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Just Around the Riverbed: Reconciling Navigability Rules in North Carolina

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Just Around the Riverbed: Reconciling Navigability Rules in North Carolina

ABSTRACT

Entrenched in the common law, North Carolina’s public trust doctrine applies to waterways and their underlying riverbeds—protecting them from misuse and adverse possession—so long as the waterways are navigable in fact. In North Carolina v. Alcoa Power Generating, Inc., the United States Court of Appeals for the Fourth Circuit veered away from the North Carolina common law rules governing navigability and instead applied the more stringent federal test. The differences between the current North Carolina common law and federal navigability tests for waterways illustrate the state’s sovereign interests, and why the Fourth Circuit erred in applying the federal regime. This Comment explores the present and future ramifications of the Alcoa decision on public trust jurisprudence in North Carolina and other original states.

Public trust doctrine cases implicate unique choice of law considerations. By disregarding common law precedent dating back to the American Revolution, the Fourth Circuit’s decision disrupts the delicate balance of federalism between state and federal courts. The present consequences of the Fourth Circuit’s decision include public policy concerns and clouded land titles in North Carolina. The future ramifications include an expansion of federal question jurisdiction and an upheaval of common law navigability rules in the original thirteen states.

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INTRODUCTION

The public trust doctrine is an inherent common law concept that requires the government to protect public lands and resources for its citizens’ use and enjoyment.¹ Under the doctrine, the government acts as a trustee—holding public lands and resources in trust, subject to certain rules and limitations.² Because the government does not own public trust lands in fee simple, it may only use and license natural resources to benefit the public interest.³ Private and public uses of public waters and other natural resources may not impair the rights of future generations.⁴

North Carolina applies the public trust doctrine to all navigable waterways and their beds thereunder—allowing rivers and riverbeds to be

1. Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J. L. & POL’Y 281, 288 (2014) (“The public trust doctrine is one of these inherent rights that pre-dates the United States Constitution.”).

2. *Id.* at 286–87.

3. *Id.*

4. *Id.* at 287–88. The doctrine “embodies this idea that every generation has a usufructuary right in the resources of the Earth, and those interests are protected by the inherently limited ownership allowed in natural resources.” *Id.* at 288.

held in a public trust for the use and enjoyment of citizens of the state.⁵ As one of the thirteen original states, North Carolina has recognized public trust interests in its waterways since before the American Revolution.⁶ Accordingly, North Carolina courts apply their own common law rules to determine whether a waterway is navigable for title purposes.⁷ Over the last two hundred years, our state courts have defined and expanded the doctrine as a judicial tool aimed at correcting government mistakes that jeopardize public trust interests.⁸

North Carolina's unique public trust doctrine continues to define the scope of private and public real property interests across the state. Under the current statutory scheme, if a trial court finds the waterway is navigable, then the waterway is subject to the public trust doctrine and protected from adverse possession.⁹ If a trial court finds the waterway is not navigable, then North Carolina's Marketable Title Act applies, and private actors can gain marketable title to the waterway and its underlying riverbed, via adverse possession.¹⁰ North Carolina's test for determining navigability is exceptionally broad, allowing for expansive public use rights and limited private ownership.¹¹

In *North Carolina v. Alcoa Power Generating, Inc.*, the United States Court of Appeals for the Fourth Circuit disregarded North Carolina's specific common law rules for navigability.¹² In this state-level quiet title action

5. *Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 210 (N.C. Ct. App. 2010).

6. *Wilson v. Forbes*, 13 N.C. 21, 21, 2 Dev. 30, 30 (1828); see *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc. (Alcoa Power)*, 853 F.3d 140, 157 (4th Cir. 2017) (King, J., dissenting) (citing N.C. CONST. OF 1776, Decl. of Rights § 25), *cert. denied*, 138 S. Ct. 981 (2018).

7. See generally *Ward v. Willis*, 51 N.C. 189, 190, 1 Jones 183, 185 (1858) (mirroring England in applying common law tests to determine ownership of land under waterways). Navigability for title purposes generally means "if a body of water in its natural condition can be navigable by watercraft," then it is subject to the public trust doctrine. *Gwathmey v. State ex rel. Dep't of Env't, Health & Nat. Res.*, 464 S.E.2d 674, 682 (N.C. 1995). If a waterway is found to be unnavigab[le], i.e., it cannot support watercraft in its natural condition, then the waterway and its riverbed are generally privately owned. See *id.* at 679.

8. *Torres & Bellinger*, *supra* note 1, at 286–95; see Brief for American Whitewater et al. as Amici Curiae Supporting Petitioner at 17–18, *Alcoa Power*, 853 F.3d 140 (4th Cir. 2017) (No. 17-683).

9. N.C. GEN. STAT. § 1-45.1 (2017); see *Fish House, Inc.*, 693 S.E.2d at 211.

10. N.C. GEN. STAT. §§ 1-45.1, 47B-2.

11. 2 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 16.03 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2016) [hereinafter WEBSTER'S]; see *Town of Nags Head v. Richardson*, 817 S.E.2d 874, 882–83 (N.C. Ct. App. 2018) (discussing public rights attaching to public lands in North Carolina).

12. *Alcoa Power*, 853 F.3d at 151–52; Brief for Law Professors as Amici Curiae Supporting Petitioner at 1–2, *Alcoa Power*, 853 F.3d 140 (No. 17-683) ("U.S. Court of

regarding the Yadkin River's riverbed, the court applied the more stringent federal test for navigability.¹³ While the general steps of analysis remain the same, the federal test is significantly more narrow than North Carolina's rules and accordingly limits public trust rights.¹⁴ The court concluded that Alcoa gained title to the Yadkin riverbed because the federal test for navigability determined the Yadkin River was not navigable.¹⁵

As a result of the *Alcoa* decision, a private corporation now owns a portion of the riverbed under North Carolina's Yadkin River.¹⁶ This corporation no longer operates any facilities in the state, but continues to charge North Carolinians \$40 million annually for hydroelectric power from its four dams.¹⁷

The potential ramifications of the Fourth Circuit's ruling violate principles of federalism and public policy rationales inherent in the public trust doctrine. In its petition for certiorari, the State of North Carolina suggested "the Fourth Circuit altered sovereign property rights held by North Carolina (and other original [s]tates) since before the United States was even formed."¹⁸ The court thus "greatly expanded federal court jurisdiction in an area long thought to be reserved to the original states and their courts."¹⁹

This Comment explores present and future ramifications of the Fourth Circuit's interpretation of North Carolina's public trust doctrine. Part I presents an overview of the procedural posture of this litigation, including an explanation of the Fourth Circuit's application of the federal navigability test in *North Carolina v. Alcoa Power Generating, Inc.* Part II explains how the Fourth Circuit erred in its decision and disregarded precedent by: (1) outlining the history of North Carolina's development of its public trust doctrine, and describing the state's current navigability test; (2) contrasting North Carolina's navigability rules with the federal test; and (3) by

Appeals for the Fourth Circuit veered from established precedent and crafted new federal constitutional law that undermines state sovereignty over their submerged lands. The decision sweeps aside centuries of state law . . .").

13. *Alcoa Power*, 853 F.3d at 151–52.

14. See generally Rachael Lipinski, *The Dividing Line: Applying the Navigability-for-Title Test After PPL Montana*, 91 OR. L. REV. 247, 263–71 (2012) (discussing the federal navigability test).

15. *Alcoa Power*, 853 F.3d at 151–52.

16. Ken Otterbourg, *Alcoa and the Great North Carolina Power Grab*, FORTUNE (Nov. 30, 2010), <https://perma.cc/QCW8-WP9C>; Ritchie Starnes, *U.S. Supreme Court Refuses to Hear State's Appeal on Alcoa*, SALISBURY POST (Feb. 21, 2018, 12:00 AM), <https://perma.cc/ZT28-PC64>.

17. Otterbourg, *supra* note 16. Alcoa sold its four dams to Cube Hydro Carolinas in February 2017. *History*, CUBE HYDRO CAROLINAS, <https://perma.cc/NXJ4-S4DG>.

