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PPL Montana v. Montana: From Settlers to Settled Expectations

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Montana's famously rugged rivers provide for a variety of recreational opportunities on the state's waterways. In addition, many of Montana's rivers are highly conducive to hydroelectric power generation. Recently, certain parties challenged a power company's ownership of several riverbeds supporting the company's hydroelectric facilities. This question of streambed ownership cast a shadow upon the future use of Montana's waterways for power generation, as well as the public's right to access Montana's streambeds for recreational use.

In PPL Montana v. Montana, *the United States Supreme Court clarified its approach to determining navigability for purposes of ascertaining riverbed title. The decision drew attention to the disparate public stream access laws of various western states, and will likely require certain states to reconsider their existing laws.*

This Note suggests that western states should develop stream access laws that carefully balance the competing interests of public recreationists and private riparian landowners. While this Note suggests that these western states should liberalize their stream access laws regardless of title to the land, such states must also continue to protect their natural resources and landowners' property rights through various mechanisms.

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INTRODUCTION

Montana's expansive mountain ranges contribute to the famously rugged character of the state's rivers. Early explorers described various segments of Montana's rivers as extremely powerful, characterized by abundant and swift water flows.[1] Such river characteristics provide for a variety of recreational opportunities on Montana's waterways, including whitewater rafting, kayaking, and tubing.[2] These characteristics are also highly conducive to hydroelectric power generation and elicited dam construction on Montana's riverbanks as early as 1891.[3] Power companies constructed various hydroelectric facilities on the Missouri, Madison, and Clark Fork Rivers throughout the late nineteenth and early twentieth centuries.[4] Many of these facilities have operated for nearly a century.[5] In 2003, however, concerned parties questioned the ownership of

1. *See* GARY E. MOULTON, MERIWETHER LEWIS & WILLIAM CLARK, THE LEWIS AND CLARK JOURNALS: AN AMERICAN EPIC OF DISCOVERY 129 (G. Moulton ed. 2003).

2. *River Recreation Management*, MONT. FISH, WILDLIFE & PARKS, RIVER RECREATION MGMT., http://fwp.mt.gov/recreation/management/river (last visited Nov. 18, 2012).

3. *See* KEN ROBISON, CASCADE COUNTY AND GREAT FALLS 40 (2011).

4. *See id*.; PPL Montana, LLC v. State (*Montana I*), 229 P.3d 421, 426 (Mont. 2010).

5. *See Montana I*, 229 P.3d at 426.

lands on which these hydroelectric facilities were constructed.[6] This question of streambed ownership cast a shadow upon the future use of Montana's waterways for power generation, as well as the public's right to access Montana's streambeds for recreational use.

After lengthy litigation, in 2012 the United State Supreme Court in *PPL Montana v. Montana* (*Montana II*) unanimously reversed a Montana Supreme Court ruling that the State owned certain riverbeds where a power company maintained hydroelectric facilities.[7] The Court also reversed the Montana court's order that the power company pay nearly $41 million for use of the riverbeds between 2000 and 2007.[8] The State had argued that the overlying waterways of various riverbeds were navigable at the time of Montana's statehood, and therefore the State owned the submerged lands—the lands lying below the high water mark of the rivers.[9] The Court, however, rejected the state court's approach to determining navigability for riverbed title purposes.[10] Applying the relevant test, the Court found that the State did not maintain title to one disputed river segment and remanded the remaining segments for reconsideration.[11] The Court found a significant likelihood that the Montana courts would determine that the State did not own the disputed riverbeds on remand.[12]

The case invoked commentary from two predominant camps: advocates of strong private property rights and advocates of strong public stream access rights. Property-rights advocates hailed *Montana II* as a major victory for riparian landowners and power companies generating hydroelectric energy.[13] They argued that the decision would prevent states from claiming title to otherwise privately or federally owned riverbeds.[14] In addition, they maintained that the decision would prevent states from seeking compensation from hydroelectric companies for their past and future use of riverbeds.[15]

Advocates of strong public stream access rights decried the decision as narrowing the public trust doctrine—the principle that states hold certain lands

6. *See id.*

7. *See* PPL Montana, LLC v. Montana (*Montana II*), 132 S. Ct. 1215, 1235 (2012); *Montana I*, 229 P.3d at 460–61. Throughout this Note, I refer to the Montana Supreme Court decision as *Montana I* and the United States Supreme Court decision as *Montana II*.

8. *See Montana II*, 132 S. Ct. at 1222.

9. *See id.*; *Montana I*, 229 P.3d at 441.

10. *See Montana II*, 132 S. Ct. at 1235.

11. *See id.* at 1232.

12. *See id.* at 1232, 1235.

13. *See* James L. Huffman, *PPL Montana v. Montana: A Unanimous Smackdown of a State Land Grab*, 11 CATO SUP. CT. REV. 167, 187 (2012); *Montana Cannot Charge Rent for Hydropower Dams, Rules U.S. Supreme Court*, POWERNEWS (Feb. 29, 2012), http://www.powermag.com/POWERnews/4450.html.

14. Russell Prugh, *Supreme Court Reverses Montana High Court in Rent for Riverbeds Case*, MARTEN LAW (Apr. 3, 2012), http://www.martenlaw.com/newsletter/20120403-rent-for-riverbeds-case-reversed.

15. *See id.*

in trust for the use of current and future citizens.[16] They posited that the decision would erect substantial barriers to states claiming title to submerged lands.[17] They argued further that the decision would limit states' ability to maintain open public access to streams and riverbeds for recreational use.[18]

Importantly, the majority of litigation over streambed title stems not from states seeking compensation from hydroelectric facilities, but rather from private landowners seeking to block recreational access to adjacent streambeds. While the Court suggested that *Montana II* would not affect states' laws granting public access to streambeds, the decision drew attention to the diverse stream access laws of various western states. Some western states provide expansive public stream access rights. Others restrict public access to waterways deemed navigable under a narrow federal test.

These states, however, may find a middle ground. Entities responsible for developing stream access laws should strike an appropriate balance between riparian landowners' and the public's interests in streambeds by expanding public stream access rights while simultaneously implementing measures to maintain the integrity of adjacent landowners' property. First, western states should liberalize their stream access laws and grant public access to streambeds for recreational use regardless of title to the land. Next, these states should impose certain limitations on recreational use of streambeds through direct regulation and licensing schemes. Such a plan will ensure a broad public right to access streambeds, while helping states to moderate overcrowding, limit pollution, and promote restoration and conservation projects.

I. *PPL MONTANA V. MONTANA*

A. The Navigability-for-Title and Equal-Footing Doctrines

Following the American Revolution, the original Thirteen Colonies became sovereign states and each maintained an "absolute right to all their navigable waters, and the soils under them, for their own common use . . . ."[19] As such, states generally maintain title to the underlying riverbeds of

16. *See* Matthew F. Hanchey & Craig A. Bromby, *Regulatory Issues: Understanding Riverbed Issues Associated with Dams*, HYDRO REV. (Sept. 1, 2012), http://www.hydroworld.com/articles/hr/print/volume-31/issue-06/article/regulatory-issues-understanding-riverbed-issues-associated-with-dams.html.

17. *See id.*

18. *See* Brief for California Sportfishing Protection Alliance et al. as Amici Curiae Supporting Respondent at 6, 24, *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 U.S. S. Ct. Briefs LEXIS 1786; Mark McGlothlin, *An Unwelcome but Not Unexpected Challenge to Montana Stream Access*, CHI WULFF (Apr. 11, 2012), http://chiwulff.com/2012/04/11/an-unwelcome-but-not-unexpected-challenge-to-montana-stream-access-from-the-say-it-aint-so-joe-file.

19. Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842); *see also* Shively v. Bowlby, 152 U.S. 1, 31 (1894) (holding that states as sovereigns maintain "title in the soil of rivers really navigable").

waterways that were navigable at the time of statehood.[20]

The equal-footing doctrine extended the original colonies' ownership rights in submerged lands to states later admitted to the Union.[21] Under the equal-footing doctrine, states entering the Union after 1789 were granted the same status and legal rights as pre-existing states "in all respects whatever," including sovereignty, jurisdiction, and ownership of land.[22] Accordingly, Montana gained title to beds underlying its navigable waters upon entering the Union in 1889.[23]

Courts use the navigability-for-title test to determine whether a state maintains title to a waterway within its borders.[24] For purposes of title under the equal-footing doctrine, a waterway must be "navigable-in-fact" at the time of statehood.[25] This requires that the river be used or "susceptible of being used . . . as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[26] The extent and type of use of a navigable waterway is irrelevant to a determination of navigability-in-fact, so long as the waterway has the capacity for use as an actual avenue of transportation and commerce.[27] In *Montana II*, the Court held that the Montana court incorrectly found the relevant river stretches to be navigable-in-fact at the time of Montana's statehood.[28]

B. Montana II*: Facts and Procedural History*

1. The Lower Court Decisions

For decades, PPL Montana, LLC (PPL) and its predecessor owned and operated several hydroelectric facilities on riverbeds underlying stretches of Montana's Missouri, Madison, and Clark Fork Rivers.[29] By the time of *Montana I*, some of PPL's hydroelectric facilities had operated in these locations for over a century.[30] In fact, a PPL predecessor completed construction of the Black Eagle Falls dam on the Missouri River by 1891.[31]

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20. Once title is established, a state "may allocate and govern those lands according to state law subject only to the United States' power 'to control such waters for purposes of navigation in interstate and foreign commerce.'" *Montana II*, 132 S. Ct. 1215, 1222 (2012) (citing United States v. Oregon, 295 U.S. 1, 14 (1935)).

21. *See* Oregon *ex rel*. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370 (1977); Submerged Lands Act, 43 U.S.C. §1311(a)(1) (2006) (establishing and confirming states' title to and interest in "lands beneath navigable waters within the boundaries of the respective States . . . .").

