

NO. 10-218

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**IN THE SUPREME COURT OF  
THE UNITED STATES**

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PPL MONTANA, LLC,

*Petitioner,*

v.

STATE OF MONTANA,

*Respondent.*

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ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF MONTANA

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**AMICUS BRIEF IN SUPPORT OF RESPONDENT BY OREGON,  
WASHINGTON, ALABAMA, ALASKA, ARKANSAS,  
CALIFORNIA, FLORIDA, GEORGIA, HAWAII, IDAHO,  
ILLINOIS, LOUISIANA, MARYLAND, MINNESOTA,  
MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW MEXICO,  
NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH DAKOTA,  
TENNESSEE, VERMONT, WEST VIRGINIA, AND WISCONSIN**

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**TABLE OF CONTENTS**

INTERESTS OF THE AMICI STATES ..... 1

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 5

I. STATE TITLE TO THE BEDS OF  
NAVIGABLE WATERS IS AN  
ATTRIBUTE OF SOVEREIGNTY THAT  
PROMOTES PUBLIC CONTROL AND  
USE OF NAVIGABLE WATERS..... 5

II. A RIVER IS NAVIGABLE-IN-FACT  
WHERE IT CAN BE USED FOR  
CUSTOMARY TRADE AND TRAVEL BY  
WATER, EVEN IF INTERRUPTED BY  
OBSTRUCTIONS COMMON TO RIVERS ..... 8

A. This Court Has Long Held That State  
Title Is Not Defeated At River Segments  
Defined By Obstructions, Portages, Or  
Rapids ..... 10

1. This Court Has Repeatedly Applied  
The Navigability-In-Fact Test From  
*The Montello* To Determine State  
Title ..... 12

2. The Petitioner Misreads *United  
States v. Utah*, Which Did Not  
Create A New Segment-By-Segment  
Test For State Title..... 16

B. Before And After <i>The Montello</i> , State Courts Have Consistently Held That Obstructions And Interruptions In Navigable Rivers Do Not Defeat State Title .....	20
III. THE PETITIONER’S TEST IS ILL-DEFINED AND WOULD CAUSE UNCERTAINTY OF TITLE .....	23
IV. THE PETITIONER’S RESTRICTIVE VIEW OF EVIDENCE OF NAVIGABILITY IS INCONSISTENT WITH ESTABLISHED STANDARDS FOR NAVIGABILITY .....	25
A. Navigability For Title Does Not Require Evidence Of Actual Use At Statehood.....	26
B. Navigability-In-Fact Can Be Shown By A Range Of Evidence, Including Modern Use And Recreational Use .....	28
CONCLUSION.....	31
APPENDIX	

## TABLE OF AUTHORITIES

<i>Alaska v. Ahtna, Inc.</i> 891 F.2d 1401 (9th Cir. 1989) .....	28
<i>Barney v. City of Keokuk</i> 94 U.S. (4 Otto) 324 (1877).....	13, 14
<i>Brewer-Elliott Oil &amp; Gas Co. v. United States</i> 260 U.S. 77 (1922) .....	19
<i>Broadnax v. Baker</i> 94 N.C. 675 (1886).....	22
<i>Brown v. Chadbourne</i> 31 Me. 9 (1849) .....	3, 20
<i>Idaho v. Coeur d’Alene Tribe</i> 521 U.S. 261 (1987) .....	7, 8
<i>Idaho v. United States</i> 533 U.S. 262 (2001) .....	15
<i>Illinois Cent. R.R. Co. v. Illinois</i> 146 U.S. 387 (1892) .....	8
<i>In re State Reservation at Niagara</i> 37 Hun. 537, 16 Abb. N. Cas. 395 (N.Y. Sup. Ct. 1885), <i>appeal dismissed</i> , 57 Sickels 734, 102 N.Y. 734, 7 N.E. 916 (1886).....	22
<i>Martin v. Waddell</i> 41 U.S. (16 Pet.) 367 (1842) .....	5, 6, 10
<i>Montana v. United States</i> 450 U.S. 544 (1981) .....	7
<i>Moore v. Sanborne</i> 2 Mich. 519 (1853) .....	21

<i>Northwest Steelheaders Ass'n, Inc. v. Simantel</i> 199 Or. App. 471, 112 P.3d 383, review denied, 339 Or. 407, 122 P.3d 65 (2005), cert. denied sub nom. <i>Grover v.</i> <i>Northwest Steelheaders Ass'n, Inc.</i> 547 U.S. 1003 (2006) .....	29
<i>Oklahoma v. Texas</i> 258 U.S. 574 (1922) .....	19
<i>Phillips Petroleum Co. v. Mississippi</i> 484 U.S. 469 (1988) .....	14, 23, 24
<i>Pollard v. Hagen</i> 44 U.S. 212 (1845) .....	6, 10
<i>Shively v. Bowlby</i> 152 U.S. 1 (1894) .....	6, 7, 15, 26
<i>Spooner v. McConnell</i> 1 McLean 337, 22 F. Cas. 939 (Cir. Ct. D. Ohio 1838).....	21
<i>St. Anthony Falls Water-Power Co. v. Bd. of Water Comm'rs</i> 168 U.S. 349 (1897) .....	12
<i>The Daniel Ball</i> 77 U.S. (10 Wall.) 557 (1870) ....	10-13, 15-16, 28, 30
<i>The Propeller Genesee Chief v. Fitzhugh</i> 53 U.S. (12 How.) 443 (1851) .....	13
<i>United States v. Alaska</i> 521 U.S. 1 (1997) .....	7
<i>United States v. Appalachian Elec. Power Co.</i> 311 U.S. 377 (1940) .....	14, 15

<i>United States v. Rio Grande Dam &amp; Irrigation Co.</i> 174 U.S. 690 (1899) .....	19
<i>United States v. The Steamer Montello</i> 87 U.S. (20 Wall.) 430 (1874) .....	9, 11-17, 20-22, 30
<i>United States v. Utah</i> 283 U.S. 64 (1931) .....	14-19, 24, 27
<i>Utah v. United States</i> 403 U.S. 9 (1971) .....	14, 30