18. Petition for Writ of Certiorari at 13, *Alcoa Power*, 853 F.3d 140 (No. 17-683).

19. Brief for Law Professors, *supra* note 12, at 5.

considering underlying choice of law rationales inherent in the public trust doctrine and sovereign property rights. Finally, Part III discusses the lessons learned from this unique case, and provides cautionary advice for states asserting their public trust rights as well as courts litigating those disputes.²⁰

I. NORTH CAROLINA V. ALCOA POWER GENERATING, INC.: A QUIET TITLE ACTION IN THE FOURTH CIRCUIT

A. *Factual and Procedural Background*

Flowing through northwestern North Carolina, the Yadkin River is one of the state's longest rivers and is also part of the second largest river basin in the state.²¹ Beginning in 1839, the North Carolina General Assembly authorized the construction of hydroelectric dams along the Yadkin River.²² Legislative acts incorporated Alcoa's predecessors in title in the early 1900s to 1950s, allowing power companies to acquire deeds to the land surrounding the river and construct three dams.²³ After the enactment of the Federal Power Act, Alcoa filed for a license from the Federal Power Commission in 1956 to build a fourth dam.²⁴ The Federal Power Commission then issued a fifty-year license to Alcoa to operate four dams in 1958.²⁵ When its fifty-year license was about to expire, Alcoa filed a license renewal application with the Federal Energy Regulatory Commission in 2006.²⁶ The state government did not object to Alcoa's claim of ownership at that time.²⁷

20. In the interest of brevity, this Comment does not address the merits regarding Alcoa's chain of title to the riverbed of the disputed portion of the Yadkin River. This Comment merely argues that should this issue come before a federal court again in one of the thirteen original states, the case should be remanded to state court or that particular state's common law test should apply.

21. *A Story Map: Yadkin-Pee Dee River Basin*, N.C. DEP'T OF ENVTL. QUALITY, <https://perma.cc/4BJQ-BZMP> (last visited May 5, 2019); *About the River*, YADKIN RIVERKEEPER, <https://perma.cc/SH2G-BL77> (last visited May 5, 2019).

22. North Carolina *ex rel.* N.C. Dep't of Admin. v. Alcoa Power Generating, Inc., 135 F. Supp. 3d 385, 388 (E.D.N.C. 2015). For ease of the reader, the parties will be referred to as "the State" and "Alcoa" respectively.

23. *Id.* at 388–89.

24. Alcoa had earlier filed an application in 1937, so the 1958 application was actually the second application. Alcoa told the Federal Power Commission it owned title to around sixty percent of the land and water rights to the later disputed thirty-eight-mile segment in order to obtain the 1958 license. *Id.* at 389.

25. *Id.*

26. *Id.*

27. *Id.*

On August 2, 2013, the State of North Carolina, by and through the North Carolina Department of Administration, filed a civil suit against Alcoa Power Generating, Inc. in Wake County Superior Court.²⁸ The State sought a declaratory judgment to settle its title in trust to the riverbed under a thirty-eight mile stretch of the Yadkin River in Rowan, Davie, Davidson, Stanly, and Montgomery counties.²⁹

In its complaint, the State admitted that Alcoa's 2006 application for federal license renewal put it on notice that Alcoa claimed ownership of the riverbed under the Yadkin River.³⁰ However, the State argued it never granted, conveyed, or relinquished its ownership interest in the Yadkin River's riverbed to Alcoa.³¹ Instead, it "conditionally permitted" Alcoa to construct four dams along the river in order to promote economic development.³² The State contended Alcoa's continued operation of its aluminum smelter, which had been in operation at the time the dams were built, was an integral part of a mutual agreement between the State and

28. Complaint, North Carolina *ex rel.* N.C. Dep't of Admin. v. Alcoa Power Generating, Inc. (Wake Cty. Super. Ct. 2013) (No. 13-CVS-010477); *see also* Matthew Burns, *State Sues Over Ownership of Yadkin River*, WRAL.COM (Aug. 2, 2013), <https://perma.cc/VZZ8-8BW5>.

29. Complaint, *supra* note 28, at 1, 8–9. The thirty-eight-mile portion of the Yadkin River in dispute is hereinafter referred to as the "relevant segment."

30. *Id.* at 8.

31. *Id.* at 4.

32. The four hydroelectric dams include: (1) the High Rock Dam; (2) the Narrows (Badin) Dam; (3) the Falls Dam; and (4) the Tuckertown Dam. *Id.* at 3.

Alcoa.³³ When Alcoa permanently shut down its aluminum smelter in April 2010, the State claimed Alcoa's actions altered the original agreement.³⁴

On September 3, 2013, Alcoa filed a notice of removal to federal court on the basis of federal question jurisdiction—arguing United States Supreme Court precedent showed a state's riverbed title claim turned on the federal test for navigability.³⁵ The State then motioned to remand and argued its well-pleaded complaint contained no federal question.³⁶ The United States District Court for the Eastern District of North Carolina denied the State's motion.³⁷ After a hearing solely on the issue of navigability in May 2015,

33. Alcoa operated an aluminum smelting plant powered by the Yadkin River in Badin, North Carolina from 1916 to 2010. *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 135 F. Supp. 3d 385, 388 (E.D.N.C. 2015). Regarding the agreement, the Complaint alleged in pertinent part:

Before the mid-twentieth century, Alcoa was operating a large aluminum smelting plant in Badin, Stanly County, North Carolina that employed a large number of the area's residents in high-paying industrial jobs. This plant also spurred the creation and subsequent maintenance of a substantial amount of economically significant indirect employment and business development in the area and the region.

Alcoa's Badin aluminum smelting plant was powered and was made economically viable (and highly profitable) by electricity generated by the waters of the Yadkin River

Upon information and belief, by the late second half of the twentieth century, if not before that time, the profits earned by the operation of the [d]ams and Alcoa's Badin aluminum smelting plant had re-paid the investment costs of building the [d]ams and the smelting plant.

Complaint, *supra* note 28, at 4. The district court, however, found the "understanding" was not "memorialized." *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 135 F. Supp. 3d 385, 388 (E.D.N.C. 2015).

34. Complaint, *supra* note 28, at 5–7. After April 2010, Alcoa continued to profit from the hydroelectric dams "without providing the people of North Carolina with any commensurate economic benefit in return." *Id.* at 5; *see also* Judi, *Momentum Builds to Keep Yadkin River in Public Hands*, YADKIN RIVERKEEPER (Sept. 6, 2013, 12:00 AM), <https://perma.cc/7PXX-ZQNF>.

35. Notice of Removal at 1–8, *North Carolina ex rel. N.C. Dep't of Admin v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479 (E.D.N.C. 2013) (No. 5:13-cv-00633-BO).

36. Motion to Remand at 1–5, *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479 (E.D.N.C. 2013) (No. 5:13-cv-00633-BO); Memorandum in Support of Plaintiff's Motion to Remand and Alternative Motion for Abstention at 1–18, *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479 (E.D.N.C. 2013) (No. 5:13-cv-00633-BO).

37. The court concluded, "a declaration of judgment under state law that the State of North Carolina owns the portions of the Yadkin River bed at issue necessarily turns on construction of federal law." *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479, 481 (E.D.N.C. 2013).

the court determined the disputed river segment was not navigable, and a few months later found Alcoa owned the segment of the Yadkin's riverbed.³⁸

On April 3, 2017, the United States Court of Appeals for the Fourth Circuit affirmed the district court's ruling, and concluded federal common law properly determined title ownership in this case.³⁹ The majority opinion drew a thirty-seven-page dissent.⁴⁰ Despite the robust dissent, the court denied the State's petition for a rehearing en banc by a one vote margin.⁴¹ On February 20, 2018, the United States Supreme Court denied the State's petition for certiorari.⁴²

B. *The Fourth Circuit's Rationale*

The Fourth Circuit held that the district court properly found Alcoa had clear title to the relevant segment of the Yadkin River.⁴³ Specifically, the Fourth Circuit concluded the federal navigability test, as outlined in *PPL Montana, LLC v. Montana*, was the proper test to determine navigability of a waterway for title disputes.⁴⁴ In *PPL Montana*, the United States Supreme Court recited the basic federal test for navigability:

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

38. On May 6, 2015, at a hearing solely on the issue of navigability, the district court found the State failed to prove the relevant segment was navigable at statehood. *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2015 WL 2131089, at *4–6 (E.D.N.C. 2015). Alcoa then moved for summary judgment, and argued it obtained valid title to the Yadkin riverbed via North Carolina's Real Property Marketable Record Title Act, adverse possession, and laches. *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 135 F. Supp. 3d 385, 390 (E.D.N.C. 2015). On September 28, 2015, the court granted Alcoa's motion for summary judgment, and found Alcoa owned the segment of the riverbed via the Marketable Record Title Act and adverse possession. *Id.* at 396.

