

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 AMICUS CURIAE IN SUPPORT OF
PETITIONER BY FREEPORT-MCMORAN
CORPORATION, SALT RIVER PROJECT
AGRICULTURAL IMPROVEMENT AND
POWER DISTRICT AND SALT RIVER
VALLEY WATER USERS' ASSOCIATION**

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INTERESTS OF AMICI CURIAE

Amici Curiae participating in this brief are Freeport-McMoRan Corporation (“Freeport”), a New York corporation with extensive mining operations and landholdings in Arizona, Colorado and New Mexico, and the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users’ Association (collectively, “SRP” as further described below), which operate a large federal Reclamation project delivering waters of the Salt and Verde Rivers to irrigators, municipalities and other water users in and near Phoenix, Arizona.¹ The interests of each Amicus are described in greater detail below.

Amici are concerned that the decision of the Montana Supreme Court in this case, if it is allowed to stand, will pose a grave threat to their long-established property rights in lands underlying numerous watercourses that have never been “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*, 10 Wall. 557, 563 (1870). Furthermore, the opinion below also threatens

¹ This brief is filed with the consent of both parties, which consents are on file with the Clerk of this Court. Pursuant to Rule 37.6, Amici disclose that no counsel for either party in this case authored any portion of this amicus brief, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amici made any such monetary contribution.

to interfere with the rights of Amici, and numerous other surface water appropriators throughout the western United States, to impound and divert water for beneficial use consistent with the laws of the states in which they operate. Accordingly, Amici submit this brief in support of Petitioner PPL Montana LLC (“PPL Montana”) and urge this Court to reverse the decision of the Montana Supreme Court and remand the case with clear instructions regarding the proper federal test of navigability for title purposes.

I. FREEPORT-MCMORAN CORPORATION

Freeport owns and operates a variety of mining facilities in Arizona, New Mexico and Colorado. As a necessary component of these mining operations, Freeport also owns and operates various facilities (*e.g.*, dams, reservoirs, water diversion structures, etc.) in or adjacent to streambeds in each of these states. In addition, Freeport owns farm and ranch lands that rely on surface water diversions for irrigation and cattle grazing and for related ranch operations. Finally, Freeport cooperates with federal agencies to manage riparian lands it owns to ensure protection of habitat for endangered species. Freeport’s operations and interests in each of these states are described in greater detail below.

A. Freeport’s Interests in Arizona

In Arizona, Freeport owns and operates multiple mining facilities located adjacent to or on both sides

of watercourses. In 2010, these operations employed approximately 7,000 people and generated approximately \$1.2 billion in direct economic impact in Arizona, including approximately \$220 million in tax payments to state and local governments. For many years, Freeport, like all other private property owners in Arizona, believed it held clear title to the beds and banks of the streams that traverse or border its operations because the streams were considered to be non-navigable.

Beginning in 1985, however, these long-held assumptions regarding title were clouded due to actions by the State of Arizona, which began to claim title to streambeds in the state on the basis of the federal navigability for title doctrine. *See Land Dept. v. O'Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (App. 1987). Since that time, a continuous cloud has been cast on the title to Freeport's ownership of riparian property, as well as on the title to thousands of other riparian parcels throughout the state. *Id.* at 45, 739 P.2d at 1362 ("This case concerns a potential cloud on the title of many parcels of land. The State claims that hundreds of millions, if not billions, of dollars' worth of land in Arizona's most populous county are at issue.") In the face of these threats to its vital property interests, Freeport has been actively involved in litigation and administrative proceedings regarding the navigability of streams throughout Arizona for more than fifteen years. *See, e.g., Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (App. 2001) *reconsideration denied* (May 8, 2001); *State of Arizona*

v. Arizona Navigable Stream Adjudication Commission, 224 Ariz. 230, 229 P.3d 242 (App. 2010), *review denied* (Feb. 8, 2011) (hereafter, “*State v. ANSAC*”). Unfortunately, as will be described in greater detail below, this litigation continues to this day with no end in sight.

B. Freeport’s Interests in Colorado

In Colorado, Freeport owns and operates the Climax and Henderson Mines. In 2010, Freeport employed approximately 650 people and generated approximately \$152 million in direct economic impact in Colorado, including approximately \$35 million in state and local tax payments. At these mines, Freeport operates multiple surface water diversions on Ten Mile Creek and the Williams Fork River, which are tributaries of the Colorado River.

Colorado is a semi-arid state where most streams originate in the Rocky Mountains and fall rapidly through steep canyons to either the east or west. While some of these streams are tributaries to larger rivers, such as the Missouri, Mississippi and Colorado, they have never been considered navigable waterways or highways for commerce. Instead, for more than 150 years, these streams have been impounded and diverted to provide vital water supplies for agricultural, mining, municipal, industrial and other beneficial purposes throughout the state.

In Colorado, the federal test of navigability for title has been largely dormant. Despite the relatively quiet nature of this issue in Colorado, Freeport is concerned that the precedent set by the Montana Supreme Court in this case may be a strong temptation for the Colorado State Land Board and Colorado's state courts to assert navigability as a convenient means to claim title to, and exact rental payments for, streambeds that have long been considered private property in Colorado.

C. Freeport's Interests in New Mexico

In New Mexico, Freeport owns several mining operations, as well as irrigated agricultural lands where surface waters are diverted and impounded for beneficial use. In 2010, Freeport employed approximately 950 people and generated approximately \$145 million in direct economic impact in New Mexico, including approximately \$22 million in state and local tax payments. In addition, Freeport voluntarily cooperates with federal agencies to manage property adjacent to the Gila River to protect the riparian corridor and preserve habitat for endangered species. Freeport's operations require that water be diverted through facilities constructed in and across the beds of streams that have long been considered non-navigable. Ownership and control of its river diversion facilities is indispensable to the success of Freeport's operations in New Mexico.