22. *See* Pollard v. Hagan, 44 U.S. 212, 222–24 (1845); *see also* U.S. CONST. art. IV, § 3, cl. 1.

23. *See Montana II*, 132 S. Ct. at 1222.

24. *See id*. at 1228–29.

25. *See id*. at 1228; *see also* The Daniel Ball, 77 U.S. 557, 564 (1870).

26. *The Daniel Ball*, 77 U.S. at 563.

27. *See* United States v. Utah, 283 U.S. 64, 82–83 (1931).

28. *See Montana II*, 132 S. Ct. at 1235.

29. *Id*. at 1222, 1225.

30. *See id.* at 1225.

31. *See id.*

Although PPL had operated these facilities without title objection for decades, in 2003 parents of Montana school children sued PPL in federal court, arguing that "the riverbeds occupied by PPL's dams were part of the school trust lands" and that "PPL was obligated to compensate the state for their use."[32] Although Montana was aware of the hydroelectric facilities and never before sought rent from PPL, the State joined the suit and requested payment for PPL's use of the riverbeds.[33]

After the court dismissed the case for lack of diversity jurisdiction, PPL filed a declaratory judgment against the State in state court, seeking a determination that the company was not required to compensate the State for its use of the riverbeds.[34] PPL argued that the relevant river segments were not navigable at the time of Montana's statehood and therefore the State did not own the underlying lands.[35] The State countered that the disputed rivers were navigable at the time of statehood, the State gained title to the riverbeds under the equal-footing doctrine, and the State was entitled to compensation.[36] Both parties relied heavily on historical records in determining the navigability of the rivers at the time of Montana's statehood.

The trial court granted summary judgment to the State regarding navigability for purposes of determining title to the riverbeds and found that the State owned the riverbeds.[37] The court then ordered PPL to pay nearly $41 million in back-rent for its use of the riverbeds.[38] PPL appealed.[39]

2. The Montana Supreme Court on the Navigability-For-Title Test and Present-Day Recreational Use

The Montana Supreme Court affirmed, finding that the lower court properly interpreted and applied the federal navigability-for-title test.[40] Relying on historical newspaper articles; personal accounts of various nineteenth century explorers, fur-trappers, miners, and settlers; and evidence of modern-day recreational use of the rivers, the court found the rivers navigable for purposes of commerce at the time of statehood.[41]

First, the court noted that the concepts of "navigability-for-title," and

32. *Montana I*, 229 P.3d 421, 426 (Mont. 2010).
33. *See id.* at 427.
34. *See id.*
35. *See id.* at 433.
36. *See id.* at 428.
37. *See id.* at 431–32.
38. *See id.* at 426, 457.
39. *See id.* at 443.
40. *See id.* at 446, 460–61; *Montana II*, 132 S. Ct. 1215, 1226 (2012).
41. *See Montana I*, 229 P.3d at 431–33, 446–49. The Montana Supreme Court found reliance on such historical documents "well-accepted and proper" when applying the navigability-for-title test. *See id.* at 446 ("Courts applying this test are often required to arrive at factual determinations regarding matters outside the recall of any living witnesses, thus requiring a higher degree of reliance upon historical material than in the run of the mill civil dispute.").

"commerce" in the navigability-for-title context, are "fluid" and "very liberally construed."[42] Based on its expansive understanding of these terms, the court determined that present-day, recreational use of a river may be "probative of its status as a navigable river at the time of statehood."[43] Furthermore, the court agreed that new forms of commerce may be retroactively applied to considerations of navigability.[44] Thus, the court found that evidence of modern use of a river may support a determination that a river was susceptible to commerce at the time of statehood, and therefore may support a finding of navigability.[45]

3. The Montana Supreme Court on the Segment-by-Segment Approach

Next, the court discussed the limited applicability of a "segment-by-segment" approach to determining navigability, which PPL had advocated.[46] Under a segment-by-segment approach, a court analyzes each section of a river rather than a waterway's entirety in order to "assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not."[47] Examining relatively lengthy waterway stretches minimizes the legal impact of brief interruptions to navigation on navigability determinations. However, dissecting a waterway into discrete segments increases the chances of finding non-navigability, as the "short interruptions" may comprise a comparatively significant portion of a given waterway segment.[48]

PPL argued that interruptions in navigability based on natural obstructions rendered the relevant river segments non-navigable for title purposes.[49] The State maintained that even with obstacles to free passage, historical evidence of portages and log floats supported a finding of commercial navigability.[50] The court determined that short interruptions in the relevant waterways were insufficient to find non-navigability, since portage allowed commercial travel over those segments.[51] The court stated that PPL "merely points to relatively short interruptions" which impede 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."[52] Rather, the court stated "we are concerned with long reaches with particular characteristics of navigability or

42. *Id.* at 446–47. Note that a liberal construction and application of the navigability-for-title test increases the chances of finding in favor of the State, since it broadens the parameters upon which the court could find that the State owned the submerged lands.

43. *Id.* at 447.

44. *See id.*

45. *See id.* at 448.

46. *See id.* at 463 (discussing United States v. Utah, 283 U.S. 64, 77 (1931)).

47. *See Montana II*, 132 S. Ct. 1215, 1229 (2012).

48. *See Montana I*, 229 P.3d at 448–49.

49. *See id.* at 447–48.

50. *See id.* at 432, 435.

51. *See id.* at 449.

52. *Id.*

nonnavigability . . . ."[53] Thus, the court agreed that the disputed rivers were navigable for purposes of commerce at the time of statehood and, therefore, the State maintained title to the riverbeds under the equal-footing doctrine.[54]

4. The Montana Supreme Court on the Public Trust Doctrine

Finally, the court found that the State held the disputed lands in public trust pursuant to the Montana Constitution.[55] Under the public trust doctrine, certain lands are held in trust by the state for the use and benefit of current citizens and future generations.[56] The public trust doctrine provides that "states hold title to navigable waterways in trust for the public benefit and use . . . ."[57]

Montana's State Land Board (Board) administers lands held in public trust and must "administer these lands in accordance with the trust obligations imposed by Article X, Section 11 of the Montana Constitution."[58] The Montana Constitution prohibits the Board from disposing of public trust lands "except in pursuance of general laws providing for such disposition" or "until full market value" of the land has been paid.[59] As such, the court suggested that the Board had a "constitutional and statutory duty to seek compensation" from PPL for its use of lands held in public trust.[60]

C. Montana II*: The United States Supreme Court Decision*

The Court granted certiorari to establish the applicable test for navigability in disputes over riverbed ownership and subsequently reversed the judgment of the Montana Supreme Court.[61] The Court discussed the proper application of the navigability-for-title test, the role of modern recreational watercraft in determining navigability, and the applicability of the public trust doctrine to the disputed lands. After holding that the State did not maintain title to a certain riverbed and could not seek compensation for PPL's use of the riverbed, the Court remanded the case for a determination regarding the remaining riverbeds.[62]

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53. *See id.* at 448 (quoting United States v. Utah, 283 U.S. 64, 77 (1931)).

54. *See id.* at 448–49.

55. *See id.* at 450; MONT. CONST. art. X, § 11.

56. *See* CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW 626 (Christine A. Klein et al. eds., 1st ed. 2005); *see also* Richard M. Frank, Symposium, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 667 (2012).

57. *Montana I*, 229 P.3d at 436 (quoting Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 168 (Mont. 1984)).

58. *Id.* at 450.

59. MONT. CONST. art. X, § 11. Montana law provides that the Board may issue a lease to any entity for the development of "power sites." *Montana I*, 229 P.3d at 427; *see* MONT. CODE ANN. § 77-4-201 (2009).

60. *Montana I*, 229 P.3d at 450, 452 n.11.

61. *See Montana II*, 132 S. Ct. 1215, 1226 (2012).

62. *See id.* at 1235.

1. The Supreme Court on the Segment-by-Segment Approach

The Court found that the Montana court's ruling was "based upon an infirm legal understanding of this Court's rules of navigability for title under the equal-footing doctrine."[63] First, the Court found that Montana incorrectly applied the navigability-for-title test, primarily because the State failed to address navigability on a segment-by-segment basis.[64] The Court stated that the Montana court disregarded this "well-settled" approach.[65] Although the Montana court argued that the necessity of portage did not undermine navigability since commercial use of the rivers could be maintained by simply bypassing natural obstacles, the Court found that the need for overland portage at the relevant river segments "defeat(s) navigability for title purposes."[66] The Court suggested that at these points, "transportation over land rather than over the water" rendered such segments non-navigable.[67] After holding that one disputed stretch was not navigable under the equal-footing doctrine, the Court found a "significant likelihood" that the other stretches in dispute would similarly fail the federal navigability test on remand.[68]

2. The Supreme Court on Present-Day Recreational Use

Next, the Court found that the Montana court erred in relying on present-day recreational use of a certain river segment as probative evidence of navigability at the time of statehood.[69] The Court stated that while a court may consider present-day recreational use of a river in analyzing navigability, the evidence may be considered only to "the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood."[70] The Court suggested that modern-day, lightweight, recreational watercraft—including fishing boats, inflatable rafts, canoes, and kayaks—are more adept at traversing shallow, rocky waters than watercraft used "for trade and travel" in the nineteenth century.[71] Thus, the Court held that a party seeking to use present-day use of a river segment as evidence of title must show that (1) the present-day watercraft are meaningfully similar to those used in trade and travel at the time of statehood and (2) the

63. *Id*.
64. *Id*.at 1229–31.
65. *Id.* at 1220.
66. *Id.* at 1231–32.
67. *Id*.
68. *Id.*
69. *See id.* at 1233. Parties advocating present-day use as probative evidence of navigability at statehood likely sought to expand the narrow federal navigability-for-title test. Expansion of the federal test would result in increased findings of navigability. An increase in navigability findings would qualify more waterways and streambeds as state-owned. This would result in an increase in the number of publicly accessible waterways and streambeds.
70. *Id*.
71. *See id.* at 1234.

river segment presently maintained similar physical characteristics as at the time of statehood.[72] The Court found that the Montana court failed to make these necessary findings.[73]

3. The Supreme Court on the Public Trust Doctrine

As a brief "final contention," the Court determined that denying the State title to the riverbeds does not undermine states' public trust doctrines.[74] The State had argued "Montana's interest in the riverbeds at issue implicates a matter of core federalism."[75] It maintained that the equal-footing doctrine "is grounded in on the centuries-old 'public trust doctrine,'" and that the public trust doctrine "recognizes that the sovereign holds the submerged lands beneath those waters."[76] The State then contended that, "the Constitutional test of navigability advanced by PPL, and fully backed by the United States, would have the effect of stripping states of sovereignty over the lands underlying navigable waters . . . ."[77]

The Court, however, stated that Montana's suggestion that denying the State title to disputed riverbeds would undermine the public trust doctrine "underscores the State's misapprehension of the equal-footing and public trust doctrines."[78] The Court noted that questions of public trust and state ownership of riverbeds are determined under separate standards.[79] The equal-footing doctrine is the federal, "constitutional foundation" for the navigability-for-title test; the public trust doctrine is a matter of state law.[80] The Court maintained that "[s]tates retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."[81] In other words, while the federal test for navigability determines *title* to riverbeds, states are free to shape the contours of their own public trust doctrines.[82]

72. *See id.* at 1233.

