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By Peter N. Davis*

State Ownership of Beds of Inland Waters—A Summary and Reexamination

I. INTRODUCTION

States rely on state ownership of the beds of streams, rivers, and lakes for various regulatory and proprietary purposes. These include licensing of bed use, leasing of underlying mineral rights, protection of public use rights, assertion of public trust powers, and location of boundaries of abutting privately-owned land. The extent of this state ownership in states created from federal territories is determined by a conjunction of the following: (1) the "equal footing rule," (2) the law of federal land patent interpretation, (3) state rules on incidents to title to abutting uplands, (4) federal and state definitions of navigability, and (5) the law of implied grants of land from the sovereign. States have asserted title to the beds of many streams, rivers, and lakes by assuming the correctness of certain interpretations of these rules of law. This article will reexamine those interpretations.

This reexamination is timely for two reasons. First, there is no clear authority on the question whether states created from federal territories have title to the beds of inland waters declared to be nonnavigable under federal law for bed title purposes. Second, the basic structure of bed title law itself was thrown into question in 1973 by a decision of the United States Supreme Court.[1] The Court corrected its position in 1977 and restored the former bed title law.[2] This article will summarize the basic structure of bed title law and will examine its current status under the recent Supreme Court decisions. It will then analyze the cases to determine the location of title of beds of

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1. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).
2. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).

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federally nonnavigable inland waters when a state created from a federal territory asserts such title.

II. SUMMARY OF THE LAW OF BED OWNERSHIP

A. Equal Footing Doctrine

The common law recognized that title to beds of navigable waters was in the Crown, both in England[3] and in the colonies.[4] At that time navigable waters were defined as those affected by the ebb and flow of the tide.[5] The thirteen original states acquired title to the beds of navigable waters as successors to the Crown.[6]

The United States acquired title to the beds of navigable waters of federal territories because it was the territorial sovereign prior to the creation of new states.[7] Territorial sovereignty was the origin of all bed titles in the Midwestern and Western states, including Nebraska. The United States held title to such beds in trust for the future states to be created out of the federal territories.[8] It also held title to the beds of nonnavigable waters incident to its proprietorship of the public domain be-

3. *See* Shively v. Bowlby, 152 U.S. 1, 11-13, 57 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) *367, *410 (1842).
4. Massachusetts v. New York, 271 U.S. 65, 85-86 (1926); Morris v. United States, 174 U.S. 196, 226-27 (1899); Shively v. Bowlby, 152 U.S. 1, 48-49, 57 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) *367, *410 (1842).
5. *See* Shively v. Bowlby, 152 U.S. 1, 11, 57 (1894); Packer v. Bird, 137 U.S. 661, 667 (1891); Barney v. Keokuk, 94 U.S. 324, 337 (1876) (dictum).
6. *See* Borax Consol. v. Los Angeles, 296 U.S. 10, 15, *rehearing denied*, 296 U.S. 664 (1935); Massachusetts v. New York, 271 U.S. 65, 86, 89 (1926); Morris v. United States, 174 U.S. 196, 226-27 (1899); Shively v. Bowlby, 152 U.S. 1, 15-18, 49, 57 (1894); Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867); Martin v. Waddell, 41 U.S. (16 Pet.) *367, *410, *416 (1842). *See also* Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317-18 (1973) (title was not acquired at time of ratification of the federal Constitution as the Court indicates, but at the time of the Revolution).
7. *See* Borax Consol. v. Los Angeles, 296 U.S. 10, 15, *rehearing denied*, 296 U.S. 664 (1935); United States v. Oregon, 295 U.S. 1, 25 (1935); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87 (1922); Oklahoma v. Texas, 258 U.S. 574, 583 (1922); Donnelly v. United States, 228 U.S. 243, 259 (1913); Shively v. Bowlby, 152 U.S. 1, 48-49, 57 (1894); Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891); Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65 (1873).
8. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 373 (1977); United States v. Holt State Bank, 270 U.S. 49, 58-59 (1926); United States v. Mission Rock Co., 189 U.S. 391, 404 (1903); Shively v. Bowlby, 152 U.S. 1, 49-50, 57 (1894); Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891); Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65 (1873).

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cause such bed titles were incidents to title in the abutting uplands under the common law.[9]

When new states were created from federal territories and admitted to the Union, they were admitted on an equal basis with the thirteen original states. This is the so-called "equal footing rule"[10] mandated by the federal Constitution.[11] The new states acquired title to the beds of navigable waters upon admission to the Union because the thirteen original states held such title.[12] Only title to the beds of waters navigable at the time of

9. *See* United States v. Oregon, 295 U.S. 1, 6-7 (1935); Oklahoma v. Texas, 258 U.S. 574, 595-96 (1922); Hardin v. Jordan, 140 U.S. 371, 383-84 (1891).

10. The term "equal footing" is derived from language appearing in the compact between the original states and the people and states within the Northwest Territory as enacted in the Northwest Territory Ordinance of 1787, 1 Stat. 51, 53 n.(a) (1845). Article V provides: "[S]uch State shall be admitted . . . into the Congress of the United States, on an equal footing with the original States, in all respects whatever . . . ." *Id.* at lxii. Similar "equal footing" language also appears in subsequent acts establishing territories and in acts of admission.