Much as in Colorado, the navigability for title doctrine has long been dormant in New Mexico. This may, perhaps, result from the fact that in 1899, this Court approved a lower court's taking of judicial notice that the Rio Grande, the largest stream in the State of New Mexico, is non-navigable throughout the state. See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) ("Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water."). While such a conclusion by this Court regarding the largest stream in New Mexico might suggest a similar outcome for all other watercourses in the state, the Montana Supreme Court's decision in this case would create uncertainty regarding the status of streams in New Mexico. As such, it is a cause for concern regarding the potential for similar actions to occur in New Mexico.

II. SALT RIVER PROJECT

The terms "Salt River Project" or "SRP" refer collectively to the Salt River Project Agricultural Improvement and Power District ("District") and the Salt River Valley Water Users' Association ("Association"). The District is an Arizona agricultural improvement district established pursuant to Title 48, Chapter 17, of the Arizona Revised Statutes. It is a political subdivision of the State of Arizona. The Association is an Arizona territorial corporation. Pursuant to a 1917 agreement with the United States, the District and

the Association operate the Salt River Federal Reclamation Project (“Project”).

SRP has demonstrated a substantial interest in the law relating to the public trust doctrine and the legal standards for determining whether a watercourse is navigable for title purposes. For more than twenty years, SRP has been a participant in numerous administrative and judicial proceedings in Arizona to determine the navigability of various watercourses. *See, e.g., State v. ANSAC*, 224 Ariz. at 230, 229 P.3d at 242; *Defenders of Wildlife*, 199 Ariz. at 411, 18 P.3d at 722; *Arizona Cntr. for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991), *review dismissed* (Oct. 6, 1992). Currently, cases are pending with respect to the navigability of at least six Arizona watercourses—the Lower Salt, Upper Salt, San Pedro, Santa Cruz, Verde, and Gila Rivers.

SRP has participated in these Arizona actions to protect its interests in the beds of the affected watercourses and the waters that flow therein. The Project was constructed by the United States Reclamation Service (now the Bureau of Reclamation). The keystone of the Project is Roosevelt Dam on the Salt River, one of the first dams constructed pursuant to the Federal Reclamation Act of 1902. *See Act of June 17, 1902, c. 1093, 32 Stat. 388* (codified as amended at 43 U.S.C. §§ 371 to 600). The lake behind Roosevelt Dam began to fill in 1908, and construction on the dam was completed in 1911. The United States operated the Project for the first several years after construction of Roosevelt Dam was completed and to this day

retains legal title to the Project facilities. *Ball v. James*, 451 U.S. 355, 358 (1981). The care, operation, and maintenance of the Project facilities were transferred to the Association in 1917. *Id.*; see also *Uhlmann v. Wren*, 97 Ariz. 366, 373, 401 P.2d 113, 119 (1965). The United States subsequently constructed five other Reclamation dams on the Salt and Verde Rivers (Stewart Mountain, Horse Mesa and Mormon Flat Dams on the Salt River and Horseshoe and Bartlett Dams on the Verde River).² Each of those dams is a Project facility that SRP operates and in which it has a significant interest.

Although the United States holds legal title to the Project facilities and the lands beneath them, the United States holds that title on behalf of the Association and its shareholders. SRP, acting on its own behalf and on behalf of the Association shareholders, holds an equitable possessory interest in the Project facilities and lands and continues to operate and maintain the facilities.

In addition, SRP possesses habitat mitigation lands along the San Pedro, Verde, Upper Salt and Upper Gila Rivers. A finding of navigability for any of these watercourses could affect SRP's ability to manage these lands for habitat protection.

² SRP also operates another Reclamation facility, C.C. Cragin Dam and Reservoir, on Clear Creek in the Little Colorado River watershed in northern Arizona.

The Montana Supreme Court has erroneously applied the law relating to navigability in a manner such that, if it were similarly applied in Arizona, could have grave consequences for the interests of SRP and the Association shareholders in Arizona's watercourses and flowing waters. A determination that the watercourses on which the Project facilities are located were navigable when Arizona became a state on February 14, 1912, could adversely affect SRP's ability to protect those interests and to conduct its operations.



SUMMARY OF ARGUMENT

In the case below, the Montana Supreme Court affirmed a trial court's grant of summary judgment in favor of the State of Montana on the issue of whether specific reaches of three rivers were navigable when Montana became a state in 1889. *See PPL Montana LLC v. State of Montana*, 355 Mont. 402, 229 P.3d 421 (2010). Based on this holding, the court concluded that the State of Montana, not PPL Montana, held title to the beds of the rivers under the federal test of navigability for title and the equal footing doctrine.³

³ The federal test of navigability for title is discussed in greater detail below. The equal footing doctrine holds that as new states are admitted to the Union, they take title to the beds of all navigable waters within the new states on an "equal footing" with the original 13 states, which took title to the beds of navigable waters at the inception of our Nation. *See Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

The court then approved the lower court's order requiring PPL Montana to pay more than \$40 million in damages to the state for past occupancy, by dams and reservoirs, of the riverbeds in question. *Id.* at 461, ¶171, 229 P.3d at 461.

The Montana Supreme Court approved the trial court's summary judgment ruling despite the fact that PPL Montana had presented detailed admissible evidence, in the form of expert witness affidavits, technical reports and other documents contesting the navigable status of each of the river reaches at issue in the case. As Justice Rice of the Montana Supreme Court noted in his dissent, the majority opinion erred in two fundamental ways, first "in its analysis of the law governing title navigability," and second by failing to "properly apply the tenets of summary judgment by disregarding genuine material factual issues." *Id.* at 461-62, ¶174, 229 P.3d at 461.