### Constitutional Provisions

Wash. Const. art. XVII, § 1.....	3, 6
----------------------------------	------

### Statutes

11 Stat. 383, § 1 (1859) .....	6
11 Stat. 383, § 2 (1859) .....	6
25 Stat. 676 (1889) .....	6

### Other Authorities

<a href="http://lewisandclarkjournals.unl.edu/read/?_xmlsrc=img_1805-10-22.01.xml&amp;_xslsrc=LCstyles.xsl">http://lewisandclarkjournals.unl.edu/ read/?_xmlsrc=img_1805-10-22.01. xml&amp;_xslsrc=LCstyles.xsl</a> (last visited Nov. 1, 2011) (map) .....	25
Richard A. Epstein, <i>The Public Trust Doctrine</i> , 7 Cato J. 411 (Fall 1987) .....	2
<i>The Journals of Lewis and Clark</i> (Bernard DeVoto ed., 1953).....	25

**Treatises**

27 R.C.L. <i>Waters</i> § 218 (1920) .....	22
78 Am. Jur. 2d <i>Waters</i> § 126 (WL db updated Aug. 2011) .....	22

## INTERESTS OF THE AMICI STATES

The amici are twenty-six sovereign states. Under the framework of the Constitution, at the time of statehood, each state received title to the beds of navigable rivers within its borders. This constitutional grant of title to the beds of navigable waters is a vital incident of each state's sovereign power to protect public use of navigable rivers and promote intrastate and interstate travel and commerce. This incident of sovereignty was necessary to the development of the nation and remains vital to the states today.

The states are deeply concerned because the petitioner asks the Court to jettison the longstanding constitutional rule that obstructions to navigation do not defeat the navigability of a river for purposes of state title. Moreover, the states are concerned that the petitioner would have the Court substitute an ill-defined and unworkable standard that would segment title to the beds of navigable rivers in a patchwork fashion, which would upset settled expectations and defeat the very reasons that the states received this incident of sovereignty.

Throughout our country's history, navigable rivers and streams have provided ways for travel and trade within and among the states. Rivers, both great and small, provide avenues for travel and trade despite obstacles like sandbars, shifting channels, shallow stretches, high or low water periods, blockages, ice, rapids, and waterfalls. Travel and trade could bypass rapids, sandbars, and other obstructions by using appropriate vessels and techniques to move a vessel through a difficult area,

while people, goods, or vessels could portage around an obstruction. These obstacles have never defeated a state's title to the beds of navigable rivers where the river was used, or susceptible to being used, as a highway for travel and trade.

A test for navigability that excludes segments of navigable rivers from a state's title would severely hamper public use of the river by creating segments under private control that could exclude the public.<sup>1</sup> Moreover, a change to the established test of navigability-in-fact could also unsettle the rights of a wide variety of existing uses that rely on a state's title to navigable rivers. By way of example, Washington has over 3,600 active leases, use agreements, and easements affecting state-owned river beds, and Oregon has over 4,500 such agreements. Washington has approximately 4,000 past sales of "shore-lands" (submerged lands below the ordinary high water mark) along rivers in Washington. Similarly, other states have a variety of use authorizations, permissions, and laws that govern use of navigable rivers. With these various forms of permission, the states authorize use of navigable rivers for marinas and boat ramps, utility lines, roads and bridges, water rights diversions, habitat and conservation projects, mineral development projects, and even hydropower facilities. Without

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<sup>1</sup> Richard A. Epstein, *The Public Trust Doctrine*, 7 *Cato J.* 411, 415 (Fall 1987) ("Each segment of the river is worth very little for transportation unless all segments could be subjected to uniform ownership. The risk is that the owner of one segment will hold out against all the others, so that bargaining breakdown will prevent any use of the river at all for navigation.").

doubt, some of the long-established uses allowed by states are on segments of navigable rivers that the petitioner would excise from state title.

A change in the test regarding the scope of state title to beds of navigable rivers could affect any state that contains navigable rivers. In states like Washington, the petitioner's arguments would affect title because the state asserts sovereignty and title to its navigable rivers to the extent allowed by the federal constitution. Wash. Const. art. XVII, § 1 (state takes "ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes"). The petitioner's changes to the test for navigability-in-fact, however, would also upset state jurisprudence where state sovereignty is manifested with public navigation rights in navigable rivers. *E.g.*, *Brown v. Chadbourne*, 31 Me. 9, 23 (1849) (Maine law preserves public use of rivers that are navigable-in-fact, but state title extends only to the highest influence of the ocean tides.).<sup>2</sup>

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<sup>2</sup> The states have a variety of property laws applicable to navigable rivers. *See Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324, 338 (1877). The issues in this case address the scope of state title received at statehood, not how states utilized their sovereignty and developed different common laws applicable to navigable rivers. For example, the *Barney* Court recognized that some states had limited state title to tidally influenced rivers, but asserted navigation servitudes and other public rights on navigable rivers, even when state law assigned title or rights to riparian owners.

The Court should reject the petitioner's invitation to alter the scope of state title and affirm application of the long-established test that determines when a river is navigable-in-fact.

#### **SUMMARY OF ARGUMENT**

Under the framework of the Constitution, the states receive title to the beds of all rivers and streams that were navigable-in-fact in their ordinary condition at the time of statehood. The state's power over the title to beds of navigable waters is a fundamental attribute of state sovereignty, which the states have long used to advance the public interest in navigable waters.

This Court has long held that rivers and streams may be navigable-in-fact even if they include natural barriers such as rapids, waterfalls, and sandbars, so long as the river or stream is useful for a highway for travel and commerce, or susceptible to that use. The petitioner's argument would change this well-established definition of navigable-in-fact and defeat state title at these obstructions and interruptions. The result of petitioner's argument would be segments of private title within the nation's navigable rivers. This result would undermine the constitutional design that placed this incident of sovereignty in the states—to preserve public control over navigable rivers that were used as ways for travel and trade.

Moreover, by changing the navigability-in-fact definition, the petitioner's standard would upset long-settled expectations built upon the established navigability-in-fact test. It would trigger endless line drawing to define the beginnings and ends

of the petitioner's ill-defined non-navigable segments. The Court should, therefore, reject the petitioner's argument and affirm that the long-established navigability-in-fact test applies to determining the scope of a state's sovereign title.

The Court should also reject the petitioner's argument that navigability-in-fact requires evidence of actual use at statehood or extensive commercial use, or that the test precludes consideration of modern use. The navigability-in-fact test has always allowed evidence of post-statehood use with a proper foundation for relevance. Moreover, the test has always examined whether a river is used, or was susceptible to being used, as a way for travel and trade by the type of small vessels used at statehood.