73. *See id.* at 1234. Note that the lower court could potentially make these findings on remand.

74. *Id.* at 1235.

75. *See* Brief for Respondent at 35, *Montana II*, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 U.S. S. Ct. Briefs LEXIS 1657.

76. *Id*. at 42.

77. *Id.* at 45–46.

78. *See Montana II*, 132 S. Ct. at 1234.

79. *See id.* at 1235.

80. *Id.*

81. *Id.*

82. *See* Amy Wegner Kho, Case Note, *What Lies Beneath Troubled Waters: The Determination of Navigable Rivers in* PPL Montana, LLC v. Montana, 132 S. Ct. 1215 (2012), 15 U. DENV. WATER L. REV. 489, 498 (2012) ("Federalism principles give states the power to establish the breadth of the public trust over waters within their state, while federal law allows the equal-footing doctrine to control riverbed title.").

II. DISCUSSION

The implications of *Montana II* extend beyond states seeking compensation from power companies for operating hydroelectric facilities on riverbeds. Indeed, the bulk of litigation over streambed ownership stems from private landowners seeking to block recreational public access to adjacent streambeds, or alternatively, from recreationists seeking to expand public access to waterways and their streambeds.[83]

Thus, the Court's decision drew attention to state laws addressing the public's right to access waterways and their streambeds for recreational use. Various critics and commentators—including historians,[84] environmental and natural resource conservation organizations, sportfishing and hunting groups, and water-access advocacy organizations[85]—expressed concern that a decision in favor of PPL would negatively affect public access to rivers and streams. Prior to the decision, one commentator suggested that "[t]he Court's decision in this case could have far reaching effects . . . on the public's access to and use of the nation's rivers for fishing, boating, [and] recreating . . . ."[86] Another stated, "a cloud looms over [Montana's] now-famous Stream Access Law and future recreational—and commercial—activities on our nationally-recognized streams."[87] Following the decision, one commentator stated that "[t]he very core of Montana Stream Access law, the envy of many a fisher around the country, appears to once again be under fire."[88]

First, I will show why these criticisms are misguided. *Montana II* does not undermine states' ability to determine the contours of their own public trust doctrines or the breadth of their stream access laws.[89] Next, I provide a survey

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83. I use the term "recreationist" to refer to an individual engaged in recreational use of a waterway or streambed.

84. *See* Brief for Stephenie Ambrose Tubes as Amicus Curiae Supporting Respondent, *Montana II*, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 U.S. S. Ct. Briefs LEXIS 1775.

85. *See* Brief for California Sportfishing Protection Alliance, *supra* note 18; McGlothlin, *supra* note 18.

86. *See* Brief for California Sportfishing Protection Alliance, *supra* note 18, at 24.

87. *U.S. Supreme Court No. 10-218: Who Owns Riverbeds?*, FISHING OUTFITTERS ASS'N OF MONT. BLOG (Dec. 18, 2011), http://foam-montana.org/blog/?p=119.

88. *See* McGlothlin, *supra* note 18.

89. There exists confusion regarding states' development of stream access laws. "The topic of stream access illustrates one of the most perplexing types of legal conflict that can arise. . . . Indeed, it is difficult to find a legal issue that is more tangled and uncertain." ERIC T. FREYFOGLE & DALE G. GOBLE, WILDLIFE LAW: A PRIMER 6, 86 (2009). Overlapping governmental authorities participate in the development and maintenance of laws regarding submerged lands. It is often "difficult to figure out what law governs a particular problem." *Id*. Furthermore, the fact-intensive nature of legal disputes arising in the context of access to waterways and riverbeds leads to unpredictability in determining what the "law" actually is. *Id*. at 7. Vague existing state statutes and regulations regarding stream access compound this confusion and erode predictability. *Id*. Furthermore, caselaw establishing precedent regarding title to submerged lands is decades—sometimes nearly a century—old.

Perhaps most importantly, wide variability in states' definitions of navigability creates confusion. States may employ separate tests to determine navigability-for-title and "navigability-for-use." "Navigability-for-use" standards extend beyond the federal navigability for title test—which

of stream access laws in Montana, Utah, Colorado, and Arizona. Montana utilizes an expansive navigability test and provides broad stream access rights; Utah, Colorado, and Arizona apply narrow standards and severely limit recreational access to streams. Finally, I suggest that these divergent stream access laws may be reconciled by balancing public and private interests in streambeds. Western states might avoid costly litigation and high transaction costs stemming from drawn-out negotiations between riparian landowners and public recreationists by elucidating clear state navigability standards and expanding the types of access rights granted to the public. Expansion of public access rights, however, must be carefully balanced against the rights and expectations of parties owning land adjacent to streambeds.

A. State Navigability Standards: Navigability-For-Use

While the Court in *Montana II* clarified the federal test for determining navigability-for-title—which only addresses *ownership* of lands underlying navigable waterways—it also suggested that separate state authority exists for determining the contours of state public trust doctrines and stream access laws. Importantly, ownership is not a necessary determination for whether states may apply public trust principles and public access rights to streambeds. In establishing their own standards, states may expand the federal test to include important state interests beyond title to the land—namely recreational access to and use of streambeds.

Irrespective of title, the public may enter a waterway "if access is authorized by *either* state or federal law."[90] Because of federal preemption principles, a state may not bar access to waterways deemed navigable-for-title under federal law.[91] However, a state may grant access to waterways that are non-navigable under the federal test.[92] The federal test essentially acts as a minimal baseline: while states may not establish standards that restrict public access to waterways deemed navigable under the federal test, states are free to adopt more expansive standards. The federal test of navigability used to

determines only ownership of the land—to encompass broader state interests, including public access to and use of riverbeds for recreational purposes. Each state's definition of navigability affects the scope of its access laws, and states may define navigability differently for various purposes. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556 (1970) ("Sometimes the coverage of the trust depends on a judicial definition of navigability, but that is a rather vague concept . . . .").

90. FREYFOGLE & GOBLE, *supra* note 89, at 6 ; *see also* MONT. CODE ANN. § 23-2-302 (2007) (granting public access to Montana riverbeds regardless of title as determined by the federal navigability-for-title test). Note that stream access advocates likely hoped the Court in *Montana II* would expand the federal navigability test. An expanded federal navigability test would preempt more restrictive state laws and mitigate the internal state battles discussed *infra* Part II.C.3–5.

91. *See* Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830, 834 (Cal. Ct. App. 1976) (explaining that a "uniform federal test is mandatory upon the state and federal courts alike."); *see also* FREYFOGLE & GOBLE, *supra* note 89, at 6.

92. *See* Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); *see also* FREYFOGLE & GOBLE, *supra* note 89, at 6.

determine title under the equal-footing doctrine does not preclude "the various states from adopting more liberal tests in order to advance other important interests or public uses."[93] Such interests may include "resource conservation, apportionment of waterways between private and public uses, and protection of public access to waterways."[94]

State navigability standards are typically deemed "navigability-for-access"[95] or "navigability-for-use" tests.[96] In general, these tests expand the narrow federal test to address the public's right to access waterways and their underlying lands for recreational use.[97] Waterways deemed navigable under such state tests are generally open to the public notwithstanding title to the riverbeds.[98]

Because Montana maintains broad state navigability standards with respect to public access rights—permitting access to waterways and streambeds regardless of ownership—the public will enjoy the same stream access benefits it enjoyed before the decision in *Montana II*.[99] The *Montana II* decision, however, draws attention to public stream access rights—or lack thereof—in other western states.

B. Survey of Western States' Navigability Standards and Stream Access Laws

Western states exhibit great variability in the extent to which they provide public access to streams. Montana lies at one extreme, employing broad navigability standards and providing extensive public stream access rights.[100] Utah, Colorado, and Arizona, on the other hand, apply narrow state navigability

93. *See* Defenders of Wildlife v. Hull, 18 P.3d 722, 729 (Ariz. Ct. App. 2001).

94. *See id.*

95. FREYFOGLE & GOBLE, *supra* note 89, at 96; *see also* Ravis H. Burns, *Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West*, 5 WYO. L. REV. 561, 567 (2005) (noting that state standards "are usually based on something other than a waterway's ability to sustain commercial navigation").

96. *See, e.g.*, Op. Or. Att'y Gen. No. 8281 (Apr. 25, 2005), *available at* http://www.doj.state.or.us/agoffice/agopinions/op8281.pdf (explaining that Oregon has established a state public use doctrine that gives the public certain rights to use a waterway whose bed is privately owned "if the waterway has the capacity . . . to enable boats to make successful progress through its waters").