Unless this Court corrects these errors, the opinion below may have grave negative consequences not only for Amici, and not only in Arizona, Colorado and New Mexico, but potentially throughout the western United States. By misapplying this Court's test of navigability for title, the Montana Supreme Court threatens to undermine the property rights of landowners and political subdivisions across the West. To preclude this possibility, Amici urge this Court to reverse the judgment of the Montana Supreme Court and return this case with instructions to determine the navigability of the rivers in question in a manner

consistent with this Court's long history of jurisprudence on the issue of navigability for title.

◆

ARGUMENT

I. THE TEST OF NAVIGABILITY FOR TITLE IS FEDERAL AND REQUIRES CAREFUL ANALYSIS OF ALL RELEVANT FACTS BEFORE A COURT DETERMINES NAVIGABILITY.

As this Court is aware, the test of navigability for title purposes is a federal test that has been applied for more than 150 years, largely through decisions rendered by this Court. The original, and still frequently quoted, test of navigability is found in *The Daniel Ball*:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

10 Wall. at 563. Although *The Daniel Ball* was an admiralty case, its statement of the test for navigability has long been applied as the appropriate federal test of navigability for title. *See, e.g., Utah v. United States*, 403 U.S. 9 (1971); *United States v. Oregon*,

295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931).

The navigability cases decided by this Court have applied this test in a consistent manner, requiring a detailed factual analysis of historical information to establish the fact of navigability. Where insufficient facts are presented to support navigability, the Court has held the rivers in question non-navigable. For example, in *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Court considered “voluminous” evidence concerning the Red River, which forms a portion of the border between Oklahoma and Texas. *Id.* at 586. As the Court noted, “a large part” of the evidence it considered “deals directly with the physical characteristics of the river, comes from informed sources and is well in point.” *Id.* Based on this evidence, the Court stated:

We regard it as obvious that in the western half of the state the river is not susceptible of being used in its natural and ordinary condition as a highway for commerce, and there is no evidence that in fact it ever was so used.

* * *

While the evidence relating to the part of the river in the eastern half of the state is not so conclusive against navigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water; in other words, that it is neither used,

or susceptible of being used, in its natural and ordinary condition as a highway for commerce. Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability.

Id. at 588, 591.

Other examples abound, but the key factor in all cases, whether a river was determined to be navigable or non-navigable, is that the Court has carefully weighed all evidence presented before making a navigability determination.⁴ In light of this consistent approach, it is particularly disconcerting that the Montana Supreme Court summarily rejected the evidence of non-navigability offered by PPL Montana and approved a grant of summary judgment in favor of the State of Montana. Rather than overturn the summary judgment and remand the case for an appropriate evidentiary hearing, the court improperly weighed the conflicting evidence and rejected the evidence offered by PPL Montana. This circumstance alone is sufficient

⁴ Even in *United States v. Rio Grande Dam & Irrigation*, where a lower court took judicial notice that the Rio Grande is not navigable in New Mexico, this Court examined “the affidavits and other evidence introduced in [the] case” before concluding “it is clear to us that the Rio Grande is not navigable within the limits of the territory of New Mexico.” 174 U.S. at 698.

to overturn the decision below. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“at the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial”); *Andersen v. Schenk*, 353 Mont. 424, ¶2, 220 P.3d 675, 676 (2009) (“at the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses”).

II. THE NAVIGABILITY FOR TITLE TEST SHOULD BE APPLIED IN A MANNER THAT REFLECTS CONDITIONS IN THE WESTERN UNITED STATES.

The Montana Supreme Court’s decision in this case is especially egregious in the western United States, where rivers often are either steeply sloped mountain streams with frequent falls, rapids and other impediments to navigation, or desert rivers with widely variable flows and shallow, shifting beds. Again, this Court’s precedents provide numerous examples of each of these types of rivers being held to be non-navigable.

For example, in *United States v. Utah*, the Court addressed the navigable status of several rivers, including the Colorado River from its confluence with the Green River to Utah’s southern border with Arizona. 283 U.S. at 64. The Colorado River rises in the

Rocky Mountains of Colorado, flows through Utah and Arizona, forms a portion of the border between Arizona and Nevada and the border between Arizona and California, and then flows into Mexico. Overall, the Colorado River is more than 1,400 miles in length. In Arizona, the river has been held to be navigable. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968). Nevertheless, as this Court noted,

Even 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. The question here is 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 nonnavigable. We are concerned with long reaches with particular characteristics of navigability or non-navigability. . . .

United States v. Utah, 283 U.S. at 77 (footnotes omitted). On this basis, the Court held that a thirty-six mile stretch of the Colorado River through Cataract Canyon was non-navigable. The Court noted that in this reach, “the river has a rapid descent or slope of about 399 feet, a drop of 11 feet per mile, with a long

series of high and dangerous rapids.” *Id.* at 80.⁵ Importantly, the Court found this reach of the Colorado River to be non-navigable despite the fact that the remainder of the river in Utah downstream of Cataract Canyon was held to be navigable. *Id.* Finally, the Court also found that a stretch of the river approximately four miles in length immediately upstream of “the first rapid in Cataract Canyon” was navigable. *Id.* at 89-90.

