

**BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE**

DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT

**For Amendment #22 to the Nantahala and Pisgah National Forests
Revised Land and Resource Management Plan
Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River
Corridor**

DATED: January 31, 2012

DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT

**For Amendment #1 to the Sumter National Forest
Revised Land and Resource Management Plan
Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River
Corridor**

DATED: January 31, 2012

DECISION NOTICE AND FINDING OF NO SIGNIFICANT IMPACT

**For Amendment #1 to the Chattahoochee-Oconee National Forests
Revised Land and Resource Management Plan
Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River
Corridor**

DATED: January 31, 2012

Appeal by the Rust Family

**I.
APPELLANT**

Appellant: The Rust family.

The contact person for the Appellant is: Alan R. Jenkins, Jenkins at Law, LLC, 2265 Roswell Road, Marietta, GA 30062. Telephone: 770-509-4866

**II.
NOTICE OF APPEAL**

The Forest Supervisors chose Optional Appeal Procedures Available During the Planning Rule Transition Period to govern the appeal procedure, and this appeal is being filed pursuant to Section 9 of those procedures and pursuant to 36 CFR §219.14(b)(2).

Appellant hereby respectfully appeals:

The Decision Notice and Finding of No Significant Impact For Amendment #22 to the Nantahala and Pisgah National Forests Revised Land and Resource Management Plan Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor; Deciding Officer Diane Rubiaco, Acting Forest Supervisor; Date of Decision: January 31, 2012 (the “Nantahala Decision”);

The Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan, Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor; Deciding Officer Paul L. Bradley, Forest Supervisor; Date of Decision: January 31, 2012 (the “Sumter Decision”); and

The Decision Notice and Finding of No Significant Impact for Amendment #1 to the Chattahoochee-Oconee National Forests Revised Land and Resource Management Plan, Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor; Deciding Officer George Bain, Forest Supervisor; Date of Decision: January 31, 2012 (the “Chattahoochee Decision”).

Together, the Nantahala Decision, the Sumter Decision, and the Chattahoochee Decision are referred to herein as the “Decision.”

III.
LANGUAGE AND SUBSTANTIVE CHANGES

The Rust family urges the following language and substantive changes be made to the Decision:

A. Clarify property status

CURRENT TEXT

5.2 Alternatives Considered but not Evaluated in Detail

Boating through private land on the upper segment of the Chattooga WSR.

The upper portion of the Chattooga Cliffs Reach has private land on both sides of the upper segment of the Chattooga WSR. The landowners claim that public use would constitute trespass. Until decisions about navigability are made for the sections of the river with private land along them, or public access rights on this reach are determined, the U.S. Forest Service considers this section of the upper segment of the Chattooga WSR beyond the scope of this decision.

PROPOSED TEXT

5.2 Alternatives Considered but not Evaluated in Detail

Boating through private land on the upper segment of the Chattooga WSR.

The upper portion of the Chattooga River flows mostly through private lands. The U.S. Army Corps of Engineers lists this portion of the river in North Carolina as non-navigable, and consistent with Forest Service Manual 2354.14 and the Wild and Scenic River Guidelines, 47 Fed. Reg. 173 at 39,454 (1982), the U.S. Forest Service also considers this portion to be non-navigable. Accordingly, the Forest Service rejected any alternative considering public use of this private property.

The Forest Service should make similar changes to the portions of the Environmental Assessment (“EA”) that address this issue, including those portions on pages 13 and 45 of the EA.

B. Evaluate and document impact of proposed action on private property interests

So also, as described in Section V.D below, the Forest Service should evaluate and document in its environmental assessment the impact of the Forest Service’s proposed and selected management alternatives on private property interests in the WSR corridor.

C. Correct erroneous statement concerning Forest Service’s authority over private property

Finally, as described in Section V.E below, the Forest Service should correct its erroneous statement on page 45 of the Environmental Assessment that it “could have allowed boating” over the private property portion of the river below Grimshawes Bridge. The Forest Service does not have such authority to permit access to private property.

CURRENT TEXT (E.A. p.45), 2.4.A, 1st paragraph

All boating alternatives ... allow boating use downstream from Green Creek in the Chattooga Cliffs Reach. Any of these alternatives could have allowed boating to start about 1.8 miles further upstream at Grimshawes/Sliding Rock Bridge. However, this reach has private land on both sides of the river and the landowners claim that public use would constitute trespass.

PROPOSED TEXT

All boating alternatives ... allow boating use starting ¼-mile downstream of the confluence of Green Creek in the Chattooga Cliffs Reach. The portion between NC 1107 and Green Creek is considered non-navigable and is wholly in private ownership, and therefore, the public has no right to access (and the Forest Service has no right to manage) this portion of the Chattooga.

NOTE: All text referencing Green Creek as a “boater put-in” should be changed to “¼-mile below the confluence of Green Creek” consistent with the August 5, 2011 Potential Green Creek Access – text and map posted on the Forest Service Chattooga recreation use website.¹

**IV.
BACKGROUND AND SUMMARY**

Forty years ago, the Forest Service, in consultation with the US Army Corps of Engineers (“Army Corps”) and other federal and state agencies, reported the landownership within the now-designated Chattooga wild and scenic river corridor. The Forest Service told Congress and the public that in North Carolina riparian owners own the streambed of non-navigable streams and that the uppermost portion of the WSR river corridor in North Carolina was “wholly in private ownership” thereby limiting public access (and management authority of the Forest Service). The Forest Service administered a policy that provided for the protection of designation values over the next three decades, which included not allowing boating above highway 28. During the current Revised Land and Resource Management Plan process, Forest

¹ The Rust family is not opposed to changing the uppermost boater put-in to the Highway 28 Bridge, or Bull Pen Bridge as requested by other groups seeking to protect the upper Chattooga.

Service personnel once again reviewed the nature of the 1.7-mile stretch of river below Grimshawes Bridge. The guided tour and visual inspection by Forest Service personnel reconfirmed that this portion of the Chattooga is little more than a mountain stream that can be straddled in a number of places, that has numerous down trees, impassable water falls, numerous boulders that completely block passage between short pools, plus some areas that are completely choked with rhododendrons from bank to bank. Numerous photos were taken during the visit showing the impassibility of boats through this segment during ordinary flow levels. *See e.g.*, Sept. 25, 2007 letter of the Rust family and WCA and Dec. 2, 2009 letter of the Rust family re appeal of American Whitewater, et al., Attachment 1 hereto. The Forest Service then confirmed yet again through email correspondence that the Army Corps continues to list this portion of the Chattooga as non-navigable (“not section 10 waters”).

Nevertheless, bowing to pressure by a vocal and litigious minority of boaters, the Forest Service began sending conflicting signals to the public and to federal courts about the current status of the land ownership. Seeing this happen, the Rust family (and the Whiteside Cove Association - WCA, which leases land along and under the 1.7-mile stretch of river below Grimshawes Bridge) submitted numerous letters, comments and documents into the administrative record and repeatedly requested the Forest Service to clear up misconceptions regarding the ownership status of the family’s property. Namely, as provided in Section III.A above, the Forest Service should make clear to the public (as it did to Congress) that the Chattooga stream flowing through the family’s property is non-navigable, and therefore the public is not entitled to use or access that property without express permission. Wild and Scenic River designation does not grant the public access to private lands, and the Forest Service management authority of private lands within a Wild and Scenic River corridor is limited by its general statutory authority - over federal national forest lands.²

Unfortunately, the Forest Service misrepresents its prior publications that were presented to Congress regarding the ownership status of this private stretch and instead has granted incremental concessions to the boating lobby that openly seek to turn the family’s property into

² *National Wild & Scenic River System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas*, 47 Fed. Reg. 173 (Sept. 7, 1982), p.39454 (“Some management principles obviously apply only to Federal lands.... the Wild and Scenic Rivers Act does not open private lands to public recreation.”), emphasis added.

their playground. The Forest Service has also stated publicly that a federal court determination is needed to resolve the navigability and access issue, but simultaneously has blocked the attempt of the family in federal court to obtain such a determination. This is particularly troubling in light of a recent decision of the United States Supreme Court³ that makes crystal clear that the Forest Service analysis in the 1970s of private ownership based upon non-navigability was accurate, and the more recent Forest Service statements based on misrepresentations of law by the kayak lobby (and the consultant it recommended) are erroneous.

In its latest Decision, the Forest Service has authorized boating to begin immediately below the property (at Green Creek) despite not having any viable trail or access to this point. Further, building new trails for boaters to this location is irrational since a massive boulder field just below Green Creek would require immediate portage. Since the only existing access to Green Creek is over private property, the only logic for starting boats at this point would be to incite unlawful trespass over and through the property. Although the family, WCA and other private landowners have pointed out that this access point is irrational and illogical, and requested the Forest Service to document the impact Forest Service policy would have on private property interests in the WSR corridor, the Forest Service has refused to do so. Instead, the Forest Service has said only that this issue is “outside the scope of its assessment” apparently to try to avoid documenting impacts to private property; this, while selecting an alternative that incites unlawful trespass. Disregarding and failing to document the impact on private land violates (among other laws) the statutory requirements for defining the “affected area” under NEPA. *See, e.g.*, 40 C.F.R. §1508.

Sadly, these actions of the Forest Service paint a very clear picture – that the Forest Service (or at least some of its members) are willing to disregard private property rights that are guaranteed by the U.S. Constitution and recognized in the Wild and Scenic River Act and guidelines as being unchanged by that legislation (or implementing rules) and are willing to violate the Forest Service’s own guidelines in order to appease a recreational access lobby and provide that lobby a platform from which to make claims against private landowners.

³ PPL Montana, LLC v. Montana, 565 U.S. ____ (Feb. 22, 2012). For convenience, a copy of this opinion is Attachment 2 hereto.

Therefore, the family appeals the Decision and urges the Forest Service to amend its Decision and environmental assessment accordingly.

V. ARGUMENT

A. Without an adequate basis in law or clear explanation, the Forest Service has ignored its prior conclusions on landownership that it reached by formal analysis, presented to Congress, and stated to the public in the Federal Register, and even from its factual and legal analysis in this very proceeding. By misrepresenting landownership and public boundaries during this proceeding, the Forest Service has abused its discretion, acted in an unlawful, arbitrary and capricious manner, and has encouraged trespass onto private lands.

Rather than repeating at length all the arguments the family (and WCA) have already made in this proceeding, the family hereby incorporates by reference the documents it has previously submitted to the Forest Service in this protracted proceeding, which contain numerous legal citations and evidence.

Notably, once again the EA states (p.45) that “navigability and public access rights on this reach have not been formally analyzed by any federal or state agency or authority, nor has its navigability been adjudicated by a court of law.” This professed ignorance of any formal analysis is remarkable in light of the fact that it was the Forest Service’s legal duty to document ownership (including title to the riverbed) before and after WSR designation and to provide such information to Congress and other federal agencies for review and approval. *See* 16 U.S.C. 1275(a). In conjunction with the Army Corps and the North Carolina Governor’s office, the Forest Service determined that the riparian landowner also owned the streambed within North Carolina because the Chattooga there is non-navigable, and then published this conclusion with citation to the relevant opinion of the North Carolina Attorney General, and sent this determination and conclusion to other agencies and Congress for review, and ultimately approval, at the time of Chattooga WSR designation. *See Chattooga Wild & Scenic River Study Report*, p.13 (1971). Notably, the Governor of North Carolina and the Army Corps concurred in these report conclusions. *See* 1971 study report, pp. 175, 179-180. Likewise, the Forest Service stated in the development plan it submitted to Congress and published in the Federal Register on March 22, 1976 that the upper portion of the Chattooga River “is wholly in private ownership” and so “[p]ublic access is limited.” Fed. Reg. Vol. 41, No. 56 (March 22, 1976) at 11,848. For some reason, the Forest Service has decided to dismiss its own report and development plan that

it submitted to Congress, as being something other than a formal analysis and now misrepresents these facts in the EA.

The Forest Service also retreated from an analysis that is consistent with law and fact, and indeed ignored its own analysis in this current proceeding. In October of 2005, Forest Service personnel visited and walked most of the private portion below Grimshawes Bridge. The family has submitted into the record numerous photographs of Forest Service personnel and others straddling the Chattooga, standing next to impassable obstructions such as Corkscrew Falls, and viewing large fallen timber that completely crosses the stream. *See e.g.*, Attachment 1. Such evidence incontrovertibly demonstrated that the Chattooga stream flowing through the property is non-navigable, and hence the streambed is private property. Additionally, the photos indicate impassible sections that require portage on the banks which the Forest Service and even the kayak lobby recognize as being private land. Shortly after this site visit, Forest Service personnel contacted the Army Corps, which again confirmed the status of the Chattooga stream in North Carolina as being non-navigable. But after hiring Confluence Engineering (a consultant group recommended by the kayak lobby), the Forest Service began to say it never formally analyzed ownership or navigability on this stretch.

