

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 *AMICI CURIAE* OF WILBUR AND
KATHRYN HARDY; IDELLE COLLINS;
CRAIG TOMPKINS; KIRTLAND FARMS 600, LLC;
MARY CALDWELL; CRIS CALDWELL;
CALDWELL FAMILY LLC; AND ROBERT AND
MARILYN MALLOY IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae are individuals and limited liability companies who own or have an interest in property affected by the State of Oregon's declaration of ownership of an 89-mile segment of the Rogue River in southern Oregon. Wilbur and Kathryn Hardy,² Idelle Collins, Craig Thompkins, Kirtland Farms 600, LLC, Mary Caldwell, Cris Caldwell, Caldwell Family LLC, and Robert and Marilyn Malloy (the "Rogue River Petitioners") were petitioners in *Hardy v. Oregon State Land Board and Oregon Department of State Lands*, Case No. 083817Z7, before the Circuit Court of the State of Oregon for the County of Jackson. The Rogue River Petitioners respectfully submit this brief in support of the brief of petitioner on a writ of certiorari to the Supreme Court of the State of Montana. This case is significant for the Rogue River Petitioners because *Hardy v. Oregon State Land Board* is currently on appeal to the Oregon Court of Appeals, which will review the lower court's decision concerning whether portions of the Rogue River were

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

² Wilbur Hardy, petitioner before the Jackson County Circuit Court, is now deceased.

navigable for title. Certainly, the decision in this case will affect the outcome of the appeal.



SUMMARY OF ARGUMENT

The Rogue River Petitioners agree with PPL Montana that the Montana Supreme Court erroneously interpreted and applied the federal test for title navigability, employing an unduly lenient interpretation that favors the state's interest and does not comport with the jurisprudence of this Court, or background principles of law and property ownership, or indeed common sense.

The Rogue River Petitioners submit this brief to inform the Court about similarities between the State of Montana's assertion of ownership over waterways never previously considered navigable, and the State of Oregon's similar approach to Oregon waterways. To protect the stability of land titles in Oregon as in other states, we urge the Court to reiterate the importance of uniformity over time in the application of the federal test for title navigability, and to clarify the fundamental basis of the test – a waterway's overall, general capacity for useful navigation. Finally, we invite the Court to further clarify that log drives are not evidence of title navigability.



ARGUMENT

I. Oregon, Like Montana, Relies upon a Lenient Interpretation of the Federal Test to Make Belated Claims of Ownership.

In Oregon, the State Land Board, comprising the governor, the secretary of state, and the treasurer, has authority to assert title to the beds and banks of waterways that were navigable for title when Oregon became a state in 1859. Or. Const. art. VIII § 5; Or. Rev. Stat. § 274.402. The Department of State Lands (“DSL”) functions as staff to the Land Board, and from its inception in 1967 one of its tasks was to determine which of Oregon’s thousands of lakes, rivers, and streams were navigable for title. *See, e.g.*, Or. Laws 1973 ch. 496, § 2 (directing DSL to inventory navigable streams by July 1, 1977). The state has tended toward an aggressive approach in asserting state ownership.

In 1992, for example, DSL sent a letter to riparians on the Sandy River, near Portland, Oregon, notifying them, without preamble or process, that the state held title below the river’s high water line. The Sandy River had not been meandered by the Government Land Office surveys, so most of the land the state claimed had ostensibly passed into private ownership. Several property owners sought redress at the legislature, and in 1995 the Oregon Legislative Assembly created a statutory process the state must follow to determine the navigability of Oregon waterways. *See* Or. Rev. Stat. §§ 274.400-.412. Acting under that law, the “navigability study statute,” the State

Land Board and DSL have “studied” and declared navigable segments of the Sandy River in 2002, the John Day River in 2005, and the Rogue River in 2008. The navigability study statute provides for judicial review of the state’s declaration of navigability, but affected property owners were not able to mount a court challenge until August 2008, when the Rogue River Petitioners asked the Jackson County Circuit Court to review the state’s declaration under the Oregon Administrative Procedures Act. On March 28, 2011, the circuit court set aside the state’s declaration and entered judgment for the petitioners. A petition for \$555,174 in attorney fees and disbursements is still pending in the circuit court, and the state has appealed the judgment to the Oregon Court of Appeals.