The critical element in all three of these determinations was the fact that the Court carefully reviewed and weighed the evidence of navigability and non-navigability for each individual reach of the Colorado River before determining navigability. As the Court stated, “[e]ach determination of navigability must stand on its own facts.” *Id.* at 87. No less should be accepted from the Montana Supreme Court. The mere fact that a large part of the Missouri River is navigable downstream of the reach now before this Court does not mean that other portions of the river may be held to be navigable without a careful analysis of all relevant evidence relating to that reach. Because the Montana Supreme Court instead chose to discount all evidence offered by PPL Montana and

⁵ This description is remarkably similar to the reaches of the Missouri, Madison and Clark Fork Rivers described in PPL Montana’s Petition for Writ of Certiorari. *See* Petition, at 5-6 (noting that the Thompson Falls Project is “constructed on a naturally occurring waterfall,” and that the Missouri-Madison Project includes a “17-mile stretch with five historic waterfalls, [where] the river drops more than 600 feet”).

confirm summary judgment in favor of the State of Montana, the decision below should be reversed.

This conclusion is also supported by the Court's decision in *Oklahoma v. Texas*, which, as noted above, addressed the navigability of a portion of the Red River. In its entirety, the Red River is more than 1,300 miles in length, from its origins in the Texas panhandle to its mouth in the Gulf of Mexico. *Oklahoma*, 258 U.S. at 582. While noting that the portion of the river downstream of the eastern border of Oklahoma is navigable, the Court nevertheless carefully analyzed the evidence concerning navigability of the portion of the river that forms the southern boundary of Oklahoma. In doing so, the Court described the river in this manner:

When the water rises, it does so very rapidly, and when it falls, in the same way. The river bed has a fall of more than 1 foot to the mile and consists of light sand which is easily washed about and is carried downstream in great quantities at every rise of the water. At all times there is an almost continuous succession of shifting and extensive sand bars. Ordinarily the depth of water over the sand bars is from 6 to 18 inches and elsewhere from 3 to 6 feet. There is no permanent or stable channel. Such as there is shifts irregularly from one side of the bed to the other and not infrequently separates into two or three parts.

Id. at 589. In light of this Court's holding that the upstream portions of the Red River are non-navigable

despite the navigable status of downstream sections, the Montana Supreme Court erred in holding that upstream reaches of the Missouri, Madison and Clark Fork Rivers are navigable merely because lower portions of these rivers have been found to be navigable. Unless corrected by this Court, this error may be misapplied by other lower courts as well, including on rivers in Arizona and New Mexico with conditions very similar to those on the Red River that this Court has held to be non-navigable.

III. MANY STATE COURTS HAVE NOT PROPERLY AND UNIFORMLY APPLIED THE FEDERAL TEST OF NAVIGABILITY FOR TITLE.

The Montana Supreme Court's opinion in the case below, coming 120 years after Montana's statehood, is simply the latest example of state courts loosely applying this Court's test of navigability for title and unsettling long-held expectations of private property rights in western streambeds. Perhaps nowhere is this trend better demonstrated than in Arizona, where the navigability for title doctrine has had a particularly long and convoluted history. As noted above, this issue first arose in Arizona in 1985, a full seventy-three years after Arizona became a state. Until that time, the State of Arizona had not asserted a single claim of title to any streambed in the state other than

the Colorado River.⁶ In fact, to the contrary, “since statehood, Arizona has uniformly taxed the property of riparian landowners as if they held clear title to the waterway beds.” *O’Toole*, 154 Ariz. at 44, 739 P.2d at 1361; *see also Defenders of Wildlife*, 199 Ariz. at 416, ¶2, 18 P.3d at 727 (“The claims of Arizona officials . . . immediately clouded the title held by political subdivisions, private individuals, and corporations that had for years exercised control over, made improvements to, and paid taxes upon these affected stretches of land.”). Unfortunately, in the twenty-six years since Arizona first asserted an interest in riverbeds in the state, the courts of Arizona have failed to bring any clarity, much less finality, to this issue.

A. Arizona’s Courts Have Repeatedly Invalidated Legislative Efforts to Conclusively Resolve Navigability in Arizona.

There have been no fewer than five published opinions by the Arizona Court of Appeals on the issue of navigability for title. *See O’Toole*, 154 Ariz. 43, 739 P.2d 1360; *Hassell*, 172 Ariz. 356, 837 P.2d 158; *Calmat of Arizona v. Miller*, 172 Ariz. 300, 836 P.2d 1010, *vacated on other grounds by Calmat of Arizona v.*

⁶ In 1865, the Arizona Territorial Legislature declared that the Colorado River was the only navigable river in the territory. *See Memorial of the Legislature of Arizona*, 38th Cong., 2d Sess., Misc. Doc. No. 17 (January 25, 1865). In 1968, the Arizona Supreme Court determined the Colorado River is navigable in *Morgan*, 443 P.2d at 427.

Miller, 176 Ariz. 190, 859 P.2d 1323 (1993) (App. 1992); *Defenders of Wildlife*, 199 Ariz. at 411, 18 P.3d at 722; and *State v. ANSAC*, 220 Ariz. at 230, 229 P.3d at 242. At each juncture, the court has ruled either that the navigability issue is unresolved, see *O’Toole*, 739 P.2d at 1364; *Calmat*, 836 P.2d at 1020-21, or that actions by the Arizona Legislature or the Arizona Navigable Stream Adjudication Commission (“ANSAC”) were impermissible under federal or state law, *Hassell*, 172 Ariz. at 371, 837 P.2d at 173; *Defenders of Wildlife*, 199 Ariz. at 427, ¶59, 18 P.3d at 738; *State v. ANSAC*, 224 Ariz. at 242, ¶28, 229 P.3d at 254. In each of the latter three cases, the court, relying on increasingly narrow grounds, rejected lower court rulings that would have resolved the navigability for title issue.