Further, the Forest Service does not even state that this stretch is non-navigable (as required by law), but only that until such decisions are made, navigability and access rights are “beyond the scope” of the Forest Service’s inquiry. This is arbitrary and capricious decision-making. It is also contrary to the law and the agency’s own rules and WSR guidelines. Indeed, consistent with Forest Service Manual 2354.14, the Forest Service is required to consider any stream not adjudicated as navigable as a non-navigable stream, including the portion of the Chattooga flowing through the private property stretch. Therefore in order to avoid assessing the impacts to private land over which a non-navigable stream flows, the agency had to disregard its own analysis and its own guidelines. Clearly, this error has resulted in a deficient EA and evidences a severe abuse of agency discretion.

The Forest Service may have become misled by efforts of the pro-boating lobby to confuse what is a clear issue. Indeed, in a filing before the federal court in South Carolina, the Forest Service stated in September 2011 that a navigability determination may not be “straightforward” as there may be “at least four different tests for navigability” with only one

being whether the waterway is “navigable in fact.”⁴ If the Forest Service was confused before, it cannot take this position now because the United States Supreme Court recently clarified the appropriate navigability standard for determining title to waterways in its decision in PPL Montana, LLC v. Montana, Attachment 2. With respect to determining title to the land beneath a river, the navigability issue implicated in this Chattooga proceeding, the Court reiterated that the test in Daniel Ball controls – whether a waterway was navigable in fact “at the time of statehood”:

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

PPL Montana, slip op. at 13, quoting The Daniel Ball, 10 Wall. 557, 563 (1871). The Court reversed the decision of the Montana Supreme Court for, among other things, “its reliance upon the evidence of present-day primarily recreational use of the Madison River.” PPL Montana, slip op. at 21. Instead, “evidence must be confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood.” Id. Thus, with respect to the land over which the Chattooga flows, title is determined based on whether that portion of the river/stream was used, or susceptible of being used in the 1700s in its ordinary condition as a highway of commerce by boats in customary use for trade and travel at that same time (and not by high-tech modern creek kayaks). In short, the Forest Service got it right the first time when it represented to Congress that this stretch of river is “wholly in private ownership.”

Based on the Forest Service’s own study of the nature of the 1.7-mile stretch in this very proceeding, its prior determinations and representations to Congress, applicable rules and guidelines, and the Supreme Court’s PPL Montana decision, the Forest Service should clear up any public misconception created by the Forest Service’s erroneous statements in this proceeding and the Decision and EA concerning navigability. This stretch is wholly in private ownership, the public has no right to use this private property, and the Forest Service has no authority to

⁴ Reply Memorandum by the Federal Defendants to the Rust Family’s Memorandum Partially Opposing a Stay of this Action, Civil Action No. 8:09-cv-02665-JMC (Sept. 7, 2011), p.3.

allow public access but does have a duty to avoid inciting unlawful actions, including trespass onto private lands.

B. The Forest Service acted in an unlawful, arbitrary and capricious manner toward private landowners by making statements in the Decision and EA that are contrary to the position and action the Forest Service has taken in federal court concerning the same property and river portion.

Not only is the Decision (and EA) unlawful, arbitrary and capricious for the substance of those statements, the Forest Service also acts in an arbitrary, capricious and unlawful manner by taking one position in this Forest Service proceeding while simultaneously taking a contrary position in court. In this agency proceeding, the Forest Service states (Decision §5.2):

Until decisions about navigability are made for the sections of the river with private land along them, or public access rights on this reach are determined, the U.S. Forest Service considers this section of the upper segment of the Chattooga WSR beyond the scope of this decision.

The Forest Service thereby claims in effect that a judicial ruling is required before the Forest Service will state that the public has no right to access the private property and the Forest Service has no authority to manage that property. Accordingly, the family filed a motion before the federal court in the kayak lobby complaint proceeding that sought this specific ruling. Yet, while the Forest Service stated to the public in its administrative proceeding that the judiciary needs to resolve the navigability/public access issue, the Forest Service simultaneously resisted and blocked such adjudication by filing a motion to dismiss the family's request that the court make a final adjudication that this stretch is non-navigable. The Forest Service told the federal court to dismiss the family's motion because "the current [Forest Service] policy is actually against taking any actions adverse to the [Rust family's] stated interests."⁵ If this latter statement is true, the Forest Service should state to the public what the law requires it to state – that the stream flowing through the family's property is non-navigable, the public has no right to access it, and the Forest Service has no right to manage it. Otherwise, there clearly is a case and controversy between the Forest Service and landowners. The Forest Service's "on-the-fence" or more appropriately, both-sides-of-the-fence statements effectively can only keep open that case or

⁵ Memorandum of the Federal Defendants in Reply to the Rust Family Memorandum Opposing Dismissal of Crossclaim, Civil Action No. 8:09-cv-02665-JMC (April 26, 2011), p.4.

controversy while denying the landowners any remedy for clearing title to the land. Once again, this is the essence of arbitrary and capricious agency action.

This fence-straddling position represents another example of the agency creating public confusion at the expense of the private property owners that the Forest Service is required to assist. *See* 16 U.S.C. 1282(b)(1). Indeed, as described further below, this action by the agency (done apparently to appease the litigious boating lobby) has directly damaged the family. The family has not only been forced to incur substantial cost and expense to protect its rights before the agency in its now 10-year proceeding, it also incurred legal expense to do what the Forest Service told the public should be done – get a federal court determination on navigability – only to have been blocked by the agency.

C. While the Forest Service has unlawfully back-tracked from its prior determinations and representations to Congress concerning the private property, the Forest Service simultaneously has granted numerous incremental concessions to the litigious boaters that want access to the family’s property, unlawfully harming private property interests in the process and reflecting an unlawful bias.

As mentioned above, over the three decades following designation, the Forest Service implemented and continued its long-standing policy of zoning boating to the majority of the Chattooga River, i.e., to the portion below Highway 28. However, since the litigious element of the boating community challenged the 2004 management plan and sued the Forest Service in different federal courts over its management of the Chattooga River, the Forest Service has made incrementally larger concessions to that group – a group that, among other things, seeks to turn the family’s private property into a recreation playground. As the family and WCA previously pointed out, the Forest Service began by hiring pro-boating consultants that American Whitewater recommended to the Forest Service to conduct a boating/fishing recreation study. Not surprisingly, these biased consultants produced biased results that have been challenged by numerous participants in the administrative process but that the Forest Service nevertheless relies upon to support its erroneous statements of law regarding navigability and the incremental expansion of boating above Highway 28.

Thus, in 2009, the Forest Service proposed to open the river to boating starting from Norton Mill Creek approximately 1½ miles below the family’s property line at an existing trail. In January of 2011, the kayak lobby pressured the Forest Service to initiate boating just below the property line which is at Green Creek. In response, the Forest Service withdrew its

recommendation and issued another plan in July 2011 that expanded boating to immediately below the property line at Green Creek. This despite the Forest Service assurance that “the Green Creek put-in would probably be located slightly downstream of the confluence of the Chattooga WSR with Green Creek” and its publishing a map which proposes a new trail for boaters to a point over ¼-mile below Green Creek and the property boundary.⁶ The Decision authorizes boating to a point at the property boundary, despite acknowledging that no viable trails exist to that site. Even the kayak lobby questions the need or boater desire for access at Green Creek.⁷ Rather than placating the litigious boaters, these incremental concessions to a minority of vocal boaters at the expense of other interests only rewards those yelling the loudest for their litigiousness and will embolden them to continue with even more litigation. This biased approach is unscientific, arbitrary, capricious, unlawful and a clear attempt by the agency to incite unlawful action, i.e., trespass.

D. The Forest Service unlawfully failed to evaluate the impact its new boating policy will have on adjacent private property interests, a policy that directly damages those interests

As the U.S. Supreme Court has long held, the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982). The Forest Service would trample that bundle of rights while turning a deaf ear to objections of property owners.

Not even acknowledging prior comments that made clear why beginning boating access at Green Creek is a bad idea, the Forest Service invites public access at Green Creek without having a system trail or adequate parking in place and plans to create permanent access trails that will closely parallel, and in fact encourage trespass on, private property. All the time the Forest Service has been granting boaters incremental concessions while thwarting the attempts of the family to clarify ownership status, the Forest Service has not even evaluated the impact of its prior preferred alternatives, or final adopted alternative, on private property interests – as it is required to do by law. *See, e.g.*, Executive Order 12630, 53 Fed. Reg. 8859 (March 15, 1988) (agency must “evaluate carefully the effect of their administrative actions on constitutionally

⁶ See August 5, 2011 Potential Green Creek Access – text and map, posted on the Forest Service Chattooga recreation use website.

⁷ Aug. 30, 2011 letter of Montana office of American Whitewater to the USFS (pp.18-19): “It is unclear in the EA what the current status of the trail into Green Creek is, and if that trail is necessary or even desired by paddlers.”

protected property rights” and “should account in decision-making for such actions”); various NEPA regulations – see Sierra Club v. Sigler, 695 F.2d 957, 979 (5th Cir. 1983) (agency citation of the possible benefits under NEPA of a proposed action while ignoring the negative effects from that action is an unlawful sham). This is another deficiency in the Decision and EA that needs to be corrected.

In its latest Decision, the Forest Service has authorized boating to begin immediately below the property and at access points of boaters’ own making via a trail that has not been built. The only other potential access is over private property. So also, the Forest Service has included parking spaces at Grimshawes Bridge in the count of available parking for such boating. Unless such boaters are going to carry their boats two miles to the access trail and another mile or more to the ill-defined access point, the only access to the proposed put-in from that parking is through the family’s property. Although the family, WCA and other private landowners have pointed out that such a policy incites unlawful action and trespass, and requested the Forest Service to document and evaluate the impact the Forest Service’s proposed alternatives would have on private property interests in the WSR corridor, the Forest Service turned a deaf ear. Its response to this specific concern is simply to state: “This issue is outside the scope of this EA.” EA, p.13. In effect, the Forest Service is saying that it could build a highway to run adjacent to private property, build parking spaces all along that highway with trails to that private property, and post signs that state that the public may or may not have the right to access such private property, yet not consider the impact such a highway, parking, trails and statement would have on the immediately adjacent private property. Such action is unlawful.⁸ But of course, simply stating that “the issue is beyond the scope” of decision would do nothing to reduce those foreseeable and expected effects from the proposed action. This is the essence of arbitrary and capricious decision-making, and is contrary to numerous laws that the Forest Service must follow.

This failure by Forest Service of its legal duty is causing landowners in the WSR corridor, including the family, to incur substantial costs and suffer other damages, all of which the Forest Service to date has chosen to ignore. As mentioned above, in failing to clarify ownership and how the non-navigable status of the river limits public access and agency

⁸ Among other laws, Forest Service regulation 36 CFR 261.4 (c) provides that it is prohibited to “make statements or other actions directed toward inciting or producing imminent lawless action and likely to incite or produce such action.” See also, Sierra Club v. Sigler, *supra*.

management authority, the Forest Service has caused the family to expend significant resources to protect its interests in litigation that the Forest Service has at once both encouraged and opposed. By inciting trespass in its Decision and EA, the Forest Service increases landowner liability risk, creates conflict with recreational activities enjoyed by the landowner and its lessee, reduces the value of the lease for the Whiteside Cove Association, increases the cost of protecting the property from trespass, damages the resource the Forest Service is required to assist the landowner in protecting, damages the fishery and aquatic environment in the tight and narrow stream, spooks wildlife and damages riparian habitat, harms and erodes the riverbanks on undisputedly private lands, etc.

This failure by the Forest Service to perform its lawful duty renders the Decision and EA unlawful.

E. The Environmental Assessment violates the Constitution and applicable laws by stating that the Forest Service has authority to allow public access to private property

As mentioned above, the courts have long protected the bundle of rights of property owners, including the essential right of protecting their property from unwanted access. The U.S. (and North Carolina) constitutions likewise protect property owners from interference by the government of those essential property rights, with the Fifth and Fourteenth Amendments being only two of these express protections. The Forest Service acts as if those protections do not exist.