97. *See* Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 165 (Mont. 1984) ("[R]ecreation access . . . is determined by state law according to one criterion—namely, navigability for recreational purposes . . . . [T]he question of recreational access is to be determined according to state, not federal, law.").

98. *See* FREYFOGLE & GOBLE, *supra* note 89, at 96.

99. In fact, after *Montana II*, Montana Attorney General Steve Bullock issued a press release to assuage the fears of those concerned about the decision's effects on Montana's Access to Streams laws. Press Release, Mont. Dep't of Justice, Bullock: PPL Decision 'Doesn't Take Away' Montana's Strong Stream Access Rights (Feb. 24, 2012), *available at* https://doj.mt.gov/2012/02/bullock-ppl-decision-doesnt-take-away-stream-access-rights. He stated, "Montana has some of the strongest stream access laws in the nation, preserving the ability of all Montanans to hunt, fish, float and recreate on public streams and rivers. This decision by the U.S. Supreme Court, while disappointing, doesn't take away or affect that right." *Id.*

100. *See* Montana Access to Streams Law, MONT. CODE ANN. §§ 23-2-301 to -322 (2007).

standards consistent with the federal navigability-for-title test.[101] Such standards essentially require a waterway to be capable of supporting commercial traffic in order to be navigable-for-use.[102] Applying such narrow tests, these states continue to find many waterways non-navigable-for-use and severely curtail the public's right to access certain streambeds for recreation.

1. Montana

Irrespective of federal navigability determinations, Montana state law provides virtually unlimited public access to rivers and streambeds.[103] The state has expanded its own definition of navigability beyond the federal definition in terms of geographic scope and types of public access rights to streambeds.

Montana's stream access laws are rooted in various provisions of the Montana Constitution.[104] The relevant provisions state that "all existing rights to the use of any waters for any useful . . . purpose are hereby recognized and confirmed," and "all surface . . . waters within the boundaries of the state are the property of the state for the use of its people . . . ."[105]

In 1984, the Montana Supreme Court cited these provisions in deciding *Montana Coalition for Stream Access, Inc. v. Curran*[106] and *Montana Coalition for Stream Access, Inc. v. Hildreth*.[107] *Curran* addressed public access to the streambeds of navigable waters in Montana. Various members of the Montana Coalition for Stream Access (Coalition) used a stretch of Montana's Dearborn River for "floating and fishing."[108] The owner of land adjacent to the waterway harassed and interfered with the recreationists.[109] He claimed title to the banks and riverbed of the Dearborn adjacent to his property and sought to restrict their use.[110] The court, however, found that the Dearborn was navigable at the time of Montana's statehood and therefore the state maintained title to the disputed riverbeds.[111] The court held that under the Montana Constitution and public trust doctrine, "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes."[112]

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101. *See* discussion *infra* Part II.C.3–5. I selected these states because I believe they exemplify the variety of stream access laws in the western United States.

102. *See id.;* FREYFOGLE & GOBLE, *supra* note 89, at 96.

103. *See* Montana Access to Streams Law, MONT. CODE ANN. §§ 23-2-301 to -322.

104. *See* MONT. CONST. art. IX, § 3.

105. *Id.*

106. 682 P.2d 163 (Mont. 1984).

107. 684 P.2d 1088 (Mont. 1984), *overruled on other grounds by* Gray v. Billings, 689 P.2d 268 (Mont. 1984).

108. *Curran*, 682 P.2d at 165.

109. *See id.*

110. *See id.*

111. *See id.* at 168.

112. *Id.* at 171.

The same year, the Montana Supreme Court expanded its holding in *Curran* in *Hildreth*.[113] The Coalition filed a complaint against a riparian landowner who had strung a fence across Montana's Beaverhead River.[114] The Coalition alleged that the public was entitled to float the river through the private property.[115] The court held that the Beaverhead was navigable for recreational use and therefore the public "has a right to use its bed and banks up to the ordinary high water mark . . . ."[116] The court held further that "title to the underlying bed . . . is immaterial to the determination of the public's right of use . . . ."[117] In both *Curran* and *Hildreth*, the court stressed that nothing in the opinion should be construed to grant the public the right to "enter upon or cross over private property."[118]

The following year, in 1985, Montana enacted its Access to Streams laws in accord with the holdings in *Curran* and *Hildreth*.[119] The legislation provided that the public may use Montana's waterways for recreational purposes regardless of streambed ownership[120]: "all surface waters that are capable of recreational use may be so used by the public without regard to ownership of the land underlying the waters."[121] Such use includes fishing, bathing, floating, swimming, hunting, and "other water-related pleasure activities."[122] The laws further establish recreationists' right to portage around barriers—even above the high-water mark.[123]

While granting broad public access to waterways within Montana, the laws also help maintain the integrity of riparian landowners' property rights. Montana's Access to Stream laws clarify that title to the land remains unaffected by the laws: "[t]he provisions of this part and the recreational uses permitted by 23-2-302 do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters or the portage routes within this state."[124] The laws further protect landowners from unnecessary trespassing by recreational users of the waterways: "[t]he right of the public to make recreational use of surface waters does not grant any easement or right to the public to enter onto or cross private property in order to

113. *See* Mont. Coal. for Stream Access, Inc. v. Hildreth, 684 P.2d 1088 (Mont. 1984), *overruled on other grounds by* Gray v. Billings, 689 P.2d 268 (Mont. 1984).

114. *See id*. at 1090.

115. *See id.*

116. *Id*. at 1094.

117. *Id*. at 1092.

118. *See* Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163 at 172 (Mont. 1984); *Hildreth*, 684 P.2d at 1092.

119. *See* MONT. CODE ANN. § 23-2-302 (2007).

120. *See id.* § 23-2-309.

121. *Id*. § 23-2-302.

122. *Id.* § 23-2-301.

123. *Id*. § 23-2-311. ("A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers . . . .").

124. *Id.* § 23-2-309.

use such waters for recreational purposes."[125] Where portage is required, Montana's Access to Streams laws require portagers to move around barriers "in the least intrusive manner possible, avoiding damage to the landowner's land and violation of the landowner's rights."[126] Furthermore, the laws protect the potential liability of landowners by providing that landowners owe no duties to recreational users of waterways within Montana.[127]

2. Utah

Utah's current stream access laws are weaker than Montana's with respect to the public's right to access Utah's waterways and streambeds for recreational use. The development of stream access laws in Utah has a tumultuous history. Recent legislation overturned a Utah Supreme Court decision that broadened the scope of public streambed access rights. However, the constitutionality of such legislation remains in question. Thus, the future of the public's right to access Utah streams remains uncertain.

In *J.J.N.P. Co. v. State*, the Utah Supreme Court declared that the public may recreate on certain waterways that fail the federal navigability-for-title test.[128] Furthermore, the court held that "[i]rrespective of the ownership of the bed and navigability of the water, the public . . . has the right to float leisure craft, hunt, fish, and participate in any lawful activity when using that water."[129] Thus, Utah courts recognized a public access right to waterways within the state "regardless of who owns the water beds beneath the water."[130]

Before 2008, Utah had not explicitly determined whether the public right to access waterways included use of the streambed. The Utah Supreme Court addressed the issue in *Conatser v. Johnson*, and determined the scope of public access to the State's waters.[131] Specifically, the court sought to determine "whether the easement, which allows the public to engage in recreational activities in state waters, also allows the public the right to touch the privately owned beds below those waters."[132] The court defined "touch" to encompass "all aspects of touching, including walking and standing on the privately owned beds of state waters."[133]

In *Conatser*, several recreationists were cited for criminal trespass when

125. *Id*. § 23-2-302.

126. *Id.* § 23-2-311.

127. *Id.* § 23-2-321.

128. 655 P.2d 1133, 1135 (Utah 1982) ("Although 'navigability' is a standard used to determine title to waterbeds, it does not establish the extent of the State's interest in the waters of the State."); *see also Utah Navigability Report*, AM. WHITEWATER, http://www.american whitewater.org/content/Wiki/access:ut (last visited Nov. 3, 2012).

129. *J.J.N.P. Co.*, 655 P.2d at 1137.

130. *Id*. at 1136.

131. 194 P.3d 897, 898 (Utah 2008).

132. *Id.* The term "public easement" in *Conatser* refers to the public's ability to access waterways and streambeds. *See id. at* 899.

133. *Id.* at 898 & n.1.

they touched a riverbed while floating and fishing on a Utah River.[134] They sought a judicial determination regarding their right to touch the streambed where the stream crossed private property.[135] The recreationists claimed they were entitled to "recreate in natural public waters . . . [which] includes the right to touch or walk upon the bottoms of said waters in non-obtrusive ways."[136]

The issue reached the Utah Supreme Court, which began its analysis by discussing the test for navigability. The court stated that, "while the public owns state waters, the beds that lie beneath those waters may be privately owned."[137] Ownership of the submerged lands, the court stated, is determined by whether the waterway is navigable.[138] The court defined navigability as "useful for commerce and [having] 'practical usefulness to the public as a public highway.'"[139] If the body of water was navigable under this standard, the state maintained title to the underlying riverbed; if not, the riverbed "may be privately owned."[140]

The court held that "the scope of the public's easement in state waters allows the public to (1) engage in all recreational activities that *utilize* the water and (2) touch privately owned beds of state waters in ways incidental to all recreational rights provided for in the easement."[141] As to (1), the court stated that in previous cases, it "did not adopt . . . language that limits the easement's scope to activities that can be performed upon the water. Instead, we established our own rule that the public has 'the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water.'"[142] Thus, "the interpretive difference turns on a single, significant word."[143] The court clarified that "the scope of the public's easement in state waters provides the public the right to engage in all recreational activities that utilize the water and does not limit the public to activities that can be performed upon the water."[144] As to (2), the court stated that touching the riverbed is necessary to the enjoyment of fishing, hunting, swimming, and wading.[145] "The practical reality is that the public cannot effectively enjoy its right to 'utilize' the water to

134. The recreationists' raft, paddles, and fishing tackle "occasionally touched the shallow parts of the river bottom," and one recreationist "intentionally got out of the raft and touched the river bottom by walking along it to fish and move fencing . . . strung across the river." *Id.* at 898–99.