39. *Alcoa Power*, 853 F.3d 140, 140–55 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018).

40. *Id.* at 155–73 (King, J., dissenting).

41. *Id.*; Petition for Writ of Certiorari, *supra* note 18, at 3.

42. *North Carolina v. Alcoa Power Generating, Inc.*, 138 S. Ct. 981 (2018).

43. *Alcoa Power*, 853 F.3d at 155.

44. The Fourth Circuit first concluded “the constitutional nature of state ownership of navigable waters” was a proper basis for federal question jurisdiction pursuant to the equal footing doctrine. *Id.* at 147–48. In a footnote, the court explained whether or not North Carolina's status as one of the original thirteen states demanded a separate rule than *PPL Montana*. *Id.* at 146, n.2. This oversimplification of federal question jurisdiction is discussed *infra* Parts II.C, III.A.

commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.⁴⁵

The Fourth Circuit reviewed the district court's finding of fact under the *PPL Montana* navigability rule for clear error.⁴⁶ Because a key holding in *PPL Montana* provides that portages⁴⁷ defeat navigability, the court found expert testimony establishing "at least five named waterfalls, representing vertical drops of five to seven feet" along the river outcome determinative.⁴⁸ Thus, the Fourth Circuit upheld the district court's finding that the relevant segment of the Yadkin River was not navigable—turning a blind eye to an 1885 legislative act declaring the entire Yadkin River a navigable public highway.⁴⁹

II. THE FOURTH CIRCUIT ERRED BY APPLYING THE FEDERAL NAVIGABILITY REGIME

Beginning in the 1710s, North Carolina has created and expanded its own common law system regulating the public lands it received directly from the Crown of England.⁵⁰ Since the state assumed all rights of sovereignty in 1776, North Carolina's public trust doctrine developed distinctly from other states.⁵¹ Previous case law in both state and federal courts have applied North Carolina common law rules on navigability in title disputes over real property.⁵² The Fourth Circuit should have applied North Carolina's

45. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 592 (2012) (quoting *Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

46. *Alcoa Power*, 853 F.3d at 151.

47. "Portage is the act of carrying or otherwise transporting boats or goods overland between navigable waters, often around a waterborne obstruction that otherwise prevents navigation." Jared H. Jones, Annotation, *Portage Necessity as Affecting Navigability of Waterway Under Nonenvironmental Federal Law*, 3 A.L.R. Fed. 2d 375, 382–83 (2005).

48. *Alcoa Power*, 853 F.3d at 152.

49. *Id.* at 153; see Act of March 4, 1885, ch. 212, 1885 N.C. Sess. Laws 389 (declaring the Great Pee Dee and Yadkin rivers public highways).

50. Valerie B. Spalding, *The Pearl in the Oyster: The Public Trust Doctrine in North Carolina*, 12 CAMPBELL L. REV. 23, 33–46 (1989); see also Thomas W. Earnhardt, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina*, 49 N.C. L. REV. 888, 896–907 (1971) (providing an outdated but detailed review of the doctrine in North Carolina prior to the 1970s).

51. Earnhardt, *supra* note 50, at 892; Logan Starr, Note, *The High Court Wades into State-Law Water Allocation*, 62 DUKE L.J. 1425, 1437–38 (2013); see N.C. CONST. OF 1776, Decl. of Rights § 25.

52. *Swan Island Club, Inc. v. Yarbrough*, 209 F.2d 698, 699–700 (4th Cir. 1954); *Gwathmey v. State ex rel. N.C. Dep't of Env't, Health, & Nat. Res.*, 464 S.E.2d 674, 679 (N.C. 1995).

common law definition of navigability in *North Carolina v. Alcoa Power Generating, Inc.*⁵³

A. *North Carolina's Public Trust Doctrine*

1. *Common Law Overview*

The public trust doctrine stems from English common law, brought over when colonists arrived from England.⁵⁴ North Carolina's early parliamentary statutes adopted English common law in 1711 and 1715, and its early courts first used an "ebb-and-flow" test to determine which waterways were subject to the public trust doctrine.⁵⁵ When North Carolina declared independence from England in 1776, the State acquired title to "all the territories, seas, waters and harbors, with their appurtenances" within its borders.⁵⁶ However, the English public trust doctrine did not account for the interior rivers and other non-tidal waters unique to North Carolina.⁵⁷ After consideration of the unique topography of the state, the North Carolina Supreme Court created a new navigability test in 1828.⁵⁸ In *Wilson v. Forbes*, the court held a waterway was navigable if it was "wide and deep enough for sea vessels to navigate . . . without any obstruction."⁵⁹ The court declared the lunar tides test "obsolete" and no longer part of the state's common law.⁶⁰

Early case law interpreting North Carolina's new navigability test—modernly called the "navigable in fact" test—created the following rule of construction: when a waterway is found to be navigable, the court must presume the General Assembly did not intend to convey lands in a manner that would impair public trust rights.⁶¹ This presumption is overcome only

53. *Alcoa Power*, 853 F.3d at 140–55.

54. Earnhardt, *supra* note 50, at 892. For a more detailed analysis of English common law and its modification in the states, see Spalding, *supra* note 50, at 29–38.

55. *Wilson v. Forbes*, 13 N.C. 21, 21, 2 Dev. 30, 30 (1828); William E. Nelson, *Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660-1775*, 88 N.C. L. REV. 2133, 2137–39 (2010); Spalding, *supra* note 50, at 46; see N.C. GEN. STAT. § 4-1 (2017) (formally adopting common law reception after independence in 1778).

56. N.C. CONST. OF 1776, Decl. of Rights § 25; see *Alcoa Power*, 853 F.3d at 158 (King, J., dissenting); Spalding, *supra* note 50, at 46.

57. Spalding, *supra* note 50, at 47.

58. *Wilson*, 13 N.C. at 21, 2 Dev. at 30; Spalding, *supra* note 50, at 47.

59. *Wilson*, 13 N.C. at 24, 2 Dev. at 35.

60. *Id.* at 24–25, 2 Dev. at 35; see *Gwathmey v. State ex rel. N.C. Dep't of Env't, Health, & Nat. Res.*, 464 S.E.2d 674, 679–80 (N.C. 1995) (internal citation omitted).

61. *Wilson*, 13 N.C. at 21, 2 Dev. at 30; 2 WEBSTER'S, *supra* note 11, at § 16.04 ("The North Carolina Supreme Court has approved . . . the test for navigability is whether the body

by a special legislative grant expressly conveying the underlying lands in fee to a private party, without reserving any public trust rights.⁶² Still today, the legislature may only grant public trust land to a private party where a “sufficient public purpose exists.”⁶³

Several statutes and a state constitutional amendment impose additional duties on North Carolina as trustee under the public trust doctrine. In 1971, the North Carolina General Assembly passed a law declaring “the preservation of certain rivers or segments of rivers in their natural and scenic condition constitutes a beneficial public purpose.”⁶⁴ The next year, the people of North Carolina voted to commemorate the public policy behind the public trust doctrine in a state constitutional amendment, which reads in pertinent part: “It shall be the policy of this [s]tate to conserve and protect its lands and waters for the benefit of all its citizenry”⁶⁵ Then, in 1985, the legislature passed a law protecting public trust lands from adverse possession by private parties.⁶⁶ North Carolina General Statute section 1-45.1 reads as follows:

Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession. As used in this section, “public trust rights” means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State. They include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in

of water in question is navigable in fact.”) (footnote omitted); *see also* *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 828 (N.C. 1988) (noting legislative exception).

62. *Wilson*, 13 N.C. at 21, 2 Dev. at 30; *Ward v. Willis*, 51 N.C. 189, 190–91, 1 Jones 183, 185–186 (1858); *Spalding*, *supra* note 50, at 49.