The equal footing rule applies only to new states which were created out of federal territories. Therefore, the rule has no application in the thirteen original states, in their derivatives (Maine and West Virginia), in states which formerly were independent nations (Hawaii and Texas), or in present federal territories (District of Columbia).

11. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977). *See* U.S. CONST. art. IV, § 3.

12. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) *212, *223, *229-30 (1845); Goodtitle v. Kibbe, 50 U.S. (9 How.) *471, *478 (1850); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867); Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65-66 (1873); Barney v. Keokuk, 94 U.S. 324, 338 (1876); Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 434 (1892); Shively v. Bowlby, 152 U.S. 1, 26-28, 57 (1894); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 358-60, 365 (1897); Mobile Transp. Co. v. Mobile, 187 U.S. 479, 483 (1903); United States v. Mission Rock Co., 189 U.S. 391, 404-05 (1903); United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 451 (1908); Scott v. Lattig, 227 U.S. 229, 242-43 (1913); Donnelly v. United States, 228 U.S. 243, 259-60 (1913); Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56, 63 (1921); Oklahoma v. Texas, 258 U.S. 574, 583 (1922); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 83 (1922); United States v. Holt State Bank, 270 U.S. 49, 55 (1926); United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Oregon, 295 U.S. 1, 6, 14 (1935); Borax Consol. v. Los Angeles, 296 U.S. 10, 15, *rehearing denied*, 296 U.S. 664 (1935); United States v. California, 332 U.S. 19, 30, 36 (1947); Utah v. United States, 403 U.S. 9, 10 (1971); Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 318 (1973); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370, 372-74 (1977).

See also Submerged Lands Act of 1953, 43 U.S.C. §§ 1301(a), 1311(a), (b) (1970) (Congress expressly ceded beds of navigable waters and marginal seas to the states). The Act reverses United States v. California, 332 U.S. 19, 31-39 (1947), which held that the United States owned the beds of the marginal seas below the low water mark.

Where the state retains title to the beds of inland waters, the upland riparian's title runs to the ordinary high water line in most states. A few

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admission was transferred to the new states.[13]

B. Federal Navigability Definition

Prior to 1926, state courts assumed that their own navigability definition determined which beds passed to the states upon admission to the Union. During the ninteenth century, many states expanded the common law tidal definition of navigability to include the Great Lakes and great inland rivers,[14] or all waters navigable by commercial vessels or used in commercial trade.[15] Some states expanded their definitions of navigability to include all waters which floated sawlogs or recreational boats.[16] The federal courts concurred in this state court assumption that state navigability definitions were controlling.[17]

Between 1922 and 1931, the United States Supreme Court

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states extend such title to the ordinary low water line. *See generally* Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary*, 13 LAND & WATER L. REV. (1978).

There is a split of authority among the coastal states as to whether a tidal riparian's title runs to the high or low mean tide mark. Does the recent extension of federal navigational servitude jurisdiction to the maximum high tide mark affect the extent of state title to tidal flats and marshes ceded under the Submerged Lands Act? *See* United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974) (grounded on an analysis of Crown title to the marginal sea under the common law).

Beds of navigable waters granted to individual landowners prior to cession of sovereignty to the United States are excluded from transfer to the states under the "equal footing" rule. Knight v. United States Land Ass'n, 142 U.S. 161, 183-84 (1891).

13. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370, 376 (1977); Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 15 (1935); United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Holt State Bank, 270 U.S. 49, 54-58 (1926). *See also* Submerged Lands Act of 1953, 43 U.S.C. § 1301(a)(1) (1970).
14. St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 361-63 (1897); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435-36 (1892); Hardin v. Jordan, 140 U.S. 371, 382 (1891); Packer v. Bird, 137 U.S. 661, 667 (1891); Barney v. Keokuk, 94 U.S. 324, 337-38 (1876).
15. For states which followed variants of the commercial navigability definition for equal footing purposes, see, *e.g.*, St. Louis, I.M. & S. Ry. v. Ramsey, 53 Ark. 314, 13 S.W. 931 (1890); Churchill Co. v. Kingsbury, 178 Cal. 554, 174 P. 329 (1918); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); State *ex rel.* Bd. of Comm'rs v. Capdeville, 146 La. 94, 83 So. 421 (1919); Clark v. Cambridge & Arapahoe Irr. & Imp. Co., 45 Neb. 798, 64 N.W. 239 (1895)(dictum).
16. For states which followed the sawlog, recreational boat, or other definitions of navigability broader than the federal commercial navigability definition for equal footing purposes, see, *e.g.*, State *ex rel.* Dawson v. Akers, 92 Kan. 169, 140 P. 637 (1914) (navigability by judicial declaration); State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914); Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893) (by implication and subsequent interpretation).
17. *See* Shively v. Bowlby, 152 U.S. 1, 31-32 (1894); Hardin v. Jordan, 140 U.S. 371, 381-82 (1891); Barney v. Keokuk, 94 U.S. 324, 337-38 (1876).