As discussed above, in rushing headlong to extend boating ever northward toward the headwaters of the Chattooga, the Forest Service has rushed headlong away from its prior statements that it made to Congress in order to secure wild and scenic river status. Now the Forest Service goes yet another step beyond sending confusing signals to the public (and courts) concerning property ownership and rights – it now boldly asserts it has the authority to allow boating over private property. The Forest Service possesses no such authority. In fact, the WSR Act and guidelines make clear that “the WSR Act does not open private lands to public recreation.” WSR Guidelines, 47 Fed. Reg. 173 (Sept. 7, 1982), p.39454. Notably, that citation also makes clear that this statement pertains to agency management (“management principles obviously apply only to Federal lands”).

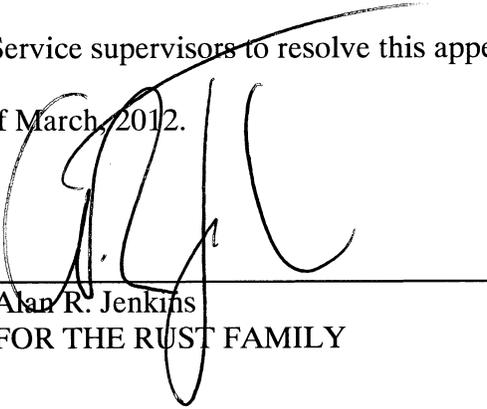
Years after publicly declaring that the public has no right to access the private property within the WSR corridor, the Forest Service now boldly claims that it “could have allowed boating” through and over the private property and that it presumably may do so after issuing the Decision, i.e., once “decisions about boating are made for the sections of the river with public land along them.” Obviously, the Forest Service is now making that “decision about boating” along the public portion of the river and so by its own statement, the Forest Service now claims authority to permit public access over private property.

Such statements are contrary to the Constitution and applicable law and must be corrected.

V. CONCLUSION

The Rust family respectfully submits this appeal and requests that the Forest Service: 1) amend the language of the Decision and EA as requested herein, 2) evaluate and document the impact of allowing boating access at Green Creek (or another alternative hereafter chosen by the Forest Service) on adjacent private property interests, and 3) clearly post the boundaries between public and private property and discourage trespass on that private property. The Rust family’s representative is willing to meet with Forest Service supervisors to resolve this appeal.

Respectfully submitted this 16th day of March, 2012.

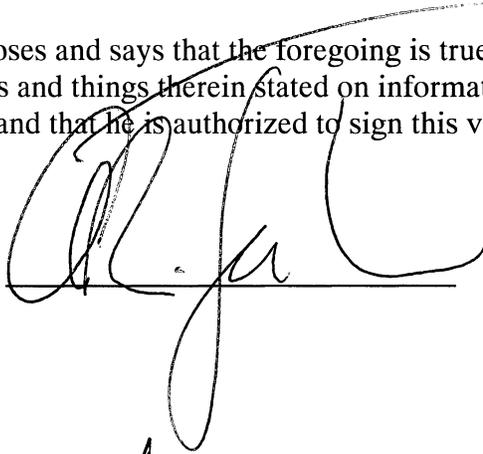


Alan R. Jenkins
FOR THE RUST FAMILY

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VERIFICATION

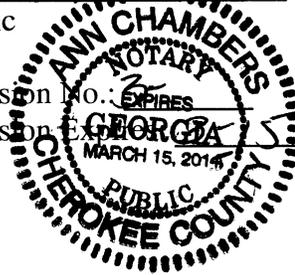
Alan R. Jenkins, first being duly sworn, deposes and says that the foregoing is true of his personal knowledge, except as to any matters and things therein stated on information and belief, and as to those, he believes them to be true; and that he is authorized to sign this verification on behalf of the Rust family.



Subscribed and sworn to before me this 16 day of March, 2012, by Alan Jenkins


Notary Public

My Commission No.: 2 EXPIRES
My Commission Expires 5/15



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September 25, 2007

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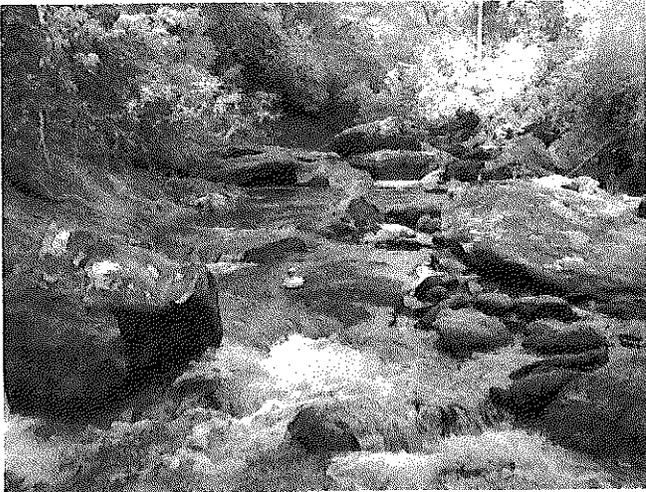
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Mr. John Cleeves
Project Coordinator
Francis Marion and Sumter National Forests

RE: Forest Service Chattooga River Environmental Assessment Concerning 1.7 miles of private land leased by the Whiteside Cove Association

Dear Mr. Thomas, Ms. Hilliard and Mr. Cleeves:

By this letter, we once again urge the United States Forest Service to document all impacts in the Environmental Assessment on private property and avoid any preferred alternative that would involve, allow, or encourage violation of our private property rights. We provide herewith important additional documentation of how the U.S. Army Corps of Engineers ("COE") has determined that the Upper Chattooga River is non-navigable. This letter goes beyond the navigability question, however, and focuses on the fact that regardless of bed ownership, the physical characteristics of the stream and surrounding property would require any attempt at boating from Grimshawes Bridge through our property to trespass on our property. Thus, the Forest Service, unless it intends to advocate and encourage unlawful activity, must document why this stretch cannot be considered as a playground for boaters.



1. Additional Navigability Information

We have new information to provide to the Forest Service on the navigability issue. The Forest Service seems to be under the mistaken impression that the COE has not determined whether the Upper Chattooga River is navigable despite written statements from the COE we have submitted to the Forest Service that the COE considers the Chattooga River in North Carolina to be non-navigable. We recently obtained additional documentation via a Freedom of Information Act request to the COE concerning the conclusion of the COE that the Upper Chattooga is non-navigable. In the early 1930's, the Corps completed an extensive study of the Savannah River and its

tributaries. On March 28, 1934, the COE Brigadier General and Acting Chief of Engineers adopted the recommendations of the District Engineer, as forwarded by the Division Engineer with respect to the non-navigability of the Savannah River and its tributaries above Mile 297.1. With respect to the Chattooga River (report p.66), the COE concluded that the "Chattooga River, Ga. and S.C. ... be considered non-navigable throughout" and stated:

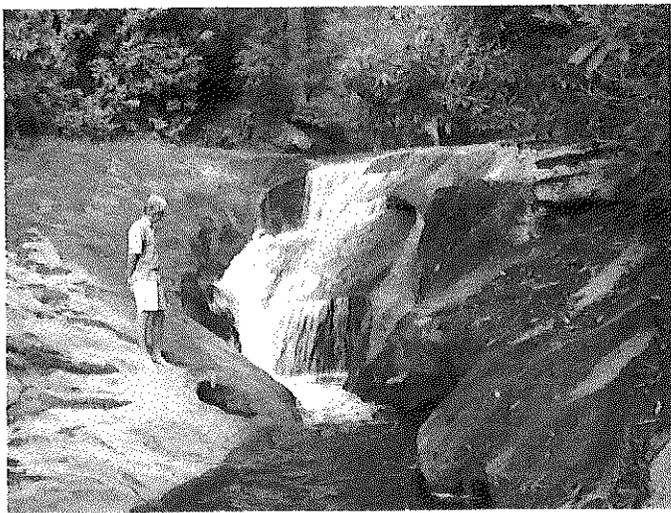
Chattooga River, Ga. and S.C. - In view of the nature of the country through which this stream also flows, the sparse population of the area, and the unfavorable slopes of the stream itself, it is believed that there is no justification for considering it a navigable stream.

Attached please find the relevant pages from the COE report and final determination. Obviously, the Corps would consider the Chattooga River even further upstream in North Carolina to be non-navigable and hence, has appropriately listed the Upper Chattooga River in North Carolina as being non-navigable for decades.

There are no new positions to discuss regarding the navigability of the stream that flows through our private property. American Whitewater alone claims the North Carolina portion of the Chattooga to be navigable, and it does so based on flawed legal analysis. On the other hand, the U.S. Army Corps of Engineers and the U.S. Coast Guard, the federal agencies responsible for making navigability determinations, the North Carolina Attorney General, documents from the USDA and Forest Service, members of our association who are intimately familiar with the stream, Federal Judge O'Kelly, and objective people with knowledge of the area all believe this tiny mountain stream is not navigable in law or fact.



Nor is there any change to the physical characteristics of the stream flowing from Grimshawes Bridge in North Carolina. These physical characteristics lead inexorably to the conclusion that this stream is not navigable waters of the United States. In fact, this stretch is a river in name only. Instead, the water below Grimshawes Bridge is a classic, small headwater mountain stream **only two or three miles from its source and 440 river miles from its ultimate outlet into the Atlantic Ocean**. At normal flow, the stream can be straddled in a number of places and walked across in others without even getting your ankles wet. Pictures of ordinary conditions establishing these facts are attached hereto and can be verified by USFS employees who have legally visited the property during ordinary conditions.



The first 1.7 mile stretch alone of the stream below Grimshawes Bridge has a 25-foot corkscrew waterfall, impassible boulders, numerous other waterfalls and crisscrossing logs, a mean flow of 14 cubic feet per second, and a drop in elevation of nearly 200 feet. If this narrow, rhododendron-surrounded stream two or three miles from its source and 440 miles from its eventual outlet is considered navigable, then all streams and rivulets in the United States are navigable. This may be AW's goal but it is not the law. All water and the land below it is not "public property" as claimed by creek-boating lobbyists. The rain collecting in our house gutters does not make our gutters public property, nor does a summer thunder shower flooding a roadside ditch make the ditch a navigable waterway. If that were true, there would be no private

property in this country. Once people understand that not every small puddle, trickle or rivulet is open to the public, they can easily see that the tiny stream below Grimshawes Bridge is clearly non-navigable and the land under and about it is private property.

The *Integrated Report* claims a "final adjudication of non-navigability in the judiciary" is required for final resolution. Under Federal and North Carolina laws, however, only tidal waterways and navigable rivers are considered public trust waters, (open to the public). In 1995, the North Carolina Supreme Court stated: "The public trust doctrine is not an issue in cases where the land involved is above water or where the body of water regularly covering the land involved is not navigable in law." *Gwathmey v. State*, 464 S.E.2d 674, 678 (NC 1995) (emphasis added). A lack of final adjudication by a court then (particularly where the responsible federal agency has determined that the water is non-navigable) does not alter the right of a property owner to protect his or her property, including the river bottom, from trespass. Indeed, kayakers who have attempted to run the Horsepasture River in North Carolina based on American Whitewater's public misinterpretation of

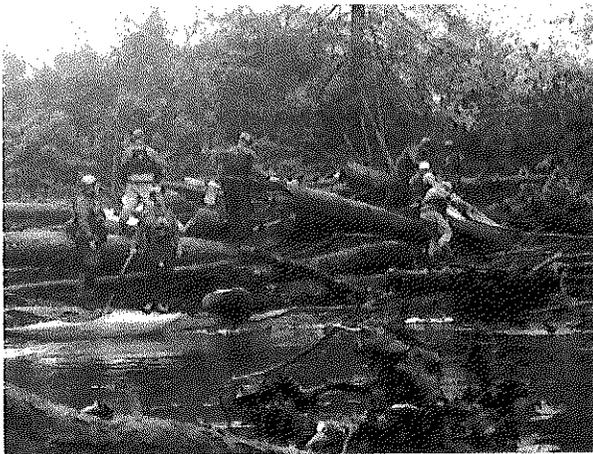
North Carolina law have been liable for trespass and made well aware that navigability is a prerequisite for public trust privileges.