63. *Spalding*, *supra* note 50, at 49; *see Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 194 (N.C. Ct. App. 2015) (“[T]he General Assembly may convey ownership of public trust land to a private party, but will be considered to have retained public trust rights in that land unless specifically relinquished in the transferring legislation by the clearest and most express terms.” (internal citation and quotation marks omitted)).

64. N.C. GEN. STAT. § 113A-31 (1973) (current version at N.C. GEN. STAT. § 143B-135.142 (2017)) (“The General Assembly finds that certain rivers of North Carolina possess outstanding natural, scenic, educational, geological, recreational, historic, fish and wildlife, scientific and cultural values of great present and future benefit to the people. . . . It is further declared that the preservation of certain rivers or segments of rivers in their natural and scenic condition constitutes a beneficial public purpose.”).

65. N.C. CONST. art. XIV, § 5 (1972); *see also State ex rel. Rohrer*, 369 S.E.2d at 831 (“Our state constitution mandates the conservation and protection of public lands and waters for the benefit of the public.”).

66. Act of May 30, 1985, ch. 277, 1985 N.C. Sess. Laws 227 (declaring the existing policy of the state that title to land subject to public trust rights may not be acquired by adverse possession). This session law is codified at N.C. GEN. STAT. § 1-45.1 (2017).

the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.⁶⁷

North Carolina courts continue to protect the state's natural resources by limiting privatization.⁶⁸

2. North Carolina's Current Navigability Test

The modern North Carolina Supreme Court case explaining the current navigability rules under the state's public trust doctrine is *Gwathmey v. State*.⁶⁹ *Gwathmey* involved a title dispute, between private landowners and the State, to land under marshlands and an adjoining creek.⁷⁰ The trial court found the adjoining creek was navigable in fact and thus navigable as a matter of law.⁷¹

Before addressing the merits, the court recognized the public trust doctrine as a judicial tool used to protect inherent public rights in state-owned submerged land.⁷² The court then stated the current navigability test under North Carolina's public trust doctrine:

[I]f a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine.⁷³

Applying this test, the court remanded the case to determine navigability of the creek by its "capacity to support *watercraft used for pleasure or commercial purposes*, not by whether they ever have actually been used for purposes of navigation."⁷⁴ The court explained that "although evidence of present or past actual navigation of the waters in question is evidence tending to support a finding that the waters are navigable in fact,

67. N.C. GEN. STAT. § 1-45.1 (2017).

68. See *Town of Nags Head v. Richardson*, 817 S.E.2d 874, 882–83 (N.C. Ct. App. 2018) (discussing local town's standing in a public trust dispute); Melissa K. Scanlan, *The Role of the Courts in Guarding Against Privatization of Important Public Environmental Resources*, 7 MICH. J. ENVTL. & ADMIN. L. 237, 264 (2018).

69. *Gwathmey v. State ex rel. N.C. Dep't of Env't, Health, & Nat. Res.*, 464 S.E.2d 674, 676–88 (N.C. 1995).

70. *Id.* at 676–77.

71. *Id.* at 677.

72. *Id.* (quoting Monica Kivel Kalo & Joseph J. Kalo, *The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. REV. 565, 572 (1986)).

73. *Id.* at 682.

74. *Id.* at 688 (emphasis added).

such evidence will not be needed in every case in order to establish navigability in fact.”⁷⁵

In 2010, the North Carolina Court of Appeals extended the public trust doctrine to land under manmade canals.⁷⁶ In *Fish House, Inc. v. Clarke*, the court held that North Carolina’s controlling law of navigability “reflects only upon the manner in which the water flows without diminution or obstruction.”⁷⁷ Thus, both manmade and artificial water flows which are “capable of navigation by watercraft” are subject to the public trust doctrine in North Carolina.⁷⁸

B. *Comparing and Contrasting North Carolina’s Common Law and Federal Navigability Rules*

At first glance, the North Carolina and federal navigability tests appear to be the same.⁷⁹ Both assert all waterways that are navigable in fact are navigable in law.⁸⁰ Additionally, artificial waterways can be subject to the public trust doctrine under both regimes.⁸¹ Although the language is similar, case law reveals that North Carolina’s common law test does more to protect public trust rights than the federal rule because of its expansive definition of navigable waterways.⁸² North Carolina’s broad navigability analysis is best illustrated through specific distinctions from, and comparisons to, the federal test.

First, the boats used to test navigability of a waterway differ in type and purpose. North Carolina’s approach focuses on a waterway’s capacity for non-commercial use boats, such as “pleasure boating,” to test whether water is navigable.⁸³ The North Carolina navigability test is sometimes referred to

75. *Id.*

76. *Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 212 (N.C. Ct. App. 2010).

77. *Id.*

78. *Id.*

79. *Alcoa Power*, 853 F.3d 140, 164 (4th Cir. 2017) (King, J., dissenting) (“On its face, North Carolina’s navigability test is somewhat similar to the federal navigability test, in that both tests weigh the question of whether waters have been or can be used by watercraft.”), *cert. denied*, 138 S. Ct. 981 (2018).

80. *Id.* at 163 (majority opinion) (quoting Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) for the federal standard); *id.* at 164 (quoting *Gwathmey v. State ex rel. N.C. Dep’t of Env’t, Health, & Nat. Res.*, 464 S.E.2d 674, 682 (N.C. 1995) for the North Carolina standard).

81. *See PPL Mont., LLC v. Montana*, 565 U.S. 576, 592 (2012) (noting case law recognizing that an artificial canal is navigable); *Fish House, Inc.*, 693 S.E.2d at 135 (“[O]ur test for navigability does not discriminate between natural and artificial waterways.”).

82. Scholars have noted that the definition of navigable waterways in North Carolina after *Gwathmey* is so broad that it “seems problematical.” 2 WEBSTER’S, *supra* note 11, at § 16.04; *see Gwathmey*, 464 S.E.2d at 674.

83. *Gwathmey*, 464 S.E.2d at 682 (internal quotation marks omitted).

as the “pleasure craft test.”⁸⁴ “Pleasure boating” may be for recreation or profit.⁸⁵ The North Carolina Supreme Court has concluded the following boats can be used to test a waterway’s navigability: “boats drawing 5 or 6 feet of water,”⁸⁶ barges,⁸⁷ flat boats,⁸⁸ and skiffs.⁸⁹ Arguably, canoes, kayaks, and other small recreational boats can also determine navigability.⁹⁰ In contrast, the federal test focuses on the commercial purposes for navigation, depending on whether “the stream or body of water is capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted.”⁹¹ Recreational use is not determinative under the federal definition.⁹² Instead, the federal test focuses on a boat’s extensive and continuous use for the purpose of commerce.⁹³ Boats used for commercial purposes typically include larger boats and ships.⁹⁴ Because the federal test does not allow small, lightweight boats to determine navigability, it is easier to find a river navigable under North Carolina common law.

Another distinction between the tests involves segmentation. Under North Carolina common law, a river may be assessed for navigability on the

84. See Letter to Richard B. Whisnant, in 1998 N.C. ATT’Y GEN. REPS. & OPINIONS 346.

85. *Fish House, Inc.*, 693 S.E.2d at 211–12.

86. *State v. Twiford*, 48 S.E. 586, 586 (N.C. 1904).

87. *Id.* at 587.

88. *State v. Duplin Canal Co.*, 91 N.C. 637, 638 (1884) (deciding a case in the context of a conviction for obstructing a navigable stream). *Cf.* *State v. Glen*, 7 N.C. (1 Jones) 321, 333 (1859) (“All the rivers, creeks and other watercourses, not embraced in the above description, but which are, in fact, sufficiently wide and deep to be navigable by boats, flats and rafts, are technically styled unnavigable, and are open to be appropriated by individuals, by grants from the State, under the entry laws.”).

89. *Gaither v. Albemarle Hospital*, 70 S.E.2d 680, 685 (N.C. 1952).

90. Letter to Richard B. Whisnant, *supra* note 84; see *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 827 (N.C. Ct. App. 2009) (concluding that a kayak trip on a creek made points of the creek navigable, but that the stream was not navigable in fact because the kayak trip only covered a short distance instead of the entire stream).

91. 78 AM. JUR. 2d *Waters* § 139 (2013) [hereinafter *Waters*] (citing *United States v. Utah*, 283 U.S. 64 (1931)).

92. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 600–01 (2012) (“Evidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood.”) (emphasis added).

