No. 10-218

IN THE
Supreme Court of the United States

PPL MONTANA, LLC,
Petitioner,
v.

STATE OF MONTANA,
Respondent.

On Writ of Certiorari
to the Supreme Court of Montana

BRIEF OF THE CREEKSIDE COALITION, COLORADO CATTLEMEN'S ASSOCIATION, COLORADO FARM BUREAU, AND DUDE RANCHERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHARLES B. WHITE
PETROS & WHITE, LLC
1999 Broadway
Suite 3200
Denver, Colorado 80202
(303) 825-1980

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

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INTEREST OF *AMICI CURIAE*[1]

It long has been settled in Colorado that title to riverbeds belongs to the riparian landowner — not the State of Colorado. *Amici* each have an interest in preserving that status quo and preserving the long-settled reliance interests of riparian landowners.

The Creekside Coalition[2] is a Colorado non-profit corporation formed in 1994. Creekside receives support from hundreds of donors including landowners, wildlife experts, ranch managers, biologists, fishermen, farmers, river recreationists, outfitters, and conservationists who have long acted in reliance on settled Colorado law concerning title to riverbeds. Creekside seeks to protect Colorado's riparian environments and habitat on private property for economic and non-economic activities, including farming, ranching, water storage and diversion, fishing, hunting, and fish and wildlife habitat improvement.

The Colorado Cattlemen's Association[3] is a Colorado non-profit corporation whose mission is to promote the interests of Colorado's beef industry and protect Colorado's land, water, and forage resources. Founded in 1867, it is the Nation's oldest state

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief. Letters reflecting their consent are on file with the Clerk.

[2] *See* http://www.thecreeksidecoalition.com.

[3] *See* http://www.coloradocattle.org.

cattlemen's association and has more than 12,000 members, many of whom have worked the same private and public land for generations, own the beds of rivers and streams, and rely for their livelihood on riverbed water diversion and storage structures.

The Colorado Farm Bureau[4] is a Colorado non-profit corporation founded in 1919, with membership of more than 23,000 farmers, ranchers, and landowners. The Farm Bureau is dedicated to helping family farmers and ranchers stay on their land and continue to produce food, fiber, and fuel. The ownership and control of riparian land and water rights is essential to the viability of its members' operations.

The Dude Ranchers' Association[5] is a non-profit corporation originally formed in 1926, with more than 100 members in Colorado and other western States. The association supports its members in providing high-quality traditional western ranch vacations and seeks to preserve and protect the natural environment. Many of those members own riparian property and offer fishing and other water-based recreational activities to their guests.

Amici and other similarly situated landowners and water users rely on their lawful ability in Colorado to protect their economic and non-economic property interests through long-settled private property rights under which riparian landowners hold title to the beds of non-navigable rivers. *Amici* have a vital interest in reversal of the Montana Supreme Court's decision, which threatens to upset long-established titles to riverbeds, not only in Montana but also in Colorado and other western States in which numer-

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[4] *See* http://www.coloradofarmbureau.com.

[5] *See* http://www.duderanch.org.

ous rivers long have been considered non-navigable. *Amici* bring a unique and important Colorado-based perspective to the issues raised by petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court long has recognized that "[t]he right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions." *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 439 (1866). The Montana Supreme Court's decision radically upsets the stability of title to submerged lands under rivers that, for more than a century, were understood to be non-navigable when Montana attained statehood. Private and public riparian property owners, including the federal government, have acted in reliance on their secure ownership of riverbeds in using their riparian lands.

I. The Montana court distorted this Court's navigability-for-title test by ruling that Montana had held title to the riverbeds at issue since 1889. The court sanctioned Montana's rental charges to petitioner for the use of riverbeds amounting to $41 million in retroactive liability, and many millions more in future fees. Despite significant and extensive obstructions to navigability at statehood well documented in the record below, the Montana court erroneously held that hundreds of miles of three Montana rivers then were commercially navigable.

Remarkably, the Montana court did so by granting summary judgment to Montana — the party with the burden of proof on navigability — in effect weighing the evidence to adopt Montana's evidence, reject petitioner's evidence, and avoid a trial on the merits. If the court's erroneous decision is not reversed, the implications will be grave and enormous for riparian

landowners across the country. The Department of the Interior's Bureau of Land Management also concluded that the federal government's ownership of riverbeds could be placed at risk.

II. No Colorado river has been held to have been navigable at the time of statehood. In a 1912 decision, the Colorado Supreme Court observed that, when Colorado with its rugged terrain became a State in 1876, "the natural streams of this state [we]re, in fact, nonnavigable within its territorial limits." *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912), *overruled in part on other grounds by Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1*, 535 P.2d 200 (Colo. 1975) (en banc), and *overruled in part on other grounds by United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982) (en banc). Ownership by riparian landowners of non-navigable riverbeds long has been recognized in Colorado since statehood. If the Montana Supreme Court's exceedingly loose navigability standard were affirmed, however, then other States, including Colorado, could be emboldened to challenge riverbed titles, upsetting numerous and longstanding settled expectations and reliance interests.