2. Even Apart From the Navigability of the Stream, Any Boating Attempt of the Stretch Immediately Below Grimshaws Bridge Would Result in Illegal Activities

However, even apart from the navigability issue, which in all likelihood would be resolved in our favor in a court of law, public boating is not legally possible through the private section. Any attempt to traverse this upper section of this private stream, regardless of the pending non-navigability judicial determination, clearly would violate North Carolina trespassing and nuisance laws, damage private property, and violate WSR laws because the boater would have to touch our land to portage and scout around obstacles. For this reason as well, Grimshaws bridge cannot be the starting point for any Forest Service-sanctioned boating.

a. Requires Mandatory Portages:

The private land above Greens Creek has numerous down trees (over 25 that cross the entire river), five unrunnable water falls, and boulders that completely block passage between short pools, plus some areas that are completely choked with rhododendrons. Most of these obstacles could not be floated over, under, through, or around at any water level; these obstacles require portaging onto private property,^[1] which would violate North Carolina law. See N.C. GEN. STAT. S. 14-159.



If a tree fell in a road, it does not give motorists the right to drive across an adjacent property owner's front lawn. Likewise, a down tree across a stream does not give boaters the right to trespass on adjacent private property in order to portage around the obstacle. Thus, under North Carolina law, "the right of navigation gives no license to go and come through and over the riparian owner's land without 'let or hindrance.' Similarly, those navigating a river have no right, as incident to the right of navigation, to land upon and use the bank at a place other than a public landing without the consent of the owner, for the banks of a navigable stream are private property." *Gaither v. Albemarle Hospital*, 235 N.C. 431, 444, 70 S.E.2d 680 (1952) (emphasis added).

The Forest Service likewise has correctly published with respect to our property that: "The public does not have a right to trespass on this private land, which includes the shorelines."^[2]

b. Requires Scouting:

Not only would portaging be required on the property, scouting the stream for the numerous waterfalls, boulders and fallen timber would also be required. The scouting of a class IV or V river is either mandatory or necessary under USFS (see USDA published Chattooga River Map), American Canoe Association and most other published safety guidelines.^[3] Additional references recommending scouting include:

- ❑ The American Red Cross, *Canoeing and Kayaking* (1981) pp. 5.12-5.15.
- ❑ Dave Harrison, *Sports Illustrated Canoeing* (1981) pp. 154-155.
- ❑ William "Bill" Hillcourt, *Official Boy Scout Handbook* (1979) p. 161.

[1] See exhibit 3 in AW letter to the USFS dated September 13, 2007 (section attached below) and reference page 15 of the 1971 WSR study.

[2] <http://www.fs.fed.us/r8/fms/forest/projects/clarification.shtml>

[3] The word "mandatory" was removed from the AW guidelines in the late 1990's to help with access issues to the detriment of their members' safety. A downloaded copy of their 1995 published guidelines is available upon request.

- ❑ Benner, "Carolina White Water; a paddlers guide to the Western Carolinas"(1993) p.22
- ❑ BLM's website recommends "**When in Doubt, Scout**".
- ❑ <http://www.scouting.org>; Scout all rapids first and use your best judgment to decide whether to run or portage.

Scouting is the recommend safety protocol. Therefore, any alternative indicating the public could boat this 1.7 mile section would either be against published safety guidelines and/or encourage trespass.

c. Would Result in Property Damage

Trails do not exist on the property to accommodate scouting and portaging and therefore trampling and damage to the riparian vegetation would be required to traverse this section and in some cases just to pass along the surface of the river. Destruction of this property violates North Carolina law. N.C. GEN. STAT. S. 14-128. In addition, the trampling of flora for required new user-created trails^[4] would violate the "protect and enhance" mandates under the WSR law. Not only did the recent 2007 Chattooga study point out the need for new trails but the 1971 Study indicated that "deterioration of the streamside conditions" can be "expected" at these scouting and portage spots.^[5]



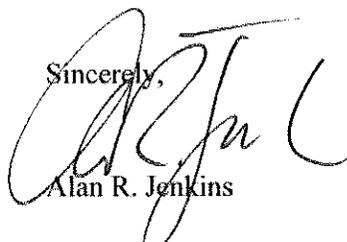
d. Would violate other rights of users of this property and the WSR Act

This is a tight meandering stream. Property rights, solitude, safety and the ability of the WCA members to enjoy their protected right of recreation (to fish, swim etc), would be devastated by grounded paddlers having to hike down the river or cascading into the deeper pools in which our members fish and swim. Not only would this violate state nuisance laws, it would violate the WSR "protect and enhance" mandates that serve to protect the experiences of the taxpaying members of the association. The protected recreational values and stream experiences of association members - whom are also taxpaying citizens - cannot be ignored when setting management policy for a Wild and Scenic River.^[6]



3. Conclusion

For these reasons, any attempts at floating the uppermost 1.7 miles of stream below Grimshawes bridge would violate existing law and our rights to enjoy our property free from interference. The landowners and association simply ask that the Forest Service make this clear to the public in the Environmental Assessment and in all publications referencing this section of the Chattooga (consistent with Executive Order 12630).

Sincerely,

 Alan R. Jenkins

COUNSEL FOR THE RUST FAMILY
 AND WHITESIDE COVE ASSOCIATION

Cc: Matthew Tilden, Esq., USFS

[4] *Chattooga Integrated Report* (p.42) noting the need for some new user-created trails.

[5] *Chattooga a Wild & Scenic River Study Report*, p.157, USDA (1971).

[6] WSR Act I(b) "their immediate environments shall be protected for the benefit and enjoyment of present and future generations". Thus, the landowners' enjoyment, and those of WCA members and guests must be satisfactorily protected.

REPORT ON NAVIGABILITY

OF

SAVANNAH RIVER, GA. & S. C. (Cd) AND ITS TRIBUTARIES

		Paragraphs
Section	I General- - - - -	1 - 4
Section	II Savannah River above Savannah and below Augusta- - - - -	5 - 11
Section	III Abercorn & Big Callis Creeks, Ga. - - - -	12 - 16
Section	IV Ebenezer Creek, Ga. - - - - -	17 - 19
Section	V Briar Creek, Ga. (and Beavertan Creek) - - - -	20 - 25
Section	VI Savannah River above Augusta - - - - -	26 - 32
Section	VII Stevens Creek, S. C. - - - - -	33 - 36
Section	VIII Little River, Ga. - - - - -	37 - 41
Section	IX Little River, S. C. - - - - -	42 - 44
Section	X Broad River, Ga. - - - - -	45 - 46
Section	XI Rocky River, S. C. - - - - -	47 - 49
Section	XII Tagalog River, Ga. & S. C. - - - - -	50 - 53
Section	XIII Seneca River, S. C. - - - - -	54 - 67
Exhibit "A"	System of Stream Designation and List of Streams	
Exhibit "B"	Map of Savannah River below Augusta	
Exhibit "C"	Map of Savannah River above Augusta	
Exhibit "D"	Profile of Savannah River below Augusta	
Exhibit "E"	Profile of Savannah River above Augusta	

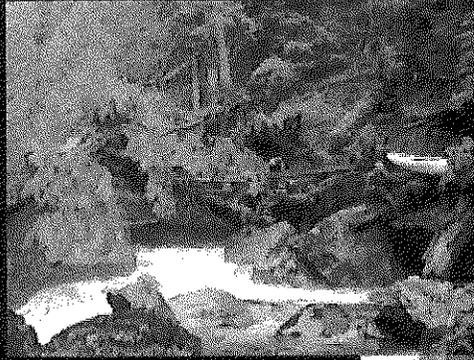
d. Chattooga River, Ga. and S. C. - In view of the rugged nature of the country through which this stream also flows, the sparse population of the area, and the unfavorable slopes of the stream itself, it is believed that there is no justification for considering it a navigable stream.

Recommendations.-

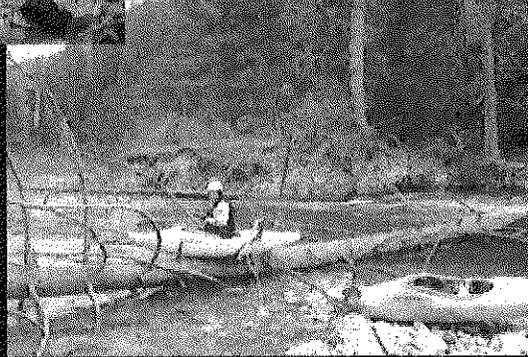
- a. That Tugalooc River, Ga. and S. C. (Cd 297.1L) be classified as non-navigable throughout.
- b. That Chauga River, S. C. (Cd 297.1L-29.4R) be considered non-navigable throughout.
- c. That Tallulah River, Ga. (Cd 297.1L-45.9L) be considered non-navigable throughout.
- d. That Chattooga River, Ga. and S. C. (Cd 297.1L-45.9R) be considered non-navigable throughout.

U. S. Engineer Office,
Savannah, Ga.
November 2, 1932.

C. Garlington,
Major, Corps of Engineers
District Engineer



Portaging wood is
part of paddling



[Therefore,
trespass, erosion
of the banks and
the required new
trails are also a
**part of
paddling.**
Emphasis added.

Portaging wood is part of paddling: There are situations where for some period of time (ranging from minutes to decades or longer) that wood pieces or accumulations totally block recreational passage. These instances represent a very small percentage of wood pieces in a river system. In these cases, paddlers typically either portage the obstruction or avoid the reach until the obstruction naturally changes enough to allow passage. Portaging wood obstructions is an expected and integral part of the paddling experience, particularly on narrow streams. Wood portages can often be very short and accomplished within the channel.

From American Whitewater letter to the USFS
regarding the Chattooga River Alternatives
September 13, 2007 signed by K. Colburn

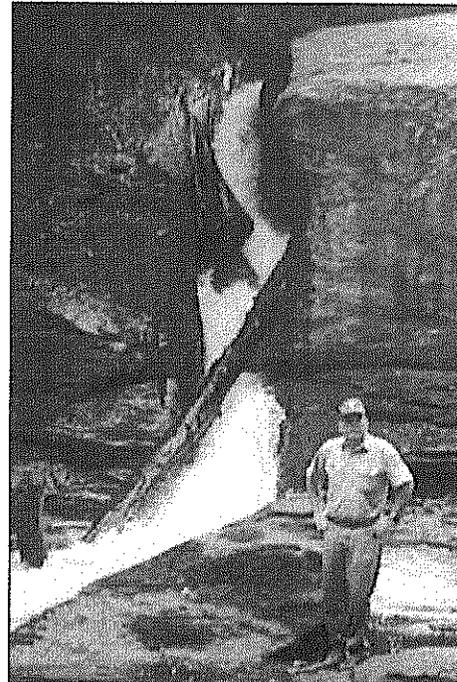
December 2, 2009

USDA Forest Service Regional Office
ATTN: J. Rick Ledbetter
1720 Peachtree Rd., NW
Suite 811-N
Atlanta, GA 30309

Re: Appeal by American Whitewater, et al., of Forest Supervisors George M. Bain's, Marisue Hilliard's and Monica Schwalbach's Decisions for Amendments on the Upper Chattooga River Land and Resource Management Plan

The litigious radical element of the boating community¹ once again tries to use an administrative process to force federal agencies to confiscate private property for their own recreation interests. In a headlong plunge in pursuit of their self-serving interests, the Radical Boaters distort both fact and law, and would severely impact the riparian vegetative buffers that the Rusts must maintain under North Carolina state laws.² As described further in our August 4, 2008 comments on the draft Environmental Assessment and in our September 25, 2007 comments, and attachments thereto (incorporated by reference herein), the Rust family has already lived through one taking of our property by a federal agency and will not allow its current family property to be condemned in order to placate the recreational fads of creek boaters. We urge the Forest Service not to be intimidated by the kayaking lobby with respect to both the private and public segments of the Chattooga.

This small headwater mountain stream that flows over the Rust property can be straddled in a number of places at ordinary water levels. This stretch has numerous down trees, numerous unrunnable water falls, and boulders that completely block passage between short pools, plus some areas that are completely choked with rhododendrons from bank to bank. Most of these obstacles could not be floated over, under, through, or around at any water level; these obstacles require portaging onto private property. Not only would portaging be required, scouting the stream at the numerous waterfalls, boulders and fallen timber would also be required.³ Even the floats conducted under the FS boater survey on the Chattooga River downstream of the private property required numerous portages and bank scouts.⁴ The Radical Boaters ignore all of these facts in falsely alleging that they could float 52 miles without touching shore.



¹ American Whitewater, American Canoe Association, Atlanta Whitewater Club, Georgia Canoeing Association, and Western Carolina Paddlers ("Radical Boaters").