The Rogue River flows 215 miles in a general east-west direction from its headwaters near Crater Lake National Park to the Pacific Ocean at Gold Beach, Oregon. In its upper reaches, the river’s average gradient is 57 feet per mile, with ordinary flows that range from less than 1,000 cubic feet per second (“cfs”) in September to more than 2,000 cfs in the spring. In the vicinity of and west of Grants Pass, Oregon, at river mile 100, the average gradient is 10 feet per mile or less and flows range from 1,100 to 5,000 cfs. Oregon Department of State Lands, *Rogue River Navigability Report* at 18-20, 37 (May 19, 2008) (“*Navigability Report*”).³ In the 1970s, the state had

³ The *Navigability Report* is available on DSL’s website, at http://oregonstatelands.us/DSL/NAV/rogue_intro.shtml.

already asserted ownership of the lower Rogue River from its mouth to river mile 68.5. The “study segment” declared navigable in 2008 extended from river miles 68.5 to 157.5, with the upper reach of claimed ownership less than 60 river miles downstream from the headwaters.

II. The Federal Test Should Not Change over Time to Broaden States’ Claims to “Navigable” Waterways.

The Rogue River Petitioners agree with PPL Montana that the federal test for title navigability should not remain in flux – the equal footing doctrine as well as basic principles of stability in land titles mandate reasonable uniformity in its application, both between and among states and across the passage of years or decades. On the Rogue River, the state’s assertion of ownership relied unabashedly on the liberalization of the federal test in the Ninth Circuit and in Oregon state courts. *Navigability Report* at 13. The state acknowledged, but discounted, the fact that historically the Rogue River had been viewed as nonnavigable. *See Wycoff v. Mayfield*, 280 P. 340 (Or. 1929) (concluding that the Rogue River was not navigable at river mile 128, squarely in the middle of the 2008 study segment); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 151 (1935) (taking judicial notice of the Rogue River’s nonnavigability in the same reach as the 2008 study segment); 22 Op. Or. Atty. Gen. 409 (Mar. 5, 1946) (advising the state that the Rogue River was

not navigable for title); 23 Op. Or. Atty. Gen. 249, 250 (No. 363) (June 10, 1947) (“[W]e held that a point on the Rogue river, which is navigable for fishermen and hunters in rowboats and does not afford a channel for useful commerce, is not navigable in the sense that the state would acquire title to the bed of the stream.”).

In essence, the state used what it perceived as an expansion of the reach of the title navigability test to enlarge its real property holdings at the expense of individual property owners. The Court should take this opportunity to clarify the test’s scope and forestall this strategy in Oregon as well as other states.

III. This Court Should Reaffirm the Core Principles of the Federal Test.

The Rogue River Petitioners agree with PPL Montana that the Court should “provide a meaningful check on States and state courts by reaffirming certain core principles of the navigability-for-title test.” Brief for Petitioner (Aug. 31, 2011) at 33. On the Rogue River, the State of Oregon, like Montana, relied on sparse evidence and a lenient interpretation of the federal test to claim the bed and banks of a river long regarded as nonnavigable. The two states used similar arguments that gave undue prominence to isolated aspects of the federal test without remaining faithful to its underlying principles as elucidated by this Court’s precedent. First, the states each relied on isolated incidents of irrelevant or speculative use

as evidence of navigability, without analyzing the waterway's overall capacity for useful navigation in commerce. Second, because of their failure to analyze usefulness, both states minimize the significance of obstacles to navigation. Third, both Montana and Oregon resorted to the "susceptibility" aspect of the test to compensate for the lack of evidence of actual use at the time of statehood.

A. The Federal Test Has Been Clearly Applied and Developed in This Court's Jurisprudence.

This Court has developed the federal test for title navigability with reasonable clarity. After adopting the language and analysis from two admiralty law cases, *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), and *The Montello*, 87 U.S. (20 Wall.) 430 (1874), the Court has consistently employed, as the gravamen of navigability, the *general usefulness* of a waterway as a highway or channel for commerce at the time of statehood. See *The Montello*, 87 U.S. at 443 ("[T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce."); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) (Rio Grande was nonnavigable because it lacked a "general capacity for navigation along its entire length."); *United States v. Holt State Bank*, 270 U.S. 49, 56-57 (1926) (Mud Lake and associated waterways were navigable because they were "dependable routes for trade and travel" and could provide, in their natural and ordinary

condition, “a channel for useful commerce.”); *Utah v. United States*, 403 U.S. 9, 11 (1971) (Great Salt Lake was navigable because it “was used as a highway and that is the gist of the federal test.”).