For 135 years, the owners and users of riparian land in Colorado have depended for their livelihood on their settled titles to riverbeds. Farmers, ranchers, public and private water utilities, power companies, ski areas, and other commercial and industrial interests have constructed water storage and diversion facilities on their own lands, or under easements and licenses on the lands of others, to meet ever-increasing water demands in the arid West. Riparian landowners and conservation interests have installed structures in riverbeds to improve in-stream habitats

for fish. Those facilities, and the right to control access to the stream, are the lifeblood of dude ranches, fishing clubs, and other businesses catering to anglers. Local governments have installed kayak courses in the stream channel to enhance recreational opportunities for their residents and visitors, which create revenues for local economies. In each case, the owners of the lands and facilities have relied on the established title to the riverbed as the basis for making investments that increased the value and utility of riparian lands.

ARGUMENT

I. THE COURT SHOULD REVERSE THE ERRONOUS DECISION BELOW TO PROTECT LANDOWNER RELIANCE INTERESTS AND THE STABILITY OF RIVERBED TITLES

A. The Decision Misunderstands This Court's Cases On Navigability-for-Title

Through application of the "equal footing" doctrine, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845), this Court has held that who holds title to submerged lands under particular reaches of a river depends on whether those reaches were "navigable in fact" at the time the State joined the Union. *United States v. Utah*, 283 U.S. 64, 76 (1931) (internal quotation marks omitted). If the reaches at issue in this case were "then navigable" when Montana became a State in 1889, title to the beds of those rivers vested in Montana. *Id.* at 75. If those reaches were not "then navigable," however, "title to the river beds remained in the United States" or any private grantees. *Id.*; *see also* 43 U.S.C. § 1311(a) (Submerged Lands Act of 1953).

Navigability for title purposes "is a federal question," not one of state law. *Utah*, 283 U.S. at 75.

This Court's precedents provide that rivers are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *see Utah*, 283 U.S. at 76. However, "[i]t is not . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." *The Montello*, 87 U.S. (20 Wall.) 430, 442 (1874) (internal quotation marks omitted). And "[t]he 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." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899).

This Court repeatedly has assessed navigability on a section-by-section basis and has not relied on general determinations that a river is navigable as a whole. Thus, "[e]ven where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, *how far* navigability extends." *Utah*, 283 U.S. at 77 (emphasis added); *see Rio Grande Dam & Irrigation*, 174 U.S. at 698 (inquiring "at what particular place between [a river's] mouth and its source navigability ceases").

In *Utah*, this Court evaluated the navigability of several "long reaches with particular characteristics of navigability or nonnavigability." 283 U.S. at 77. One of those "long reaches" was a 4.35-mile portion

of a larger, 40-mile stretch of the Colorado River in Utah, the entire length of which the special master found to have been non-navigable at statehood. *See id.* at 79-80. This Court concluded that the smaller 4.35-mile portion was navigable in fact, emphasizing that the evidence showed that "4.2 miles of this stretch . . . are . . . quiet water." *Id.* at 89. As the analysis in *Utah* makes clear, this Court has declined to make categorical pronouncements of the navigability of entire rivers, recognizing that navigable and non-navigable reaches may coexist in the same river. *See also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922) (holding that "the Arkansas [River] is and was not navigable at the place where the river bed lots, here in controversy, are").[6]

The Montana Supreme Court's decision erred by failing to assess navigability of the Missouri, Madison, and Clark Fork Rivers in Montana on a section-by-section basis. In particular, the state supreme court declared a 17-mile stretch of indisputably non-navigable rapids and falls at Great Falls, Montana, to be "merely a short interruption in the use of the Missouri as a channel for useful commerce." Pet. App. 61; *see also* Pet. Br. 8-9 (discussing a grueling 33-day portage around Great Falls by the Lewis and Clark expedition). In *Utah*, however, this Court found the 4.35-mile stretch at issue to be sufficiently

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[6] Lower courts likewise have assessed navigability on a section-by-section basis. *See, e.g.*, *Oregon ex rel. Div. of State Lands v. Riverfront Prot. Ass'n*, 672 F.2d 792, 793 (9th Cir. 1982) (assessing navigability of "the McKenzie River between river mile 37 and its confluence with the Willamette River"); *Utah v. United States*, 304 F.2d 23, 26 (10th Cir. 1962) (concluding that "the part of the river in question was in fact and in law non-navigable at the time Utah was admitted into the Union").

"long" to warrant independent analysis of navigability and made clear that "[t]he question here [was] not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise non-navigable." 283 U.S. at 77 (footnote omitted). As the dissent concluded, the Montana court's characterization of extensive non-navigable stretches of the rivers at issue as unduly "short" was "[d]isturbing." Pet. App. 99 (Rice, J., dissenting); *see also* Pet. Br. 33-49.