93. See *United States v. Utah*, 283 U.S. 64, 76 (1931).

94. See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 8 (2007).

whole, if not limited on the face of a complaint.⁹⁵ In effect, North Carolina courts balance minor interruptions with the overall length of the river.⁹⁶ The North Carolina Court of Appeals expressly disavowed a navigability test using segmentation in *Bauman v. Woodlake Partners, LLC*.⁹⁷ In *Bauman*, the court stated segmenting a stream to determine navigability of its individual parts “would introduce considerable confusion and difficulty into the application of the public trust doctrine in North Carolina.”⁹⁸ The court concluded by stating, “We do not believe that such a result is mandated by or consistent with applicable North Carolina law and decline to adopt such an approach.”⁹⁹ The federal test, on the other hand, focuses on segmentation and mandates that courts consider a river’s navigability on a segment-by-segment basis.¹⁰⁰ Thus, the federal approach does not compare the length of unnavigable segments to the overall length of an otherwise navigable river.¹⁰¹ It limits public trust rights down to an exact point—a hodgepodge of navigable and unnavigable parts.¹⁰²

A third key distinction between the two tests is whether portages, or traveling by land around an obstacle, defeat a river’s navigability. Under North Carolina’s regime, a waterfall or portage generally does not defeat navigability.¹⁰³ In contrast, the United States Supreme Court in *PPL Montana* concluded that a need for portage to avoid waterfalls or rapids defeats navigability.¹⁰⁴ The different approaches to the types of boats to measure navigability, segmentation rules, and portages were heavy-handed in the *Alcoa* litigation; and these three differences were outcome determinative at the trial court’s hearing on navigability.¹⁰⁵

95. *Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 213 (N.C. Ct. App. 2010) (concluding that the “issue of navigability of the entire canal was properly before the trial court” because the plaintiff did not specify which portion was at issue).

96. *Broadnax v. Baker*, 94 N.C. 675, 681 (1886).

97. *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 827 (N.C. Ct. App. 2009).

98. *Id.*

99. *Id.*

100. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 598–600 (2012).

101. *Id.* at 600–01 (citing *United States v. Utah*, 283 U.S. 64, 90 (1931)).

102. *Id.* at 593–94.

103. *Broadnax v. Baker*, 94 N.C. 675, 681 (1886).

104. *PPL Mont., LLC*, 565 U.S. at 597–598; see *Jones*, *supra* note 47.

105. *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2015 WL 2131089, at *1–6 (E.D.N.C. 2015).

C. *The Fourth Circuit Should Have Applied North Carolina's Navigability Regime*

If the Fourth Circuit had applied the North Carolina common law test for navigability, the people of North Carolina would still own the Yadkin River's riverbed. The Fourth Circuit relied on the portages along the relevant segment of the river to defeat navigability, determining they were treacherous and seemingly impassible at the time of statehood.¹⁰⁶ Under the North Carolina test, such portages would not defeat the navigability of the Yadkin River on the whole.¹⁰⁷ Additionally, if North Carolina's recreational use test determined the Yadkin's navigability, then the State likely could have proven that the relevant segment was navigable by canoes or kayaks.¹⁰⁸ Instead, larger and more cumbersome "pole boats" were used to measure navigability under the federal standard.¹⁰⁹

As a matter of public policy, the presumption under both North Carolina and federal law against conveyances in fee of submerged public trust lands should prevail.¹¹⁰ By requiring express disownment of public trust rights in legislative grants, North Carolina seeks to protect the people from bungled government actions or inactions by requiring courts to look at state grants with skepticism.¹¹¹ Even if the State's argument that its agreement with Alcoa was revocable is not persuasive, in 1885 the North Carolina General

106. *Alcoa Power*, 853 F.3d 140, 152 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018). The State conceded that two waterfalls, each plunging roughly seven feet, were not susceptible to navigation for commerce. *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2015 WL 2131089, at *5 (E.D.N.C. 2015). The trial court concluded that this stipulation denied navigability for the entire relevant segment. *Id.*

107. *Broadnax*, 94 N.C. at 681.

108. The Yadkin Riverkeeper gives regular tours of the river, including a trip down the 184.5 miles to the South Carolina border, in recreational kayaks. Judi, *That was One for the Books! Tour de Yadkin Finale*, YADKIN RIVERKEEPER (July 11, 2013, 3:03 PM), <https://perma.cc/67S7-6M48>; Judi, *Yadkin Riverkeeper Announces Plan to Paddle River*, YADKIN RIVERKEEPER (Mar. 21, 2010, 2:41 PM), <https://perma.cc/VXT2-PYDA>.

109. *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2015 WL 2131089, at *3 (E.D.N.C. 2015). An expert for Alcoa described pole boats as ranging "from 30 to 70 feet long while only six to seven feet wide and could carry up to 20,000 pounds of cargo[,] . . . unable to make the turns needed to navigate around large obstacles" and particularly susceptible to capsizing. *Alcoa Power*, 853 F.3d at 152.

110. Spalding, *supra* note 50, at 43, 49; *see supra* footnotes 61–63 and accompanying text.

111. Torres & Bellinger, *supra* note 1, at 310 ("When government actions (and inactions) allow private interests to substantially impair trust resources, beneficiaries of the public trust can rely on the courts to hold the government accountable and ensure that it acts in a manner consistent with the public interest."); *see* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 508 (1970) (arguing legislative grants may be read "in conformity with the high sense of duty which the state has toward the administration of its trust lands").

Assembly declared the “Great Pee Dee and Yadkin rivers public highways.”¹¹² This declaration impliedly requires that the North Carolina common law rules govern because the legislature took affirmative steps toward asserting public trust rights in the Yadkin River. Additionally, Choice of law rules and concerns of clouding land titles further illustrate that the Fourth Circuit should have used North Carolina’s definition of navigability in *North Carolina v. Alcoa Power Generating, Inc.*

1. North Carolina Quiet Title Actions are a State Law Issue

The main differences between North Carolina and the federal definitions of navigability stem from the idea that North Carolina gained title to its riverbeds straight from the British Crown.¹¹³ By creating its own common law before the existence of the Union, North Carolina courts have held that navigability of a waterway wholly within North Carolina does not create an issue arising under the Constitution of the United States.¹¹⁴ This choice of law logic was disputed throughout the *Alcoa* litigation and ultimately rejected by the Fourth Circuit.¹¹⁵

Alcoa removed the case to federal court claiming the issue of navigability presented a federal question.¹¹⁶ However, federal question jurisdiction is generally limited in quiet title actions—and absent an interstate commerce issue, title to land under navigable waters is governed by state law.¹¹⁷ Further, declaratory judgments regarding title to real

112. Act of March 4, 1885, ch. 212, 1885 N.C. Sess. Laws 389 (declaring the Great Pee Dee and Yadkin rivers public highways); see Complaint, *supra* note 28, at 6–8.

113. See *Alcoa Power*, 853 F.3d at 157 (J. King, dissenting) (citing N.C. CONST. OF 1776, Decl. of Rights § 25); Earnhardt, *supra* note 50, at 892.

114. See Petition for Writ of Certiorari, *supra* note 18, at 18–22 (arguing that the court was required to apply state law to decide navigability). This issue is discussed further *infra* Part III.

115. *Alcoa Power*, 853 F.3d at 146–50.