² E.g., N.C. Gen. Stat. §113A-57(1); NC Env'l Management Commission Rule 15A NCAC 02B.0201 *et al.*

³ The scouting of a class IV or V river is either mandatory or necessary under USFS, American Canoe Association and most other published safety guidelines. See numerous citations listed in the Rust family comments to FS of September 25, 2007, which for convenience are attached hereto.

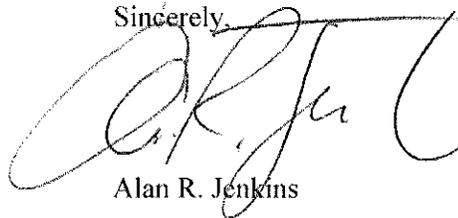
⁴ 2007 Expert Panel Study Report Pg 29 (paddlers required as many as 5 portages and 7 incidents of scouting on the Chattooga Cliffs reach which has three times the water flowing under Grimshaws Bridge).

Not only do the Radical Boaters trample on the facts, they also trample on the law. Somehow they claim that the Property Clause of the U.S. Constitution requires the Forest Service to force open private property to create a boating playground. Appeal ¶¶237-241. For good reason, the Radical Boaters do not quote the language of the Property Clause, which states in relevant part that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting ... Property belonging to the United States.” Obviously, our family property does not “belong to the United States.” The Radical Boaters even go so far as to claim that the Due Process Clause of the 5th Amendment requires our private property to be converted into a recreational boating playground even though this clause became law specifically to protect private property interests from the reach of the federal government! In fact, Congress when determining whether to declare the Chattooga River a Wild and Scenic River specifically provided the Rust family assurance that such designation would not affect our property rights. See August 4, 2008 Comments.

The Radical Boaters also conveniently ignore the known fact that the small stream flowing over our property has been declared to be non-navigable water by the federal agencies responsible for making navigability determinations (including the U.S. Army Corps of Engineers), and as such under North Carolina law, our family owns the stream bank and streambed onto which boaters would repeatedly land and hit.⁵ The Forest Service Handbook section FSH 8.33 suggests that ownership be included within a WSR study report and the Chattooga 1971 WSR Study noted that *the riparian owner owns the streambed to the center of the stream*⁶ in North Carolina and cites the NC Attorney General’s opinion that the river is non-navigable (on page 13). Other federal agencies and USFS documents agree that the Chattooga stream that flows over our property is a non-navigable stream.

The Radical Boaters may use sugar-cereal marketing tactics to try and cover over contrary statements American Whitewater and its members have made during their lengthy administrative and judicial litigation, but simply repeating erroneous (and varying) claims does not make those claims true. Accordingly, the Forest Service should dismiss the appeal of the Radical Boaters, which is wrong on both the facts and law, and should not institute a recreational policy that necessitates trespassing .

Sincerely,



Alan R. Jenkins

COUNSEL FOR THE RUST FAMILY

CC: American Whitewater, ATTN: Mr. Kevin Colburn, 1035 Van Buren St., Missoula, MT 59802

⁵ For further citations, see the family’s September 25, 2007 Comments and attachments. Even if the tiny stream somehow was not considered non-navigable, any attempt to boat this stretch immediately below Grimshawes Bridge would violate North Carolina trespass and nuisance laws, damage private property and violate Wild and Scenic River laws because the boater would have to trample our land to portage and scout around obstacles.

⁶ 1971 USDA Chattooga WSR Study Report, p.14.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PPL MONTANA, LLC *v.* MONTANA

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 10–218. Argued December 7, 2011—Decided February 22, 2012

Petitioner PPL Montana, LLC (PPL), owns and operates hydroelectric facilities in Montana. Ten of its facilities are located on riverbeds underlying segments of the Missouri, Madison, and Clark Fork Rivers. Five hydroelectric dams on the Upper Missouri River are along the Great Falls reach, including on the three tallest waterfalls; and PPL's two other dams on that river are in canyons on the Stubbs Ferry stretch. These, together with two dams located in steep canyons on the Madison River, are called the Missouri-Madison project. The Thompson Falls project is a facility on the Clark Fork River. Both projects are licensed by the Federal Energy Regulatory Commission. PPL's facilities have existed for many decades, some for over a century. Until recently, Montana, though aware of the projects' existence, sought no rent for use of the riverbeds. Instead, the understanding of PPL and the United States is that PPL has paid rents to the United States. In 2003, parents of Montana schoolchildren filed a federal suit, claiming that PPL's facilities were on riverbeds that were state owned and part of Montana's school trust lands. The State joined the suit and, for the first time, sought rents from PPL for its use of the riverbeds. That case was dismissed, and PPL and other power companies filed a state-court suit, claiming that Montana was barred from seeking compensation for PPL's riverbed use. Montana counterclaimed, contending that under the equal-footing doctrine it owns the riverbeds and can charge rent for their use. The trial court granted Montana summary judgment as to navigability for purposes of determining riverbed title and ordered PPL to pay Montana \$41 million in rent for riverbed use between 2000 and 2007. The Montana Supreme Court affirmed. Adopting a liberal construction of the navigability test, it discounted this Court's approach of considering the navigability of particular river segments for purposes of deter-

Syllabus

mining whether a State acquired title to the riverbeds underlying those segments at the time of statehood. Instead, the Montana court declared the river stretches in question to be short interruptions of navigability that were insufficient as a matter of law to find nonnavigability, since traffic had circumvented those stretches by portage. Based on evidence of present-day, recreational use of the Madison River, the court found that river navigable as a matter of law at the time of statehood.

Held: The Montana Supreme Court’s ruling that Montana owns and may charge for use of the riverbeds at issue was based on an infirm legal understanding of this Court’s rules of navigability for title under the equal-footing doctrine. Pp. 10–26.

(a) The rule that the States, in their capacity as sovereigns, hold “title in the soil of rivers really navigable,” *Shively v. Bowlby*, 152 U. S. 1, 31, has federal constitutional significance under the equal-footing doctrine. Pursuant to that doctrine, upon its date of statehood, a State gains title within its borders to the beds of waters then navigable. It 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.” *United States v. Oregon*, 295 U. S. 1, 14. The United States retains title vested in it before statehood to land beneath waters not then navigable. To be navigable for purposes of title under the equal-footing doctrine, rivers must be “navigable in fact,” meaning “they are used, or are 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.” *The Daniel Ball*, 10 Wall. 557, 563. This formulation has been used to determine questions of waterbed title under the equal-footing doctrine. See *United States v. Utah*, 283 U. S. 64, 76. Pp. 10–14.

(b) The Montana Supreme Court erred in its treatment of the question of river segments and portage. To determine riverbed title under the equal-footing doctrine, this Court considers the river on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not. See, e.g., *Utah, supra*, at 77. The State Supreme Court erred in discounting this well-settled approach. A key justification for sovereign ownership of navigable riverbeds is that a contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public’s right to use the waters as a highway for commerce. Because commerce could not have occurred on segments nonnavigable at the time of statehood, there is no reason to deem those segments owned by the State under the equal-footing doctrine. Practical considerations also support segmentation. Physi-

Syllabus

cal conditions affecting navigability vary over the length of a river and provide a means to determine appropriate start points and end points for disputed segments. A segment approach is also consistent with the manner in which private parties seek to establish riverbed title. Montana cannot suggest that segmentation is inadministrable when the state courts managed to apportion the underlying riverbeds for purposes of determining their value and PPL's corresponding rents. The State Supreme Court's view that the segment-by-segment approach does not apply to short interruptions of navigability is not supported by this Court's *Utah* decision. Even if the law might find some nonnavigable segments so minimal that they merit treatment as part of a longer, navigable reach, it is doubtful that the segments in this case would meet that standard. Applying its "short interruptions" approach, the State Supreme Court found the Great Falls reach navigable because it could be managed by way of land route portage, as done by Lewis and Clark. But a portage of even one day would demonstrate the need to bypass a nonnavigable river segment. Thus, the State Supreme Court was wrong to conclude, with respect to the Great Falls reach and other disputed stretches, that portages were insufficient to defeat a navigability finding. In most cases, they are, because they require transportation over land rather than over the water. This is the case at least as to the Great Falls reach. In reaching a contrary conclusion, the State Supreme Court misapplied *The Montello*, 20 Wall. 430. There, portage was considered in determining whether a river was part of a channel of interstate commerce for federal regulatory purposes. *The Montello* does not control the outcome where the quite different concerns of the riverbed title context apply. Portages may defeat navigability for title purposes, and do so with respect to the Great Falls reach. Montana does not dispute that overland portage was necessary to traverse that reach, and the trial court noted the waterfalls had never been navigated. The Great Falls reach, at least from the head of the first waterfall to the foot of the last, is not navigable for purposes of riverbed title under the equal-footing doctrine. There is also a significant likelihood that some of the other river stretches in dispute fail this federal navigability test. The ultimate decision as to these other disputed river stretches is to be determined, in the first instance, by the Montana courts on remand, which should assess the relevant evidence in light of the principles discussed here. Pp. 14–21.

(c) The Montana Supreme Court further erred as a matter of law in relying on evidence of present-day, primarily recreational use of the Madison River. Navigability must be assessed as of the time of statehood, and it concerns a river's usefulness for "trade and travel." *Utah*, 283 U. S., at 75–76. River segments are navigable if they

Syllabus

“[were]” used and if they “[were] susceptible of being used” as highways of commerce at the time of statehood. *Id.*, at 76. Evidence of recreational use and poststatehood evidence may bear on susceptibility of commercial use at the time of statehood. See *id.*, at 82–83. In order for present-day use to have a bearing on navigability at statehood, (1) the watercraft must be meaningfully similar to those in customary use for trade and travel at the time of statehood, and (2) the river’s poststatehood condition may not be materially different from its physical condition at statehood. The State Supreme Court offered no indication that it made these necessary findings. Pp. 21–24.

(d) Because this analysis is sufficient to require reversal here, the Court declines to decide whether the State Supreme Court also erred as to the burden of proof regarding navigability. P. 24.

(e) Montana’s suggestion that denying the State title to the disputed riverbeds will undermine the public trust doctrine—which concerns public access to the waters above those beds for navigation, fishing, and other recreational uses—underscores its misapprehension of the equal-footing and public trust doctrines. Unlike the equal-footing doctrine, which is the constitutional foundation for the navigability rule of riverbed title, the scope of the public trust over waters within the State’s borders is a matter of state law, subject to federal regulatory power. Pp. 24–25.

(f) This Court does not reach the question whether, by virtue of Montana’s sovereignty, neither laches nor estoppel could apply to bar the State’s claim. Still, the reliance by PPL and its predecessors in title on the State’s long failure to assert title to the riverbeds is some evidence supporting the conclusion that the river segments over those beds were nonnavigable for purposes of the equal-footing doctrine. Pp. 25–26.

2010 MT 64, 355 Mont. 402, 229 P. 3d 421, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 10–218

PPL MONTANA, LLC, PETITIONER *v.* MONTANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
MONTANA

[February 22, 2012]

JUSTICE KENNEDY delivered the opinion of the Court.

This case concerns three rivers which flow through Montana and then beyond its borders. The question is whether discrete, identifiable segments of these rivers in Montana were nonnavigable, as federal law defines that concept for purposes of determining whether the State acquired title to the riverbeds underlying those segments, when the State entered the Union in 1889. Montana contends that the rivers must be found navigable at the disputed locations. From this premise, the State asserts that in 1889 it gained title to the disputed riverbeds under the constitutional equal-footing doctrine. Based on its title claims, Montana sought compensation from PPL Montana, LLC, a power company, for its use of the riverbeds for hydroelectric projects. The Montana courts granted summary judgment on title to Montana, awarding it \$41 million in rent for the riverbeds for the period from 2000 to 2007 alone. That judgment must be reversed.

I

The three rivers in question are the Missouri River, the Madison River, and the Clark Fork River. The Missouri and the Madison are on the eastern side of the Continen-

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tal Divide. The Madison flows into the Missouri, which then continues at length to its junction with the Mississippi River. The Clark Fork River is on the western side of the Continental Divide. Its waters join the Columbia River system that flows into the Pacific Ocean. Each river shall be described in somewhat more detail.

A

The Missouri River originates in Montana and traverses seven States before a point just north of St. Louis where it joins the Mississippi. 19 *Encyclopedia Americana* 270 (int'l ed. 2006). If considered with the continuous path formed by certain streams that provide the Missouri River's headwaters, the Missouri is over 2,500 miles long, the longest river in the United States. *Ibid.* The Missouri River's basin (the land area drained by the river) is the second largest in the Nation, surpassed only by the Mississippi River basin of which it is a part. *Rivers of North America* 427 (A. Benke & C. Cushing eds. 2005) (hereinafter *Rivers of North America*). As a historical matter, the river shifted and flooded often, and contained many sandbars, islands, and unstable banks. *Id.*, at 432–433. The river was once described as one of the most “variable beings in creation,” as “inconstant [as] the action of the jury,” *Sioux City Register* (Mar. 28, 1868); and its high quantity of downstream sediment flow spawned its nickname, the “Big Muddy,” *Rivers of North America* 433.