#### ARGUMENT

#### I. STATE TITLE TO THE BEDS OF NAVIGABLE WATERS IS AN ATTRIBUTE OF SOVEREIGNTY THAT PROMOTES PUBLIC CONTROL AND USE OF NAVIGABLE WATERS

After the American Revolution, the original states succeeded to attributes of sovereignty formerly held by Great Britain. As sovereigns, each state held "absolute right to all their navigable waters *and the soils under them* for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842) (emphasis added). This sovereignty and title to beds of navigable rivers (and to the ocean shore, bays, and arms of the sea) allowed the states, as sovereigns, to preserve public interests in using waters and beds

for navigation, commerce, and fisheries. *Id.* at 413; see *Shively v. Bowlby*, 152 U.S. 1, 23 (1894) (states “succeeded to the rights, both of the crown and of the proprietors, in the navigable waters and the soil under them”).

Every subsequent state received this same sovereignty over beds of navigable waters upon entering the union on an equal footing with the original states. *Pollard v. Hagen*, 44 U.S. 212 (1845). In *Pollard*, the Court held that Alabama had the rights of sovereignty, possession, and title that had belonged to the predecessor sovereign, the state of Georgia. *Id.* at 223. Alabama, not the United States, received and controlled title to the beds of navigable waters when Alabama became a state. *Id.* at 229.<sup>3</sup>

The landmark ruling in *Shively* reviewed a long history of cases establishing state sovereign title to beds of navigable waters. States received such title to ensure that the people, as the ultimate sovereign, could preserve and protect navigation, commerce, and fishing. *Shively*, 152 U.S. at 11-12. The Court has repeatedly relied on this foundational

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<sup>3</sup> The Acts admitting states recognize the importance of public title to navigable rivers. For example, Congress admitted the state of Oregon to the Union on February 1, 1859, “on an equal footing with the other States in all respects whatever[.]” 11 Stat. 383, § 1 (1859). The admissions act provided “*all the navigable waters of said State, shall be common highways and forever free*, as well as to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.” 11 Stat. 383, § 2 (1859) (emphasis added). Similarly, Congress admitted the state of Washington on an equal footing in 25 Stat. 676 (1889). Washington, in turn, accepted “ownership to the beds and shores of all navigable waters[.]” Wash. Const. art. XVII, § 1.

principle when examining the scope of a state's title to rivers and submerged lands. *See Montana v. United States*, 450 U.S. 544, 552 (1981) (ownership of the land underlying navigable waterways is “strongly identified with the sovereign power of government”); *United States v. Alaska*, 521 U.S. 1, 5 (1997) (“Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty.”) (citing *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)).

*Shively* also established a strong presumption that a state's sovereignty includes *all* navigable waters found within its borders. Before statehood, the government holds the beds of navigable waters “in trust for the future states that might be erected out of such territory.” *Shively*, 152 U.S. at 30 (quoting *Knight v. United Land Ass'n*, 142 U.S. 161, 183 (1891)). This obligation to the future states prevents the federal government from defeating a state's sovereign title except when required by public exigency or international need, and except when congressional intent is “definitely declared or otherwise made very plain.” *Alaska*, 521 U.S. at 34 (citing *Utah Div. of State Lands*, 482 U.S. at 201-02); *see also Montana*, 450 U.S. at 553 (recognizing established presumption that beds of navigable rivers pass to the states as they assume sovereignty).

Submerged lands thus have “a unique status in the law” and are “infused with a public trust the State itself is bound to respect.” *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1987) (Kennedy, J., plurality opinion). The Court's decision in *Illinois*

*Central Railroad Co. v. Illinois*, 146 U.S. 387, 453-54 (1892), is a prominent example of the “weighty public interests in submerged lands.” *Idaho*, 521 U.S. at 285. The Court in *Illinois Central* held that the Illinois legislature lacked power to grant submerged lands along Lake Michigan. While states may sell, lease, and allow private use of lands under navigable waters, a state cannot “abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties[.]” *Illinois Central*, 146 U.S. at 453.

The amici states therefore ask the Court to reaffirm the test for navigability-in-fact relied on by the Montana Supreme Court. That test preserves the states’ sovereign interest in protecting public use and control over the beds of our nation’s navigable rivers as intended by the framework of the Constitution.

**II. A RIVER IS NAVIGABLE-IN-FACT WHERE IT CAN BE USED FOR CUSTOMARY TRADE AND TRAVEL BY WATER, EVEN IF INTERRUPTED BY OBSTRUCTIONS COMMON TO RIVERS**

The Court’s earliest decisions addressing the navigability of rivers hold that a river is navigable-in-fact despite interruptions and obstacles when it is used for travel and trade, or is susceptible to providing a way for travel and commerce. The petitioner asks the Court to abandon this established rule in favor of a rule where segments as short as four miles in a navigable river would be excluded from the sovereign title received by states, and to that extent, defeat the purposes that justified

granting this title to the states in the first instance. Pet'r Br. at 38 (arguing that state title exists only at a “*de minimus* ‘short interruptions’” and that 4.35 mile segments are per se greater than *de minimus* and outside the state’s title).

The United States, who seeks to claim title to river beds adjacent to federal lands, offers a more restrained argument. The United States argues that state title can be defeated “on a segment-by-segment basis” but its rule would apply only for “*discrete and substantial portions* [of a navigable river] that could not be navigated at all[.]” U.S. Br. at 11; *see also* U.S. Br. at 25 (to address state title, the navigability-in-fact test excludes “substantial river segments where navigation is impossible”).

The Court should reject petitioner’s argument that would defeat state title at ill-defined segments where there are interruptions to navigation. The petitioner’s view of navigability-in-fact is contrary to this Court’s rulings, and to rulings by the numerous state courts applying the long-standing test from *United States v. The Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874), upholding state title through interruptions and obstructions. The petitioner’s view of state title would, if adopted, unsettle expectations across the country built upon the legal standard in *The Montello*—which is the standard relied on by the Montana Supreme Court and the standard applied by courts across the country for the past 137 years.

The Court should also reject the United States’ invitation to excise “discrete and substantial segments” from a state’s title to a navigable river. This Court’s decisions universally hold that the

states received title to navigable rivers, including areas of interruptions to navigation, so long as the river is navigable-in-fact. The essential point for navigability-in-fact is whether the river is used, or is susceptible for use, as a highway for travel and commerce. When the river is navigable-in-fact under this test, then state title is not defeated at segments with interruptions, even if the interruption is “discrete and substantial.”