116. Notice of Removal, *supra* note 35; see 28 U.S.C. §§ 1331, 1441 (2012). No diversity jurisdiction existed at the time of removal between the parties because *Alcoa* had substantial contacts in North Carolina. See 28 U.S.C. § 1332; *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

117. *Montana v. United States*, 450 U.S. 544, 551 (1981) (“The State’s power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.”); see ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 390–95 (Wolters Kluwer ed., 7th ed. 2016) (discussing the extremely limited circumstances where federal common law may be utilized by federal courts). Outside of title disputes, navigability is used to determine the federal government’s authority under the Admiralty and Commerce Clauses. For a history of navigability under the federal regulatory power, see Richard C. Ausness, *The Supreme Court and the PPL Montana Case: Examining the Relationship Between Navigability and State Ownership of Submerged Lands*, 31 VA. ENVTL. L.J. 168, 185–99 (2013).

property are inherently state court issues under *lex loci rei sitae*, or the situs rule.¹¹⁸ The situs rule, articulated by Justice Story in 1846, provides that the law of the place where the real property is located controls.¹¹⁹ Under *lex situs*, courts apply a state's common law "to determine issues in which the situs has the dominant interest."¹²⁰ Generally, federal courts should abstain from hearing state law issues involving a state's sovereign interests.¹²¹ Moreover, because North Carolina, as a trustee, has a substantial interest in protecting its citizens' public trust rights, the Fourth Circuit should have applied North Carolina common law to determine ownership of the Yadkin River's riverbed.¹²²

2. Changing the North Carolina Rule Will Likely Cloud Land Titles

North Carolina's public trust rights are embedded in its laws and court precedent. One need look no further than the North Carolina Constitution of 1776.¹²³ The Declaration of Rights expressly declares "all the territories, seas, waters and harbors . . . agreeable to the said charter of King Charles, are the right and property of the people of this [s]tate, to be held by them in sovereignty[.]"¹²⁴ North Carolina real property owners have relied on such provisions since the state's founding.¹²⁵

Providing static title record systems for "a bona fide purchaser who has relied upon record title" is a key rationale behind the situs rule.¹²⁶ Departing

118. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (AM. LAW INST. 1971); see *Sunderland v. United States*, 266 U.S. 226, 232–33 (1924) (explaining the general rule "that the tenure, transfer, control and disposition of real property are matters which rest exclusively with the state where the property lies"); 2 WEBSTER'S, *supra* note 11.

119. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.1 (6th ed. 2010).

120. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 cmt. b (AM. LAW INST. 1971).

121. Petition for Writ of Certiorari, *supra* note 18, at 22–27 (citing *Gunn v. Minton*, 568 U.S. 251 (2013) in its discussion of the limits on federal question jurisdiction); LARRY W. YACKLE, FEDERAL COURTS 513–15 (Carolina Acad. Press ed., 3d ed. 2009).

122. See Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 76–77 (2005); Spalding, *supra* note 50, at 47.

123. N.C. CONST. of 1776, Decl. of Rights § 25.

124. *Id.*

125. Brief for American Whitewater et al., *supra* note 8, at 17–18; see *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 831 (N.C. 1988) ("[F]rom our examination of the background of the case before us . . . [b]ecause of our recognition of the public trust doctrine, no title in fee can be granted to lands submerged beneath navigable waters."); *Waters*, *supra* note 91, at §137 ("[W]hat shall be deemed a navigable water within the meaning of the local rules of property in the bed of a stream is a matter of state law." (internal citation omitted)).

126. WEINTRAUB, *supra* note 119, at § 8.2.

from the rules of the situs disrupts longstanding public trust interests and creates notice issues.¹²⁷ Such a drastic change from common law precedent could strip innocent landowners of their rights in waterway cases.¹²⁸ Judge King's dissent in *Alcoa* echoed these trepidations and stated, "I am also concerned that the majority's ruling will result in a sea change with respect to judicial decisions that have already recognized North Carolina's ownership of its waters and the lands thereunder. . . . [T]he majority's ruling could cloud land titles in North Carolina."¹²⁹ Questioning titles to land under valuable waterways could open the floodgates of litigation.¹³⁰

III. FUTURE RIVERBED LITIGATION: LESSONS LEARNED

Though the public trust rights of the original thirteen states are seemingly niche issues, they are vastly important.¹³¹ If another riverbed title dispute comes before a federal court in one of the original thirteen states, the court will have to decide which navigability test to apply.¹³² Because the Fourth Circuit's choice of law "create[d] widespread discord between federal and state courts on a legal issue with important implications for federalism and property rights[.]" a potential circuit split is on the horizon in the First, Second, Third, or Eleventh Circuits.¹³³ In the event such a case comes before these federal courts, the common law of the original state in which the waterway is located should apply for two main reasons. First, because *PPL Montana*'s holding did not extend to original states. And second, the original thirteen states' public trust rights do not present a federal question. Attorney generals of original states should proceed with caution in future submerged land title disputes to ensure protection of waterways for future generations.

127. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 cmt. b (AM. LAW INST. 1971).

128. Brief for American Whitewater et al., *supra* note 8, at 17–18.

129. *Alcoa Power*, 853 F.3d 140, 162 (4th Cir. 2017) (King, J., dissenting), *cert. denied*, 138 S. Ct. 981 (2018).

130. Brief for American Whitewater et al., *supra* note 8, at 20; see Gerrit Jöbbsis, *Big Dam Successes in the Southeast*, AM. RIVERS (Aug. 31, 2018), <https://perma.cc/R2VU-8EX3> (discussing other private dam litigation in the southeast).

131. See Petition for Writ of Certiorari, *supra* note 18, at 13–15.

132. *Id.* at 24; Sean Morrison, *Public Trust or Equal Footing: A Historical Look at Public Use Rights in American Waters*, 21 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 69, 108–09 (2015) (predicting problematic choice of law concerns after the *PPL Montana* decision).

133. Petition for Writ of Certiorari, *supra* note 18, at 18. These four federal circuit courts encompass the original thirteen states. The original thirteen states are Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island. *US States: Order and Dates of Statehood*, ENCHANTED LEARNING, <https://perma.cc/7YU6-WWXT> (last visited May 8, 2019).

A. *PPL Montana's Limited Holding*

Contrary to the Fourth Circuit's interpretation, the United States Supreme Court did not categorically make public trust cases federal issues in *PPL Montana, LLC v. Montana*.¹³⁴ Federal question jurisdiction was proper in *PPL Montana* because Montana is a later admitted state whose public trust rights are subject to the equal footing doctrine.¹³⁵ The equal footing doctrine is distinctly a constitutional doctrine, while the public trust doctrine arises from common law.¹³⁶ Though both doctrines dictate title to public trust lands, they need not be intertwined.¹³⁷

The equal footing doctrine was created in reaction to the original states retaining their public trust lands upon their entry into the Union.¹³⁸ The Supreme Court first recognized the doctrine in 1845 as a means "to support the principle that each state inherited title to the submerged lands of navigable waters upon entering the union."¹³⁹ When a new state is created under Article IV, Section 3 of the United States Constitution, the equal footing doctrine provides that the state "assume[s] sovereignty on an 'equal footing' with the established States."¹⁴⁰ New states' property interests thus pass under, and subject to, the Constitution as they receive public lands from the federal government.¹⁴¹

134. *Alcoa Power*, 853 F.3d at 148 (J. King, dissenting) ("[W]hen the *PPL Montana* Court stated that 'questions of navigability for determining state riverbed title are governed by federal law,' it was only reaffirming the federal nature of the issue of navigability for title, a nature evident since the founding and recognized in cases over the course of more than 150 years."). *But see* *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012) (concluding "the public trust remains a matter of state law").

135. *PPL Mont., LLC*, 565 U.S. at 597; Morrison, *supra* note 132, at 71; see Amy Wegner Kho, Note, *What Lies Beneath Troubled Waters: The Determination of Navigable Waters in PPL Montana, LLC v. Montana*, 132 *S. Ct. 1215* (2012), 15 *U. DENV. WATER L. REV.* 489, 492–94 (2012).

136. Morrison, *supra* note 132 (quoting *PPL Mont., LLC*, 565 U.S. at 597).

137. *Id.* at 74–76.

138. Ausness, *supra* note 117, at 181.

139. Morrison, *supra* note 132, at 91 (citing *Shively v. Bowlby*, 152 U.S. 1, 27 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 216 (1845)). However, "[i]t wasn't until the 1920s that the federal courts decided that the equal footing doctrine made 'navigable waters' for purposes of title a federal, as opposed to state law, question." *Id.* at 75. The exact origin of the equal footing doctrine is discussed *infra* Part III.B.