135. *See id.* at 899.

136. *Id.*

137. *Id.* at 900.

138. *See id.*

139. *Id.* (citing Monroe v. State, 175 P.2d 759, 761 (Utah 1946)).

140. *Id*. While the court stated that navigability is relevant to establish private ownership of the riverbed, and that the public has an easement to use the river where it crosses private property, the court said no more about navigability. Rather, the court went on to define the scope of the public easement. *See id.*

141. *Id.* at 898.

142. *Id.* at 901.

143. *Id.*

144. *Id.*

145. *See id.* at 902.

engage in recreational activities without touching the water's bed."[146] The court held further that such touching does not unnecessarily injure adjacent landowners.[147]

Notwithstanding this holding, in 2010 the Utah legislature substantially overruled *Conatser* with the implementation of the Utah Public Waters Access Act.[148] The legislature declared that the scope of the public's right to recreationally use public waters on private property is "uncertain," since the court in *J.J.N.P.* and *Conatser* failed to "address the constitutional prohibition on taking or damaging private property without just compensation . . . ."[149] The legislature expressed concern regarding the "invasion of private property rights" resulting from the decision in *Conatser*, which would allow recreational users "to physically occupy the land for an indeterminate time and for a wide range of activities by the public against the owner's will and without just compensation."[150]

The Utah Public Waters Access Act limits public recreational access to "navigable waters" and "public waters" on "public property."[151] The Act defines navigable water as "a water course that in its natural state without the aid of artificial means is useful for commerce and has a useful capacity as public highway of transportation."[152] The legislation further prohibits "recreational water users (including anglers, kayakers, tubers, hunters and others) [from] walk[ing] on the private bed of a public waterbody."[153] Thus, the public may access Utah's waterways only to a limited extent. While recreationists may float on Utah's navigable rivers, they may be subject to criminal liability if they walk on a streambed.

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146. *Id.*

147. In fact, the court stated that riparian landowners enjoyed several limitations to protect their interests:

> First, the public may engage only in lawful recreational activities. Second, those activities must utilize the water. Where utilizing the water is not the purpose, the activity is beyond the scope of the easement. Third, as noted, the public must act reasonably in touching the water's bed. Finally, the public may not cause unnecessary injury to the landowner. If the public acts beyond these strictures, it has exceeded the scope of the easement.

Id. at 903.

148. *See* UTAH CODE ANN. § 73-1-1 (2010).

149. *Id.* § 73-29-103(3).

150. *Id.* § 73-29-103(4), (5).

151. *Id.* § 73-29-201.

152. *Id.* § 73-29-102(4).

153. *Recreational Access to Utah Waters on Private Land*, UTAH DIV. OF WILDLIFE RES. (May 27, 2010), http://wildlife.utah.gov/dwr/component/content/article/40-fishing/238-hb-141.html; *see also* UTAH CODE ANN. § 73-29-202. This makes little sense. How is one to hunt or fish on a river if one is prohibited from touching the streambed? While one might arguably engage in these activities from a boat, how would a hunter procure shot game? Is a lure or net touching the riverbed incidental? These questions highlight the need for Utah to clarify its laws.

Various parties have attacked the constitutionality of this legislation.[154] Rather than clearly asserting public ownership of the state's waters, the Utah Constitution states, "All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed."[155] Supporters of the 2010 legislation maintain that "public ownership of Utah's waters arises solely from a statutory provision in the Utah code."[156] Critics argue that such an interpretation violates the separation of powers set forth in the Utah Constitution. They maintain that "[j]udicial precedent and constitutional history suggest that an alternative, independent legal basis for public ownership of Utah's waters exists."[157] They argue that the Utah Supreme Court, "[a]s ultimate arbiter of the constitution," may invalidate "legislation defying the constitution, including legislative acts that violate the separation of powers."[158] Since the court interpreted the state constitution in deciding *J.J.N.P.* and *Conatser*, and because the court is the ultimate arbiter of the constitution, state legislation questioning the legal bases of the court's decisions may "intrude upon the judiciary's exclusive authority to interpret the constitution."[159] Because the Utah courts could potentially invalidate the 2010 legislation, the state of the law regarding stream access in Utah remains in flux.

3. Colorado

As in Utah, the future of public streambed access rights in Colorado remains uncertain. Colorado has not established a state navigability test.[160] No statute, regulation, or court decision defines a standard for determining navigability-for-use in Colorado.[161] "No court has held that any river in Colorado was navigable in fact at statehood."[162] Indeed, the Colorado Supreme Court has noted in passing that virtually all natural streams in Colorado are

154. *See, e.g.*, Jeremiah Williamson, *Stream Wars: The Constitutionality of the Utah Public Waters Access Act*, 14 DENV. WATER L. REV. 315, 333–34 (2011) (arguing that there may be a constitutional foundation for public ownership of water).

155. UTAH CONST. art. XVII, § 1.

156. *See* Williamson, *supra* note 154, at 317 (citing Floor Debate on Recreational Use of Public Water on Private Property, H.B. 141, 2010 Sess. (Utah 2010) (statement of Rep. McIff), http://le.utah.gov/~2010/htmdoc/hbillhtm/HB0141.htm).

157. *See id*. at 317.

158. *See id*. at 334; Rampton v. Barlow, 464 P.2d 378, 390 (Utah 1970).

159. *See* Williamson, *supra* note 154, at 334.

160. *See* Cory Helton, *The Right to Float: The Need for the Colorado Legislature to Clarify River Access Rights*, 83 U. COLO. L. REV. 845, 846 (2012); *see also The Legalities of Floating on Colorado Waters*, FRYING PAN ANGLERS, http://www.fryingpananglers.com/archive-essays/articles/Legal-comments-on-Floating-Colorado-rivers/Final-Comments.htm (last visited Nov. 4, 2012).

161. *See* Colorado Navigability Report, AM. WHITEWATER, http://www.americanwhitewater.org/content/Wiki/access:co (last visited Nov. 3, 2012).

162. Brief for the Creekside Coal. et al. as Amici Curiae Supporting Petitioner at 24, *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215 (2012) (No. 10-218), 2011 U.S. S. Ct. Briefs LEXIS 1259.

non-navigable.[163] Colorado courts have even deemed the South Platte, Colorado, and Arkansas Rivers—relatively bountiful waterways—as non-navigable; however, in the cases addressing each river, the courts failed to elucidate a navigability standard.[164]

The Colorado Supreme Court has recognized that title to the riverbeds of non-navigable streams rests with the private owners of adjacent lands.[165] In *People v. Emmert*, recreational rafters touched a riverbed when they reached a shallow point as the river crossed a private ranch.[166] Affirming the decision of the lower court, the Colorado Supreme Court found the floaters liable for trespass.[167] The court held that the public had no right to use the waters overlying private lands for recreational purposes—no right to float non-navigable streams—without the consent of the property owner.[168]

The Colorado legislature codified *Emmert*'s holding. Colorado Revised Statutes section 18-4-504.5 states that a person commits trespass if she enters "stream banks and beds of any nonnavigable freshwater streams flowing through such real property."[169]

The Colorado Attorney General subsequently issued an opinion stating that recreational water-users could float on Colorado waterways through private property as long as they did not touch the riverbed.[170] He noted that the legislation was not intended to stop the public from "canoe[ing] or tub[ing] or stay[ing] on the water," but rather to restrict loitering on "the banks and beds of streams."[171] Nonetheless, this opinion had no legal effect.

In 2012, various parties proposed a ballot initiative to amend the Colorado Constitution and enact the "Colorado public trust doctrine."[172] The initiative sought to ensure that the public's right in the waters of natural streams are "fair,

163. *In re* German Ditch & Reservoir Co., 139 P. 2, 9 (Colo. 1913) ("The natural streams of the state are non-navigable within its limits . . . ."); *see* AM. WHITEWATER, *supra* note 161.

164. *See* United States v. Dist. Court in & for the Cnty. of Eagle, 458 P.2d 760, 762 (Colo. 1969) ("The Eagle River is a tributary of the Colorado River and is non-navigable."); Platte Water Co. v. N. Colo. Irrigation Co., 21 P. 711, 713 (Colo. 1889) ("It is scarcely necessary to add that the South Platte river is not navigable in Colorado . . . ."); Smith v. Town of Fowler, 333 P.2d 1034, 1036 (Colo. 1959) (referring to the Arkansas River as non-navigable); AM. WHITEWATER, *supra* note 161.

165. In *People v. Emmert*, the court stated, "It is the general rule of property law recognized in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands." 597 P.2d 1025, 1027 (Colo. 1979) (en banc).

166. *See id.* at 1026. At no time did the floaters leave their rafts. *See id*. The ranch owners had warned defendants not to float through the ranch and defendants did not ask the ranch owners for permission to float the river on this occasion. *See id.*

167. *See id.* at 1026–27, 1030.

168. *See id.* at 1030.

169. COLO. REV. STAT. § 18-4-504.5 (2010).

170. *See* Purpose and effect of C.R.S. 1973, 18-4-504.5 (1978 repl. Vol. 8), AG Alpha No. NR AD AGALA, AG File No. ONR8303042/KW (Aug. 1983), *available at* http://www.nationalrivers.org/states/co-law-ago1983.htm.

