g., *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, *supra*, 130 S.Ct. at 2612 ("The Takings Clause only protects property rights as they are established under state law") (plurality opinion, unanimous concurrence with Part IV). Ignoring the threshold barrier that no private property has been shown to have existed here, several *amici* supporting petitioner have nonetheless asserted that the Montana Supreme Court's reasoned analysis of title to public trust lands under the Equal Footing Doctrine constitutes a "judicial taking." Creekside Coalition, *et al.*, *Amicus Curiae* Brief, at 27-29; Mountain States Legal Foundation, *et al.*, *Amicus Curiae* Brief, at 10-22 (sections addressing

certainty of title); Montana Farm Bureau Federation, *et al.*, *Amicus Curiae* Brief, at 26-33 (labeling the Montana Supreme Court’s ruling a “redefinition of property rights” and calling that Court’s arguments to the contrary “effete”); and Montana Water Resources Association, *et al.*, *Amicus Curiae* Brief, at 36. These arguments not only put the cart before the horse,² they also ask the Court to reach well beyond the necessities of the current case to announce sweeping new rules, rules which are not based on the facts of any particular case in controversy. *See Stop the Beach Renourishment*, 130 S.Ct. at 2615 (Kennedy, J., concurring in judgment and dissenting in part).

As explained by the majority of the briefings in the present case, *PPL Montana, LLC v. State of Montana* is a straightforward dispute over title to public trust riverbed lands. Nowhere in petitioner’s merits brief does there appear the claim that the Montana Supreme Court’s action constitutes a taking. If the Court finds that the riverbed in question did not at statehood become public trust lands under

² *Amici* Montana Farm Bureau Federation, *et al.*, for example, fret about the Montana Supreme Court’s disregard for “established property rights” without any acknowledgment that as far as the Montana Supreme Court is concerned there is no private interest in the riverbeds in question. Montana Farm Bureau Federation, *et al.*, *Amicus Curiae* Brief, at 31. Somehow, though the Montana Supreme Court squarely addressed the question of navigability *at statehood*, *Amici* Montana Farm Bureau Federation, *et al.*, proceed under the theory that a retroactive rule on navigability has been established. *Id.* at 32.

the Equal Footing Doctrine, then petitioner's private property rights would remain wholly intact and no takings analysis would be appropriate. If the Court finds that Montana's determinations of navigability for title purposes have been correct under the Equal Footing Doctrine, then petitioner has no private property interest to be taken. In other words, "insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right." *Stop the Beach Renourishment*, 130 S.Ct. at 2609. In either case recognizing a claim that petitioner itself has not pled in its merits brief would waste the Court's time or worse, make mischief as an advisory opinion detached from the facts of the case.

Amici Creekside Coalition, *et al.*, present *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) as an analogous case where "government action declaring non-navigable private property to be navigable" constitutes a taking. *Amici* Creekside Coalition, *et al.*, *Amicus Curiae* Brief, at 28. But the cart is before the horse again: the core issue in the present case concerns the test for navigability, which once determined makes any subsequent discussion of the Fifth Amendment moot. It was undisputed in *Kaiser Aetna* that Kuapa Pond, from which a navigable marina was constructed, was *non-navigable* at the time of Hawaii's statehood. *Id.* at 167 ("Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government"). Moreover, *Kaiser Aetna* concerned a federal right to

navigation, not a state claim to title. *Id.* at 170. Consequently *Kaiser Aetna* has no application to the case at bar.

Even were there the potential for a private property interest to exist despite the Montana Supreme Court's determination that the rivers at issue were navigable for title purposes at statehood, such claims should be governed by state law. Property interests in general are defined by state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). State law is particularly relevant where flowing waters and the lands beneath them are concerned: "states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks." *U.S. v. Cress*, 243 U.S. 316, 319 (1917). Therefore, private property rights would only exist in the present case to the extent they have been granted by state law. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("a mere unilateral expectation or an abstract need is not a property interest entitled to protection"). Justice Scalia acknowledged in *Stop the Beach Renourishment*, 130 S.Ct. at 2608, that "[a] property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but *accept the determination of the state*

court.”³ *Id.*, emphasis added. The Montana Supreme Court’s ruling that no private interest in the riverbed can exist under the laws of the state of Montana thus disposes of *amici*’s takings contention.

Principles of federalism militate strongly against federal courts adopting the role of watchdogs over state property rulings. *Amici* Montana Water Resources Coalition, *et al.*, makes the counterintuitive argument that principles of federalism actually *demand* that federal courts strip the states of final authority over property. The Montana Water Resources Coalition contends, without support, that federalism is “a two-way street,” and that as such the power of state courts to rule on state property law must be checked by federal power. *Amici* Montana Water Resources Coalition, *et al.*, *Amicus Curiae* Brief, at 35-36. The philosophical underpinnings of

³ This Court has consistently upheld the power of state courts to finally determine property rights under state law. *See, e.g., Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) (the mere fact of reversal of a prior ruling does not take private property); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930) (state courts are free to interpret the common law of property in accordance with changing ideas and conditions); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) (the U.S. Constitution has no say in whether new rules of state property law can be applied prospectively); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977) (states can formulate and modify rules of riparian ownership as they see fit); *Fox River Paper Co. v. Railroad Comm’n*, 274 U.S. 651, 657 (1927) (the U.S. Constitution does not protect property found by a state court to be nonexistent).

our national government, the federal Constitution and the writings of the Court, however, advise the opposite.⁴ The Founding Fathers understood that power over “the lives, liberties and properties” of the people, as well as “the internal order, improvement, and prosperity of the State,” should be reserved for individual state governments. The Federalist No. 45, at 292-93 (Clinton Rossiter ed., 1961). This philosophy is