Where the evidence demonstrates general, overall usefulness, measured as of the date of the state’s admission, a waterway is navigable for title and the state may claim ownership. Where the evidence falls short of that showing, the state has no claim. As this Court’s decisions consistently hold, evidence of sporadic, ineffective, or attempted use is not sufficient to satisfy the test. Thus the Court concluded that neither the Red River nor the Arkansas River were navigable in Oklahoma because, though there was evidence of use, that use had been exceptional. *Oklahoma v. Texas*, 258 U.S. 574, 591-92 (1922) (Red River); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86, 89 (1922) (Arkansas River). On the Red River, there was evidence that small boats had transported goods and produce, but even that evidence was not enough to satisfy the navigability test because the use had been too difficult to make the river useful as a transportation route. Attempts to navigate it for commerce had ceased as soon as an alternative – rail transportation – presented itself. 258 U.S. at 589-90. Similarly, the Court decided that Oregon’s Lake Malheur, Mud Lake, and Harney Lake were not navigable.⁴ *United States v. Oregon*, 295 U.S. 1 (1935).

⁴ In 1921, Oregon’s legislature had enacted a law asserting state ownership of any lake that had been meandered by the
(Continued on following page)

As on the Red River, there was evidence of boat use around the time of statehood, but the Court characterized such use as “occasional,” “sporadic,” and “ineffective” and therefore concluded that the lakes did not possess “that capacity for general and common usefulness for purposes of trade and commerce which is essential to navigability.” 295 U.S. at 22, 23.

The Court has not authored a navigability-for-title opinion, however, since *Utah v. United States* in 1971. In actuality, the Court has not provided a rigorous application and analysis of the federal test since *United States v. Oregon* in 1935.⁵ In the interim, states like Oregon and Montana have strayed vast distances from anything like a faithful reading of the Court’s precedent, and the Ninth Circuit has flatly left it behind in two title navigability decisions in Oregon and Alaska. *State of Oregon v. Riverfront Protection Ass’n*, 672 F.2d 792 (9th Cir. 1982); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989).

United States surveys. Or. Rev. Stat. § 274.430. The *United States v. Oregon Court* chastised the state for attempting to wrest title from the United States or its grantees “by legislative fiat.” 295 U.S. at 29.

⁵ The Court *has* decided cases addressing the validity of pre-statehood grants of waterways assumed to be navigable, *see, e.g., Idaho v. United States*, 533 U.S. 262 (2001), and it has concluded that tidality constitutes an independent basis for state ownership, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

B. Sporadic, Ineffective Use Is Not Sufficient to Prove Navigability.

To prove that the Rogue River was navigable in 1859, the State of Oregon cited to a handful of historical references to canoe use by Indian Tribes, to the use of cable ferries to *cross*, rather than navigate, the river, and to four accounts of boat travel in the 19th century. The first boat journey occurred in 1869, from Grants Pass at approximately river mile 100 downstream to the ocean, and was reported in the newspaper because it was a remarkable venture. *Navigability Report* at 42-43. The second and third private attempts did not take place until 25 years later, in 1894; they, too, were featured in the *Gold Beach Gazette*, which reported: “For the third time in a quarter century Rogue river has been navigated between Grants Pass and Gold Beach.” *Id.* at 43. The only documented 19th-century travel on the river above Grants Pass was a government survey of the river’s potential for navigation in 1879. The journey took Army Engineer Philip Eastwick from river mile 110.5 to river mile 51, where the examination ended abruptly when the boat was dashed to pieces in the rapids. *Id.* at 22-23, 44. Eastwick reported back that the Rogue River, “by reason of its ruggedness and forbidding character,” was not navigable and could not be improved to render it navigable. Philip G. Eastwick, 1879, *Examination of Rogue River, Oregon: G.L. Gillespie, Report of the Chief of Engineers* (U.S. Government Printing Office) at 1863.