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decided three cases which smashed that general state court assumption by holding that the federal definition of navigability determined which beds passed to the states upon admission.[18] Three reasons were given to justify use of the federal rule. First, the beds of navigable waters comprised part of the public domain prior to statehood, and conveyance of federal title is involved under the "equal footing rule."[19] Second, the act of admitting a state to the Union is a federal action, and federal law, not state law, should determine what incidents accrue from the act of admission.[20] Third, each new state is to be admitted on an "equal footing" under constitutional mandate, and there can be no equality of status unless interpretation of navigability for bed title purposes is uniform throughout the country.[21] The three cases adopting the federal navigability definition expressly rejected the use of various state definitions to determine which beds passed to the states upon admission.[22] Many,[23] but not all,[24] state courts have recognized the effect of those deci-

18. United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922). These cases are discussed in Johnson & Austin, *Recreational Rights and Title to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1, 8-25 (1967).
19. *See* Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87-88 (1922).
20. United States v. Oregon, 295 U.S. 1, 14 (1935).
21. *See* United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926); State v. Bunkowski, 88 Nev. 623, 503 P.2d 1231 (1972).
22. United States v. Utah, 283 U.S. 64, 75-76 (1931); United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87-88 (1922).
    See also United States v. Oregon, 295 U.S. 1, 14 (1935); Oklahoma v. Texas, 258 U.S. 574, 586 (1922).
23. For states which continued to follow or began to follow the commercial navigability definition for equal footing purposes, see, *e.g.*, State *ex rel.* Indiana Dep't of Conservation v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950); State v. Nichols, 241 Iowa 952, 44 N.W.2d 49 (1950) (by implication); State v. Sweet Lake Land & Oil Co., 164 La. 240, 113 So. 833 (1927) (express recognition that federal definition controls); State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957) (express recognition that federal definition controls); County of Becker v. Shevlin Land Co., 186 Minn. 401, 243 N.W. 433 (1932) (express recognition that federal definition controls); State v. Bunkowski, 88 Nev. 623, 503 P.2d 1231 (1972) (express recognition that federal definition controls); State Eng'r v. Cowles Bros., 86 Nev. 872, 478 P.2d 159 (1970); Aladdin Petroleum Corp. v. State *ex rel.* Comm'rs of Land Office, 200 Okla. 134, 191 P.2d 224 (1948); Monroe v. State, 111 Utah 1, 175 P.2d 759 (1946). *See also* note 69 *infra*.
24. For states which continued to follow or began to follow the sawlog, recreational boat, or other definitions of navigability broader than the federal commercial navigability definition for equal footing purposes, see, *e.g.*, Shore v. Shell Petroleum Corp., 55 F.2d 696 (D. Kan. 1931), *aff'd*, 60 F.2d 1 (10th Cir.), *cert. denied*, 287 U.S. 656 (1932) (judicial declaration of naviga-

sions of the United States Supreme Court.

The federal bed title navigability definition is similar, but not identical to, the navigability definition employed for federal commerce power and navigational servitude purposes.[25] In order to be navigable for bed title purposes a stream, river, or lake must be navigable by customary modes of travel for commerce in its natural and ordinary condition.[26] Natural barriers are not an impediment to navigability if in fact commerce traffic could pass the barrier in some fashion at some time during the year.[27]

The federal bed title navigability definition is distinguished from the commerce power and navigational servitude navigability tests in two respects. First, rivers which can be made navigable with "reasonable improvements" apparently are not navigable for bed title purposes.[28] The "reasonable improvement" concept has not been expressly rejected for bed title purposes. However, the concept was introduced in a commerce power licensing case which stated in dictum that it was not intended to apply to bed title questions.[29] Although the "reasonable improvement" concept has not yet been applied to bed title situations, it has not been precluded from being applied in the future.

Second, the bed title cases do not require that the subject waterway be a link in interstate commerce, but only that the waterway be commercially navigable in isolation.[30] That distinction was made abundantly clear in a recent pair of cases involving the navigability of the Great Salt Lake in Utah. The

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bility); State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949). *See also* notes 70-71 *infra*.

25. *See* Utah v. United States, 403 U.S. 9, 10-11 (1971); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408-10 (1940); United States v. Utah, 283 U.S. 64, 75-77 (1931).

26. Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 15, 23 (1935); United States v. Utah, 283 U.S. 64, 76 (1931); United States v. Holt State Bank, 270 U.S. 49, 56 (1925); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86 (1922); Oklahoma v. Texas, 258 U.S. 574, 586 (1922); Packer v. Bird, 137 U.S. 661, 667 (1891).

27. *See* United States v. Utah, 283 U.S. 64, 76 (1931); United States v. Holt State Bank, 270 U.S. 49, 56-57 (1926); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 359 (1897).

28. H. ELLIS, J. BEUSCHER, C. HOWARD & J. DEBRAAL, WATER-USE LAW AND ADMINISTRATION IN WISCONSIN 61 (1970). *See* United States v. Ladley, 42 F.2d 474, 474 (D. Idaho 1930); State v. Adams, 251 Minn. 521, 537-38, 89 N.W.2d 661, 673 (1957), *cert. denied*, 358 U.S. 826 (1958). *See generally* Johnson & Austin, *supra* note 18, at 18-19.

29. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408-09 (1940) (dictum).

30. Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 14 (1935); United States v. Utah, 283 U.S. 64, 75 (1931).