**A. This Court Has Long Held That State Title Is Not Defeated At River Segments Defined By Obstructions, Portages, Or Rapids**

Shortly after *Martin* and *Pollard*, which involved tidally influenced waters, the Court addressed navigable, non-tidal rivers. In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), the Court reaffirmed its earlier decisions that navigability is not limited to tidally influenced rivers, as in English common law. Rivers in the states were navigable hundreds of miles above tidewater, and for these rivers a navigability-in-fact test applied:

A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. 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.*

*The Daniel Ball*, 77 U.S. at 563 (emphasis added).

Four years later, in *The Montello*, the Court established that navigability-in-fact was not defeated and did not disappear at the segments of a river posing common obstructions to navigation. *The Montello* considered the Fox River in Wisconsin, which included chutes, falls, and rapids that made navigation difficult: “All these embarrassed the navigation of early days, but they did not destroy or even much arrest it.” *The Montello*, 87 U.S. at 432. Marquette and Joliet explored and traveled the Fox River before the Revolution, and fur traders used the river despite obstructions. The traders would unload their boats and portage the cargo, loading it into another boat or the same boat to continue the journey up to the source of the Fox River. After this, the traders portaged to the Grand River, which connected to the Mississippi. *Id.* These facts established that the Fox River was navigable-in-fact:

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

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

Beyond holding that navigability-in-fact was not affected by the various obstructions, the test in *The Montello* holds that navigability-in-fact is demonstrated by any kind of small boats, whether propelled by humans, wind, or steam, or even pulled by animals. These “are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river.” *Id.* at 442.

The Court emphasized this broad view of the navigability-in-fact test when it considered a waterfall obstruction in *St. Anthony Falls Water-Power Co. v. Board of Water Commissioners*, 168 U.S. 349 (1897). “[I]n its natural state the river at this point was not navigable at ordinary stages of the water for 1/2 mile below St. Anthony Falls, and in its natural state it was not navigable immediately above the falls, but that it was navigable in its natural state above Nicollet Island.” *Id.* at 359. At the stretch containing the falls, “boats could not go up and down [the river] in its natural condition;” but the river “was navigable above the rapids for the purpose of running shallow boats and for floating logs.” *Id.* The Court concluded that the river was navigable-in-fact at the stretch obstructed by the falls. *Id.* (concluding that the river was a “navigable river at all points referred to”).

**1. This Court Has Repeatedly Applied The Navigability-In-Fact Test From *The Montello* To Determine State Title**

The petitioner asks the Court to avoid the test as stated in *The Montello* and *The Daniel Ball* by

arguing that those cases addressed only “regulatory navigability, not title navigability” and that the test has not been applied to determine state title. Pet’r Br. at 42. The Court, however, has long applied the navigable-in-fact test from *The Montello* and *The Daniel Ball* to determine state title. Never has the Court suggested that a state’s title is incomplete or missing at the rapids, waterfalls, or other obstructions that do not otherwise defeat navigability-in-fact.<sup>4</sup>

In *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324 (1876), the Court demonstrated that navigability-in-fact for purposes of state title was determined by applying the test from *The Montello* and *The Daniel Ball*. The *Barney* Court started by noting that *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), had held that navigable rivers above tidewaters were “amenable to the admiralty jurisdiction[.]” *Barney*, 94 U.S. at 338. The same navigability test applied to title, because there was “no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters.” *Id.* Under the navigable-in-fact test of

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<sup>4</sup> The United States implies that the Court may avoid the test from *The Montello* because navigability can involve different contexts such as a decision defining the scope of federal commerce power long after statehood. U.S. Br. at 9. The United States provides no basis for establishing a different test for navigability-in-fact when considering state title, or why state title should be defeated at the obstructions or rapids that do not otherwise defeat a conclusion that a river is navigable-in-fact. The United States’ argument confirms only that when title is at issue, navigability-in-fact examines the river’s condition at the time of statehood.

*The Montello*, these same rivers “properly belong[] to the States by their inherent sovereignty[.]” *Id.*

The Court has reaffirmed this ruling from *Barney* numerous times. *See, e.g., United States v. Utah*, 283 U.S. 64 (1931) (citing and applying *The Montello* to address state title and obstructions in rivers); *Utah v. United States*, 403 U.S. 9, 10 (1971) (holding that “the test of navigability” for purpose of determining ownership of the bed of the Great Salt Lake was the test from *The Daniel Ball*, quoted above). As recently as 1988, the Court recognized that navigability-in-fact for state title was the same test as used for admiralty jurisdiction. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (“decisions in *The Genesee Chief* and *Barney v. Keokuk* extended admiralty jurisdiction *and public trust doctrine* [establishing state title] to navigable freshwaters and the lands beneath them” (emphasis added)).

Despite the above cases, amicus United States argues that a decision addressing the federal commerce power to license hydroelectric dams implies that *The Montello* test does not apply to state title. U.S. Br. at 25 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 398 (1940)). *Appalachian Electric* does not support the United States’ argument. Citing to both *The Montello* and *United States v. Utah* (a state title case), the Court in *Appalachian Electric* explained “[t]here has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents.” *Appalachian Elec.*, 311 U.S. at 409. The Court’s alignment of *The Montello* and

*United States v. Utah* to support a statement that obstructions do not destroy navigability-in-fact refutes any argument that the Court had in mind a different test of navigability for state title.<sup>5</sup>

For the above reasons, there is no merit to the petitioner's premise that the Court should abandon the established navigability-in-fact test when determining state title at obstructions in rivers. As shown by *The Montello* and *The Daniel Ball*, the reasons for finding admiralty jurisdiction over those sections of river are the same reasons that states received sovereign title. In both contexts, the navigability-in-fact test preserves public control over the navigable river. Compare *The Montello*, 87 U.S. at 441, with *Shively*, 152 U.S. at 11-12. Moreover, the grant of title to the states protects these public interests immediately at statehood, whereas federal protection of public interests in rivers depends on an act of Congress. See also *Idaho v. United States*, 533 U.S. 262, 272 (2001) (it is "ownership of the land underlying" navigable waters that is identified with sovereign control over a navigable river); *United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands . . . carries with it the power to control navigation, fishing, and other public uses[.]").

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<sup>5</sup> The part of the *Appalachian Electric* opinion cited by the United States explains only that cases fixing ownership of river beds examine navigability-in-fact at statehood, but "[t]he power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." *Appalachian Elec.*, 311 U.S. at 408. This statement does not alter the test for navigability-in-fact. It simply recognizes that Congress has greater powers over commerce.