The Montana court erred further in accepting present-day recreational uses on the Madison River as conclusive evidence of navigability at the time of statehood. *See* Pet. App. 55-56. Although this Court has suggested that post-statehood uses can be probative of a river's susceptibility for navigation at statehood, *see Utah*, 283 U.S. at 83, it has done so only where river conditions have not changed materially and the prevailing river traffic is indicative of the type of commerce existing at statehood. *See Utah v. United States*, 403 U.S. 9, 11-12 (1971) (relying on use of boats to transport cattle and sheep in the 1880s only because the water conditions at the time Utah attained statehood in 1896 had not changed materially).

The Montana court found that present-day use by "commercial fishing guides and their clients" demonstrated navigability of the Madison River at statehood. Pet. App. 18-19; *see also id.* at 26, 58. As petitioner explains, however, that analysis "improperly equates recreational and commercial use." Pet. Br. 49; *see id.* at 49-52. Before finding navigability in fact, this Court has required that a river have been conducive to "commercial utilization on a large scale." *Utah*, 283 U.S. at 83. No record evidence,

however, suggests that modern-day guided recreational fishing involves travel on waterways sufficiently extensive to show that the Madison River in 1889 (or ever) was a suitable highway for large-scale commerce. This Court additionally has required that such large-scale commerce was or could have been "conducted in the customary modes of trade and travel on water" at the time of statehood. *Id.* at 76 (internal quotation marks omitted). But Montana's evidence of modern-day fishing from watercraft makes no distinction between vessels constructed of modern materials, such as fiberglass drift boats and PVC-coated nylon inflatable rafts used by river guides today, and heavier, much less maneuverable wooden boats in use in the 19th century. *See* JA46-49, 262, 940-47; Pet. App. 18-19, 58, 143. Nor did Montana establish that recreational commerce of the type displayed in present times was in evidence at the time of statehood.

The Montana court also erred in rejecting evidence from petitioner's expert fluvial geomorphologist[7] showing that conditions on the Madison River have changed significantly. Petitioner's expert concluded that current river conditions are not relevant to establish that the Madison River was susceptible to navigation at the time of statehood, because dams subsequently have been constructed and the location and condition of river channels otherwise had changed. *See* Pet. App. 103 (Rice, J., dissenting); *see also* Pet. Br. 18. The court rejected that expert evidence as insufficient to create even a triable issue of fact. *See* Pet. App. 57-58. The court likewise disregarded a 1931 Army Corps of Engineers study

[7] Fluvial geomorphology is the study of the physical characteristics of rivers and how they change over time. *See* Pet. Br. 14.

concluding that "the Madison river has never been historically navigated and that commercial navigation on this river was 'entirely out of the question,'" again concluding that such evidence failed to create a triable issue of fact. *Id.* at 56.

B. The Decision Defies This Court's Warning Against State Abuse Of Navigability Determinations

The Montana court made its sweeping ruling by granting summary judgment to Montana — the party with the burden of proof on navigability — and ignoring the significant evidence introduced by petitioner that both demonstrated non-navigability of the rivers at issue and cast serious doubt on the veracity of the evidence accepted by the Montana court. *See* Pet. App. 101-17 (Rice, J., dissenting) (conducting extensive review of the overwhelming evidence of non-navigability and finding it troubling that the majority had "depriv[ed] [petitioner] of the right to trial by the improper entry of summary judgment"). This Court's decisions concerning navigability for title typically have been based on a trial record of extensive factfinding. *See*, *e.g.*, *Utah*, 283 U.S. at 72 (referring to "voluminous evidence" taken by Special Master Charles Warren); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922) ("The evidence . . . is voluminous and in some respects conflicting.").

The Montana court's decision, if affirmed, would authorize a radical departure from the Court's historical practice. It would give other state courts license to perform a one-sided weighing of the evidence on summary judgment, picking and choosing the evidence that will lead to a finding of navigability and title in the home State, and rejecting any conflicting evidence calling navigability into question. As the

dissent explained below, "[petitioner] has satisfied its burden [on summary judgment] to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable. The Court's decision to the contrary makes one wonder just what evidence the Court would have considered sufficient for [petitioner] to defeat summary judgment in this case." Pet. App. 117 (Rice, J., dissenting).

This Court long has guarded against such abuse of the navigability-for-title test, cautioning in 1922 that "[s]ome states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control." *Brewer-Elliott*, 260 U.S. at 89. The Court plainly was concerned about protecting the reliance interests and stability of titles in property underlying non-navigable waters that is held by riparian landowners, including the federal government. This Court pointedly cautioned that "[i]t is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission." *Id.* at 88.