In asserting title to the Rogue River between river miles 100 and 68.5, the State of Oregon merely collected and catalogued historical accounts of sporadic, ineffective use, second-hand reports of Indian canoe sightings, and irrelevant evidence that overland travel had included cable ferry crossings. In applying the federal test to that evidence, the state failed utterly to analyze the overall usefulness of the 30-mile river segment as a highway for commerce. Nevertheless, the Jackson County Circuit Court, using a deferential “substantial evidence” standard, concluded on summary judgment that the state had proved its case for navigability between river miles 100 and 68.5. *Hardy v. Oregon State Land Board*, No. 083817Z7, Opinion (Feb. 10, 2011).

C. Obstacles to Navigation Indicate Non-navigability Where a Waterway Lacks a General Capacity for Useful Navigation.

The Montello, 87 U.S. (20 Wall.) 430 (1874), introduced the principle that obstructions to uninterrupted navigation would not preclude a finding that a river was navigable. Oregon, like Montana, has strayed from the core of the federal test for title navigability by over-emphasizing this aspect of the test’s interpretation. *The Montello* Court began with the fundamental notion of usefulness, which is “the vital and essential point” of navigability. 87 U.S. at 443. *If* a river meets the usefulness requirement, *then* obstacles to navigation, such as rapids and sand bars, may be discounted and will not defeat overall navigability. *Id.* It follows that if a river, or a segment of a river,

does not meet the “vital and essential” requirement of usefulness, then it is not navigable. On the Rogue River, as on the disputed rivers in Montana, the overall character of the waterway was treacherous and difficult; obstacles to navigation were the norm, not the exception. *See United States v. Utah*, 283 U.S. 64, 77 (1931) (“We are concerned with long reaches with particular characteristics of navigability or non-navigability. . .”). Rivers without a general character of usefulness for trade and travel are not navigable, and it is unfair to this Court’s precedent to use isolated language from *The Montello* while sidestepping the true basis for navigability.

D. “Susceptibility” Cannot Substitute for Evidence of Usefulness.

United States v. Utah, 283 U.S. 64 (1931), developed the “susceptibility” aspect of the federal test. Both Oregon and Montana have compensated for thin evidence of actual use at the time of statehood with misplaced reliance on susceptibility. For example, the primary author of DSL’s *Navigability Report* for the Rogue River made the following statement in his deposition: “On those parts where the uses can’t be historically documented to the extent of other places, what we do is we fall back on the susceptibility.” Kroft Dep. at 31:5-8; *Navigability Report* at 26-27, 32, 33, 35-36, 43.

Oregon, like Montana, treats susceptibility as though it were a separate prong of the federal test, an independent route to navigability. It is not. In *United*

States v. Utah, the navigable portions of the Green, Grand, and Colorado Rivers were not subject to extensive actual use, but there was a good explanation: That region was sparsely settled when Utah became a state. 283 U.S. at 82-83. The Court concluded that, while evidence showing actual use is “most persuasive,” nevertheless, “where conditions of exploration and settlement explain the infrequency or limited nature of such use” it is appropriate to prove a river’s susceptibility through other evidence, such as the waterway’s physical characteristics. 283 U.S. at 82. It is *not* appropriate, however, to “fall back” on susceptibility without first examining the reasons for the lack of evidence of actual use.

On the Rogue River, the lack of actual use stemmed not from the fact that no one had settled near the river, but rather from the river’s treacherous and generally nonnavigable character. In other words, the Rogue River simply did not afford a useful highway for transportation. In 1860, a year after statehood, the census indicated a population in Jackson and Josephine Counties of approximately 5,400 people, and the Government Land Office survey in 1854 showed dirt roads and pack trails along both sides of the river. *See Navigability Report* at 24 (“A number of roads and trails are indicated to exist in the 1850s paralleling various segments of the Rogue River.”). The state’s own evidence showed that the Rogue River basin was settled at the time of statehood and that people traveled extensively over land, transporting goods and equipment in commerce in defiance of

rugged terrain and the poor quality of pack trails and roads. If those travelers could have used the river, they would have. The fact that they did not indicates that the river was not useful for travel, and there is no justification for resort to the susceptibility aspect of the test.