For example, in *Hassell*, while the court acknowledged that the Arizona Legislature was validly concerned about the “unsettling of record title” to “substantial real property holdings throughout the state,” *Hassell*, 172 Ariz. at 362, 837 P.2d at 164, the court nevertheless rejected the legislature’s attempt to resolve this issue through a streamlined process for private parties to obtain clear title to the riparian lands everyone had long believed to be in private ownership. *Id.* at 371, 837 P.2d at 173. The court based its holding in part on the public trust doctrine articulated by this Court in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), and in part on the “gift clause” of the Arizona Constitution, which forbids donations or grants by the State to private parties. See Ariz.

Const., art. IX, § 7. The court ruled that before a claim of title to any potentially navigable streambed land could be relinquished by the State, the State must undertake a “particularized assessment” of the validity of the navigability claims asserted for such lands. *Hassell*, 172 Ariz. at 372, 837 P.2d at 174.

Following the *Hassell* opinion, the Arizona Legislature made several attempts to create a mechanism for completing the “particularized assessment” mandated by the court. For example, in 1992 the legislature enacted statutes establishing ANSAC as an administrative agency charged with making the particularized assessment for each watercourse in the state. In 1994, the legislature amended these statutes to adopt a variety of evidentiary standards for ANSAC’s determinations. In *Defenders of Wildlife*, the Arizona Court of Appeals ruled that the evidentiary standards were impermissible under the federal test of navigability. *Defenders of Wildlife*, 199 Ariz. at 427-28, ¶¶59-63, 18 P.3d at 738-39. In doing so, the court overruled a trial court determination that the standards were acceptable and consistent with the federal test. *Id.* at 417, ¶8, 18 P.3d at 728.

After the *Defenders of Wildlife* opinion was issued, the Arizona Legislature once again attempted to create an effective means to resolve navigability claims in the state. The legislature further amended the statutes governing ANSAC’s administrative duties to remove the evidentiary standards the court of appeals had held invalid. For much of the next decade, ANSAC conducted dozens of evidentiary hearings,

received and considered voluminous evidence submitted both by proponents of navigability and parties that argued specific streams were non-navigable, and made findings concerning more than 39,000 individual stream segments throughout the state. See ANSAC, <http://www.azstreambeds.com> (last visited Sept. 2, 2011). There can be no doubt that this Herculean effort by ANSAC satisfied any reasonable interpretation of the *Hassell* court's requirement that a "particularized assessment" be made of the navigable status of each watercourse before any public trust claims may be relinquished. Nevertheless, despite all of this effort, the Arizona Court of Appeals once again found fault with the process used by ANSAC.

B. The Arizona Court of Appeals Has Rejected a "Particularized Assessment" of Navigability by the Administrative Agency Created Specifically to Make That Determination.

In *State v. ANSAC*, the Arizona Court of Appeals rejected a final administrative decision issued by ANSAC on September 21, 2005 (the "Lower Salt Report"). In the Lower Salt Report, ANSAC determined that the Lower Salt River was non-navigable on February 14, 1912, the date Arizona entered the Union. The Lower Salt Report includes more than forty-five pages of text and fifteen additional pages of

appendices.⁷ In the Lower Salt Report, ANSAC specifically notes that

the Commission received, compiled and reviewed evidence and records regarding the navigability and non-navigability of the Salt River from Granite Reef Dam to its confluence with the Gila River. Evidence consisting of studies, written documents, reports, newspapers and other historical accounts, pictures and testimony were submitted. The written materials and documents submitted are approximately three feet thick.

Lower Salt Report, *supra*, at 22. The documents included “[c]omprehensive studies” submitted by multiple expert witnesses. *Id.* In addition to the abundant documentary evidence, ANSAC held a two-day evidentiary hearing on April 7 and 8, 2003. “A total of 20 witnesses appeared at the hearing in Phoenix and gave testimony. Six of the witnesses were acknowledged experts in the fields of hydrology, hydraulics, geomorphology and history.” *Id.* at 23. Finally, ANSAC held another public hearing on January 17, 2004 “to consider all of the evidence, testimony and post-hearing memoranda submitted.” *Id.*

⁷ A copy of the report is available on ANSAC’s website. See ANSAC, <http://www.azstreambeds.com/UserFiles/File/pdf/finalreports/Lower%20Salt%20River.pdf> (last visited Sept. 2, 2011).

After considering all of this evidence, ANSAC found:

[T]he Lower Salt River between Granite Reef Dam and its confluence with the Gila River is an erratic, unstable and undependable stream characterized by periodic floods, sometimes extreme, followed by periods of drought where there is little or no water in the riverbed. The Commission finds that in its ordinary and natural condition even in the absence of the existence of Roosevelt Dam and reservoir the Lower Salt River was a braided stream of 2 to 4 channels interspersed with sandbars and sand islands which shift with floods or high flow of water and as such had a configuration that would be impossible to be considered navigable or susceptible of navigability.

Accordingly, the Commissioner [sic] finds that the Lower Salt River from Granite Reef Dam to its confluence with the Gila River was not used or susceptible of use for commercial trade or travel as of February 14, 1912 and therefore was not navigable as of that date nor was it susceptible of navigation.

Lower Salt Report, *supra*, at 45-46.

Despite this thoroughly documented decision, ANSAC's conclusions regarding the non-navigability of the Lower Salt River were rejected by the Arizona Court of Appeals in *State v. ANSAC*. Rather than consider the totality of the evidence evaluated by

ANSAC and provide the deference to which an administrative agency's determination is entitled under Arizona law, see *Arizona Water Co. v. Arizona Dept. of Water Resources*, 208 Ariz. 147, 154, ¶30, 91 P.3d 990, 997 (2004), the court of appeals instead chose to overturn ANSAC's decision on the narrowest of grounds—that ANSAC did not explicitly exclude the effects of “dams, irrigation diversions, canals, and other human impacts” that existed as of the date of Arizona statehood. *State v. ANSAC*, 224 Ariz. at 239-40, ¶20, 229 P.3d at 251-52. In doing so, the court elevated form over substance, ignored the detailed evidence considered by ANSAC, and set aside ANSAC's “particularized assessment” of the Lower Salt River—the very thing the court had previously insisted on in *Hassell*.