C. The Decision Calls Into Question Titles To Both Federal And Private Lands

Montana has done precisely what this Court has warned cannot be done, by adopting a retroactive rule that stands to upset title to millions of acres of land in rivers long thought to be non-navigable. Until the start of this case, Montana had never notified petitioner that the State considered itself to hold

title to the riverbeds underlying petitioner's dams and reservoirs. *See* Pet. App. 4; Pet. Br. 4. All but one of the nine dams at issue in this case were built between 1891 and 1930, not long after Montana became a State in 1889. In 1908, the Montana Supreme Court observed that one of the dams built by a predecessor of petitioner was "an immense structure of steel and concrete, built across the Missouri river, and about 70 feet high." *Spratt v. Helena Power Transmission Co.*, 94 P. 631, 633 (Mont. 1908) (Hauser Dam). Yet Montana waited nearly a century to assert an ownership interest in the riverbeds under petitioner's dams — a claim that must be rejected under a proper application of this Court's navigability-for-title test.

In 1986, a river study commissioned by Montana and relied on by the court below concluded that 37 Montana rivers, most of which long had been thought to be non-navigable, were in fact navigable. As petitioner and the dissenting opinion explain, that study was deeply flawed and is entirely unreliable. *See* Pet. Br. 6-7; Pet. App. 105-06.

In 1988, the Department of the Interior's Bureau of Land Management ("BLM") wrote to Montana's Department of State Lands ("DSL") concerning the dramatic upheaval in land titles that Montana's late assertion would cause. BLM explained that, "as the agency responsible for protecting and managing some 8 million acres of federally-owned surface and all of the federally-owned minerals within the state, [BLM] does not agree with the DSL's determination of the navigability of these waterways." Pet'r Supp. Br. App. 2 (U.S. filed May 31, 2011).[8] BLM reasoned

[8] The federal government owns a significant portion of the land in western States. *See United States v. New Mexico*, 438

that "the United States only recognizes portions of [three rivers] within the State of Montana as being navigable for title related purposes" and asserted that the decision could impact "hundreds of mineral leases on [federal] lands to which the state now claims ownership" if it were decided that title to those federal lands instead were held by Montana. *Id.* In the same way, easements for water storage and diversion projects on federal lands could be jeopardized.[9] And federal land management plans for national forests, wilderness, and other sensitive areas also could be placed at risk by such a decision.

BLM additionally observed, with respect to private landowners, that any assertion by Montana of title to riverbeds long considered non-navigable "will have a disquieting effect on the title to thousands of parcels of private land through which these streams pass," because "[c]urrent owners' titles generally encompass complete legal subdivisions with no exceptions for the stream bed which might traverse the subdivision." *Id.*

The considerable record developed by petitioner in the trial court and the erroneous application by the state supreme court of this Court's governing principles compel reversal of the judgment below.

U.S. 696, 699 n.3 (1978) ("The percentage of federally owned land (*excluding* Indian reservations and other trust properties) in the Western States ranges from 29.5% of the land in the State of Washington to 86.5% of the land in the State of Nevada, an average of about 46%.") (citing General Services Administration, *Inventory Report on Real Property Owned by the United States Throughout the World as of June 30, 1974*, at 17, 34, & App. 1, table 4 (May 30, 1975)).

[9] Petitioner claims that it is now being double-charged by both the United States and the State of Montana for the use of lands to which both claim title. *See* Pet'r Supp. Br. 6.

II. REVERSAL IS NECESSARY TO PROTECT VESTED PRIVATE PROPERTY INTERESTS IN COLORADO AND ELSEWHERE

Thousands of property owners in Colorado — including members and supporters of *amici*, municipalities, water districts, and the federal government — hold title to lands abutting Colorado rivers and streams that include the submerged riverbeds. If the decision below is allowed to stand, a dark cloud will encumber those titles with the specter of litigation for decades to come, upsetting private property rights in Colorado long thought to have been beyond dispute. This Court should reverse the Montana court's judgment to preserve the reliance interests of property owners in Colorado, as well as in all other States in which property owners on non-navigable waters are similarly put at risk by the Montana court's erroneous decision.

A. The Colorado Supreme Court Long Has Understood That All Colorado Rivers Were Non-Navigable At Statehood

1. No court has held that any river in Colorado was navigable in fact at statehood. Accordingly, title to submerged riverbeds always has been understood to vest in the riparian landowner — not the State of Colorado. In 1912, the Colorado Supreme Court expressed the contemporary understanding that, at the time Colorado attained statehood and adopted its constitution in 1876, "the natural streams of this state are, in fact, nonnavigable within its territorial limits." *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912).[10]

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[10] *Stockman* was overruled on other grounds to the extent it might have suggested that the United States could not reserve

A year later, the Colorado Supreme Court reiterated that "[t]he natural streams of the state are nonnavigable within its limits," explaining that "it is proper to take judicial notice of conditions existing at the time of [statehood]." *In re German Ditch & Reservoir Co.*, 139 P. 2, 9 (Colo. 1913). More recently, the Colorado Supreme Court cited *Stockman* for the same proposition in a case in which the parties agreed that a particular river was non-navigable, consistent with the long-held understanding in Colorado. *See People v. Emmert*, 597 P.2d 1025, 1026 (Colo. 1979) (en banc).[11]