171. *See id.*

172. *See In re* Title, Ballot Title, Submission Clause for 2011–2012 No. 3 (*In re Title*), 274 P.3d 562, 564 (Colo. 2012) (en banc); Susan M. Ryan, *Colorado Water Law Ballot Initiatives Move Forward*, 10 No. 2 ABA WATER QUALITY & WETLANDS COMM. NEWSL. (Aug. 2012), at 14.

clear, accurate, and complete."[173] One proposed subsection of the ballot initiative sought to provide public access "along, and on, the wetted natural perimeter" of any "natural stream in Colorado."[174] The amendment would extend public access rights to the "naturally wetted high water mark of the stream.[175] This proposal, however, failed to receive the requisite number of signatures to place the initiative on the ballot in 2012.[176] Nonetheless, proponents of the initiative "promised that the initiatives would return in 2014."[177]

Thus, while Colorado currently severely limits public streambed access, future recreational use of non-navigable waterways in Colorado remains uncertain.[178] "The debate regarding nonconsumptive water uses, river access, and the nature and scope of the public's interest in water resources continues and will intensify over the next several years, especially in light of the proponents' promise to return with a more organized effort."[179]

4. Arizona

Arizona maintains narrow navigability standards and stream access laws with respect to public use. Arizona applies the federal test for all navigability determinations and prohibits public recreation on all non-navigable waterways overlying privately owned streambeds.[180] Furthermore, Arizona does not provide public portage rights over private property.[181]

As in Utah, the issue of streambed ownership in Arizona has a turbulent history. In 1985, Arizona courts and legislators attempted to resolve the issue of

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173. *See In re Title*, 274 P.3d at 565.

174. *See id.* at 564.

175. *Id.*

176. *See* Ryan, *supra* note 172, at 17; *Update: Signature Collecting Ends for Public Trust Doctrine Initiatives #3 & 45*, PROTECT COLO. WATER, http://protectcoloradowater.org (last visited Nov. 3, 2012).

177. *See* Ryan, *supra* note 172, at 17.

178. Furthermore, Colorado courts must now apply the navigability standards set forth in *Montana II*. Application of this standard will surely result in findings of navigability for some of Colorado's more bountiful waterways.

179. *See* Ryan, *supra* note 172, at 17.

180. *See* Defenders of Wildlife v. Hull, 18 P.3d 722, 737 (Ariz. Ct. App. 2001); State *ex rel.* Winkleman v. Ariz. Navigable Stream Adjudication Comm'n, 229 P.3d 242, 254 (Ariz. Ct. App. 2010) (finding that owners of land adjacent to non-navigable rivers hold title to their bedlands); Reed Watson, *Stream Access Across the West*, Prop. & Env't Res. Center, PERC REPORT, VOL. 27, NO. 1, (2009), http://perc.org/articles/stream-access-across-west.

181. Arizona provided public portage rights in the past. However, the legislature repealed the statute granting such rights. *See* ARIZ. REV. STAT. ANN. § 37-1104(C) (repealed 1992) (providing that a recreational user of Arizona's surface waters may "walk or portage around the obstruction in the least intrusive manner possible."); *see also* Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 162 n.3 (Ariz. Ct. App. 1991); Arizona Navigability Report, AM. WHITEWATER, http://www.americanwhitewater.org/content/Wiki/access:az (last visited Nov. 8, 2012) ("[I]f the federal government has retained ownership [of the streambed], the public likely enjoys rights to boat, fish, wade, recreate, and portage. If, on the other hand, the streambed is privately owned, then the public may not boat, fish, or otherwise access the watercourse without the owner's permission.").

streambed ownership.[182] Arizona officials asserted that the state "owned all lands in the beds of Arizona watercourses that were navigable when Arizona was admitted to the Union."[183] However, in 1987, with H.B. 2017 the state legislature sought to relinquish state title to these lands, and disclaimed the state's interest in the vast majority of the state's watercourses.[184]

In *Arizona Center For Law In Public Interest v. Hassell*, however, the Arizona Court of Appeals invalidated certain provisions of the 1987 legislation that relinquished state ownership in the streambeds of Arizona's watercourses.[185] In reviewing the legislation, the court discussed the federal navigability-for-title test. Applying this test, the court found "substantial evidence from which a factfinder might conclude that portions of rivers and streams other than the Colorado met the applicable standard of navigability at the time that Arizona became a state."[186] The court did not address whether any of Arizona's waterways were navigable. It did, however, find that relinquishment of state title to lands under waters found navigable would violate the public trust doctrine.[187]

The following year, in 1992, the Arizona legislature created the Arizona Navigable Stream Adjudication Commission (ANSAC) "to establish an administrative procedure for the necessary fact-finding efforts and the determination of the extent of this state's ownership of the beds of watercourses located in this state."[188] The legislature charged ANSAC with determining ownership of the beds of Arizona's 39,039 rivers and streams.[189] ANSAC applied the federal test for navigability and made a preliminary determination that the Salt River was navigable.[190]

In response to this determination, in 1994 the Arizona legislature amended the state's criteria for determining navigability.[191] The new criteria narrowed the federal definition of navigability; crafted "more restrictive, specifically-enumerated evidentiary requirements" for navigability determinations; and created presumptions that significantly disfavored navigability findings.[192]

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182. *See* S.B. 1275, 45th Leg., First Reg. Sess. (Ariz. 2001).

183. *Hassell*, 837 P.2d at 161.

184. *See* H.B. 2017, 38th Leg., (Ariz. 1987) (codified at ARIZ. REV. STAT. ANN. §§ 37-1101 to 37.1108, 12-510, and 12-529 (Supp. 1990)); S.B. 1275, 45th Leg., First Reg. Sess. (Ariz. 2001); *Hassell*, 837 P.2d at 161.

185. *Hassell*, 837 P.2d at 161.

186. *Id.* at 165.

187. *See id.* at 166.

188. Navigable Waters—Beds Of Watercourses—Determination Of Ownership, H.B. 2594, 1992 Ariz. Legis. Serv. Ch. 297 (1992).

189. *See* ARIZ. REV. STAT § 37-1121 (2012); ARIZ. ADMIN. CODE §§ R12-17-101 to -25 (2005).

190. *See* Joe Feller & Joy Herr-Cardillo, *The Application of the Public Trust Doctrine to the Gila River*, http://azriparian.wp.prod.gios.asu.edu/docs/arc/2004/presentations/feller-herrcardillo.pdf (last visited Nov. 18, 2012).

191. 1994 Ariz. Sess. Laws, ch. 277, §§ 1–14.

192. *See* Defenders of Wildlife v. Hull, 18 P.3d 722, 727 (Ariz. Ct. App. 2001); ARIZ. REV. STAT. ANN. § 37-1128 (Supp. 1999). The legislation weakened ANSAC, which "ceased to function as an

Employing these new restrictive standards, ANSAC subsequently determined that all Arizona rivers, with the exception of the Colorado, were non-navigable.[193]

In 2001, however, the Arizona Court of Appeals in *Defenders of Wildlife v. Hull* (*Defenders*) determined that the 1994 legislation conflicted with federal law by narrowing the federal test for navigability. In 1998, several wildlife organizations filed complaints alleging that the legislation violated the public trust doctrine.[194] They claimed that "the 1994 Act's standards for determining navigability are so contrary to the federal test of navigability that the statutes are 'deliberately designed to defeat [public] trust claims by setting up a framework of tightly-constructed presumptions that make the legislature's non-navigability findings virtually inevitable."[195]

The court laid out the federal navigability test and determined that the 1994 legislation impermissibly narrowed the federal test for determining navigability. The court stated that "the legislature was obligated to apply the [federal navigability test] when determining the potential navigability of the rivers . . . ."[196] The court found that the 1994 legislation contradicted the federal navigability test by "defining the bed of a watercourse from the low-water mark," "establishing 'clear and convincing' as the burden of proof for determining navigability," and "enacting evidentiary limitations and almost irrefutable presumptions in favor of non-navigability."[197] The court held that "to prove navigability of an Arizona watercourse under the federal standard for title purposes, one must merely demonstrate the following: On February 14, 1912, the watercourse, in its natural and ordinary condition, either was used or was susceptible to being used for travel or trade in any customary mode used on water."[198]

Following *Defenders*, the Arizona legislature amended state law to maintain consistency with the federal navigability standard. Thus, ANSAC currently applies the narrow navigability test set forth by the court in *Defenders*, which is substantially similar to the federal test.[199]

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adjudicatory body and instead operated, in both theory and practice, as merely a fact-finding, legislative advisory committee." *Defenders*, 18 P.3d at 727.

193. *See* Feller & Joy Herr-Cardillo, *supra* note 190; *see* Brasher v. Gibson, 406 P.2d 441, 447 (Ariz. Ct. App. 1965), *vacated on other grounds*, 419 P.2d 505 (Ariz. 1966) ("The Colorado River . . . is one of the great navigable rivers of the west, and a navigable stream is dedicated to the public for its use and enjoyment.").

194. *See Defenders*, 18 P.3d at 727–28.

195. *See id.* at 728.

196. *Id.* at 731.

197. *Id.*

198. *Id.* at 737.

199. ANSAC's test for determining navigability requires that the watercourse "was in existence on February 14, 1912, and at that time was used or susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water." ARIZ. REV. STAT § 37-1101 (2012).

With the exception of the Colorado River, ANSAC has determined that all rivers and streams in Arizona are non-navigable.[200] Thus, title to the riverbeds of non-navigable waterways remains with the federal government or private entities.[201] "Although the public may recreate on waters above federally owned streambeds, it has no such right to access waters above privately owned streambeds."[202] The public may not recreationally use private riverbeds in Arizona without the permission of the landowner.

Recently, ANSAC requested submission of memoranda regarding the effects of the *Montana II* decision on ANSAC's navigability determinations.[203] It has yet to issue any determinations of navigability following *Montana II*. Nonetheless, it appears that ANSAC will apply the narrow federal navigability test as set forth in *Montana II* in making navigability determinations, rather than expanding the scope of the federal test to make navigability determinations under state law.