The Montana Supreme Court, therefore, correctly held that *The Montello* provides the applicable legal standard for evaluating petitioner’s claim to segments of the Madison, Missouri, and Clark Fork rivers. See Pet. App. at App-54 to App-56 (Opinion at ¶¶ 99-101).

**2. The Petitioner Misreads *United States v. Utah*, Which Did Not Create A New Segment-By-Segment Test For State Title**

Contrary to the petitioner’s arguments, *United States v. Utah* did not change the legal standard for determining state title, nor does it preclude state title of any segment of a river where obstructions disrupt navigation. This is demonstrated first because the *Utah* Court disclaimed any intent to change legal standards—there was no controversy “in relation to the general principles of law that are applicable.” *Utah*, 283 U.S. at 75. Those general principles, which the Court set out, were the tests from *The Montello* and *The Daniel Ball*, quoted above. *Id.* at 74-75. The Court went on to emphasize that state title extends through “difficulties in navigation,” when as a matter of “fact . . . the stream in its natural and ordinary condition affords a channel for useful commerce.” *Id.* at 76 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)). As in all those prior cases, the Court emphasized that “useful commerce” was a broad category, and did not depend on the mode; such commerce might occur in small boats and in shallow draft “flatboats.” *Utah*, 283 U.S. at 76.

Furthermore, the *Utah* Court emphasized that navigability-in-fact for title typically involved

determining how far along its length a river is susceptible for travel and trade. “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.” *Id.* at 77. Again, the Court reaffirmed that rivers were navigable-in-fact even where “serious obstructions” impede navigation. *Id.* at 86-87 (quoting *The Montello*, 87 U.S. at 443). The Court specifically referenced the rule from *The Montello* when it described the special master’s ruling as involving a length of impassable canyon, which was not a “short interruption of navigability in a stream otherwise navigable[.]” *Id.* at 77.

The petitioner, however, argues that *Utah* supports examining river segments as short as 4.35 miles. *E.g.*, Pet’r Br. 38. This argument has no basis in the issues decided, nor in the Court’s holdings, nor in its stated reasons. The issue in *Utah* was not whether a potentially non-navigable 4.35 mile segment within a navigable river was excluded from the state’s title. The parties briefed and disputed the location of a point that divided the upper end of the nearly 40-mile stretch of impassible Cataract Canyon from the navigable Green and Grand rivers above. *Utah*, 283 U.S. at 74-75. As the Court noted, the parties were looking for “the exact point at which navigability may be deemed to end, in the approach to Cataract [C]anyon[.]” *Utah*, 283 U.S. at 90; *see also id.* at 89 (Utah’s exception “relates to the first 4.35 miles of the stretch of the Colorado River” entering Cataract Canyon (emphasis added)).

The *Utah* Court's ruling upholding the navigability of the Green and Grand Rivers also rebuts the petitioner's theory that the case endorses excising relatively short segments of a few miles from state title. The special master and the Court recognized a three-mile segment of the Grand that was "less susceptible of practical navigation." *Id.* at 79. But the Court and special master did not claim that such segments should be excised from the state's title. Nor did the special master or the Court excise any segments of "difficult and dangerous rapids" in the Green river. *Id.* at 78.

Accordingly, there is simply no merit to petitioner's arguments that interruptions of a few miles defeat state title. The *Utah* opinion simply addresses the narrower issue presented by the parties. With regard to the long stretch of the Colorado river, the decision only describes the conclusion of the special master regarding Cataract Canyon as addressing "long reaches" with characteristics of navigability and non-navigability. This description of the unchallenged decision by the special master did not declare a new, ill-defined standard for state title. Indeed, the description is not a ruling about a legal standard at all because it does not resolve a question presented to the Court.<sup>6</sup>

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<sup>6</sup> The petitioner ascribes great significance to the *Utah* Court's statement approving the master's decision to limit findings and conclusions as to navigability to sections of the rivers described in the complaint. Pet'r Br. at 37. The Court's statement, however, no matter how it is configured, means nothing more than that the Court observed that the master's decision analyzed only those portions of the river in dispute.

The *Utah* Court, however, did reaffirm that “[e]ach determination as to navigability must stand on its own facts.” *Utah*, 283 U.S. at 87. Accordingly, the special master’s unchallenged ruling on Cataract Canyon is, at most, a ruling on the specific facts, where a long stretch of river did not provide *any* highway for travel or trade because of the lengthy canyon. See U.S. Br. at n.13 (special master ruled that trade and travel could not follow the river or return to the river once it dropped into the canyon).

Although petitioner and its amici cite other decisions by this Court, those opinions do not address carving out a non-navigable segment within a navigable river. Instead, each case examines a dispute over the head point of navigation, the point to which navigation extends. See *Oklahoma v. Texas*, 258 U.S. 574, 584 (1922) (the Red River was “in a general way, known to be navigable in [its] lower reaches and not navigable in [its] upper reaches, but how far up the stream[] navigability extended was not known”); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922) (“the head of navigation is and was the mouth of the Grand River . . . a number of miles below the reservation”); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (“at what particular place between its mouth and its source navigability ceases” is not a matter for judicial notice).

In light of the Court’s established principles about how navigability-in-fact must be determined, the Court should reject petitioner’s efforts to carve out a new, ill-defined test of navigability-in-fact that would serve only to avoid state title. Petitioner’s

approach would add confusion to well-established principles. Instead, the Court should affirm that the Montana Supreme Court relied on the proper test for navigability-in-fact for determining the scope of state title.

**B. Before And After *The Montello*, State Courts Have Consistently Held That Obstructions And Interruptions In Navigable Rivers Do Not Defeat State Title**

When the Court in *The Montello* held that obstructions such as rapids or shallows do not defeat navigability of a river that has capacity to serve as a channel for travel and trade, the Court relied on numerous state court decisions applying that same standard. Since then, the states have commonly followed the test in *The Montello*. Together, the federal and state courts have created reasonable expectations that state title to the beds of navigable rivers extends to areas of obstructions like rapids and waterfalls. The petitioner's theory would greatly disrupt these expectations and change long-settled property interests.

For example, the Court in *The Montello* looked to an early decision from the Maine Supreme Court which held that a river is navigable despite "rocks, falls and other obstructions." *Brown v. Chadbourne*, 31 Me. 9, 23 (1849), cited in *The Montello*, 87 U.S. at 443 n.16. The Maine court observed that most of the rivers in Maine contain various interruptions, and that a "rigid and severe" test of navigability "would annihilate the public character of all our fresh rivers, for many miles in their course, from their sources towards the ocean." *Brown*, 31 Me. at 23.