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United States Supreme Court held in 1971 that the Great Salt Lake was navigable *for bed title purposes* because some minor *intrastate* commercial uses of the lake were made in the 1880's.[31] Therefore, title to the bed of the lake had passed to Utah upon its admission to the Union in 1896.[32] Three years later, the Court of Appeals for the Tenth Circuit held that the lake was not navigable *for commerce power purposes* because the same minor *intrastate* commercial uses of the lake were not part of *interstate* commerce, but were purely local in nature.[33] The court held that a permit was not required under the Rivers and Harbors Act of 1897 for construction of a railroad causeway across the lake. The Supreme Court's pronouncement in 1971 that commercial navigation need not be part of interstate commerce for bed title navigability purposes reiterated similar statements in two earlier decisions.[34]

For bed title purposes, inland waters must be capable of

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31. Utah v. United States, 403 U.S. 9, 11-12 (1971). The Court stated: "[T]he fact that the Great Salt Lake is not a part of a navigable interstate or international commercial highway in no way interferes with the principle of public ownership of its bed." *Id.* at 10.
32. *Id.* at 12-14.
33. Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1166-69 (10th Cir. 1974). The court stated:
    > [W]e conclude that there was no reversible error [in excluding evidence of commercial navigation across the Great Salt Lake and up the Bear River to Corinne, Utah] since the proof offered showed only a connection with the railhead and not with navigable interstate waters and, therefore, as a matter of law, could not establish that the Lake is a "navigable water of the United States" within the meaning of the [Rivers and Harbors] Act [of 1899].

    Id. at 1167.
34. United States v. Utah, 283 U.S. 64 (1931), required a factual determination of whether portions of the Colorado River were navigable for purposes of determining whether the bed underlying those portions of the river had passed to Utah upon admission to statehood. The Court stated: "The question of navigability . . . is a federal question. This is so, although it is undisputed that none of the portions of the rivers under consideration constitute navigable waters of the United States, that is, they are not navigable in interstate or foreign commerce . . . ." *Id.* at 75.

    United States v. Oregon, 295 U.S. 1 (1935), required a factual determination of whether Malheur Lake in Oregon was navigable for purposes of determining whether its bed had passed to Oregon upon admission to statehood. The Court stated:
    > Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce.

    Id. at 14.

navigation at the time the state is admitted to the Union. Although actual commercial navigation is not required at the time of admission, such use must have occurred before or after admission.[35] However, actual commercial navigation must occur at some time; mere capability without use is insufficient.[36]

C. Incidents to Federal Land Patent Titles

Title to all public lands and all beds of navigable and nonnavigable waters abutting such lands is conveyed either by federal land patents or by operation of law. The interrelationship between the law interpreting incidents to federal land patents and the law elaborating the "equal footing" doctrine determines the location of title to beds of navigable and nonnavigable inland waters. It is that interrelationship which was the subject of controversy in two United States Supreme Court cases decided during this decade.[37] The consequences of the interrelationship between these two bodies of law arise whenever the federal government patents uplands abutting on navigable or nonnavigable inland waters.

1. Federal Conveyances Before Statehood

An express grant of the bed of federally navigable water by the United States[38] or its predecessors in title[39] prior to statehood will convey title to the grantee free of any claims to the title asserted by the state after statehood. Furthermore, the federal government can reserve title to any such beds before statehood free of subsequent state title claims.[40]

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35. Utah v. United States, 403 U.S. 9, 11-12 (1971); United States v. Utah, 283 U.S. 64, 81-83 (1931).
36. Utah v. United States, 403 U.S. 9, 12 (1971). If capability for navigation existed at statehood, should the location of bed title in the state or the federal government be determined, not by the character of the stream itself, but by the fortuity of whether the use for commercial navigation or the bed title litigation occurs first?
37. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), *overruling* Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). For discussion of these cases, see text accompanying notes 54-65 *infra*.
38. United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926) (dictum); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 84-85 (1922); Oklahoma v. Texas, 258 U.S. 574, 594-96 (1922); Prosser v. Northern Pac. R.R., 152 U.S. 59, 64 (1894); Shively v. Bowlby, 152 U.S. 1, 47-48, 58 (1894)(dictum).
    The power of the United States to convey bed title before statehood is based on U.S. CONST. art. IV, § 3.
39. Knight v. United States Land Ass'n, 142 U.S. 161, 183-84 (1891).
40. United States v. Oregon, 295 U.S. 1, 25, 29 (1935) (nonnavigable waters); United States v. Holt State Bank, 270 U.S. 49, 58 (1926) (dictum). *See* Submerged Lands Act of 1953, 43 U.S.C. § 1313(a) (1970). *See also* United States v. Alaska, 423 F.2d 764, 766, 768 (9th Cir. 1970).

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When the abutting upland is patented to a private person prior to statehood, the effect on the title to the beds of federally navigable waters is not clear. There are three lines of authority. One group of cases states that pre-statehood patents to abutting uplands do not carry bed title with them because the United States holds title to them in trust for the future states[41] and cannot impliedly grant it away.[42] A second group of cases indicates that if the post-statehood rules attach bed title to the land patent title, then a pre-statehood federal patent will also carry bed title with it.[43] A third line of cases states that pre-statehood patents carry title to the bed *ad medium filum aquae*;[44] it is not clear whether this result is based on federal common law or on post-statehood rules developed by the states.