⁴ This Court has long exercised judicial restraint where it is not actually necessary to address constitutional claims based on the facts before the Court. See, e.g., *Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372-73 (1955) (involving hypothetical injuries and claimants who at the time were not parties to the proceedings); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988) (First Amendment Establishment Clause determinations were necessary to the decisions and relief granted below, overcoming the Court’s strong preference for judicial restraint on constitutional issues); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984) (determining that it was unnecessary to address equal protection claims under the U.S. Constitution in light of the independent sufficiency of state law grounds for the result in question); *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (immigration statutes and U.S. Immigration and Naturalization regulations should be addressed before tackling potentially related equal protection claims under the U.S. Constitution); *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring in the judgment) (the Court should avoid advisory opinions and proceed with great caution when ruling on constitutional questions, such as the power to overrule legislative enactments); *Liverpool, N.Y. & P.S.S. Co. v. Emigration Com’rs*, 113 U.S. 33, 39 (1885) (two rules should serve as guides to wise judgment: “one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”).

reflected in both the Tenth Amendment to the United States Constitution and the Guarantee Clause contained in Article IV. *See, e.g., Chandler v. Florida*, 449 U.S. 560, 579-80 (1981) (the Court generally respects the power of individual states to declare and interpret their own law).

For all of these reasons, this Court should resist *amici*'s unwarranted and improvident invitation for judicial activism under the guise of a "judicial takings" analysis.

III. DUE PROCESS

Hand in hand with the judicial takings argument pursued by some *amici* supporting petitioner is their argument under the Fourteenth Amendment to the U.S. Constitution that private property has been taken by the Montana Supreme Court without due process of law. Ostensibly invoking the concern for certain due process rights expressed by Justice Kennedy in *Stop the Beach Renourishment*, 130 S.Ct. at 2614, *Amici* Creekside Coalition, *et al.*, Montana Farm Bureau Association, *et al.*, and Mountain States Legal Foundation, *et al.*, take the opportunity to load on yet another aspect of constitutional private property protection never asserted by the petitioner. *Amici* Creekside Coalition, *et al.*, *Amicus Curiae* Brief, at 27; *Amici* Montana Farm Bureau Association, *et al.*, *Amicus Curiae* Brief, at 31-33; *Amici* Mountain States Legal Foundation, *et al.*, *Amicus Curiae* Brief, at 10, 13, and 26. This Court should recognize the danger to

established state property doctrines posed by the *amici's* pursuit of such jurisprudence, and reject *amici's* invitation to enter their darkened alleyway. The moment a constitutional basis for challenging the property determinations of state courts is established, the rush of private litigants to federal court will be overwhelming. Such a result would fly in the face of the Court's settled practice of granting deference to local courts with local expertise in disposing of cases involving private property.

The Montana Supreme Court's ruling is only binding on parties to that ruling; those parties have certainly received sufficient notice and opportunity for a public hearing. Mont. Code Ann. § 70-28-109. In addition, the navigability of and title to Montana's riverbeds has been settled for a very long time and the present case in no way purports to determine any property interests but those of the present parties. Any procedural due process claim is thus empty.

Furthermore, an established property right – absent here – is also necessary to the invocation of a due process claim. There is no need to proceed with a due process analysis because the very determination that petitioner *lacks* property rights completely disposes of the issue. Justice Kennedy's solicitude for "a judicial decision . . . that eliminates an established property right" is thus controlling here. *Stop the Beach Renourishment*, 130 S.Ct. at 2614.

Even were the Court to proceed under a due process theory, the inquiry would end at the beginning because states possess the authority to modify or overrule prior property law decisions without violating the Constitution. In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924), for instance, the Court declined to overrule the Oklahoma Supreme Court on a point of state property law, stating that “the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law.” *See also, Fox River Paper Co. v. Railroad Comm’n*, 274 U.S. 651, 657 (1927) (it is for state courts “to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent”); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 541 (1930) (the Supreme Court “will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court”). In light of this deference, it is inappropriate for *amici* to raise, much less for this Court to indulge, in a due process analysis.

IV. PREEMPTION

Amici Edison Electric Institute, *et al.*, persists in raising the issue of preemption, stating that “[t]he

Montana Supreme Court's decision undercuts a foundational policy of the [Federal Power Act]." Edison Electric Institute, *et al.*, *Amicus Curiae* Brief, at 17. But objections that do not appear in the parties' briefs at the certiorari stage are deemed waived. *See* Supreme Court Rule 15.2; *cf.* *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Therefore this argument is waived as a matter of law.

Furthermore, the Montana Supreme Court exhaustively covered the arguments for federal preemption and found that there was no basis whatsoever for the claim that state ownership of public trust riverbed lands frustrated federal law. *PPL Montana, LLC v. State of Montana*, 355 Mont. at 449. Montana is exerting no regulatory authority that would interfere with any federal statute. Rather, Montana is merely requesting that private corporations pay for the use of state-owned, public trust lands. The core of the Montana Supreme Court's decision is clearly and properly compensatory, not regulatory. *Id.*



CONCLUSION

For the foregoing reasons, the well-reasoned ruling of the Montana Supreme Court should be upheld in all of its particulars.

Respectfully submitted,

STEPHAN C. VOLKER*

JOSHUA A.H. HARRIS

JAMEY M.B. VOLKER

M. BENJAMIN EICHENBERG

LAW OFFICES OF STEPHAN C. VOLKER

436 14th Street, Suite 1300

Oakland, California 94612

Telephone: (510) 496-0600

**Counsel of Record*

Attorneys for Amici Curiae

California Sportfishing Protection

Alliance, Big Blackfoot Riverkeeper,

North Coast Rivers Alliance, and

Klamath Forest Alliance