The “susceptibility” component of the federal test cannot and should not carry the weight that Oregon and Montana wish to assign it, but those states have been emboldened by the Ninth Circuit’s cavalier treatment of “susceptibility” in *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). In *Ahtna*, the Ninth Circuit held that present-day recreational use of the lower Gulkana River was sufficient to prove navigability for title. 891 F.2d at 1405. *Ahtna*, however, deviates from this Court’s precedent in *United States v. Utah* by treating susceptibility as a “fall back” concept, much as the State of Oregon did on the Rogue River. Navigability, said the *Ahtna* court, “*only* means that, at the time of statehood, *regardless of the actual use of the river*, the river must have been susceptible to use as a highway for commerce.” 891 F.2d at 1404 (emphasis added). The *Ahtna* court compounded its error by mixing precedents: To justify its position that recreational use constituted “commercial activity,” the court imported the concept of “flexibility” from the regulatory navigability context into a case about title navigability. 891 F.2d at 1405.

As discussed above, however, the navigability-for-title test should *not* be flexible; because it affects land

title, it must be stable in its application, and in spite of the Ninth Circuit's digression in *Ahtna*, overall usefulness for navigation is still the essential principle of the federal test. If states like Oregon and Montana are to be permitted to make belated claims of ownership based on navigability, they must at a minimum conduct a rigorous, objective examination of a river's capacity for useful navigation at statehood.

IV. This Court Should Clarify That Log Drives Are Not Evidence of Navigability.

The Rogue River Petitioners agree with PPL Montana that log drives should not constitute evidence of navigability for title, but rather that "a river must be capable of carrying human travelers, not just logs or other inanimate objects," to be deemed navigable. Brief for Petitioner (Aug. 31, 2011) at 53. In pressing its claim to the Rogue River, the State of Oregon relied *solely* on use of the river for log drives in the upper reach of the 89-mile study segment. The state's evidence was ludicrously sparse: The *Navigability Report* mentions one unsuccessful tie drive that *may* have occurred in the 1880s, and it speculates that other log drives *probably* occurred between river miles 160 and 125.5 sometime around 1910. *Navigability Report* at 50-51. Not surprisingly, the circuit court decided that no matter how deferential the standard, the state had not demonstrated navigability between river miles 157.5 and 100. *Hardy v. Oregon*

State Land Board, No. 083817Z7, Opinion (Feb. 10, 2011).

The state's temerity in asserting title to 60 miles of river on such a thin evidentiary reed arises from a 1982 decision of the Ninth Circuit Court of Appeals. In *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792 (9th Cir. 1982) ("*Riverfront*"), the Ninth Circuit reversed the District Court of Oregon to declare the McKenzie River navigable for title between river miles 0 and 37. Evidence in *Riverfront* was (by stipulation) limited to log drives that occurred for a 17-year period in the late 19th and early 20th centuries, attended by great difficulty and conducted only for a period of two or three months each year. 672 F.2d at 795. The defendant riparian property owners described the log drives in their opening brief: "It is not entirely accurate to say logs were 'floated' down the McKenzie. In truth, logs were hauled, pushed, rolled, blasted and pulled down the channel. The waters of the river were more of a lubricant than a vehicle of transportation." Defendant's Opening Memorandum at 16-17, *Oregon v. Riverfront Protective Ass'n*, No. 79-40-E (D. Or. Dec. 5, 1980).

The district court agreed that the McKenzie River was not navigable: First, it could only be used for an average of 53 days per year. Second, log driving required artificial alterations to the river – log drivers blasted a large rock out of the way in 1907 and routinely constructed "wing dams," which impounded tributaries so that the river's volume could be regulated. Third, the log drives had been conducted with

such difficulty that the McKenzie lacked practical usefulness as a highway for commerce. *Oregon v. Riverfront Protective Ass'n*, No. 79-40-E, Opinion at 13-15 (D. Or. Dec. 5, 1980).