The Court in *The Montello* also looked to the Michigan Supreme Court's holding that the character of rivers in the United States necessitates a "liberal adaptation" of English common law to the states and "that the right of the public to a common passage, has been liberally supported and applied." *Moore v. Sanborne*, 2 Mich. 519, 523, 524 (1853), cited in *The Montello*, 87 U.S. at 443 n.16. This application of navigability recognizes the fundamental public policy of maintaining public ways across our country's waters.<sup>7</sup>

Numerous contemporaneous and subsequent state cases endorse *The Montello* rule that interruptions in a river do not defeat navigability-in-fact where the river provides a channel for travel and commerce above and below the interruption. For example, Niagara Falls stands impassable to navigation, but the New York court did not hesitate to declare the river navigable-in-fact through the falls: "And that the fact, that at the particular place in question the river is not navigable by reason of the interruption produced by the Falls, does not qualify or distinguish it in that locality as a public river from its general character." *In re State Reservation at Niagara*, 37 Hun. 537, 547-48, 16 Abb. N. Cas. 395

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<sup>7</sup> In addition to the cases cited by *The Montello*, cases in other states had similarly held that an interruption in a river does not defeat navigability. For example, in *Spooner v. McConnell*, 1 McLean 337, 22 F. Cas. 939 (Cir. Ct. D. Ohio 1838), the judge observed that the Maumee River in Ohio is navigable despite sixteen miles of rapids at its mouth prior to entering Lake Erie, where the river was clearly navigable for 120 miles above such rapids. The court did not question the sixteen miles of rapids as defeating the river's navigability.

(N.Y. Sup. Ct. 1885), *appeal dismissed*, 57 Sickels 734, 102 N.Y. 734, 7 N.E. 916 (1886). The North Carolina Supreme Court in *Broadnax v. Baker*, 94 N.C. 675 (1886), observed that the waters of a river do not lose their navigability because of falls or other obstructions when the waters support commerce both above and below the obstructions.<sup>8</sup>

Similarly, the settled expectations surrounding the established navigability-in-fact test are illustrated by historic and current legal treatises that follow *The Montello* for determining navigability-in-fact. A historic treatise, Ruling Case Law, under the topic of *Waters*, stated as a rule that natural obstructions do not preclude navigability. 27 R.C.L. *Waters* § 218 (1920) (citing, among others, *St. Anthony Falls Water-Power Co. v. Bd. of Water Comm'rs*, 168 U.S. 349 (1897); *United States v. The Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874)); see also 78 Am. Jur. 2d *Waters* § 126 (WL db updated Aug. 2011) (“A river is navigable-in-fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars, if the natural navigation of the river is such that it affords a channel for useful commerce or a useful purpose.”).

The test set out in *The Montello*, which includes obstructions and interruptions as part of a

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<sup>8</sup> In addition to cases cited in the text from Maine, Michigan, New York, North Carolina, and Ohio, courts in many other states and circuits also apply and rely on the test from *The Montello*, where interruptions to navigability do not defeat state title or state navigation easements in rivers determined to be navigable-in-fact. The attached Appendix provides a sample of reported cases on this topic.

navigable-in-fact river, has been the established law for the last 137 years. The Court should reject petitioner's invitation to alter this test and change the long-established scope of the public's title to navigable rivers.<sup>9</sup>

### **III. THE PETITIONER'S TEST IS ILL-DEFINED AND WOULD CAUSE UNCERTAINTY OF TITLE**

Petitioner proposes an ill-defined and unmanageable standard that will generate litigation and disrupt long-standing expectations regarding property. The uncertainty created by petitioner's segmentation test would be significant. To identify and delineate segments of private property, the states and private parties would be called upon to litigate boundary lines for the non-navigable segments. In doing so, the litigants would be forced to litigate historic boundaries of the obstructed section, notwithstanding that rapids, sandbars, and slides are often geological transients in dynamic river systems.

This Court has long recognized that uniformity, certainty, and ease of application are important considerations in determining state title to land such as where tidally influenced waters are at issue. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988). As in *Phillips Petroleum*, the petitioner does not provide useful "alternatives for

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<sup>9</sup> Given this long history of state courts applying the federal standard, the Court should give no weight to the petitioner's arguments that impugn the integrity of state courts. Instead, the Court may presume that state courts faithfully apply the federal law as set forth by this Court.

delineating the boundaries of public trust” lands. *Id.* Similarly, the Court today should recognize that segmenting discrete portions of the beds of navigable rivers would defeat uniformity, certainty of title, and provide no ease of application.

The United States, however, argues that segmenting ownership could fulfill expectations of hypothetical riverfront owners who, the United States argues, should form expectations of ownership “based on conditions at his location, not somewhere else.” U.S. Br. at 18. Riparian owners, however, should have always expected that rivers are granted to the states when the river is navigable-in-fact. Navigability-in-fact, in turn, has always depended on use and potential use of the river upstream and down. “[E]xpectations can only be of consequence where they are ‘reasonable’ ones.” *Phillips Petroleum*, 484 U.S. at 482. The expectations described by the United States brief are unreasonable.<sup>10</sup>

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<sup>10</sup> The United States’ argument is also inconsistent with its brief on the merits in *Utah*, where it explained that navigability-in-fact considers characteristics of a river above and below a disputed area:

In order to determine the value of the rivers as highways of commerce, *the whole river must be taken into consideration*. This was done in *Brewer-Elliott Oil and Gas Company v. United States*, *St. Anthony Falls Water Power Company v. Board of Water Commissioners*; *Packer v. Bird*; *Oklahoma v. Texas*, *supra*.

Br. For The United States Of America at 102-03, *United States v. Utah*, 283 U.S. 64 (1931) (No. 14) (original).