The upstream part of the Missouri River in Montana, known as the Upper Missouri River, is better characterized as rocky rather than muddy. While one usually thinks of the Missouri River as flowing generally south, as indeed it does beginning in North Dakota, the Upper Missouri in Montana flows north from its principal headwaters at Three Forks, which is located about 4,000 feet above sea level in the Rocky Mountain area of southwestern Montana. It descends through scenic mountain ter-

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rain including the deep gorge at the Gates of the Mountains; turns eastward through the Great Falls reach, cascading over a roughly 10-mile stretch of cataracts and rapids over which the river drops more than 400 feet; and courses swiftly to Fort Benton, a 19th-century fur trading post, before progressing farther east into North Dakota and on to the Great Plains. 19 *Encyclopedia Americana*, *supra*, at 270; 8 *New Encyclopaedia Britannica* 190 (15th ed. 2007) (hereinafter *Encyclopaedia Britannica*); 2 *Columbia Gazetteer of the World* 2452 (2d ed. 2008) (hereinafter *Columbia Gazetteer*); F. Warner, *Montana and the Northwest Territory* 75 (1879). In 1891, just after Montana became a State, the Upper Missouri River above Fort Benton was “seriously obstructed by numerous rapids and rocks,” and the 168-mile portion flowing eastward “[f]rom Fort Benton to Carroll, Mont., [was] called the rocky river.” *Annual Report of the Chief of Engineers, U. S. Army* (1891), in 2 H. R. Exec. Doc. No. 1, 52d Cong., 1st Sess., pt. 2, pp. 275–276 (1891) (hereinafter *H. R. Exec. Doc.*).

The Great Falls exemplify the rocky, rapid character of the Upper Missouri. They consist of five cascade-like waterfalls located over a stretch of the Upper Missouri leading downstream from the city of Great Falls in mid-western Montana. The waterfall farthest downstream, and the one first encountered by Meriwether Lewis and William Clark when they led their remarkable expedition through the American West in 1805, is the eponymous “Great Falls,” the tallest of the five falls at 87 feet. W. Clark, *Dear Brother: Letters of William Clark to Jonathan Clark* 109, n. 5 (J. Holmberg ed. 2002) (hereinafter *Dear Brother*). Lewis recorded observations of this “sublimely grand spectacle”:

“[T]he whole body of water passes with incredible swiftness. . . . over a precipice of at least eighty feet [T]he irregular and somewhat projecting rocks

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below receives the water . . . and brakes it into a perfect white foam which assumes a thousand forms in a moment sometimes flying up in jets . . . [that] are scarcely formed before large rolling bodies of the same beaten and foaming water is thrown over and conceals them. . . . [T]he [rainbow] reflection of the sun on the spray or mist . . . adds not a little to the beauty of this majestically grand scenery.” The Lewis and Clark Journals: An American Epic of Discovery 129 (G. Moulton ed. 2003) (hereinafter Lewis and Clark Journals); The Journals of Lewis and Clark 136–138 (B. DeVoto ed. 1981).

If one proceeds alongside the river upstream from Great Falls, as Lewis did in scouting the river for the expedition, the other four falls in order are “Crooked Falls” (19 feet high); “Rainbow Falls” (48 feet), which Lewis called “one of the most beautiful objects in nature”; “Colter Falls” (7 feet), and “Black Eagle Falls” (26 feet). See Lewis and Clark Journals 131–132; Dear Brother 109, n. 5; P. Cutright, *Lewis & Clark: Pioneering Naturalists* 154–156 (2003). Despite the falls’ beauty, Lewis could see that their steep cliffs and swift waters would impede progress on the river, which had been the expedition’s upstream course for so many months. The party proceeded over a more circuitous land route by means of portage, circumventing the Great Falls and their surrounding reach of river before returning to travel upon the river about a month later. See Lewis and Clark Journals 126–152.

The Upper Missouri River, both around and further upstream of the Great Falls, shares the precipitous and fast-moving character of the falls themselves. As it moves downstream over the Great Falls reach, a 17-mile stretch that begins somewhat above the head of Black Eagle Falls, the river quickly descends about 520 feet in elevation, see *Montana Power Co. v. Federal Power Comm’n*, 185 F.2d

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491 (CADC 1950); 2010 MT 64, ¶¶29–30, 108–109, 355 Mont. 402, 416, 442, 229 P.3d 421, 433, 449, dropping over 400 feet within 10 miles from the first rapid to the foot of Great Falls, Parker, Black Eagle Falls Dam, 27 Transactions of the Am. Soc. of Civil Engineers 56 (1892). In 1879, that stretch was a “constant succession of rapids and falls.” Warner, *supra*, at 75; see also 9 The Journals of the Lewis & Clark Expedition 171 (G. Moulton ed. 1995) (hereinafter Journals of the Lewis & Clark Expedition) (“a continued rapid the whole way for 17 miles”). Lewis noted the water was so swift over the area that buffalo were swept over the cataracts in “considerable quantities” and were “instantly crushed.” Lewis and Clark Journals 136–137. Well above the Great Falls reach, the Stubbs Ferry stretch of the river from Helena to Cascade also had steep gradient and was “much obstructed by rocks and dangerous rapids.” Report of the Secretary of War, 2 H. R. Doc. No. 2, 54th Cong., 1st Sess., pt. 1, p. 301 (1895).

B

The second river to be considered is the Madison, one of the Missouri River’s headwater tributaries. Named by Lewis and Clark for then-Secretary of State James Madison, the Madison River courses west out of the Northern Rocky Mountains of Wyoming and Montana in what is now Yellowstone National Park, then runs north and merges with the Jefferson and Gallatin Rivers at Three Forks, Montana, to form the Upper Missouri. Lewis and Clark Journals 158; Rivers of North America 459; 7 Encyclopaedia Britannica 658; 2 Columbia Gazetteer 2242. Along its path, the Madison River flows through two lakes artificially created by dams built in canyons: Hebgen Lake and Ennis Lake. Federal Writers’ Project of the Work Projects Administration, Montana: A State Guide Book 356 (J. Stahlberg ed. 1949); R. Aarstad, E. Arguimbau, E. Baumler, C. Porsild, & B. Shovers, Montana Place Names

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from Alzada to Zortman: A Montana Historical Society Guide 166 (2009).

C

The third river at issue in this case is the Clark Fork. That river, which consists in large part of “long, narrow streams confined by mountainous terrain,” rises at an elevation of about 5,000 feet in the Silver Bow Mountains of southwestern Montana. 3 Encyclopaedia Britannica 352; Dept. of Interior, U. S. Geological Survey, J. Stevens & F. Henshaw, Surface Water Supply of the United States, 1907–8, Water-Supply Paper 252, pp. 81–82 (1910). The river flows northward for about 40 miles; turns northwest for a stretch; then turns abruptly northeast for a short stint, by which time it has descended nearly 2,500 feet in altitude. It then resumes a northward course until it empties into Lake Pend Oreille in northern Idaho, out of which flows a tributary to the Columbia River of the Pacific Northwest. *Ibid.*; 1 Columbia Gazetteer 816. The Clark Fork is “one of the wildest and most picturesque streams in the West,” marked by “many waterfalls and boxed gorges.” Federal Writers’ Projects of the Works Progress Administration, Idaho: A Guide in Word and Picture 230 (2d ed. 1950).

Lewis and Clark knew of the Clark Fork River but did not try to navigate it, in part because the absence of salmon in one of its tributaries made Lewis believe “there must be a considerable fall in [the river] below.” H. Fritz, *The Lewis and Clark Expedition* 38–39 (2004). This was correct, for shortly before the Clark Fork exits to Idaho from the northwest corner of Montana, “the waters of the river dash madly along their rocky bed,” dropping over 30 feet in a half-mile as they rush over falls and rapids including a “foaming waterfall” now known as Thompson Falls. O. Rand, *A Vacation Excursion: From Massachusetts Bay to Puget Sound* 176–177 (1884); C. Kirk, A

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History of the Montana Power Company 231 (2008).

II

Petitioner PPL Montana, LLC (PPL), owns and operates hydroelectric facilities that serve Montana residents and businesses. Ten of its facilities are built upon riverbeds underlying segments of the Upper Missouri, Madison, and Clark Fork Rivers. It is these beds to which title is disputed.

On the Upper Missouri River, PPL has seven hydroelectric dams. Five of them are along the Great Falls reach, including on the three tallest falls; and the other two are in canyons upstream on the Stubbs Ferry stretch. See K. Robison, *Cascade County and Great Falls* 56 (2011); Aarstad et al., *supra*, at 125, 119, 145–146. On the Madison River, two hydroelectric dams are located in steep canyons. On the Clark Fork River, a hydroelectric facility is constructed on the Thompson Falls.

The dams on the Upper Missouri and Madison are called the Missouri-Madison project. The Thompson Falls facility is called the Thompson Falls project. Both projects are licensed by the Federal Energy Regulatory Commission. PPL acquired them in 1999 from its predecessor, the Montana Power Company. 355 Mont., at 405–406, 229 P. 3d, at 426.

PPL's power facilities have existed at their locations for many decades, some for over a century. See Robison, *supra*, at 40 (Black Eagle Falls dam constructed by 1891). Until recently, these facilities were operated without title-based objection by the State of Montana. The State was well aware of the facilities' existence on the riverbeds—indeed, various Montana state agencies had participated in federal licensing proceedings for these hydroelectric projects. See, e.g., *Montana Power Co.*, 8 F. P. C. 751, 752 (1949) (Thompson Falls project); *Montana Power Co.*, 27 FERC ¶62,097, pp. 63,188–63,189 (1984) (Ryan Dam of

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Missouri-Madison project). Yet the State did not seek, and accordingly PPL and its predecessor did not pay, compensation for use of the riverbeds. 355 Mont., at 406, 229 P. 3d, at 427. Instead, the understanding of PPL and the United States is that PPL has been paying rents to the United States for use of those riverbeds, as well as for use of river uplands flooded by PPL's projects. Reply Brief for Petitioner 4; App. to Supp. Brief for Petitioner 4–5; Brief for United States as *Amicus Curiae* 3, n. 3.

In 2003, parents of Montana schoolchildren sued PPL in the United States District Court for the District of Montana, arguing that PPL had built its facilities on riverbeds that were state owned and part of Montana's school trust lands. 355 Mont., at 406, 229 P. 3d, at 426. Prompted by the litigation, the State joined the lawsuit, for the first time seeking rents for PPL's riverbed use. The case was dismissed in September 2005 for lack of diversity jurisdiction. *Dolan v. PPL Montana, LLC*, No. 9:03-cv-167 (D Mont., Sept. 27, 2005).

PPL and two other power companies sued the State of Montana in the First Judicial District Court of Montana, arguing that the State was barred from seeking compensation for use of the riverbeds. 355 Mont., at 407–408, 229 P. 3d, at 427–428. By counterclaim, the State sought a declaration that under the equal-footing doctrine it owns the riverbeds used by PPL and can charge rent for their use. *Id.*, at 408, 229 P. 3d, at 428. The Montana trial court granted summary judgment to Montana as to navigability for purposes of determining riverbed title. *Id.*, at 408–409, 413–414, 229 P. 3d, at 428, 431–432; App. to Pet. for Cert. 143. The court decided that the State owned the riverbeds. 355 Mont., at 428–429, 229 P. 3d, at 440. The court ordered PPL to pay \$40,956,180 in rent for use of the riverbeds between 2000 and 2007. *Id.*, at 431–432, 229 P. 3d, at 442–443. Whether a lease for future periods would commence, and, if so, at what rental rate, seems to

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have been left to the discretion of the Montana Board of Land Commissioners. App. to Pet. for Cert. 128–129.