The Ninth Circuit reversed, in a five-page opinion whose reasoning was fundamentally flawed. First, the court conflated analyses of navigability for title with navigability for regulatory jurisdiction. The opinion began with an implicit admission that the court's view of the case was influenced by a regulatory navigability case decided the previous year, *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir. 1981), which found shingle bolt drives sufficient for navigability under the Federal Power Act. *See Riverfront*, 672 U.S. at 794-95. Later in the opinion, the Ninth Circuit posited that the construction of wing dams and use of dynamite to clear the channel could be disregarded in applying the aspect of the federal test that requires evaluation of a waterway in its natural and ordinary condition. 672 F.2d at 795-96. The court discounted the fact that wing dams "sometimes temporarily deepened" the river to aid log driving, *id.*, and it ignored the fact that the log drivers used dynamite not only to blast apart log jams, but also to clear the channel, *see Oregon v. Riverfront Protective Association*, No. 79-40-E, Opinion at 13. Instead, the court cited *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), another regulatory navigability case, by way of comparing the insignificance of wing dams and dynamite to large-scale "planned civil

engineering projects.” 672 F.2d at 796. Ironically, even that inapplicable case seemed in disagreement with the court’s position on wing dams: *Appalachian Electric* defined “natural and ordinary condition” as including “*volume of water, the gradients and the regularity of the flow.*” 311 U.S. at 407 (emphasis added).

Second, the court veered sharply away from this Court’s precedent. In *United States v. Rio Grande Dam & Irrigation Co.*, the Court stated: “The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river.” 174 U.S. 690, 698 (1899); *see also North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992) (rejecting, a decade after *Riverfront*, tie drives on the Little Missouri as evidence of navigability). Log drives on the McKenzie River could only take place in April, May, and early June: The river was too high in the winter and spring, and too low in late summer. The Ninth Circuit nonetheless quoted the *Rio Grande* statement and read it verbatim – log drives on the McKenzie could only take place for two or three months each year, but they “did not depend on high water” specifically, so the court held that the admittedly “seasonal nature of log drives on the McKenzie” would not defeat navigability. 672 F.2d at 795.

In regulatory navigability caselaw, “natural and ordinary condition” relates to the volume and gradient of a river and includes the concept that a river may be navigable for regulatory jurisdiction if it can

be made navigable by construction of reasonable improvements. In the regulatory context, navigability may, with the passage of time, “later arise.” *Appalachian Electric*, 311 U.S. at 408. Not so in title navigability analysis: Title navigability is property law; it determines whether title vested in a state on its date of admission. Neither title to real property, nor the title navigability doctrine itself, ought to be in flux: There is a repugnance in the law for unsettling expectations of property ownership. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) (“This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned. . . .”).

The *Riverfront* case unsettled more in Oregon than private property expectations. First, it sent title companies scrambling for cover – by the following year, a standard exception appeared in nearly all title insurance policies excluding coverage against ownership rights that might be claimed by the State of Oregon below the high water mark.

Second, the Oregon legislature took immediate action in its next regular session, repealing a statutory definition of navigability in which use of a stream for floating unrafted logs was not sufficient for state ownership. Or. Laws 1977 ch. 471, § 1 (codified as amended at Or. Rev. Stat. § 274.029, *repealed by* Or. Laws 1983 ch. 566, § 1). In the same session, DSL presented a comprehensive navigability study, 10 years in the making, that recommended the state not assert title to nontidal waterways unless they had

been meandered by the United States surveys. The legislature disregarded the report and repealed DSL's statutory mandate to determine ownership of Oregon waterways. Or. Laws 1983 ch. 566, §§ 1, 3.

Third, *Riverfront* turned 100 years of common law in Oregon inside out. Since early statehood, Oregon courts recognized a public right, in the nature of an easement, to float logs or boats on any stream capable of floating them, even though the bed and banks of the stream were in private ownership. See *Weise v. Smith*, 3 Or. 445 (1869); *Shaw v. Oswego Iron Co.*, 10 Or. 371 (1882); *Guilliams v. Beaver Lake Club*, 175 P. 437 (Or. 1918) (extending log floatation right to recreational use); *Luscher v. Reynolds*, 56 P.2d 1158 (Or. 1936) (same). Before the *Riverfront* case, streams that could be used for log drives, or later recreation, were understood in Oregon to be privately owned but subject to a right of public use. After the case, the state's confidence in asserting ownership based on title navigability swelled to gigantic proportions.

The Court should take this opportunity to correct the flawed reasoning in Ninth Circuit title navigability caselaw. The Rogue River Petitioners urge the Court to overrule *Riverfront* as well as the Ninth Circuit's other maverick decision, *State of Alaska v. Ahtna, Inc.*



CONCLUSION

For all the foregoing reasons, the Court should reverse the decision of the Montana Supreme Court and find for Petitioner.

Respectfully submitted,

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