The Court need only consider the Lewis and Clark expedition to see potential impacts from petitioner's argument. On its journey west, the expedition circumvented falls and rapids in numerous places along the Missouri River and its tributaries. The explorers then navigated the Columbia River to the Pacific, where they encountered the Great Falls of the Columbia—Celilo Falls. Under petitioner's argument, every falls, rapids, or other difficulty in that journey provides a basis to challenge the state's title to portions of the Missouri or Columbia rivers. Indeed, in its 700 mile run from the Canadian border to the Pacific, the Columbia River had numerous areas of rapids. Each set of historic rapids could trigger challenges to state title under the petitioner's proposed test. But the Celilo Falls, like other obstructions on the Columbia River, did not defeat the vital fact the Columbia River could be used as useful highway for travel and commerce and, therefore, was navigable-in-fact.<sup>11</sup>

**IV. THE PETITIONER'S RESTRICTIVE VIEW OF EVIDENCE OF NAVIGABILITY IS INCONSISTENT WITH ESTABLISHED STANDARDS FOR NAVIGABILITY**

The petitioner also attacks several features of the Montana Supreme Court's evaluation of the

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<sup>11</sup> In 1805, Captain Clark noted a portage route on the north side of the river on his hand-drawn map of the area. See [http://lewisandclarkjournals.unl.edu/read/?\\_xmlsrc=img\\_1805-10-22.01.xml&\\_xslsrc=LCstyles.xsl](http://lewisandclarkjournals.unl.edu/read/?_xmlsrc=img_1805-10-22.01.xml&_xslsrc=LCstyles.xsl) (last visited Nov. 1, 2011). The intrepid explorers successfully navigated over and around the rapids of Celilo taking their boats all the way to the Pacific. See *The Journals of Lewis and Clark*, ch. XIX, ch. XX (Bernard DeVoto ed., 1953).

summary judgment record. The petitioner's evidentiary arguments should be rejected because they would change the test for navigability-in-fact to the detriment of the states and the public interests that depend on the long-established test.

**A. Navigability For Title Does Not Require Evidence Of Actual Use At Statehood**

The petitioner asks the Court to rule that evidence of a "river's 'susceptibility' to commercial use" should be barred except when an absence of historic use is explained by the absence of historic settlement of the areas. Pet'r Br. at 26. Petitioner argues that its rule is needed to focus on the river's conditions at statehood. Pet'r Br. at 44. Petitioner seeks proof of "actual, contemporaneous uses of the river" at the time of statehood. Pet'r Br. at 44. The petitioner's attacks on the evidence are contrary to the definition of navigability-in-fact. Moreover, the petitioner's unwarranted evidentiary rules would unfairly prevent states from protecting their sovereign title.

As shown above, the constitutional framework places title in the states to ensure that the people of the states, as sovereigns, receive title and dominion over the lands below navigable rivers. *E.g.*, *Shively*, 152 U.S. at 11-12. The test for title examines use or susceptibility for use as a way for travel and trade without preference for, or requirement of, actual use at the time of statehood. As stated in *Utah*:

*The extent of existing commerce is not the test.* The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.

*Utah*, 283 U.S. at 82 (emphasis added). Requiring actual use at statehood deprives states of “the possibilities of growth and future profitable use[.]” *Id.* at 83. These rulings from *Utah* defeat the petitioner’s argument that navigability-in-fact favors or requires evidence of actual use at statehood.

Moreover, parties may have practical needs for modern evidence when examining navigability-in-fact. There may be no evidence of actual use at the time of statehood. The earliest users may have been illiterate, or failed to keep written records. As in *Utah*, there might have been limited settlement in the area. In more recently admitted states, the use of cars and airplanes, and the displacement of rural and native inhabitants can bear on the actual use at the time of statehood. Additionally, even if evidence of navigability or non-navigability existed at or around the time of statehood, that evidence may have been lost to the passage of time.

Navigability determinations occur long after statehood and will continue in years to come. The public’s right of ownership of its rivers should not be victim to the vagaries of spoliation of evidence over

the centuries and, therefore, there is no requirement that the states address why there may be limited evidence of actual use at the time of statehood. Navigability-in-fact is shown equally by actual use, or by showing the river at statehood was susceptible to being used as a highway for travel and trade.

**B. Navigability-In-Fact Can Be Shown By A Range Of Evidence, Including Modern Use And Recreational Use**

A wide variety of evidence can reveal a river's condition at statehood and whether, "in their ordinary condition," it could be used for "the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. at 563. The test for navigability-in-fact should not categorically exclude or discount evidence of modern use by fishing and recreation because it will often be relevant to the conditions at statehood. Many boats today displace water and float according to the same rules of physics that governed the "customary modes of trade and travel on water" at the time of statehood. When there is modern use on a river with the same flow and gradient as at statehood, modern use can demonstrate navigability-in-fact.<sup>12</sup>

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<sup>12</sup> As pointed out by amicus United States, on page 29 of their brief, the Ninth Circuit provided a sound explanation for relying on modern use evidence in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). First, the court recognized that the river's physical characteristics today were consistent with the conditions at statehood. Next, the court observed that the modern vessels shown to navigate the river were comparable to vessels used for travel and commerce at statehood. Thus, modern evidence showed the river was "susceptible for use as a highway for commerce at statehood." *Id.* at 1405.

A recent case in Oregon illustrates the range of evidence states use to establish title. In *Northwest Steelheaders Association, Inc. v. Simantel*, 199 Or. App. 471, 112 P.3d 383, *review denied*, 339 Or. 407, 122 P.3d 65 (2005), *cert. denied sub nom. Grover v. Northwest Steelheaders Association, Inc.*, 547 U.S. 1003 (2006), the state called a historian, a hydrogeologist, and a university professor of natural resources. These witnesses supplemented evidence of Native Americans' use of a river before statehood with evidence of the river's susceptibility for navigation. *Northwest Steelheaders*, 199 Or. App. at 485. The historian testified to historical uses and the river's capacity for navigation. The hydrogeologist testified to the characteristics of the watershed based on analysis of stream flow, precipitation, and runoff.<sup>13</sup> The natural resource expert testified about a study of recreational use and river-flow requirements for various types of boats. The evidence showed that Native Americans used the watershed for commerce in canoes drafting six to eight inches of water, and that modern craft of similar draft regularly travel the river. The court held that "in its ordinary condition [at statehood], the John Day River as it passes the defendants' properties would have provided ample capacity for travel and trade by means of dugout canoes." *Northwest Steelheaders*, 199 Or. App. at 486.

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<sup>13</sup> For example, the river had far less water in modern times because of extensive irrigation. *Northwest Steelheaders*, 199 Or. App. at 475.