If this pattern continues, the question of navigability for title may never be settled in Arizona. The importance of this issue, both in Arizona and throughout the West, cannot be overstated. Unsettling long-held expectations regarding title to streambeds based on loose and shifting interpretations of the federal test will adversely affect the western states, their citizens and their businesses, all of whom would benefit from a decision by this Court that restores order to this now unsettled area of the law.

IV. THE “LIBERALLY CONSTRUED” STANDARD APPLIED BY THE MONTANA SUPREME COURT IS INCONSISTENT WITH THIS COURT’S DECISIONS ON THE NAVIGABILITY FOR TITLE TEST.

One of the most significant errors in the opinion below is its overly “liberal” application of the navigability for title test. The state district court in this case concluded that the test is “somewhat ‘fluid.’” *PPL Montana LLC*, 355 Mont. at 437, ¶98, 229 P.3d at 446. The Montana Supreme Court upheld the district court’s “fluid” and “liberal” application of the test, stating: “Our independent review of the caselaw in this area establishes unequivocally that the District Court’s understanding of the navigability for title test is correct. The concept of navigability for title purposes is very liberally construed by the United States Supreme Court.” *Id.* at 438, ¶99, 229 P.3d at 446. In reaching this conclusion, the Montana Supreme Court has misread this Court’s prior decisions regarding the navigability for title test.

The selected quotations from this Court’s prior decisions upon which the Montana courts relied do not support this extremely expansive application of the federal test. It is true that this Court has opined that a river need not have been actually used for navigation at statehood and that mere susceptibility to navigation is sufficient if the patterns of civilization and development in the region at the time of statehood otherwise explain the lack of actual navigation. *See Utah v. United States*, 403 U.S. at 10. This

Court has further held that the test for navigability does not depend on the river's ability to float sailing ships or other large vessels of commerce; the ability to float more modest vessels can be sufficient to satisfy the river's classification as a highway for commerce. *Id.* at 10-11. The Court also has found that certain natural impediments to navigation, such as those that require reasonable portages, do not necessarily eliminate the watercourse from being found "navigable" at statehood. *The Montello*, 20 Wall. 430 (1874). But these conclusions do not authorize a "fluid" or "liberal" interpretation of the federal test designed to support a predetermined conclusion regarding navigability.

This same overly expansive view of navigability also has been applied by the Arizona Court of Appeals in the series of cases described in Section III above. Despite the arid nature of the Southwest and this Court's prior decisions regarding the proper application of the federal test, landowners and other affected parties in Arizona have spent more than twenty years in litigation regarding whether the state's watercourses were navigable at statehood.

Upon reviewing this Court's prior decisions on the subject, one might assume that the parameters of the federal test were sufficiently clear to guide the lower courts in applying the test to particular watercourses. Unfortunately, that has not been the case. Lower courts, such as the Montana Supreme Court in this case and the Arizona courts in the decisions cited above, have misused this Court's prior opinions to

justify an overly expansive and “liberal” application of the test, stretching the boundaries of the test beyond the breaking point. This Court’s prior decisions simply do not support the overly broad interpretation of the test applied by the Montana Supreme Court in this case—i.e., to determine, on summary judgment, that a reach of a river with little historical evidence of navigation satisfied the federal test because it was subject to modern-day boating on certain stretches or that the entire river was navigable because it was subject to navigation on some stretches but not others.

Because navigability must be determined using the federal test, only this Court can rein in expansive and overly “liberal” applications of the test. As PPL Montana has requested, this Court should reiterate the fundamental concepts of the test that some lower courts have forgotten or ignored. Contrary to the holdings of the Montana and Arizona courts, the test cannot be so “fluid” and “liberal” that it authorizes the use of whatever limited evidence may be before the court to support a finding of navigability and thereby take the property of hundreds or thousands of citizens without notice while creating an unjustified windfall for state governments at the expense of those citizens.

V. THE MONTANA SUPREME COURT'S REFUSAL TO CONDUCT A SECTION-BY-SECTION ANALYSIS IN DETERMINING NAVIGABILITY CONTRAVENES THIS COURT'S PRECEDENTS AND WOULD RESULT IN VAST OVERREACHING ON STREAMS THAT ARE ONLY PARTIALLY NAVIGABLE.

In addition to its overly “liberal” and “fluid” application of the federal test of navigability for title, the Montana Supreme Court also erred by refusing to conduct any meaningful section-by-section analysis of the rivers before it. Justice Rice, in his dissent, aptly described this error:

Importantly – and I believe the Court begins to get off track in its substantive legal analysis here – in applying the navigability for title test, courts are not to assume that an entire river is navigable merely because certain reaches of the river are navigable, and likewise, are not to conclude that non-navigable reaches render an entire river non-navigable. . . . Instead, courts look to relevant portions of a river and, based upon the facts, determine whether particular reaches at issue are navigable or non-navigable. . . .

. . . Contrary to the Court's view, Utah demonstrates the propriety of applying a section-by-section analysis to determine where navigability begins and “how far navigability extends.” . . . Recognizing that navigable and non-navigable reaches may co-exist on the

same river, the Court [in Utah] refrained from making categorical pronouncements about a river's status. This section-by-section approach has been used by many courts. . . .

PPL Montana, 355 Mont. at 464-65, ¶¶178, 180, 229 P.3d at 462-63 (citations omitted).