Other Colorado cases likewise have noted in passing that particular rivers were non-navigable in fact. *See United States v. District Ct. in & for the County of Eagle*, 458 P.2d 760, 762 (Colo. 1969) (en banc) (Eagle River), *aff'd*, 401 U.S. 520 (1971); *Hall v. Brannan Sand & Gravel Co.*, 405 P.2d 749, 750 (Colo. 1965) (South Platte River); *Smith v. Town of Fowler*, 333 P.2d 1034, 1036 (Colo. 1959) (en banc) (Arkansas River). In 1889, the Colorado Supreme Court thought the matter so well-settled that it

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for federal use certain "unappropriated non-navigable waters on federal lands." *United States v. City & County of Denver ex rel. Bd. of Water Comm'rs*, 656 P.2d 1, 17 (Colo. 1982) (en banc); *see id.* (discussing doctrine of "federal reserved water rights" set out by this Court "in several cases throughout the past one hundred years"); *New Mexico*, 438 U.S. at 700 ("many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified").

[11] *See also* Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 76 (2010) ("[r]elying on the federal test of navigability, the Colorado Supreme Court [in *Stockman*] has declared almost all streams in Colorado to be non-navigable").

observed in passing that "[i]t is scarcely necessary to add that the South Platte river is not navigable in Colorado." *Platte Water Co. v. Northern Colorado Irrigation Co.*, 21 P. 711, 713 (Colo. 1889).

This Court likewise has taken judicial notice of well-known facts concerning non-navigability, referring in one case to the "Platte and other large western streams known to be unnavigable." *Oklahoma v. Texas*, 258 U.S. at 585. To *amici*'s knowledge, the State of Colorado never has asserted that any Colorado river is navigable for title purposes.

2. The Army Corps of Engineers assesses "navigable water[s] of the United States" for purposes of its permitting jurisdiction under section 10 of the Rivers and Harbors Appropriation Act of 1899. 33 U.S.C. § 403. Unlike navigability for title, however, navigability for purposes of such Commerce Clause regulation may arise *following* statehood and may be based on *subsequent* improvements such as the erection of dams, dredging, channels, canals, or other means of engineering and construction. Thus, "[a]lthough navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may *later* arise." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (emphasis added; footnotes omitted). An Army Corps of Engineers' regulation therefore provides that, for purposes of Rivers and Harbors Act jurisdiction, "[n]avigable waters of the United States are those waters that . . . are presently used, or have been used in the past, or may be *susceptible* for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (emphasis added); *see*

id. § 329.9(b) (navigability can arise "by reasonable improvement").

Even allowing for subsequent improvements to create navigability for regulatory purposes, the Army Corps of Engineers has classified only two Colorado water bodies as navigable: the Navajo Reservoir, which was created by a dam and lies primarily in New Mexico but partially in Colorado; and the Colorado River downstream of Grand Junction, Colorado, a 39-mile stretch between Grand Junction and the Colorado-Utah border that lies below multiple dams built since Colorado attained statehood.[12] The Army Corps of Engineers' decisions to classify only two water bodies in Colorado as navigable since 1899 (presumably based on post-statehood improvements) is persuasive additional support for the Colorado Supreme Court's conclusion in 1912 that Colorado rivers were not navigable in fact at the time of statehood.

B. Colorado Property Owners Hold Title To Submerged Lands Under Non-Navigable Rivers And Enjoy Certain Exclusive Rights To Use The Streambeds

1. "It is the general rule of property law recognized in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands." *Emmert*, 597 P.2d at 1027. This rule consistently has been applied in Colorado over the 135

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[12] *See* http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/co_waterways.html (setting out two navigable Colorado waterways). Army Corps of Engineers regulations provide that omission from the Corps' list of navigable waters "should not be taken as an indication that the waterbody is not navigable." 33 C.F.R. § 329.16(b).

years since statehood.[13] As this Court observed in 1891, state common law throughout the Nation typically has provided that "all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main-land and the center thread of the current." *Hardin v. Jordan*, 140 U.S. 371, 384 (1891).

If allowed to stand, the Montana Supreme Court's erroneous application of this Court's navigability-for-title test could call into question thousands of land titles to riverbeds in Colorado and other States. The Montana court's interpretation of that test as being "very liberally construed" in favor of finding navigability and thus state ownership, Pet. App. 54, could be asserted as grounds to overturn the Colorado Supreme Court's determination that Colorado's rivers and streams were not navigable at statehood.