140. U.S. CONST. art. IV, § 3, cl. 1; *Montana v. United States*, 450 U.S. 544, 551 (1981).

141. Morrison, *supra* note 132, at 74–76; Frank W. DiCasteri, *Are All States Really Equal? The "Equal Footing" Doctrine and Indian Claims to Submerged Land*, 1997 *WIS. L. REV.* 179, 182 (1997); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 *COLUM. L. REV.* 817, 817–18 (1980); see *United States v. Holt State Bank*, 270 U.S. 49, 55–56 (1926) ("Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be

The main distinction between the equal footing and public trust doctrines is the source, or grantor, of the property rights. Though both original and later admitted states gained title to public lands at statehood, only the latter received theirs directly from the federal government.¹⁴² The original thirteen states existed as sovereigns before the federal government, and received their public trusts rights straight from the British Crown.¹⁴³ The United States Supreme Court recognized this distinction in *PPL Montana*.¹⁴⁴ The Court emphasized equal footing doctrine has “constitutional foundation” while “the public trust remains a matter of state law.”¹⁴⁵ The Court explicitly noted that the equal footing doctrine turned on federal law because “a [s]tate’s title to [public trust] lands was conferred not by Congress but by the Constitution itself.”¹⁴⁶ This holding was impliedly limited to later admitted states.¹⁴⁷

B. Public Trust Rights in the Original Thirteen States Do Not “Arise Under” the Federal Constitution

For proper federal question jurisdiction, the civil controversy must “arise[e] under the Constitution, laws, or treaties of the United States.”¹⁴⁸ Whether navigability for title purposes presents a federal question depends on whether a state was one of the original thirteen states or a later admitted state.¹⁴⁹ All parties in *Alcoa* agreed that the equal footing doctrine determines public trust rights for *later* admitted states, and those rights are a

determined according to the general rule recognized and applied in the federal courts.”) (emphasis added).

142. DiCasteri, *supra* note 141; Touton, *supra* note 141 (noting that “the national government was the original owner of substantially all the land that now forms most of the other states[,]” but not the original thirteen).

143. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410–11 (1842); Ausness, *supra* note 117, at 172–74; Morrison, *supra* note 132, at 74–76.

144. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603–04 (2012); Touton, *supra* note 141.

145. *PPL Mont., LLC*, 565 U.S. at 603.

146. *Id.* at 591 (internal citation and quotation marks omitted).

147. See Morrison, *supra* note 132, at 96–97 (discussing *PPL Montana*’s holding and stating that after the decision, “new states were deprived of the right as sovereign to determine the most appropriate rule regarding public ownership of submerged lands for their own geography and culture.”).

148. 28 U.S.C. § 1331 (2012). Notably, *Alcoa* removed the case pursuant to the statutory authority for federal question jurisdiction. Notice of Removal, *supra* note 35, at 2. Arguably, 28 U.S.C. § 1331 “arising under” jurisdiction is narrower than Article III jurisdiction. CHEMERINSKY, *supra* note 117, at 292–95.

149. See *supra* notes 142–47 and accompanying text. For a history of federal court jurisprudence on navigability for title issues, see Ausness, *supra* note 117, at 199–213.

federal question.¹⁵⁰ However, the State argued the original thirteen states public trust rights do not present a federal question.¹⁵¹ The Fourth Circuit rejected this argument in part on a policy rationale stating the State's argument "would result in a bizarre state of affairs with two different classes of [s]tates under the Constitution."¹⁵² Yet distinct rules in different states is a core tenant of federalism, and other areas of law already recognize unique legal differences between the states.¹⁵³

The United States Supreme Court has long held that "the contours of th[e] public trust [doctrine] do not depend upon the Constitution."¹⁵⁴ In the seminal case *Martin v. Lessee of Waddell* in 1842, the Court held that after the American Revolution, "the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since *surrendered* by the constitution to the general government."¹⁵⁵ For original states whose public trust rights extend back to before statehood, the Constitution did not alter title to lands under navigable waters they already possessed.¹⁵⁶

After the American Revolution, seven states owned western lands past their original boundaries, and six states did not.¹⁵⁷ As part of a compromise

150. *Alcoa Power*, 853 F.3d 140, 146–47 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018).

151. *Id.* at 147. Specifically, the State claimed, "PPL [Montana], an equal footing case, has no bearing on the riverbed title of an original state. PPL's language that 'questions of navigability for determining state riverbed title are governed by federal law,' . . . applies solely to the 'new' equal footing states[.]" *Id.* at 147.

152. *Id.* at 149. The Court bypassed the State's argument that its well-pleaded complaint did not contain a federal question. *Id.* at 146. This decision ignored a core tenant of § 1331 jurisdiction: "[I]f a plaintiff chooses not to present a federal claim, even though one is potentially available, the defendant may not remove the case from state to federal court." CHEMERINSKY, *supra* note 117, at 304. For a discussion of the unsettled jurisprudence on federal question jurisdiction involving state causes of action, see *id.* at 311–18.

153. See Petition for Writ of Certiorari, *supra* note 18, at 18–22. For example, the legality of common law marriages varies from state to state. See generally John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 401–05 (1999) (discussing the history of common law marriage and the few states that have the doctrine today).

154. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012); see Morrison, *supra* note 132, at 75–83, 97–99.

155. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842) (emphasis added); see Morrison, *supra* note 132, at 80.

156. See Craig, *supra* note 94, at 4; Touton, *supra* note 141, at 817–18; Petition for Writ of Certiorari, *supra* note 18, at 8.

157. C. Perry Patterson, *The Relation of the Federal Government to the Territories and States in Landholdings*, 28 TEX. L. REV. 43, 46 (1949).

for the Articles of Confederation, the larger seven states ceded their western lands to the Confederation.¹⁵⁸ Though the Articles failed, the Northwestern Ordinance of 1787 promulgated the deal.¹⁵⁹ These western lands, along with other territories from which subsequent states might seek admission into the Union, were subject to the equal footing doctrine.¹⁶⁰

Though the equal footing doctrine mandates all subsequently admitted states are “on an equal footing with the original states in all respects[.]” one key caveat exists: timing.¹⁶¹ After the Northwest Ordinance of 1787, the United States held land for new states obtained “by grant from the original states, purchase, treaty, and conquest” until a new state was formed.¹⁶² In contrast, the original thirteen states’ public trust lands were never held by the United States as an intermediary.¹⁶³ Though later admitted states are on an equal footing in theory, practically, only later admitted states that were “temporarily[] deprived of control” of their public trust lands by the federal government are subject to the equal footing doctrine.¹⁶⁴ Public trust doctrine quiet title actions arising in original states do not present a federal question because the original thirteen states’ public trust rights are not subject to the equal footing doctrine—public trust rights alone do not “aris[e] under the Constitution, laws, or treaties of the United States.”¹⁶⁵

In future submerged land litigation in an original state, courts should apply that state’s unique definition of navigability. Like North Carolina, the other original states’ public trust doctrines date back to the American Revolution “as a matter of their conquest of England.”¹⁶⁶ Each developed

158. *Id.*

159. *Id.* at 63–64; see Morrison, *supra* note 132, at 91.

160. Patterson, *supra* note 157, at 64. The main policy goal behind the equal footing doctrine was to stop the federal government from requiring explicit concessions from new states seeking admission to the Union. Touton, *supra* note 141, at 833.

161. Pollard v. Hagan, 44 U.S. 212, 222 (1845); see Ausness, *supra* note 117, at 172–74.

162. Touton, *supra* note 141, at 817–18; Morrison, *supra* note 132, at 91–92.

163. *Id.* At founding, the federal government owned no land at all, and the original thirteen states exercised sovereignty over their own lands respectively. John C. Ruple, *The Transfer of Public Lands Movement: The Battle to Take “Back” Lands That Were Never Theirs*, 29 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 1, 16–18 (2018); Touton, *supra* note 141, at 836 (“[A]t the time of the formation of the Union the original states retained overflowed land as sovereigns for common use[.]”).

164. Pollard, 44 U.S. at 224; see Morrison, *supra* note 132, at 80–82; Ruple, *supra* note 163.

165. 28 U.S.C. § 1331 (2012); see Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 396–97 (1842); DiCasteri, *supra* note 141, at 183–84; Patterson, *supra* note 157.

166. Craig, *supra* note 94, at 6.

its own common law doctrine before the creation of the Union, and those early developments continue to influence separate doctrines today.¹⁶⁷

C. North Carolina v. Alcoa Power Generating, Inc.: A Cautionary Tale

There are over three-hundred and fifty privately owned hydroelectric dams along the waterways of the original thirteen states.¹⁶⁸ As trustee, each state has absolute control of the trust property and, in exercising its fiduciary duties, has an affirmative obligation to protect public trust lands.¹⁶⁹ Specifically, each state must carefully consider potential impacts of private actors' exploitations of the corpus.¹⁷⁰ Some practical tips derived from *Alcoa* will assist in governmental trustees protecting public trust rights for future generations.