5. Conclusion: Survey of Stream Access Laws in Western States

The stream access laws of Montana, Utah, Colorado, and Arizona highlight the discontinuity in western states regarding the public's right to access streambeds. Montana maintains expansive stream access laws. Recreational users of waterways, whether navigable-for-title or not, may access Montana waterways and streambeds for recreational use. Utah, Colorado, and Arizona, however, maintain narrow navigability standards and severely curtail public access to waterways and streambeds.

An Arizona court recently found that ANSAC improperly applied this test. In *Winkleman*, the Arizona Court of Appeals determined that ANSAC "ultimately failed to apply the proper legal standard" for determining the navigability of the Lower Salt River when ANSAC found the river non-navigable. State *ex rel.* Winkleman v. Ariz. Navigable Stream Adjudication Comm'n, 229 P.3d 242, 254 (Ariz. Ct. App. 2010). While ANSAC evaluated the "ordinary and natural" conditions of the river at the time of Arizona's statehood, the court found that ANSAC conflated the terms "ordinary" and "natural" in making its determination, thus rendering the term "natural" superfluous. *See id*. The court stated that the river was in its natural condition before the Hohokam people diverted its flows centuries ago. *See id*. However, the court acknowledged that since that time, these diversions disappeared from non-use. *See id*. The court stated that "the River could be considered to be in its natural condition after many of the Hohokam's diversions had ceased to affect the River, but before the commencement of modern-era settlement and farming in the Salt River Valley, when some of the Hohokam's diversions were returned to use and other man-made diversions and obstructions began to affect the River." *Id*. The court remanded to ANSAC the determination of whether the river was navigable in its natural condition using the "best evidence" from this period. *Id*. ANSAC has yet to make such a determination.

200. *See* Brasher v. Gibson, 406 P.2d 441, 447 (Ariz. Ct. App. 1965), *vacated on other grounds*, 419 P.2d 505 (Ariz. 1966); AM. WHITEWATER, *supra* note 181; *Program Summary*, ARIZ. NAVIGABLE STREAM ADJUDICATION COMM'N (July 24, 2012), http://www.azleg.gov/jlbc/psnav.pdf.

201. *See Defenders*, 18 P.3d at 726; AM. WHITEWATER, *supra* note 181.

202. *See* Watson, *supra* note 180.

203. *See Memoranda Submitted Regarding USSC Montana Case*, ARIZ. NAVIGABLE STREAMS ADJUDICATION COMM'N, http://www.ansac.az.gov/memorandums.asp (last visited Nov. 3, 2012).

C. Addressing Public Stream Access in Western States

Montana II highlighted the disparities of stream access laws in various western states and the competing interests in developing such laws. While Montana's expansive public access rights provide for a variety of public recreational opportunities, they may diminish the private interests of adjacent riparian landowners. Conversely, restrictions on public streambed access in Utah, Arizona, and Colorado may strengthen private interests by allowing riparian landowners to exclude public recreationists from certain streambeds, but they also severely limit the public's recreational opportunities.

Montana II suggests that states may employ expansive navigability-for-use tests and grant the public recreational access to streambeds regardless of title. But should these states expand their laws to liberalize stream access or should they continue to employ narrow standards to maintain strong riparian landowner rights? It may be possible to strike an appropriate balance between these competing interests.

1. Arguments in Favor of Strengthening Stream Access Laws

Commentators posit many arguments in favor of broad stream access laws. First, some argue that waterways and their underlying riverbeds provide a valuable, historically preserved outlet for public recreation.[204] Recreation, a source of entertainment, exercise, and leisure, greatly contributes to public health and welfare.[205] Public recreation enriches quality of life and contributes to personal development and community growth.[206] Restricting public access to waterways and streambeds would remove a valuable outlet for public recreation and may therefore limit states' ability to realize these important public interests.

Next, many argue that broad public access to waterways contributes to economic growth in western states.[207] Recreation and leisure "constitute major forces in our national and local economies."[208] In Montana, for example, "[t]hose who come to float and fish Montana's Rivers contribute significantly to commerce in Montana, from the airlines they fly, to the hotels they stay in, the restaurants they eat in, and the fishing guides they hire."[209] Similarly, Colorado receives significant income from commercial floating ventures.[210] Some argue that the current state of the law in Colorado may result in

204. *See* Brief for Stephenie Ambrose Tubes, *supra* note 84, at 9–11.

205. *See* DANIEL D. MCLEAN & AMY R. HURD, KRAUS' RECREATION AND LEISURE IN MODERN SOCIETY 2 (9th ed. 2012).

206. *See id*. at 186, 188, 200.

207. *See* Brief for Stephenie Ambrose Tubes, *supra* note 84, at 9; MCLEAN & HURD, *supra* note 205.

208. *See* MCLEAN & HURD, *supra* note 205, at 2.

209. *See* Brief for Stephenie Ambrose Tubes, *supra* note 84, at 10.

210. *See* Helton, *supra* note 160, at 848 (noting that Colorado's commercial rafting industry is the largest in the nation).

"financial harm to Colorado's economy" and "jeopardize the $150 million per year industry."[211]

Broad stream access laws may also reduce transaction costs resulting from complex negotiations between public recreationists and riparian landowners. In states where recreational users require the permission of adjacent landowners in order to utilize certain waterways, would-be recreationists must negotiate with the landowners for streambed access. "Negotiations are often time-consuming and highly contentious because the private landowners believe they have the right to exclude the rafters, while the rafting companies argue they have unlimited access and do not need permission to raft."[212]

Because recreational access to streambeds in certain states requires landowner consent, the threat that private landowners may "hold out" for unreasonably high exchange offers can frustrate negotiations.[213] "Holdout" issues may occur when a plan or project requires the assembly of multiple pieces of land.[214] If such projects require voluntary sales or permission from individual landowners, "any individual landowner might 'hold out' for a prohibitively high price and block the entire project."[215] Suppose, for example, that a railroad company has begun to lay tracks through fifty contiguous properties. Knowing that the costs of abandoning the track for an alternative route may be very high, "people owning land in the path of the advancing line will be tempted to hold out for a very high price."[216] This price may be higher than the value of the railroad project.[217] As such, even if the vast majority of property owners sell their land to the railroad company, a single property owner may "hold out" and kill the project.

Similarly, holdout problems may arise since a single streambed may cross innumerable private properties. "[I]t is unrealistic to negotiate a settlement with every single property owner . . . ."[218] Thus, some argue that states like Utah, Colorado, and Arizona should broaden the scope of their stream access laws in order to mitigate transaction costs and holdout concerns related to negotiations between the public and private landowners.[219]

2. Arguments Against Strengthening Stream Access Laws

On the other hand, some commentators argue against broadening stream

211. *Id.* at 865.
212. *Id.* at 853.
213. *See e.g.*, William D. Araiza, Symposium, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 715 (2012); Carol M. Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 753–58 (1986).
214. *See* Rose, *supra* note 213, at 750.
215. *Id.*
216. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 56–57 (7th ed. 2007).
217. This is referred to as the "opportunity cost" of the land. *Id.*
218. Helton, *supra* note 160, at 866.
219. *See id.*; *see also* Rose, *supra* note 213.

access laws, or conversely, argue in favor of preserving strong private property rights. First, broad public access rights invoke "tragedy of the commons" concerns.[220] The "tragedy of the commons" concept suggests that free and open access to a public resource promotes its overuse, since "each [user] seeks to maximize his gain."[221] Thus, broad stream access rights could lead to increased traffic and pollution on waterways, ultimately resulting in the destruction of the public resource.[222]

In addition to overuse, the "tragedy of the commons" concern suggests that open access to a public resource may result in underinvestment in the resource. "Protecting private property rights is critical to protecting environmental resources . . . . [E]nvironmental resources that generate costs to landowners or compromise their privacy will likely suffer from neglect at the landowner's hand."[223] Following a 2008 Utah Supreme Court decision in favor of public stream access, for example, several landowners halted stream restoration and fishery projects.[224] After all, "[n]o one wishes to invest in something that may be taken from him tomorrow . . . ."[225] Therefore, expanding stream access rights might disincentivize landowners from investing in important stream restoration or conservation measures.[226]

Expanding public access rights to private lands also raises takings concerns.[227] Critics of expansion of stream access rights argue that "government action declaring non-navigable private property to be navigable in a way that affects significant property rights is an impermissible taking absent payment of just compensation."[228]

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220. *See* Rose, *supra* note 213; Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

221. Hardin, *supra* note 220, at 1244.

222. *See* Rose, *supra* note 213, at 712.

223. Watson, *supra* note 180.

224. *See* Matthew Frank, *Montana's Stream Access Law Stays Strong*, HIGH COUNTRY NEWS (JULY 25, 2011), http://www.hcn.org/issues/43.12/montanas-stream-access-law-stays-strong.

225. *See* Rose, *supra* note 213, at 712.

226. *See* Watson, *supra* note 180 ("Access laws that expand public use rights beyond navigable waterways and onto privately owned streambeds undermine the property rights and privacy expectations of riparian landowners, forcing the label of liability onto streams flowing through private land. As a consequence, such laws remove the incentive for riparian landowners to invest in stream restoration or fish habitat—investments that generate public benefits.").

227. *See* Brief for the Mont. Farm Bureau Fed'n and the Cato Inst. as Amici Curiae Supporting Petitioner, *Montana II*, 132 S. Ct. 1215 (2012) (No. 10-218), 2010 U.S. S. Ct. Briefs LEXIS 4631 at 22–28; Brief for the Creekside Coalition, *supra* note 162, at 43–44.

Consider the Utah legislature's reasons for implementing legislation in 2010 to curtail public access to streams: "whether, or to what extent, a public easement exists for recreational use of public waters on private property is uncertain after . . . *J.J.N.P. Co. v. State* and *Conatser v. Johnson*, which decisions did not address the constitutional prohibition on taking or damaging private property without just compensation . . . ." UTAH CODE ANN. § 73-29-103(3) (2010).