2. If Montana were successful, the State of Colorado could seek to assert ownership over numerous stretches of riverbeds long thought to be owned by private landowners or the United States. Colorado could attempt to use its suddenly discovered riverbed ownership to enforce rights against riparian landowners. The result would be a destabilizing and radical transfer of property rights from landowners to the State of Colorado, threatening to strip property

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[13] *See, e.g.*, *City of Denver v. Pearce*, 22 P. 774, 776 (Colo. 1889) (presumption that a land grant "carried the boundary to the thread of the stream"); *Hanlon v. Hobson*, 51 P. 433, 435 (Colo. 1897) ("[W]here, . . . in a deed conveying lands, a nonnavigable river itself is named as a monument, the grant extends to its center, and the thread of the stream is its true boundary."); *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905) ("the owner of lands along a nonnavigable fresh water stream, as an incident of such ownership, owns the bed of the stream"); *More v. Johnson*, 568 P.2d 437, 439 (Colo. 1977) (en banc) (same).

owners of a range of rights on which they have relied since Colorado gained statehood 135 years ago.

First, as Montana has done in this case, Colorado could seek to extract revenues from the use or occupancy of the stream beds by current owners or their licensees, or to exclude them from use altogether. Members and supporters of *amici*, like other Colorado property owners, make substantial economic and non-economic use of their submerged lands. They could stand to lose those valuable rights if the Montana court's decision is allowed to create a billowing wave of challenges to long-settled submerged land titles across the western States — piecemeal litigation that might endure for decades as navigability is asserted over numerous rivers or portions thereof.

Second, that uncertainty for existing submerged lands titles also could affect the ability to exercise adjudicated water rights in Colorado. The right to use the beds and banks of rivers under established land titles in Colorado is an essential aspect of the development of appropriative water rights under the Colorado Constitution.[14]

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[14] In Colorado, although "all water in the state is a public resource dedicated to the beneficial use of public and private agencies, as prescribed by law," "the beds of non-navigable streams in Colorado are not held by the state under a public trust theory." *Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 704, 709 n.29 (Colo. 2002) (en banc). Water diversion rights in Colorado (as distinguished from ownership of riverbeds and the use of the waters above them for activities such as fishing) are decided based on the "prior appropriation doctrine, recognized in most of the Western States," pursuant to which "water rights are acquired by diverting water and applying it for a beneficial purpose." *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982). Colorado's state constitution, ratified in 1876, adopts the doctrine of

The appropriation of water for irrigation, domestic, municipal, industrial, and other beneficial uses outside of the river channel requires diversion or control of water by means of dams, reservoirs, ditches, headgates, pumps, and pipelines that are placed on submerged riverbeds. Water users in Colorado, including the farmers and ranchers who are members of *amici*, municipal water utilities, and federal government agencies, have installed and operate structures and facilities ranging from simple irrigation ditches to major public water supply reservoirs and federal reclamation facilities.

Whether those structures are located on land owned by the appropriator or another party who has granted an easement for access,[15] the constitutionally protected right of *amici* and thousands of other Coloradans to use water depends on access to the bed and banks of the stream. The continued use of those structures depends in turn on the stability of land titles that have formed the basis for water development projects since the original adoption and

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prior appropriation. *See* Colo. Const. art. 16, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."). In the Desert Land Act of 1877, Congress acquiesced in the doctrine of prior appropriation for western lands, which initially were owned by the United States prior to statehood. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155-56 (1935); *Board of County Comm'rs*, 45 P.3d at 708.

[15] In many cases, those structures were built on federal lands pursuant to congressional grants and federal easements. *See, e.g.*, 30 U.S.C. §§ 51, 52; 43 U.S.C. § 661; *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 611-12 (1978). The Federal Land Policy and Management Act of 1976 repealed such prior authorizations, subject to existing rights, and provided for the issuance of new rights-of-way for water projects by the Departments of Agriculture and Interior. *See* 43 U.S.C. § 1761.

congressional recognition of the prior appropriation doctrine.

Third, riparian landowners benefit from operating or leasing rights to others to conduct recreational businesses on their private river and streambeds. Those recreational businesses, exemplified by the members of the Dude Ranchers' Association, include fishing, hunting, horseback riding, and boating, and involve exclusive use of the riverbeds, for example, by wading into the river for fly fishing, hunting waterfowl, or launching boats. Property is bought and sold on the basis of its stream access and riverbed ownership and use rights, and the right to control access to the stream often contributes substantially to its market value. If title is found to have vested at statehood in the State of Colorado, however — contrary to the settled assumption that riparian owners in Colorado hold title to the riverbeds — then a vital economic underpinning for those businesses and property uses will have been demolished. Moreover, because private landowners pay property taxes on the submerged lands to which they currently have record title and the assessed value of the overall parcel is based on market transactions, a sudden conversion to state ownership would deprive local governments of a much-needed source of revenue.

Fourth, unsettling title to Colorado riverbeds would affect a range of conservation and other environmental interests. Aquatic managers recognize the value of physical modification of the beds and banks of streams to preserve and improve watersheds by stabilizing streams, reducing erosion, and providing habitat for fish and other aquatic species. Such modifications are placed on the riverbeds and banks owned or controlled by *amici* and other ripar-

ian landowners, often using configurations of native materials such as rocks, logs, grass mats, and trees. In many cases, state and federal government agencies have provided support for stream improvements initiated by private landowners.