Petitioner argues that recreational use is not commerce, and that the Court should conclude that the Great Falls reach is not susceptible to “commercial navigation.” Pet’r Br. at 43. Navigability-in-fact, however, does not depend on the nature of the commerce. In *Utah v. United States*, 403 U.S. 9, 11 (1971), the Court recognized that use by a single rancher to move animals in a shallow draft boat showed navigability-in-fact. As stated in *The Montello*, trade and travel early in our Nation’s history used fleets of flatboats and freight canoes. Therefore, “commercial utilization on a large scale” (Pet’r Br. at 49) has never been the test for state title. The only question is whether the states can show that the river was used, or susceptible for use, by vessels used in the “customary mode of trade and travel on the water.” *The Daniel Ball*, 77 U.S. at 563. Recreational vessels are quite likely, as in this case, to be the descendants of the types of vessels customarily used in trade and travel a century ago.

Furthermore, labeling use as “recreation” does not defeat the fact that it is also commerce. Today’s businesses and travelers have different needs for river travel, but countless people undeniably engage in travel and commerce when they pay for a vessel to move them along a river to fish, camp, and travel through an area. This type of commerce is vital to the economy of many regions of the country. There is no basis for the petitioner’s arguments that would treat this extensive commerce as if it were irrelevant. *See also* U.S. Br. at 31 (agreeing that navigation for commerce includes boats carrying paying passengers for recreation).

**CONCLUSION**

The Court should preserve the sovereign title granted to the states by the plan of the Constitution, and reject petitioner's several arguments seeking to undermine it.

RESPECTFULLY SUBMITTED.

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**APPENDIX**

**Alaska:** *Alaska v. Ahtna*, 891 F.2d 1401, 1404 (9th Cir. 1989) (citing with approval the statement that a river qualifies as a highway for commerce despite shallow sections and difficulty), *cert. denied*, 495 US 919 (1990).

**Arizona:** *Arizona Center for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 363, 837 P.2d 158 (Ct. App. 1991) (quoting *The Montello* test for determination of state title to rivers: “[T]he river is navigable-in-fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars”).

**California:** *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 570, 127 Cal. Rptr. 830, 836 (Ct. App. 1976) (quoting with approval a California treatise for the statement: “Neither the existence of rapids or sandbars, nor the necessity of portages . . . nor the availability of the stream only at certain times during the year, impairs whatever right of navigation otherwise exists.”).

**Florida:** *Bucki v. Cone*, 25 Fla. 1, 19-20, 6 So. 160, 162 (1889) (finding the Suwanee river navigable because it could float logs most of the time, despite shoals that prevented it at times of low water).

**Illinois:** *Schulte v. Warren*, 218 Ill. 108, 120, 75 N.E. 783 (1905) (“It is not necessary that the waters should be navigable in all their parts in order that the public may have a right of navigation where the waters are deep enough and fit for such use.”).

**Indiana:** *Indiana ex rel. Indiana Dep't of Conservation v. Kivett*, 228 Ind. 623, 630, 95 N.E.2d 145, 148 (1950) (“And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times renders the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use.”).

**Kansas:** *Dana v. Hurst*, 86 Kan. 947, 956, 964, 122 P. 1041 (1911) (citing *The Montello*'s discussion of obstructions at page 956, and pointing out at page 964 that it would be anomalous and absurd to submit different sections of the same river to different juries which would result in shifting and inconsistent findings of navigability).

**Louisiana:** *Goodwill v. Police Jury of Bossier Parish*, 38 La. Ann. 752, 755 (1886) (navigability depends on usefulness as a channel for commerce despite natural barriers such as rapids or sandbars).

**Maine:** *Brown v. Chadbourne*, 31 Me. 9, 23 (1849), cited in *The Montello*, 87 U.S. 430, 443 n.16 (1874) (a river is navigable despite “rocks, falls and other obstructions”).

**Minnesota:** *Minnesota v. Longyear Holding Co.*, 224 Minn. 451, 29 N.W.2d 657, 663 (1947) (citing *The Montello* for the proposition that interruptions do not preclude a finding of navigability).

**Nevada:** *Nevada v. Bunkowski*, 88 Nev. 623, 629-31, 503 P.2d 1231, 1234-35 (1972) (applying *The Montello*, *Holt State Bank*, and *Utah* (1931) to find the Carson river to be navigable despite segments with obstructions, low water, and irregular flows).

**New York:** *In the Matter of the Application of the Commissioners of the State Reservation at Niagara*, 37 Hun. 537, 547-48, 16 Abb. N. Cas. 395 (N.Y. Sup. Ct. 1885) (“And that the fact that at the particular place in question the river is not navigable by reason of the interruption produced by the falls, does not qualify or distinguish it in that locality as a public river from its general character.”), *appeal dismissed*, 102 N.Y. 734, 7 N.E. 916 (1886).

**North Carolina:** *Broadnax v. Baker*, 94 N.C. 675, 681 (1886) (waters do not lose navigability because of falls or other obstructions when the waters support commerce both above and below the obstructions).

**Ohio:** *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 197, 163 N.E.2d 373 (1959) (falls, rapids sand bars, and shifting currents do not preclude navigability); *Spooner v. McConnell*, 1 McLean 337, 22 F. Cas. 939 (Cir. Ct. D. Ohio 1838) (Maumee River in Ohio is navigable despite 16 miles of rapids at its mouth prior to entering Lake Erie, where the river was clearly navigable for 120 miles above such rapids).

**Pennsylvania:** *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 722 (Pa. Super. 1999) (Lehigh River is navigable, in fact, despite segment with waterfall and shallows. “[W]e cannot piecemeal by piecemeal re-examine the navigability of an acknowledged public waterway.”).

**South Carolina:** *South Carolina v. Head*, 498 S.E.2d 389, 394 (S.C. App. 1997) (holding that neither natural obstructions such as rapids and falls, nor artificial obstructions such as dams, can change the character of an otherwise navigable stream).

**Tennessee:** *Tennessee ex rel. Cates v. West Tennessee Land Co.*, 127 Tenn. 575, 586-96, 158 S.W. 746 (1913) (even though portions of a lake are not navigable due to trees, stumps and shallows, navigability of the main part renders the lake navigable as a whole).

**Washington:** *Kemp v. Putnam*, 47 Wash. 2d 530, 534, 288 P.2d 837 (1955) (“Navigability is not destroyed because of occasional natural obstructions or portages, nor is it necessary that navigation continue at all seasons of the year[.]”).

**Wisconsin:** *Olson v. Merrill*, 42 Wis. 203, 213 (1877) (obstructions in river that force log drivers to illegally touch upper shores does not preclude a conclusion that the river channel is navigable).