In a decision by a divided court, the Montana Supreme Court affirmed. 355 Mont., at 461–462, 229 P. 3d, at 460–461; *id.*, at 462, 229 P. 3d, at 461 (dissenting opinion). The court reasoned from the background principle that “navigability for title purposes is very liberally construed.” *Id.*, at 438, 229 P. 3d, at 446. It dismissed as having “limited applicability” this Court’s approach of assessing the navigability of the disputed segment of the river rather than the river as a whole. *Id.*, at 441–442, 229 P. 3d, at 448–449. The Montana court accepted that certain relevant stretches of the rivers were not navigable but declared them “merely short interruptions” insufficient as a matter of law to find nonnavigability, since traffic had circumvented those stretches by overland portage. *Id.*, at 438, 442, 229 P. 3d, at 446, 449. Placing extensive reliance upon evidence of present-day use of the Madison River, the court found that river navigable as a matter of law at the time of statehood. *Id.*, at 439, 229 P. 3d, at 447.

Justice Rice dissented. *Id.*, at 462, 229 P. 3d, at 461. He stated that “courts are not to assume an *entire river* is navigable merely because certain reaches of the river are navigable.” *Id.*, at 464, 229 P. 3d, at 462. The majority erred, he wrote, in rejecting the “section-by-section approach” and “declaring, as a matter of law, that the reaches claimed by PPL to be non-navigable are simply too ‘short’ to matter,” when in fact PPL’s evidence showed the “disputed reaches of the rivers were, at the time of statehood, non-navigable.” *Id.*, at 463–466, 476–477, 229 P. 3d, at 462–464, 470.

This Court granted certiorari, 564 U. S. ____ (2011), and now reverses the judgment.

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III

A

PPL contends the opinion of the Montana Supreme Court is flawed in three respects: first, the court's failure to consider with care the navigability of the particular river segments to which title is disputed, and its disregard of the necessary overland portage around some of those segments; second, its misplaced reliance upon evidence of present-day, recreational use; and third, what the state court itself called its liberal construction of the navigability test, which did not place the burden of proof upon the State to show navigability. Brief for Petitioner 26. The United States as *amicus* is in substantial agreement with PPL's arguments, although it offers a more extended discussion with respect to evidence of present-day, recreational use. Brief for United States 27–33.

It is appropriate to begin the analysis by discussing the legal principles that control the case.

B

The rule that the States, in their capacity as sovereigns, hold title to the beds under navigable waters has origins in English common law. See *Shively v. Bowlby*, 152 U. S. 1, 13 (1894). A distinction was made in England between waters subject to the ebb and flow of the tide (royal rivers) and nontidal waters (public highways). With respect to royal rivers, the Crown was presumed to hold title to the riverbed and soil, but the public retained the right of passage and the right to fish in the stream. With respect to public highways, as the name suggests, the public also retained the right of water passage; but title to the riverbed and soil, as a general matter, was held in private ownership. Riparian landowners shared title, with each owning from his side to the center thread of the stream, as well as the exclusive right to fish there. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 285 (1997).

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(summarizing J. Angell, *A Treatise on the Common Law in Relation to Water-Courses* 14–18 (1824)); 3 J. Kent, *Commentaries on American Law* 528–529 (9th ed. 1858).

While the tide-based distinction for bed title was the initial rule in the 13 Colonies, after the Revolution American law moved to a different standard. Some state courts came early to the conclusion that a State holds presumptive title to navigable waters whether or not the waters are subject to the ebb and flow of the tide. See, e.g., *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810); *Executors of Cates v. Wadlington*, 12 S. C. L. 580 (1822); *Wilson v. Forbes*, 13 N. C. 30 (1828); *Bullock v. Wilson*, 2 Port. 436 (Ala. 1835); *Elder v. Burrus*, 25 Tenn. 358 (1845). The tidal rule of “navigability” for sovereign ownership of riverbeds, while perhaps appropriate for England’s dominant coastal geography, was ill suited to the United States with its vast number of major inland rivers upon which navigation could be sustained. See L. Houck, *Law of Navigable Rivers* 26–27, 31–35 (1868); *Packer v. Bird*, 137 U. S. 661, 667–669 (1891). By the late 19th century, the Court had recognized “the now prevailing doctrine” of state sovereign “title in the soil of rivers really navigable.” *Shively, supra*, at 31; see *Barney v. Keokuk*, 94 U. S. 324, 336 (1877) (“In this country, as a general thing, all waters are deemed navigable which are really so”). This title rule became known as “navigability in fact.”

The rule for state riverbed title assumed federal constitutional significance under the equal-footing doctrine. In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, “hold the absolute right to all their navigable waters and the soils under them,” subject only to rights surrendered and powers granted by the Constitution to the Federal Government. *Martin v. Lessee of Waddell*, 16 Pet. 367, 410 (1842). In a series of 19th-century cases, the Court determined that the same principle applied to

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States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution. See, e.g., *Lessee of Pollard v. Hagan*, 3 How. 212, 228–229 (1845); *Knight v. United States Land Assn.*, 142 U. S. 161, 183 (1891); *Shively, supra*, at 26–31; see *United States v. Texas*, 339 U. S. 707, 716 (1950). These precedents are the basis for the equal-footing doctrine, under which a State’s title to these lands was “conferred not by Congress but by the Constitution itself.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 374 (1977). It follows that any ensuing questions of navigability for determining state riverbed title are governed by federal law. See, e.g., *United States v. Utah*, 283 U. S. 64, 75 (1931); *United States v. Oregon*, 295 U. S. 1, 14 (1935).

The title consequences of the equal-footing doctrine can be stated in summary form: Upon statehood, the State gains title within its borders to the beds of waters then navigable (or tidally influenced, see *Phillips Petroleum Co. v. Mississippi*, 484 U. S. 469 (1988), although that is not relevant in this case). It may allocate and govern those lands according to state law subject only to “the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.” *Oregon, supra*, at 14; see *Montana v. United States*, 450 U. S. 544, 551 (1981); *United States v. Holt State Bank*, 270 U. S. 49, 54 (1926). The United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses. See *Utah, supra*, at 75; *Oregon, supra*, at 14.

Returning to the “navigability in fact” rule, the Court has explained the elements of this test. A basic formulation of the rule was set forth in *The Daniel Ball*, 10 Wall. 557 (1871), a case concerning federal power to regulate navigation:

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“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *Id.*, at 563.

The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds. See, e.g., *ibid.*; *The Montello*, 20 Wall. 430, 439 (1874); *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 406, and n. 21 (1940) (Federal Power Act); *Rapanos v. United States*, 547 U. S. 715, 730–731 (2006) (plurality opinion) (Clean Water Act); *id.*, at 761 (KENNEDY, J., concurring in judgment) (same). It has been used as well to determine questions of title to water beds under the equal-footing doctrine. See *Utah, supra*, at 76; *Oklahoma v. Texas*, 258 U. S. 574, 586 (1922); *Holt State Bank, supra*, at 56. It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases.

Among the differences in application are the following. For state title under the equal-footing doctrine, navigability is determined at the time of statehood, see *Utah, supra*, at 75, and based on the “natural and ordinary condition” of the water, see *Oklahoma, supra*, at 591. In contrast, admiralty jurisdiction extends to water routes made navigable even if not formerly so, see, e.g., *Ex parte Boyer*, 109 U. S. 629, 631–632 (1884) (artificial canal); and federal regulatory authority encompasses waters that only recently have become navigable, see, e.g., *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634–635 (1912), were once navigable but are no longer, see *Economy Light & Power*

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Co. v. United States, 256 U. S. 113, 123–124 (1921), or are not navigable and never have been but may become so by reasonable improvements, see *Appalachian Elec. Power Co.*, *supra*, at 407–408. With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce. See *The Daniel Ball*, *supra*, at 564. And, of course, the commerce power extends beyond navigation. See *Kaiser Aetna v. United States*, 444 U. S. 164, 173–174 (1979). In contrast, for title purposes, the inquiry depends only on navigation and not on interstate travel. See *Utah*, *supra*, at 76. This list of differences is not exhaustive. Indeed, “[e]ach application of [the *Daniel Ball*] test . . . is apt to uncover variations and refinements which require further elaboration.” *Appalachian Elec. Power Co.*, *supra*, at 406.

IV

A

The primary flaw in the reasoning of the Montana Supreme Court lies in its treatment of the question of river segments and overland portage.

To determine title to a riverbed under the equal-footing doctrine, this Court considers the river on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not. In *United States v. Utah*, for example, the Court noted,

“the controversy relates only to the sections of the rivers which are described in the complaint, and the Master has limited his findings and conclusions as to navigability accordingly. The propriety of this course, in view of the physical characteristics of the streams, is apparent. Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evi-

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dence, how far navigability extends.” 283 U. S., at 77.

The Court went on to conclude, after reciting and assessing the evidence, that the Colorado River was navigable for its first roughly 4-mile stretch, nonnavigable for the next roughly 36-mile stretch, and navigable for its remaining 149 miles. *Id.*, at 73–74, 79–81, 89. The Court noted the importance of determining “the exact point at which navigability may be deemed to end.” *Id.*, at 90.

Similarly, in *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 85 (1922), the Court examined the segment of the Arkansas River that ran along the Osage Indian Reservation, assessing whether the Arkansas River was “navigable in fact at the *locus in quo*.” The Court concluded that the United States originally, and the Osages as its grantees, unequivocally held title to the riverbeds because the Arkansas River “is and was not navigable at the place where the river bed lots, here in controversy, are.” *Id.*, at 86. The Court found the segment of river along the reservation to be nonnavigable even though a segment of the river that began further downstream was navigable. *Ibid.* See also *Oklahoma, supra*, at 583, 584, 587–588, 589–591 (noting that “how far up the streams navigability extended was not known”; assessing separately the segments of the Red River above and below its confluence with the Washita River within Oklahoma’s borders; and concluding that neither segment, and hence “no part of the river within Oklahoma,” was navigable).

The Montana Supreme Court discounted the segment-by-segment approach of this Court’s cases, calling it “a piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable.” 355 Mont., at 440–442, 229 P. 3d, at 448–449. This was error. The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded. A key justification for sovereign ownership of

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navigable riverbeds is that a contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public's right to use the waters as a highway for commerce. While the Federal Government and States retain regulatory power to protect public navigation, allocation to the State of the beds underlying navigable rivers reduces the possibility of conflict between private and public interests. See *Utah, supra*, at 82–83; *Packer*, 137 U. S., at 667. By contrast, segments that are nonnavigable at the time of statehood are those over which commerce could not then occur. Thus, there is no reason that these segments also should be deemed owned by the State under the equal-footing doctrine.

Practical considerations also support segmentation. Physical conditions that affect navigability often vary significantly over the length of a river. This is particularly true with longer rivers, which can traverse vastly different terrain and the flow of which can be affected by varying local climates. The Missouri River provides an excellent example: Between its headwaters and mouth, it runs for over 2,000 miles out of steep mountains, through canyons and upon rocky beds, over waterfalls and rapids, and across sandy plains, capturing runoff from snow melt and farmland rains alike. These shifts in physical conditions provide a means to determine appropriate start points and end points for the segment in question. Topographical and geographical indicators may assist. See, e.g., *Utah, supra*, at 77–80 (gradient changes); *Oklahoma*, 258 U. S., at 589 (location of tributary providing additional flow).

A segment approach to riverbed title allocation under the equal-footing doctrine is consistent with the manner in which private parties seek to establish riverbed title. For centuries, where title to the riverbed was not in the sovereign, the common-law rule for allocating riverbed title among riparian landowners involved apportionment defined both by segment (each landowner owns bed and soil

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along the length of his land adjacent) and thread (each landowner owns bed and soil to the center of the stream). See J. Angell, *A Treatise on the Law of Watercourses* 18 (6th ed. 1869); *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (No. 14,312) (CC RI 1827) (Story, J.). Montana, moreover, cannot suggest that segmentation is inadministrable when the state courts managed to divide up and apportion the underlying riverbeds for purposes of determining their value and the corresponding rents owed by PPL.

The Montana Supreme Court, relying upon *Utah*, decided that the segment-by-segment approach is inapplicable here because it “does not apply to ‘short interruption[s] of navigability in a stream otherwise navigable.’” 355 Mont., at 442, 229 P. 3d, at 449 (quoting *Utah*, 283 U. S., at 77). This was mistaken. In *Utah*, this Court noted in passing that the facts of the case concerned “long reaches with particular characteristics of navigability or non-navigability” rather than “short interruption[s].” *Id.*, at 77. The Court in *Utah* did not say the case would have a different outcome if a “short interruption” were concerned. *Ibid.*

Even if the law might find some nonnavigable segments so minimal that they merit treatment as part of a longer, navigable reach for purposes of title under the equal-footing doctrine, it is doubtful that any of the segments in this case would meet that standard, and one—the Great Falls reach—certainly would not. As an initial matter, the kinds of considerations that would define a *de minimis* exception to the segment-by-segment approach would be those related to principles of ownership and title, such as inadministrability of parcels of exceedingly small size, or worthlessness of the parcels due to overdivision. See Heller, *The Tragedy of the Anticommons*, 111 Harv. L. Rev. 621, 682–684 (1998) (explaining that dividing property into square-inch parcels, could, absent countervailing legal mechanisms, “paralyze the alienability of scarce

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resources . . . or diminish their value too drastically”). An analysis of segmentation must be sensibly applied. A comparison of the nonnavigable segment’s length to the overall length of the stream, for instance, would be simply irrelevant to the issue at hand.