Despite Justice Rice's extensive discussion of the controlling law, the majority of the Montana court neglected to perform this section-by-section analysis, deciding instead that the non-navigable reaches identified by the Petitioners were "simply too 'short' to matter." *Id.* at 466 (¶182), 229 P.3d at 464 (Rice, J., dissenting). The majority of the Montana court (again, on summary judgment) found that PPL Montana "merely point[ed] to relatively short interruptions in [the rivers] that impede uninterrupted navigation, but do not affect the actual use or susceptibility of use of these rivers as channels for commerce in Montana at the time of statehood." *Id.* at 443, ¶108, 229 P.3d at 449.

Although a proper analysis of the sections of these rivers that the Montana court deemed "too short" perhaps would have complicated the court's review (and certainly would have precluded summary judgment), those stretches can be critically important to landowners and others who have invested their lives and fortunes along these rivers. Even if substantial parts of a watercourse are generally navigable, that does not relieve courts of their duty to undertake a careful examination of the navigability of each definable

reach. In the present case, evidence was available upon which the courts could have made such a factual determination, but the Montana district court ignored that evidence in favor of an “all-or-nothing” approach, and the Montana Supreme Court wrongly affirmed the decision. *See PPL Montana*, 355 Mont. at 467-77, ¶¶185-202, 229 P.3d at 464-70 (Rice, J., dissenting).

The Montana court’s “all-or-nothing” approach could cause serious consequences for landowners along other rivers if this Court allows it to stand. This is true especially in cases where long rivers traverse a variety of terrain and are of substantially different character in different reaches. The Gila River, for example, rises in New Mexico and flows through the entire width of Arizona to the Colorado River on the border of Arizona, California and Mexico. At its headwaters in New Mexico, the river is a mere trickle. At its extreme lower end, adjacent to the Colorado River, steamboats purportedly traveled upriver for several miles in the 1800s. Along its route, the river flows from high mountains, through almost impassable canyons, and then spreads out through flat, broad desert valleys. For a court to find that the Gila River in New Mexico was navigable simply because commercial navigation once occurred on a short stretch near the Colorado River hundreds of miles away would be an absurd result, but such a finding is a short step away from the “all-or-nothing” analysis conducted by the state court in the present Montana case.

Just as this Court should correct the Montana court’s misguided use of a “liberal” and “fluid” test,

this case should also be remanded with instructions that lower courts must refrain from applying the less difficult (but improper) approach of finding an entire river navigable or non-navigable based on its general characteristics without conducting a thorough factual analysis of each identifiable reach of the river.

VI. THE MONTANA SUPREME COURT'S CONSIDERATION OF MODERN MODES OF TRANSPORTATION ON WATER IMPROPERLY ANALYZES CURRENT CONDITIONS RATHER THAN CONDITIONS AS THEY EXISTED ON THE DATE MONTANA WAS ADMITTED TO THE UNION.

The Montana Supreme Court also erred in its application of the “date of statehood” element of the federal test. This Court has clearly stated on several occasions that the determination of navigability must be made as of the date of statehood. In *Utah v. United States*, for instance, this Court stated:

The operation of the ‘equal footing’ principle has accorded newly admitted States the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown. *Pollard’s Lessee v. Hagan*, 3 How. 212, 222-223, 228-230, 11 L.Ed. 565. That means that Utah’s claim to the original bed of the Great Salt Lake – whether now submerged or exposed – ultimately rests on whether the lake was navigable (*Martin v. Waddell*, 16 Pet. 367-410, 416-417, 10 L.Ed. 997) at the time

of Utah's admission. *Shively v. Bowlby*, 152 U.S. 1, 26-28, 14 S.Ct. 557-558, 38 L.Ed. 331. It was to that issue that we directed the Special Master, Hon. J. Cullen Ganey, to address himself. See *Utah v. United States*, 394 U.S. 89, 89 S.Ct. 761, 22 L.Ed.2d 99. In the present report the Special Master found that at the time in question the Great Salt Lake was navigable. We approve that finding.

403 U.S. 9, 10 (1971) (emphasis added); *see also id.* at 12 (focusing on the condition of the lake as of January 4, 1896, the day Utah became a state).

Most lower courts have followed this Court's instructions regarding the "date of statehood" requirement. For example, in *Parks v. Cooper*, the Supreme Court of South Dakota correctly stated the federal test as applying to the actual condition of the river on the day of statehood:

... Under the federal test, the question is whether the water body was "navigable in fact" at the time the state entered the Union. Thus, the waterway must have been susceptible to being used as an "avenue of commerce" in its ordinary condition at the time of statehood. *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971); *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967); *The Daniel Ball*, 77 U.S. (10 Wall 557) 19 L.Ed.2d 999.

2004 S.D. 27, ¶23, 676 N.W.2d 823 (2004) (emphasis added); *see also, e.g., United States v. Champlin Refining Co.*, 156 F.2d 769, 733 (10th Cir. 1946), *aff'd*,

331 U.S. 788, *reh'g denied*, 331 U.S. 869 (1947) (“In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within a state passes to such state upon its admission into the union, **if the rivers are then navigable.**”) (emphasis added); *Bingenheimer v. Diamond Iron Mining Co.*, 237 Minn. 332, 342, 54 N.W.2d 912, 918 (1952) (“States organized in the public domain, as was Minnesota, became vested upon admission to the Union with title to the **beds of all waters then navigable** and not previously granted by the United States. . . .”) (emphasis added).