Water diverted from streams also supports important habitats such as stream-side and floodplain vegetation, fisheries, and wildlife communities. Because riparian habitat represents just 3% of Colorado's land area and is required to support approximately 80% of Colorado's wildlife species, the State of Colorado has recognized that it is critically important to protect and promote riparian habitat.[16] Ownership of the riverbeds, and the associated right to exclude others from undoing conservation efforts on one's property, adds to the value and utility of riparian lands and the effectiveness of those conservation efforts.[17]

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[16] *See* Colorado Div. of Wildlife, *Managing Forested Lands for Wildlife* 267, 349-56 (Robert L. Hoover & Dale L. Willis eds., 1984).

[17] *See*, *e.g.*, Reed Watson, *Stream Access Across the West*, PERC Reports, Spring 2009, at 8, 11, *available at* http://www.perc.org/files/PRspring09.pdf (describing "large-scale, privately funded stream restorations in Colorado" as being "too numerous to list"; explaining that such projects likely would not occur "[i]f every angler in Colorado held access to th[e] stream"; and describing one large project that resulted in "downstream neighbors restor[ing] an additional 16 miles of" the stream); Stephanie Simon, *In This Political Battle, a River Runs Through It — Colorado Rafters, Anglers Square Off Over Use of Streams Through Private Land*, Wall St. J., Apr. 8, 2010, at A1 (discussing Colorado dude ranch that spent funds "to reshape [a] stretch of the riverbed into a haven for trout"); Michael F. Browning, *Private Means to Enhance Public Streams*, 33 Colo. Law. 69, 69 (Apr. 2004) ("[a]n increasing number of Colorado landowners and conservation organizations are recontouring

Landowners likewise have entered into agreements with the State of Colorado's Water Conservation Board that allow diversions from a stream to supply water to ponds, wetlands, sloughs, and channels that provide fish and wildlife habitat. They have granted conservation easements, through which a commitment to protect the conservation values of property, including water resources and habitat-related storage and diversion facilities, is exchanged for certain tax incentives. Colorado law also allows public agencies such as counties, municipalities, and water districts to install structures on riverbeds that control in-stream flows at particular times of year to enhance non-motorized recreational uses such as kayaking and other whitewater sports. *See* Colo. Rev. Stat. § 37-92-103(4). Many such structures have been built in waterways in Colorado that have become increasingly popular sites for recreational boating for certain members of *amici* and other Colorado residents and tourists. The title to those submerged lands often is owned by private parties or local or federal government agencies.

These actions were taken in reliance on the fact that property owners in Colorado hold title to the riverbeds on their riparian lands. If riparian landowners suddenly were regarded as trespassers on state lands, or required to pay rent to the State to maintain riparian and streambed structures, it would cause financial hardship for those currently maintaining them and would create a serious disincentive for voluntary private protection of riparian lands and waters.

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and reconfiguring stream beds throughout the state" "to enhance fish populations, quality, and habitat").

3. Interference with the foregoing uses necessarily implicates the exclusionary rights that Colorado landowners enjoy. As this Court has explained, "[t]he hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (internal quotation marks omitted). The valuable property right to exclude should not be jeopardized by a sudden and dramatic loosening of the navigability-for-title test.

In Colorado, "the owner of lands along a non-navigable fresh water stream, as an incident of such ownership, owns the bed of the stream, and the exclusive right of fishery therein to the middle thereof." *Hartman*, 84 P. at 687 (holding that fishermen could not wade into privately owned riverbeds without permission). Thus, in Colorado, "the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations." *Emmert*, 597 P.2d at 1027 (citing *Hartman* and affirming trespass conviction of rafters who "touched the riverbed" of private property).

C. This Court Long Has Sought To Preserve Reliance Interests And Stability Of Titles

In numerous cases, this Court has declined to interpret land patents or laws affecting private property in a way that would upset long-settled reliance interests. The Court has endeavored to minimize litigation over titles on which landowners had depended for long periods. Those precedents by analogy support the principle here that the navigability-

for-title test — particularly at this point in the Nation's history, when all but four States were admitted more than a century ago[18] — should be construed and applied to preserve long-held reliance interests based on the historic non-navigability of many western rivers. The Montana Supreme Court's reliance on present-day river conditions and emerging recreational uses that did not exist at statehood creates a particularly dangerous threat to settled land titles.