A number of the segments at issue here are both discrete, as defined by physical features characteristic of navigability or nonnavigability, and substantial, as a matter of administrability for title purposes. This is best illustrated by the Great Falls reach, which is 17 miles long and has distinct drops including five waterfalls and continuous rapids in between. There is plenty of reason to doubt that reach’s navigability based on the presence of the series of falls. There is also reason to think that title to that segment of bed would not be worthless or inadministrable. Indeed, the State sought and was awarded rent in the amount of \$41 million for PPL’s various hydroelectric facilities attached to the riverbeds, half of which are along the Great Falls reach.

Applying its “short interruptions” approach, the Montana Supreme Court decided that the Great Falls reach was navigable because it could be managed by way of land route portage. 355 Mont., at 440, 442, 229 P. 3d, at 447, 449. The court noted in particular the portage of Lewis and Clark’s expedition. *Ibid.* Yet that very portage reveals the problem with the Montana Supreme Court’s analysis. Leaving behind their larger boats, Lewis and Clark transported their supplies and some small canoes about 18 miles over land, which took at least 11 days and probably more. See *Lewis and Clark Journals* 126–152; *9 Journals of the Lewis & Clark Expedition* 173; *Dear Brother* 109. Even if portage were to take travelers only one day, its significance is the same: it demonstrates the need to bypass the river segment, all because that part of the river is nonnavigable. Thus, the Montana Supreme Court was wrong to state, with respect to the Great Falls

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reach and other stretches of the rivers in question, that portages “are not sufficient to defeat a finding of navigability.” 355 Mont., at 438, 229 P. 3d, at 446. In most cases, they are, because they require transportation over land rather than over the water. This is such a case, at least as to the Great Falls reach.

In reaching its conclusion that the necessity of portage does not undermine navigability, the Montana Supreme Court misapplied this Court’s decision in *The Montello*, 20 Wall. 430. See 355 Mont., at 438, 229 P. 3d, at 446. The consideration of portage in *The Montello* was for a different purpose. The Court did not seek to determine whether the river in question was navigable for title purposes but instead whether it was navigable for purposes of determining whether boats upon it could be regulated by the Federal Government. 20 Wall., at 439, 445. The primary focus in *The Montello* was not upon navigability in fact but upon whether the river was a “navigable water of the United States.” *Id.*, at 439, 443. The latter inquiry is doctrinally distinct. It turns upon whether the river “forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water.” *Id.*, at 439 (citing *The Daniel Ball*, 10 Wall. 557). It is language similar to “continued highway” that Montana urges the Court to import into the title context in lieu of the Court’s established segmentation approach. Brief for Respondent 42–43, n. 16.

The Montello reasonably concluded that the portages required in that case did not prevent the river from being part of a channel of interstate commerce. Portages continued that channel because goods could be successfully transported interstate, in part upon the waters in question. This provided sufficient basis to regulate steamboats at places where those boats could and did, in fact, navigate

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portions of the river. 20 Wall., at 445. Here, by contrast, the question regards ownership of the bed under river segments that the Montana Supreme Court, by calling them “interruptions in the navigation,” 355 Mont., at 442, 229 P. 3d, at 449, acknowledges were nonnavigable. The reasoning and the inquiry of *The Montello* does not control the outcome where the quite different concerns of the riverbed title context apply.

Having clarified that portages may defeat navigability for title purposes, and do so with respect to the Great Falls reach, the Court sees no evidence in the record that could demonstrate that the Great Falls reach was navigable. Montana does not dispute that overland portage was necessary to traverse that reach. Indeed, the State admits “the falls themselves were not passable by boat at statehood.” Brief for Respondent 10. And the trial court noted the falls had never been navigated. App. to Pet. for Cert. 137. Based on these statements, this Court now concludes, contrary to the Montana Supreme Court’s decision, that the 17-mile Great Falls reach, at least from the head of the first waterfall to the foot of the last, is not navigable for purposes of riverbed title under the equal-footing doctrine.

This Court also determines, based on evidence in the record, that there is a significant likelihood that some of the other river stretches in dispute also fail the federal test of navigability for the purpose of determining title. For example, as to the disputed segment of the Clark Fork River, the Montana Supreme Court incorrectly stated the sole evidence for nonnavigability “consists of conclusory statements . . . without any specific factual support.” 355 Mont., at 440, 229 P. 3d, at 448. In fact, PPL introduced a report of the U. S. Army Corps of Engineers from 1891, two years after Montana’s date of statehood, documenting that the portion of the Clark Fork river between Missoula and Lake Pend Oreille (which includes the location of

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PPL's Thompson Falls facility) had a fall of about 1,100 feet in 250 miles and "is a mountain torrential stream, full of rocks, rapids, and falls, . . . utterly unnavigable, and incapable of being made navigable except at an enormous cost." 2 H. R. Exec. Doc., pt. 5, at 3250; see App. 379–380 (Docket No. 169). The report based its conclusions on various failed attempts to navigate the river. It found the Thompson Falls "a complete obstruction to navigation" and the river around that area "exceedingly rapid, rough, and full of rocks." 2 H. R. Exec. Doc., pt. 5, at 3251. This was consistent with a 1910 Federal District Court decree. The decree adjudicated a title dispute between two private parties over the riverbed near and under Thompson Falls and declared the river at that place "was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation." *Steele v. Donlan*, Equity No. 950 (CC D Mont., July 19, 1910), p. 1; see App. 380–381 (Docket No. 169). While the ultimate decision as to this and the other disputed river stretches is to be determined, in the first instance, by the Montana courts upon remand, the relevant evidence should be assessed in light of the principles discussed in this opinion.

B

The Montana Supreme Court further erred as a matter of law in its reliance upon the evidence of present-day, primarily recreational use of the Madison River. Error is not inherent in a court's consideration of such evidence, but the evidence must be confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood. Navigability must be assessed as of the time of statehood, and it concerns the river's usefulness for "trade and travel," rather than for other purposes. See *Utah*, 283 U. S., at 75–76. Mere use by initial explorers or trap-

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pers, who may have dragged their boats in or alongside the river despite its nonnavigability in order to avoid getting lost, or to provide water for their horses and themselves, is not itself enough. See *Oregon*, 295 U. S., at 20–21 (evidence that “trappers appear to have waded or walked” through the river, dragging their boats rather than floating them, had “no bearing on navigability”).

True, river segments are navigable not only if they “[were] used,” but also if they “[were] susceptible of being used,” as highways of commerce at the time of statehood. *Utah*, *supra*, at 76 (internal quotation marks omitted). Evidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood. See *Appalachian Elec. Power Co.*, 311 U. S., at 416 (“[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation”); *Utah*, 283 U. S., at 82 (fact that actual use has “been more of a private nature than of a public, commercial sort . . . cannot be regarded as controlling”). Similarly, poststatehood evidence, depending on its nature, may show susceptibility of use at the time of statehood. See *id.*, at 82–83 (“[E]xtensive and continued [historical] use for commercial purposes” may be the “most persuasive” form of evidence, but the “crucial question” is the potential for such use at the time of statehood, rather than “the mere manner or extent of actual use”).

Evidence of present-day use may be considered to the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood. For the susceptibility analysis, it must be determined whether trade and travel could have been conducted “in the customary modes of trade and travel on water,” over the relevant river segment “in [its] natural and ordinary condition.” *Id.*, at 76 (internal quotation marks omitted). At a minimum, therefore, the party seeking to use present-day evidence for title

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purposes must show: (1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river's poststatehood condition is not materially different from its physical condition at statehood. See also *Oregon, supra*, at 18 (finding that scientific and historical evidence showed that the physical condition of particular water bodies had not varied substantially since statehood in a way that might affect navigation). If modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has little or no bearing on navigability at statehood.

The Montana Supreme Court opinion offered no indication that it made these necessary findings. The court concluded the evidence of present-day use of the Madison was probative of its susceptibility of use at statehood, but there is no apparent basis for its conclusion. 355 Mont., at 442–443, 438–439, 229 P. 3d, at 449, 446–447. The court did not find the watercraft similar to those used at the time of statehood, and the State's evidence of present-day use for recreational fishing did not indicate what types of boats are now used. App. 46–48. Modern recreational fishing boats, including inflatable rafts and lightweight canoes or kayaks, may be able to navigate waters much more shallow or with rockier beds than the boats customarily used for trade and travel at statehood.

As to the river's physical condition, the Montana Supreme Court did not assess with care PPL's evidence about changes to the river's flow and the location and pattern of its channel since statehood. The affidavit of PPL's expert in fluvial geomorphology—the study of river-related landforms—at least suggests that as a result of PPL's dams, the river has become “less torrential” in high flow periods and less shallow in low flow periods. App. 575–577 (Docket No. 170). Thus, the river may well be

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easier to navigate now than at statehood.

The Montana Supreme Court altogether ignored the expert's reasoning about the past condition of the river's channels and the significance of that information for navigability. Further, contrary to the Montana Supreme Court's suggestion, the expert's affidavit was not mere evidence of change in "seasonal variations" of water depth. 355 Mont., at 440, 229 P. 3d, at 448. It provided meaningful evidence that the river's conditions had changed since statehood in ways that made present-day navigation of the river easier in all seasons than it was at the relevant time. While the Montana court was correct that a river need not be susceptible of navigation at every point during the year, neither can that susceptibility be so brief that it is not a commercial reality. Against this background, the present-day recreational use of the river did not bear on navigability for purposes of title under the equal-footing doctrine. The Montana Supreme Court's reliance upon the State's evidence of present-day, recreational use, at least without further inquiry, was wrong as a matter of law.

C

The above analysis is sufficient to require reversal of the grant of summary judgment to Montana. Therefore, the Court declines to decide whether the Montana Supreme Court further erred as to the burden of proof regarding navigability.

D

As a final contention, the State of Montana suggests that denying the State title to the riverbeds here in dispute will undermine the public trust doctrine, which concerns public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses. Brief for Respondent 20, 24–26. This suggestion underscores the State's misapprehension of the equal

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footing and public trust doctrines.

The public trust doctrine is of ancient origin. Its roots trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country. See *Coeur d'Alene*, 521 U. S., at 284–286; *Illinois Central R. Co. v. Illinois*, 146 U. S. 387, 458 (1892); D. Slade, Putting the Public Trust Doctrine to Work 3–8, 15–24 (1990); see, e.g., *National Audubon Soc. v. Superior Court of Alpine Cty.*, 33 Cal. 3d 419, 433–441, 658 P. 2d 709, 718–724 (1983); *Arnold v. Mundy*, 6 N. J. L. 1, 9–10 (1821). Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, see *Coeur d'Alene*, *supra*, at 285 (*Illinois Central*, a Supreme Court public trust case, was “necessarily a statement of Illinois law”); *Appleby v. City of New York*, 271 U. S. 364, 395 (1926) (same), subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power. While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, see *Shively*, 152 U. S., at 49, 15–17, 24, 46, the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States 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.

V

As the litigation history of this case shows, Montana filed its claim for riverbed rent over a century after the first of the dams was built upon the riverbeds. Montana had not sought compensation before then, despite its full awareness of PPL’s hydroelectric projects and despite the State’s own participation in the projects’ federal licensing

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process. While this Court does not reach the question, it may be that by virtue of the State's sovereignty, neither laches nor estoppel could apply in a strict sense to bar the State's much belated claim. Still, the reliance by PPL and its predecessors in title upon the State's long failure to assert title is some evidence to support the conclusion that the river segments were nonnavigable for purposes of the equal-footing doctrine.

The Montana Supreme Court's ruling that Montana owns and may charge for use of riverbeds across the State was based upon an infirm legal understanding of this Court's rules of navigability for title under the equal-footing doctrine. As the Court said in *Brewer-Elliott*, "It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked." 260 U. S., at 88.

* * *

The judgment of the Montana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.