Other courts have been even more emphatic in holding that the federal test must be applied as of the date of statehood. Many of these cases have arisen in Alaska because Alaska was a relative latecomer to statehood. In a case involving the Gulkana River, for instance, the federal district court in Alaska stated that “the requirement that title navigability be determined at the time of statehood means only that when making a title navigability determination, the *Daniel Ball* test is to be applied to the physical dimensions and physical configuration existing at the time of statehood.” *Alaska v. United States*, 662 F. Supp. 455, 463 (D. Alaska 1987), *aff'd*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *see also Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989) (“[t]he river must be navigable at the time of statehood”) (citing *United States v. Utah*, 283 U.S. at 74). The Ninth Circuit Court of Appeals, in another Alaska case, put it even more succinctly: “The key

moment for the determination of title is the instant when statehood is created. The governing doctrine is that new States ‘enter the Union on an “equal footing” with the original 13 States [and] hold title to land under navigable waters within their boundaries upon entry into the Union.’” *Alaska v. United States*, 213 F.3d 1092, 1097 (9th Cir. 2000) (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987) (italics in original)).

In the present case, the Montana Supreme Court initially recited the controlling rule that the “key inquiry” for determining title “is whether a river is ‘navigable’ at the time the State entered the Union.” *PPL Montana*, 335 Mont. at 413, ¶23, 229 P.3d at 431 (quoting *Utah*, 283 U.S. at 76). But the Montana court then deviated from this “key inquiry” when it applied the test to the Madison River while relying on present-day uses of the river and modern modes of transportation. *Id.* at 442, ¶108, 229 P.3d at 449.

Montana became a state on November 8, 1889. *Id.* at 463, ¶177, 229 P.3d at 464 (Rice, J., dissenting). With respect to the Madison River, the State of Montana contended that “the Madison is used heavily today by commercial fishing guides and their clients and that this use is also sufficient to support a conclusion that the Madison River was susceptible to commercial navigation at the time of statehood.” *Id.* at 415-16, ¶28, 229 P.3d at 432. The Montana Supreme Court relied on this purported modern-day usage of the river as evidence that the river was navigable in 1889. *Id.* at 442, ¶108, 229 P.3d at 449.

While acknowledging that there was “little historical documentation” regarding use of the river at or near statehood, the court upheld the district court’s finding of navigability on summary judgment based in large part on the district court’s statement that “the Madison today experiences ‘considerable recreational use.’” *Id.* at 420, ¶41, 229 P.3d at 435. The court stated: “Despite the admittedly ‘sparse’ record before it, the District Court concluded that the Madison was a navigable river.” *Id.*, ¶41, 229 P.3d at 435. The court then concluded: “While the historical usage of the Madison was not as well-established [as for the other two rivers], the evidence of a log float on its middle portion in the 19th century, combined with its present-day usage, demonstrates that this river was susceptible to providing a channel for commerce at the time of statehood.” *Id.* at 439, ¶101, 229 P.3d at 447.

The Montana court expressly rejected PPL Montana’s argument that this modern-day usage is not evidence to prove that the river was navigable at statehood. *Id.* at 417, ¶32, 229 P.3d at 443. In making this determination, the court ignored evidence presented by PPL Montana to show that the condition of the river today is different from its condition at statehood. In doing so, the court relied upon an opinion by the Ninth Circuit Court of Appeals, which had considered such evidence, but only because, in that case, the parties stipulated that the characteristics of that river had not changed since statehood. *Id.*

The Montana court's reliance on modern-day boating is directly contrary to the prior pronouncements of this Court that the test for determining navigability is applied on the date a state is admitted to the Union. *Utah*, 403 U.S. at 10. The Montana court's reliance on modern-day boating is also internally inconsistent with its own statement, just a few paragraphs earlier in its opinion, that "the key inquiry in determining whether a state holds title to riverbeds under the equal footing doctrine is whether a river was 'navigable' at the time the state entered the Union." *PPL Montana*, 355 Mont. at 413, ¶23, 229 P.3d at 431. Evidence of recreational use of a river in 2011 does not demonstrate that the river was susceptible to navigation in 1889.

The Montana court's inconsistent application of the "date of statehood" test is an example of the "drift, confusion, and divisions among the lower courts over these important, recurring federal issues" identified by PPL Montana in its petition to this Court. *See* Petition at 3. The extensive case law cited in Section I.C of the Petition shows that the lower courts have not consistently and steadfastly applied this Court's holdings on the "date of statehood" test. Despite often repeating the underlying language of that test (as the Montana court did in this instance, *see PPL Montana*, 355 Mont. at 413, ¶23, 229 P.3d at 431), the lower courts have failed to faithfully apply that test and have, instead, placed undue reliance on evidence of modern-day boating or other activities. *See* cases cited in Petition at § I.C.

If this Court does not correct this errant application of the federal test, other state courts also may feel free to use evidence of modern-day boating in making navigability determinations. This may have serious adverse consequences in many western states. For example, in Colorado, kayaks and whitewater rafts are frequently used today on mountain streams that no rational application of the federal test could possibly consider to be navigable. Indeed, such watercraft are specifically designed for use in the kind of “high and dangerous rapids” that this Court has previously held to be evidence of non-navigability. *See United States v. Utah*, 283 U.S. at 80. The lower courts need to be re-focused on the “date of statehood” element of the federal test for navigability. This Court should take this opportunity to instruct the Montana court regarding the proper application of the test.



CONCLUSION

The decision below by the Montana Supreme Court fails, for all of the reasons described above, to apply properly this Court’s long-established test of navigability for title. Because the Montana decision, if it is allowed to stand, not only will affect PPL Montana, but also may adversely impact thousands of landowners and water users in Arizona, Colorado, New Mexico and other western states, Amici urge the Court to overturn the decision below and remand the

case with instructions to properly apply the test of navigability for title.

Respectfully submitted,

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