2. *State Control of Beds of Federally Navigable Waters*

Upon being admitted to the Union, a state acquires title to the beds of federally navigable waters under the "equal footing rule."[45] There is no implied reservation of the beds; any reservation of them prior to statehood must be express.[46] The state may exercise full proprietary rights to the beds it acquires at statehood subject to the exercise of the federal navigation powers.[47]

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41. *See* note 8 *supra*.
42. *See* United States v. Holt State Bank, 270 U.S. 49, 54-55 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 84 (1922) (dictum); Shively v. Bowlby, 152 U.S. 1, 51, 58 (1894); Packer v. Bird, 137 U.S. 661, 672-73 (1891); Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272, 287-88 (1868); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) *212, *229-30 (1845).

    These cases rely on the Act of May 18, 1796, ch. 29, § 9, 1 Stat. 468 (1845) (current version at 43 U.S.C. § 931 (1970)) (relating to the sale of public lands in the Northwest Territory), which provides:

    > [A]ll navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways . . . . [I]n all cases, where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both.

43. *See* United States v. Oregon, 295 U.S. 1, 14 (1935); State v. Bunkowski, 88 Nev. 623, 503 P.2d 1231, 1237 (1972).
44. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87-88 (1922); Oklahoma v. Texas, 258 U.S. 574, 595 (1922). Both cases involved rivers held nonnavigable under federal law.
45. *See* note 12 *supra*.
46. *See* note 40 *supra*.
47. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372, 378-81 (1977); Borax Consol. v. Los Angeles, 296 U.S. 10, 16, *rehearing denied*, 296 U.S. 664 (1935); United States v. Holt State Bank, 270 U.S. 49, 54, 59 (1926); Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56, 63 (1921); Wear v. Kansas *ex rel.* Brewster, 245 U.S. 154, 158-59 (1917); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 60 (1913); Donnelly v. United States, 228 U.S. 243, 261-62 (1913); Scott v. Lattig, 227 U.S. 229, 242-43 (1913); United States v. Chandler-Dunbar Water Power Co., 209 U.S.

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The extent of the upland conveyed under a federal patent is a federal question, but the extent of incidents to title conveyed by the patent by federal rule is a matter of state law.[48] This rule controls the location of title to the beds of federally navigable waters.[49] The state may declare that beds of navigable waters attach to the titles of abutting uplands. If so, when the federal patent conveys the abutting uplands, the bed titles will go with those uplands as an incident to title.[50] The state may declare that

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447, 451-52 (1908); Hardin v. Shedd, 190 U.S. 508, 519 (1903); United States v. Mission Rock Co., 189 U.S. 391, 404 (1903); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 361-66 (1897); Hardin v. Jordan, 140 U.S. 371, 382 (1891) (dictum); St. Louis v. Rutz, 138 U.S. 226, 242 (1891); Packer v. Bird, 137 U.S. 661, 671 (1891) (dictum); Barney v. Keokuk, 94 U.S. 324, 338 (1876); Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65-66 (1873).

48. Borax Consol. v. Los Angeles, 296 U.S. 10, 22, *rehearing denied*, 296 U.S. 664 (1935); United States v. Oregon, 295 U.S. 1, 27-28 (1935); Chapman & Dewey Lumber Co. v. St. Francis Levee Dist., 232 U.S. 186, 196 (1914); Joy v. City of St. Louis, 201 U.S. 332, 342 (1906); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 362 (1897); Packer v. Bird, 137 U.S. 661, 669 (1891); Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 100 (1871) (upland); Wilcox v. Jackson, 38 U.S. (13 Pet.) *498, *516-17 (1839) (upland).

This rule gives a uniform interpretation to all titles in a state regardless of whether their source is federal or nonfederal. Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272, 289 (1868).

49. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 381 (1977); Borax Consol. v. Los Angeles, 296 U.S. 10, 22, *rehearing denied*, 296 U.S. 664 (1935); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 88 (1922) (dictum); Scott v. Lattig, 227 U.S. 229, 243 (1913) (dictum); United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447, 451-52 (1908); Joy v. City of St. Louis, 201 U.S. 332, 342-43 (1906); Hardin v. Shedd, 190 U.S. 508, 519 (1903) (dictum); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 366 (1897); Shively v. Bowlby, 152 U.S. 1, 58 (1894); Hardin v. Jordan, 140 U.S. 371, 382 (1891); Packer v. Bird, 137 U.S. 661, 669 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1876).

50. Those states created from federal territories which transfer title to the beds of navigable inland waters to the owners of the abutting uplands fall into three groups (Alaska has no bed title cases).

    1. Colorado, Illinois, and Nebraska assert that rule even though they have no navigable inland waters because they employ the tidal definition of navigability to designate such waters as nonnavigable although navigable in fact. *See, e.g.*, **Colorado:** Hartman v. Tresise, 36 Colo. 146, 84 P. 665 (1905). **Illinois:** Leitch v. Sanitary Dist., 369 Ill. 469, 17 N.E.2d 34 (1938) (except Great Lakes and meandered lakes; *see* note 51(1) *infra*); Heckman v. Kratzer, 43 Ill. App. 3d 844, 357 N.E.2d 1276 (1976) (by implication). **Nebraska:** Valder v. Wallis, 196 Neb. 222, 242 N.W.2d 112 (1976).
    2. Wisconsin employs the sawlog or recreational boat definition of navigability. *See, e.g.*, Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 38 N.W.2d 712 (1949)(rivers).
    3. Kentucky, Michigan, and Ohio have not defined navigability for bed title purposes. *See, e.g.*, **Kentucky:** Commonwealth v. Henderson

the beds of navigable waters are retained by the state. If so, the federal patent to abutting fast lands will not carry the bed title with it; instead the title will remain in the state.[51] After state-

County, 371 S.W.2d 27 (Ky. 1963). **Michigan:** McCardel v. Smolen, 71 Mich. App. 560, 250 N.W.2d 496 (1976); Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953) (except Great Lakes; *see* note 51(5) *infra*). **Ohio:** State *ex rel.* Brown v. Newport Concrete Co., 44 Ohio App. 2d 121, 36 N.E.2d 453 (1975) (except the Great Lakes; *see* note 51(3) *infra*); Day v. Pittsburgh, Y & C. R.R., 44 Ohio St. 406, 7 N.E. 529 (1886).