1. States Should Devote Substantial Attention and Resources to Public Trust Cases

Generally, states have broad discretion under the public trust doctrine to determine how to best manage their resources for the public benefit.¹⁷¹ This discretion is vested in state attorney generals.¹⁷² Attorney generals may sue private entities for damages and injunctive relief as trustee of the public trust.¹⁷³ In order to keep title to the riverbeds within the trust corpus, attorney generals in the original thirteen states must diligently litigate riverbed cases.¹⁷⁴

After five years of litigation, *Alcoa* shows the importance of a fact-intensive inquiry into navigability for title purposes. In its finding of fact and conclusions of law as to navigability, the district court lamented the lack of evidence put on by the State at the navigability hearing.¹⁷⁵ The State did

167. *Id.*; see generally *id.* at 26–113 (discussing different navigability tests within eastern states).

168. *Interactive Reports*, NAT'L INVENTORY OF DAMS, <https://perma.cc/US6H-YAU3> (last visited May 9, 2019) (author conducted an "Advanced Search" of the Interactive Reports, filtering the results by "Owner Type = 'Private,'" "Primary Purpose = 'Hydroelectric,'" and "State = 'CT;,' 'DE;,' 'GA;,' 'MD;,' 'MA;,' 'NH;,' 'NY;,' 'NC;,' 'PA;,' 'RI;,' 'SC;,' and 'VA'" respectively).

169. Kanner, *supra* note 122, at 75–78.

170. *See id.* at 77–78.

171. *Id.* at 75–78.

172. *Id.* at 59.

173. *Id.* at 61–62.

174. *See id.* at 112–15 (discussing attorney generals' incentives to enforce public trust rights); Sax, *supra* note 111, at 508–09; Scanlan, *supra* note 68, at 255.

175. *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2015 WL 2131089, at *4–5 (E.D.N.C. 2015).

not put on any evidence of the relevant segment's geology, and only had one expert witness to rebut Alcoa's three.¹⁷⁶ Early navigability rulings are critical, and front-end work securing robust evidence of navigability is essential for attorney generals. Such evidence might include the condition of the river at founding, any colonial expeditions, types of boats used at the time, and points along the river that require portaging.

Timing is also essential in asserting public trust rights. Arguably, the state may revoke a public trust property license from a private party whenever they cease to benefit the public.¹⁷⁷ However, *Alcoa* shows states should clear title to public trust lands as soon as practicably possible after the public benefit stops. In its order granting Alcoa's motion for summary judgment, the district court emphasized the State's delayed assertion of public trust rights—seven years after it first learned of Alcoa's ownership claims.¹⁷⁸ The court deplored the State's all too convenient inaction, stating, "It is impossible not to notice the timing of this lawsuit."¹⁷⁹

2. Beware of Early Stipulations Regarding Navigability

After *Alcoa* and *PPL Montana*, a well-pleaded complaint can make or break a public trust doctrine case.¹⁸⁰ In *Alcoa*, the State used the term "relevant segment" in its complaint to describe the part of the river at issue.¹⁸¹ Perhaps unbeknownst to the State, the early use of the terms "relevant segment" set the stage for removal based on federal question jurisdiction.¹⁸² The federal standard under *PPL Montana* turns on "relevant segment" language, and segments are determined on the face of the complaint—only those segments are tested for navigability.¹⁸³ With current

176. *Alcoa Power*, 853 F.3d 140, 152–54 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018).

177. Kanner, *supra* note 122, at 70–72 (discussing *Ill. Cent. R.R. Co. v. Illinois Commerce Comm'n*, 146 U.S. 387 (1892)); see *Ill. Cent. R.R. Co.*, 146 U.S. at 453 ("A grant of all the lands under the navigable waters of a [s]tate has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.").

178. *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 135 F. Supp. 3d 385, 396 (E.D.N.C. 2015).

179. *Id.*

180. Federal question jurisdiction is determined by the well-pleaded complaint rule, which states that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

181. Complaint, *supra* note 28, at 6–12.

182. See *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 989 F. Supp. 2d 479, 481 (E.D.N.C. 2013).

183. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 593 (2012).

confusion over whether federal or state common law applies, state attorney generals should not give courts any reason to infer federal question jurisdiction exists from the four corners of a complaint.

The “relevant segment” language in the State’s complaint also prompted the Fourth Circuit to affirm navigability based on the entire segment.¹⁸⁴ Importantly, segments are not navigable under the federal test if any portage disrupts potential navigability.¹⁸⁵ The State’s concession that portions of the segment had been portaged proved fatal to its case.¹⁸⁶ Taking into account both the “relevant segment” language and concession of portages, the district court found the entire segment unnavigable.¹⁸⁷ The Fourth Circuit also determined the segment stipulation and portages concession was persuasive.¹⁸⁸

As the federal judge said in his order granting Alcoa’s motion for summary judgment, “hindsight is often better than foresight.”¹⁸⁹ While the State was perhaps attempting to limit the scope of the judicial inquiry under North Carolina law,¹⁹⁰ future state actors should be mindful of early stipulations. Generally, avoiding the terminology “relevant segment” in a

184. *Alcoa Power*, 853 F.3d 140, 150–51 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018). The court noted:

On the issue of segmentation, North Carolina’s complaint described the entire contested stretch of river as the “Relevant Segment”. . . . North Carolina now claims that it did not intend its use of the term “Relevant Segment” to serve as a concession that the entire segment should be considered as a whole for purposes of determining navigability. . . .

. . . .

While the district court assumed that there was no dispute about the appropriate segment for consideration, it nonetheless had sufficient evidence before it to support its treatment of the entire segment as a single entity.

Id.

185. *PPL Mont., LLC*, 565 U.S. at 597–98. Seemingly, a complaint omitting points of a river that require portaging is more likely to be successful. *See* Ausness, *supra* note 117, at 217–18 (discussing the effect of portages on the river’s navigability in *PPL Montana*).

186. *Alcoa Power*, 853 F.3d at 145–46; *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2015 WL 2131089, at *5 (E.D.N.C. 2015) (“Most persuasive to the [c]ourt, however, is the fact that the State conceded that the [n]arrows and [f]alls were always portaged.”).

187. *Id.* at *4 (“Given that the stipulated segment includes the [f]alls and [n]arrows, and that the State conceded both portions had to be portaged, the [c]ourt is compelled to conclude that the Relevant Segment, in its entirety, was not navigable in fact at statehood.”).

188. *Alcoa Power*, 853 F.3d at 149.

189. *North Carolina ex rel. N.C. Dep’t of Admin. v. Alcoa Power Generating, Inc.*, 135 F. Supp. 3d 385, 396 (E.D.N.C. 2015).

190. *See Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 828 (N.C. Ct. App. 2009).

complaint or answer could alleviate risk of early stipulations and perhaps signal to the court that state navigability common law rules apply.

CONCLUSION

Since founding, North Carolina's public trust doctrine has protected the state's navigable waterways and their underlying riverbeds. North Carolina's definition of navigability is deeply rooted in its common law, and operates as a rule of construction—presuming that the legislature did not intend to convey lands that would impair public trust rights. With many statutes and a state constitutional amendment, North Carolina has long valued protecting its public lands for future generations.

In *North Carolina v. Alcoa Power Generating, Inc.*, the United States Court of Appeals for the Fourth Circuit effectively overruled the North Carolina common law rules governing navigability. The present consequences of the Fourth Circuit's decision include public policy concerns and clouded land titles in North Carolina. The future ramifications include an expansion of federal question jurisdiction and an upheaval of common law navigability rules in the original thirteen states.

Submerged land litigation implicates unique choice of law considerations. By disregarding common law precedent dating back to the American Revolution, the Fourth Circuit's decision disrupts the delicate balance of federalism between state and federal courts. Especially in the original thirteen states, which received their public trust lands directly from the British Crown. The presumptions and public policies behind the public trust doctrine show states, as trustees, must work diligently to protect public trust lands for future generations. After *North Carolina v. Alcoa Power Generating, Inc.*, attorney generals of the original thirteen states must proceed with caution in protecting their public trust corpus.

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