In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), this Court construed federal land grants, designed to subsidize construction of the transcontinental railroad, in a way that protected private property interests against government intrusion more than a century after the United States had granted the lands. In the Union Pacific Act of 1862, Congress granted public land to the Union Pacific Railroad for each mile of track laid. In addition, "[l]and surrounding the railway right-of-way was divided into 'checkerboard' blocks," with odd-numbered lots granted for free to Union Pacific and even-numbered lots reserved by the United States for later sale or federal use. *Id.* at 672.[19] Union Pacific subsequently sold some of its odd-numbered lots to a sheep ranch, and the checkerboard configuration made access

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[18] Arizona and New Mexico were admitted in 1912, and Alaska and Hawaii were admitted in 1959.

[19] The stated rationale, and an interesting historical note, was that "'the price of the reserved sections was doubled so that it could be argued, as the *Congressional Globe* shows *ad infinitum*, that by giving half the land away and thereby making possible construction of the . . . railroad, the government would recover from the reserved sections as much as it would have received from the whole.'" *Leo Sheep*, 440 U.S. at 673 (quoting Paul W. Gates, *History of Public Land Law Development* 345-46 (1968)).

impossible to certain even-numbered lots, which contained a federal reservoir used by the public for hunting and fishing, without some intrusion on private ranchland. *See id.* at 677-78. The United States built a public access road extending to the reservoir in part on the private ranchland. *Id.* at 678. The court of appeals held that the original grants to Union Pacific "implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections that were held by the Government." *Id.*

This Court unanimously reversed. It emphasized that the issue "affect[ed] property rights in 150 million acres of land in the Western United States." *Id.* The Court reasoned that "[t]his Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." *Id.* at 687-88. The Court forcefully declined "to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago." *Id.* at 681-82. It concluded that the federal government could intrude only by exercising "the power of eminent domain" and paying just compensation for the taking of private property. *Id.* at 680.

Earlier cases from this Court similarly avoided a "sharp or stringent construction" of federal statutes that "might have the effect of unsettling titles to land to an extent the court may not be able to anticipate." *Doolittle's Lessee v. Bryan*, 55 U.S. (14 How.) 563, 567 (1853). This Court deemed it the better course to "be even astute in avoiding a construction which

may be productive of much litigation and insecurity of titles." *Id.*; *see also Louisiana v. Garfield*, 211 U.S. 70, 74-76 (1908) (construing congressional acts granting territory to the State of Louisiana in 1849 and the State of Arkansas in 1850 to avoid "a great number of titles to a very large amount of land [from being] disturbed"); *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196, 207-08 (1886) (adopting construction of land patents that protected reliance interests and rejecting construction that "would disturb titles derived from such patents, and lead to greater confusion and litigation"). In all events, this Court has safeguarded the view that "the general welfare of society is involved in the security of the titles to real estate." *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911).

D. The Montana Supreme Court's Erroneous Decision In Effect Takes Private Property Without Just Compensation

The Montana Supreme Court's reinvention of the navigability-for-title test functionally operates as a judicial taking without just compensation. Four Justices of this Court have concluded that claims alleging impermissible judicial takings are cognizable under the Fifth Amendment's Takings Clause, reasoning that, "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601-10 (2010) (plurality op.). Two other Justices in that case concluded that the Due Process Clause similarly prohibits destruction of property rights. *See id.* at 2614 (Kennedy, J., concur-

ring in part and concurring in the judgment) ("It is . . . natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.").

This Court has held that government action declaring non-navigable private property to be navigable in a way that affects significant property rights is an impermissible taking absent payment of just compensation. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), private property owners dredged a non-navigable fishpond to create a marina and connected it to navigable waters in Hawaii that, in turn, emptied into the Pacific. The Army Corps of Engineers determined that the marina thereby had become a navigable water of the United States subject to the Corps' permitting jurisdiction under the Rivers and Harbors Act, and also was subject to a public right of access. *See id.* at 168.

Although this Court agreed that the Corps had permitting jurisdiction concerning navigability pursuant to the Commerce Clause, the Court held that "it does not follow that the pond is also subject to a public right of access." *Id.* at 172-73. The Court explained that it "has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Id.* at 172. In rejecting a public right of access, the Court "h[e]ld that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the

Government cannot take without compensation." *Id.* at 179-80 (footnote omitted).[20]

Here, however, no just compensation would be forthcoming if the Montana decision were affirmed. The gravamen of such a holding would be that the rivers at issue *always* belonged to the State. By its very nature, a conclusion as sweeping as the state supreme court's leaves numerous title holders to riverbeds with questionable titles even though their deeds and chain of title stretch back to Montana statehood in 1889. Such a consequence would be doubly pernicious, as it would strip submerged land-owners of valuable property rights with no just compensation remedy in return.

CONCLUSION

The Court should reverse the judgment of the Montana Supreme Court.

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[20] *See also, e.g.*, *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (state, "by *ipse dixit*, may not transform private property into public property without compensation"); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) ("[N]o private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting from denial of certiorari) ("'[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.'") (quoting *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)).

Respectfully submitted,

CHARLES B. WHITE
PETROS & WHITE, LLC
1999 Broadway
Suite 3200
Denver, Colorado 80202
(303) 825-1980

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DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)