For state navigability definition cases, see notes 68-71 *infra*.

51. States created from federal territories which retain title to the beds of navigable inland waters fall into five groups (Alaska has no bed title cases).
    1. Illinois, Mississippi, and Oregon limit application of the rule to tidal waters (or other specially designated waters) because they employ the tidal definition of navigability to designate inland waters as nonnavigable although navigable in fact. *See, e.g.* **Illinois:** Hardin v. Shedd, 190 U.S. 508 (1903) (meandered lakes); Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (Great Lakes only); People *ex rel.* Scott v. Chicago Park Dist., 66 Ill. 2d 65, 360 N.E.2d 773 (1976) (Great Lakes only; by implication); Bowes v. City of Chicago, 3 Ill. 2d 175, 120 N.E.2d 15 (1954) (large lakes); Wilton v. Van Hessen, 249 Ill. 182, 94 N.E. 134 (1911) (dictum) (meandered lakes); ILL. ANN. STAT. ch. 19, § 71 (Smith-Hurd Supp. 1978) (Great Lakes and meandered lakes). **Mississippi:** International Paper Co. v. Mississippi State Highway Dep't, 271 So. 2d 395 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973). **Oregon:** Dahl v. Clackamas County, 243 Or. 152, 412 P.2d 364 (1966); Brusco Towboat Co. v. State *ex rel.* Straub, 30 Or. App. 509, 567 P.2d 1037 (1977); State *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 18 Or. App. 524, 526 P.2d 469 (1974), *modified*, 272 Or. 545, 536 P.2d 517, 538 P.2d 70 (1975), *rev'd on other grounds*, 429 U.S. 363 (1977); OR. REV. STAT. §§ 274.025, .430 (1975).
    2. Arkansas, California, Florida, Idaho, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nevada, Oklahoma, Tennessee, Utah, Washington, and Wyoming employ the commercial navigability definition of navigability. *See, e.g.*, **Arkansas:** Hayes v. State, 254 Ark. 680, 496 S.W.2d 372 (1973). **California:** United States v. Gossett, 277 F. Supp. 11 (C.D. Cal. 1967); City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935); CAL. CIV. CODE § 830 (West 1954). **Florida:** State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 1976); FLA. CONST. art. 10, § 11. **Idaho:** West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973); Callahan v. Price, 26 Idaho 745, 146 P. 732 (1915) (overruling prior law). **Indiana:** State *ex rel.* Indiana Dep't of Conservation v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950). **Iowa:** Mather v. State, 200 N.W.2d 498 (Iowa 1972). **Louisiana:** State v. Placid Oil Co., 300 So. 2d 154 (La. 1974); LA. CONST. art. 9, § 3; LA. CIV. CODE ANN. art. 453 (West 1952); LA. REV. STAT. ANN. § 9:1107 (West 1965). **Minnesota:** State *ex rel.* Head v. Slotness, 289 Minn. 485, 185 N.W.2d 530 (1971). **Missouri:** Hauber v. Gentry, 215 S.W.2d 754 (Mo. 1948); State *ex rel.* Citizens Elec. Lighting & Power Co. v. Longfellow, 169 Mo. 109, 69 S.W. 374 (1902). **Montana:** United States v. Eldredge, 33 F. Supp. 337 (D. Mont. 1940); Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895); MONT. REV. CODE ANN. §§ 67-302, 67-712 (1970). **Nevada:** State v. Bunkowski, 88 Nev. 623, 503 P. 2d 1231 (1972). **Oklahoma:** Cherokee Nation v. Oklahoma, 402 F.2d 739 (10th Cir. 1968); Aladdin Petroleum Corp. v. State *ex rel.* Comm'rs of Land Office, 200 Okla. 134, 191 P.2d 224 (1946) (dictum); OKLA. STAT.

hood, the United States may not by any act divest either the state[52] or the private title holder[53] of the bed title.

The power of the United States to determine title to beds of federally navigable waters after statehood was the issue before the United States Supreme Court on two occasions in this decade. Both cases involved title to former beds of navigable rivers. In the earlier case, *Bonelli Cattle Co. v. Arizona*,[54] the Court impliedly overturned the general rule that federal law cannot affect title to beds of federally navigable waters after statehood. In *Bonelli* a substantial area of land reemerged from the river-