228. Brief for the Creekside Coalition, *supra* note 162, at 44. Critics argue further that "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.*

While state and federal governments may use their eminent domain powers to "take" private property for public use, they must generally provide "just compensation" for the land.[229] State-authorized occupation of property, which may occur when state statutes or regulations encroach on a landowner's private property rights by permitting public access to the property, may trigger takings claims. The "taking" need not substantially divest the landowner of their ownership interest in order to be compensable. The Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, held that "occupations of land . . . are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."[230] While expanding stream access laws may only minimally divest riparian landowners of their ownership interest, under *Loretto* such expansion of public access to privately owned streambeds might necessitate compensation.[231]

The public trust doctrine, however, may serve "as a defense to takings claims arising from regulatory restrictions on the use of water designed to protect public trust resources . . . ."[232]

The Court in *Lucas v. S.C. Coastal Council* held that while a state may not generally deny a landowner of all economically beneficial use of their land without compensation, certain exceptions apply to restrictions that were permitted under the "background principles of the State's law of property and nuisance already place upon land ownership."[233] A state's public trust doctrine

229. *See* U.S. CONST. amend. V (providing that private property shall not be taken for public use without just compensation). Although there is debate about what constitutes a "public use," expanding stream access rights for public recreation likely qualifies as a public use. Under the "public benefit test" for determining whether a governmental action "takes" land for public use, if the contemplated ends of the "taking" are "sufficiently 'public' in one sense or another, the test is passed." JESSE DUKEMINIER ET AL., PROPERTY 1073 (7th ed. 2010). "Essentially, the public benefit test permits [a taking] so long as the objective it serves is in the public interest . . . ." *Id.* A state seeking to expand public access to streams for public recreation—a public benefit—likely satisfies this test.

230. 458 U.S. 419, 430 (1982).

231. The occupation of land need not be permanent to be considered a taking in certain instances. In *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), the Court emphasized that a certain navigational servitude requiring public access to a pond took a landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." The Court in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980), however, upheld a state constitutional provision requiring owners of large shopping centers to permit members of the public to enter the private property in order to exercise their free speech rights. "Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, 'the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *See Loretto*, 458 U.S. at 434 (quoting *Robins*, 447 U.S. at 84). Thus, it appears that the reasonableness of a landowner's expectations regarding exclusivity may play a role in whether a temporary occupation may be considered a taking. *See* Alison Rieser, *Public Trust, Public Use, and Just Compensation*, 42 ME. L. REV. 5, 16 (1990).

232. John D. Echeverria, Symposium, The Public Trust Doctrine as a Background Principles Defense in Takings Litigation, 45 U.C. DAVIS L. REV. 931, 933 (2012).

233. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); *see generally* Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005) (explaining that courts have expansively used this background principles defense to defeat takings claims).

may "certainly qualif[y] as a background principle that defeats a takings claim."[234] As such, state expansion of public trust principles to include recreational access to streambeds may not invoke legitimate takings claims in the first place.[235] Indeed, "[i]f a regulation does not impinge on a property entitlement that a plaintiff can properly claim under state or federal law, the takings claim fails at the threshold."[236]

Even if expanding stream access laws actually resulted in a taking, some states might find it economically viable to pay riparian landowners for public access to their otherwise privately owned streambeds. Certain states, like Montana and Colorado, enjoy great economic benefits associated with recreational use of their rivers. Revenues generated by allowing public access to streams may exceed revenue paid to private landowners for the use of their land. As such, a given state might simply pay riparian landowners for lands affected by expansion of public stream access rights.

3. Balancing Competing Interests

Western states can address concerns on both sides of this debate by striking the appropriate balance between the public's interest in stream access and private landowners' interests in their land. First, western states should look to Montana's Access to Stream laws as a starting point. Next, states should go

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234. Echeverria, supra note 232, at 933.It is important to note that *Lucas* suggests courts, not legislatures, determine whether the background principles of a state's property laws permit the state to confiscate property without requiring compensation.

> [C]onfiscatory regulations . . . that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that the background principles of the State's law of property and nuisance already place upon the land ownership. A law or decree with such effect must, in other words, do no more than duplicate the results that would have been achieved in the courts . . . .

Lucas, 505 U.S. at 1029; *see also* Palazollo v. Rhode Island, 533 U.S. 606, 630 (2001) ("A law does not become a background principle for subsequent owners by enactment itself."). Thus, a court may be required to determine whether the background principles inherent in a state's property law permit confiscatory regulations without compensation before the state may "legislate" or "decree" such limitations. It is also worth noting that restrictions permitted in "background principles" are more likely to be found in older, more developed property laws rather than in newer, more novel laws.

235. Echeverria, *supra* note 232, at 955.

236. *Id.* at 933. The Court in *Lucas* suggested that a compensable taking may not occur if the person claiming title to the property did not actually maintain title to the property in the first place. When discussing the "background principles," the Court stated that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. After the Court clarified the federal navigability-for-title test in *Montana II*, waterways once considered non-navigable in states like Colorado and Arizona may be deemed navigable. This suggests that under proper application of the navigability-for-title test, a state may grant public access to streambeds once thought to be privately owned without requiring compensation from the state. In other words, certain streambeds once claimed as private property may have always been public land. Thus, the state does not necessarily "take" the property since it already owned the streambeds. As such, the state may not be required to pay for "taking" the property.

beyond the Montana model to provide additional safeguards to private landowners. States might even consider providing financial benefits to landowners for public use of streambeds adjacent to their properties.

Like Montana, other western states should provide access to waterways and their submerged beds regardless of title to the land. While laws to this effect will not allow owners to maintain exclusive control of the land, these riparian landowners are only minimally divested of any ownership interest.[237] Additionally, as in Montana, other western states should provide that title to the land is unaffected by public use. This will assuage landowners' concerns regarding prescriptive easements and adverse possession.[238] Like Montana, these states should further provide laws that allow for portaging, but strongly prohibit excessive and disruptive use of the portage route. This will allow recreational waterway users to portage obstacles if absolutely necessary, but will require that they enter land adjacent to waterways in a minimally intrusive manner. Finally, like Montana, other western states should ensure that landowners are not liable to recreational users of riverbeds. This would protect streambed-adjacent landowners from any potential tort litigation stemming from landowner duties. Such laws maintain public access to riverbeds for recreational purposes while respecting riparian landowners' properties to some extent.

Next, western states should provide additional safeguards for riparian landowners—beyond those provided by Montana's Access to Streams laws—by imposing further restrictions on public streambed use. First, they should implement measures to reduce overcrowding and limit public traffic on waterways and their streambeds. Western states should restrict the time of day, month, or year that the public may access certain waterways. They should also limit the number of recreational users permitted on a given river segment at any given time.[239] Such restrictions would help address "tragedy of the commons" concerns by curbing problems related to overuse, including overcrowding and pollution. While these limitations on streambed traffic would indirectly address pollution concerns, western states might further impose harsh penalties for

237. *See* Margit Livingston, Symposium, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 688–98 (1983). This may partially mitigate takings concerns, since these landowners' property rights are not "significantly" affected. *See* Brief for the Creekside Coalition, *supra* note 162, at 44 ("[G]overnment action declaring non-navigable property to be navigable in a way that affects *significant* property rights is an impermissible taking absent payment of just compensation.") (emphasis added). Of course, the *Loretto* Court pointed out that even minor encroachments may result in a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430 (1982).

238. Furthermore, such provisions would address takings issues to some extent, since landowners—by law—would retain ownership of the land.

239. Indeed, "[d]ue to the demand for floating use and the need to manage the resource and recreational experience," Montana currently imposes time and use restrictions on a fifty-nine mile stretch of the Smith River. Public recreationists enter a yearly lottery to float the Smith River. The state permits nine parties to launch per day. *See River Recreation Permits*, MONT. FISH, WILDLIFE & PARKS, http://fwp.mt.gov/recreation/permits/floating (last visited Apr. 19, 2013).

littering and polluting streambeds open to public access.

Western states should also consider restricting public access to waterway segments where riparian landowners commit to private restoration and conservation projects. This would help mitigate concerns related to underinvestment in riparian lands by incentivizing riparian landowners to invest in adjacent streambeds. It would also grant riparian landowners a limited right to exclude the public from adjacent streambeds. Western states could place reasonable time limits on these voluntary restoration projects in order to ensure eventual public access to the relevant streambeds.

States might even consider compensating riparian landowners for public access to adjacent streambeds. Takings issues aside, riparian landowners are more likely to acquiesce to expanded public stream access laws if they receive some compensation for public use of adjacent lands.

A licensing and permitting scheme may provide the mechanism by which states may implement some of these restrictions. States could require public recreationists to apply for licenses in order to access certain waterways and riverbeds. States could require that recreational users be contractually bound by explicit time- and use-restrictions set forth in the license agreements. Furthermore, funds generated from licenses could be used to compensate riparian landowners for public use of adjacent streambeds. States might also direct these funds toward restoration and conservation measures on public waterways.

Such balancing of public and private interests will help reduce litigation and transaction costs related to extensive negotiations between recreational waterway users and private landowners. Recreational users would have less incentive to litigate, since they could access streambeds regardless of title. At the same time, private landowners would have less incentive to litigate, since stringent regulations would restrict the impact of public use on streambeds. Furthermore, state funds generated from licensing schemes could compensate riparian landowners for potential inconveniences resulting from expanded public stream access.

CONCLUSION

Montana II clarified the federal standard for determining navigability-for-title. The Court also highlighted that the decision does not undermine states' ability to define the contours of their public trust doctrines. It further suggested that states may expand their own navigability tests for purposes other than title and fashion broad stream access laws. As such, *Montana II* does not affect a Montanan's access to streams. Furthermore, the decision does not affect the ability of western states to clarify and broaden their own stream access laws. These states may strike the appropriate balance between maintaining public access to riverbeds and maintaining private property interests. Western states should therefore expand public access to streams for recreational use

irrespective of title, while imposing reasonable restrictions on that use.