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ANN. tit. 60, § 337 (West 1971). **Tennessee**: Hurley v. American Enka Corp., 93 F. Supp. 98 (E.D. Tenn. 1950); Cunningham v. Prevow, 28 Tenn. App. 643, 192 S.W.2d 338 (1946). **Utah**: Utah State Road Comm'n v. Hardy Salt Co., 26 Utah 2d 143, 486 P.2d 391 (1971). **Washington**: Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232 (1969) (by implication), *cert. denied*, 400 U.S. 878 (1970); Hughes v. State, 67 Wash. 2d 799, 410 P.2d 20 (1966), *rev'd*, 389 U.S. 290 (1967) (owner of abutting upland has right to accretion); Ghione v. State, 26 Wash. 2d 635, 175 P.2d 955 (1946); WASH. CONST. art. 17, § 1. **Wyoming**: Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

3. North Dakota, South Dakota, and Wisconsin employ the sawlog or recreational boat definition of navigability. *See, e.g.*, **North Dakota**: Hogue v. Bourgois, 71 N.W.2d 47 (N.D. 1955); State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949). **South Dakota**: Hillebrand v. Knopp, 65 S.D. 414, 274 N.W. 821 (1937); S.D. COMPILED LAWS ANN. §§ 43-17-2, 3 (1967). **Wisconsin**: State v. McFarren, 62 Wis. 2d 492, 215 N.W.2d 459 (1974) (lakes); State v. McDonald Lumber Co., 18 Wis. 2d 173, 118 N.W.2d 152 (1962) (lakes).
4. Kansas employs another definition of navigability more extensive than the commercial navigability definition. *See, e.g.*, Grape v. Laiblin, 181 Kan. 677, 314 P.2d 335 (1957).
5. Alabama, Arizona, Michigan, New Mexico, and Ohio have not defined navigability for bed title purposes. *See, e.g.*, **Alabama**: Hood v. Murphy, 231 Ala. 404, 165 So. 219 (1936). **Arizona**: State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), *aff'd on rehearing*, 108 Ariz. 258, 495 P.2d 1312 (1972), *rev'd on other grounds*, 414 U.S. 313 (1973). **Michigan**: Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953) (dictum; Great Lakes); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930) (Great Lakes and connecting waters); People *ex rel.* Gazlay v. Murray, 54 Mich. App. 685, 221 N.W.2d 604 (1974) (Great Lakes). **New Mexico**: State *ex rel.* State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945) (dictum). **Ohio**: Cleveland Boat Serv. v. City of Cleveland, 102 Ohio App. 255, 130 N.E.2d 421 (1955) (Great Lakes); OHIO REV. CODE ANN. § 123.03 (Page 1978) (Great Lakes).

For state navigability definition cases, see notes 68-71 *infra*.

52. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71, 374, 378 (1977); Borax Consol. v. Los Angeles, 296 U.S. 10, 16, *rehearing denied*, 296 U.S. 664 (1935); Hardin v. Jordan, 140 U.S. 371, 381 (1891).
53. *See* Kean v. Calumet Canal & Improvement Co., 190 U.S. 452, 460-61 (1903) (Swamp Lands Act grant titles).
54. 414 U.S. 313 (1973).

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bed following completion of a federal rechanneling project on the Colorado River. Previously, that land had gradually disappeared by erosion. Both the abutting upland owner and the state asserted title to the reemerged land. The Arizona Supreme Court held that under state law the state had acquired title to the riverbed as a result of the river's migration onto the riparian's land. The rechannelization was characterized as an avulsive change in the course of the river which did not affect bed title.[55]

The United States Supreme Court admitted that the state owned the riverbed prior to the rechannelization, but held that the "equal footing" doctrine required that federal common law, not state law, determine the location of title after statehood:

> The present case . . . does not involve a question of the disposition of lands, the title to which is vested in the States as a matter of settled federal law. The very question to be decided is the nature and extent of the title to the bed of a navigable stream held by the State under the equal-footing doctrine. . . . In this case, the question of title as between the State and a private landowner necessarily depends on a construction of a "right asserted under federal law."
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> . . . .
>
> The equal-footing doctrine was never intended to provide a State with a windfall of thousands of acres of dry land exposed when the main thread of a navigable stream is changed. It would be at odds with the fundamental purpose of the original grant to the States to afford a State title to land from which a navigable stream had receded unless the land was exposed as part of a navigational or related public project of which it was a necessary and integral part. . . .
>
> The advance of the Colorado's waters divested the title of the upland owners in favor of the State in order to guarantee full public enjoyment of the watercourse. But, when the water receded from the land, there was no longer a public benefit to be protected; consequently, the State, as sovereign, has no need for title. That the cause of the recession was artificial, or that the rate was perceptible, should be of no effect.[56]

The Court held that under the federal common law the rechanneling project effected an artificial accretion; therefore, the reemerged land belonged to the owner of the abutting fast land.[57]

Bonelli caused consternation because it overruled the host

55. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 316-17 (1973). *See* State v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699, 703 (1971).
For a discussion of accretion and avulsion, see Comment, *Land Accretion and Avulsion: The Battle of Blackbird Bend*, 56 NEB. L. REV. 814 (1977).
56. Bonelli Cattle Co. v. Arizona, 414 U.S. at 320-24.
57. *Id.* at 327-28.

of "equal footing" bed title precedent accumulated since the early nineteenth century. Furthermore, it confused the sharp line between the state's proprietary interest in title to beds of navigable waters and its sovereign and police power interest in protecting use of navigable waters by members of the public.[58] It also confused the definitional distinction between avulsion and accretion.[59]

Within four years the Court again was faced with the same factual and doctrinal questions. This time, in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*,[60] title to a portion of the bed of the Willamette River which was first occupied by the river after it suddenly changed its course during the flood of 1909 was in dispute. Oregon asserted that bed title follows the river. Corvallis asserted that the flood had caused an avulsive change in the course of the river so that its prior title to the area was not divested as a result of the inundation. The Oregon Court of Appeals followed *Bonelli* and held that the federal common law applied. Finding no need for state title to the bed for public use purposes, the court held that an avulsion had occurred and that Corvallis' prior title had not been divested.[61]

In the United States Supreme Court, each party sought an interpretation of the federal common law favorable to its position. *Amici* argued that *Bonelli* was erroneous and that the prior law should be restored. The Court agreed with *amici* and overruled the federal common law extension of "equal-footing" announced in *Bonelli*:

> The title to the land underlying the Colorado River at the time Arizona was admitted to the Union vested in the State as of that date under the rule of *Pollard's Lessee v. Hagan*. . . . Although federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law. . . .

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58. *See* Johnson & Austin, *supra* note 18, at 4-8. The distinction between navigability definitions also exists at the federal level. *See* notes 25-35 and accompanying test *supra*.

59. *See, e.g.*, 3 AMERICAN LAW OF PROPERTY §§ 15.26-.27 (A. Casner, ed. 1952); 7 R. POWELL & P. ROHAN, THE LAW OF REAL PROPERTY ¶ 983 (1977); Comment, *Land Accretion and Avulsion: The Battle of Blackbird Bend*, 56 NEB. L. REV. 814 (1977).

60. 429 U.S. 363 (1977).

61. *See* State *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 18 Or. App. 524, 534-41, 526 P.2d 469, 474-77 (1974), *aff'd & modified*, 272 Or. 545, 536 P.2d 517, 538 P.2d 70 (1975); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 367-68 (1977).

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> *Bonelli's* thesis that the equal-footing doctrine would require the effect of a movement of the river upon title to the riverbed to be resolved under federal common law was in error. Once the equal-footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have. Our error, as we now see it, was to view the equal-footing doctrine enunciated in *Pollard's Lessee v. Hagan* as a basis upon which federal common law could supersede state law in the determination of land titles. Precisely the contrary is true; in *Pollard's Lessee* itself the equal-footing doctrine resulted in the State's acquisition of title notwithstanding the efforts of the Federal Government to dispose of the lands in question in another way.
>
> The equal-footing doctrine did not, therefore, provide a basis for federal law to supersede the State's application of its own law in deciding title to the *Bonelli* land. . . . Since the application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right, we now believe that title to the Bonelli land should have been governed by Arizona law, and that the disputed ownership of the lands in the bed of the Willamette River in this case should be decided solely as a matter of Oregon law.[62]

Following its detailed examination of precedent, the Court concluded that "[t]he rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired [under the constitutionally mandated 'equal footing' doctrine] by the State is absolute so far as any federal principle of land titles is concerned."[63]

The Court explained the error of its prior analysis of the impact of the "equal footing" doctrine on bed titles:

> The [*Bonelli*] approach would result in a perverse application of the equal-footing doctrine. An original State would be free to choose its own legal principles to resolve property disputes relating to land under its riverbeds; a subsequently admitted State would be *constrained* by the equal-footing doctrine to apply the federal common law rule, which may result in property law determination antithetical to the desires of that State.[64]

The net result of the Court's reexamination of bed title law was the conclusion that *Bonelli* "was wrong in treating the equal-footing doctrine as a source of federal common law after that doctrine had vested title to the riverbed in the State of Arizona as of the time of its admission to the Union."[65] The Court then remanded the case to the Oregon Supreme Court for examination of the case under state bed title law.

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62. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-72 (1977).
63. *Id.* at 374.
64. *Id.* at 378.
65. *Id.* at 381.

Corvallis completely restored the prior general rule that once a state has acquired the beds of federally navigable waters at statehood it has sole authority to determine the law governing their disposition and that the federal government has no power to divest either states or private title holders of any bed titles conferred under the state law.[66] After *Corvallis*, there appears to be no residual precedential value to *Bonelli* concerning inland waters.[67]

D. State Navigability Definitions for Bed Title Purposes

A state may establish and use its own definitions of navigability to determine the location of title to beds of federally navigable waters acquired at statehood. This is a corollary of the principle that a state may dispose of the beds of such waters in any manner it chooses. The states created from federal territories employ several different navigability definitions for bed title purposes. A few states use the common law tidal definition of navigability,[68] which in inland states prevents any water from being characterized as navigable. A majority of states use a definition similar or identical to the federal commercial navigability test.[69] A large minority of states uses a definition which

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66. *See* note 47 *supra*.
67. Maloney suggests that *Bonelli* may not have completely struck down the federal common law of coastal frontage boundaries upheld in Hughes v. Washington, 389 U.S. 290 (1967). *See* Maloney, *supra* note 12, at 485-88.
68. Colorado, Illinois, Mississippi, Nebraska, and Oregon are states created from federal territories which employ the tidal definition of navigability. In these states, there are no inland navigable waters even though they may be navigable in fact. *See, e.g.*, **Colorado**: Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905). **Illinois**: Leitch v. Sanitary Dist. of Chicago, 369 Ill. 469, 17 N.E.2d 34 (1938). **Mississippi**: Wilson v. St. Regis Pulp & Paper Corp., 240 So. 2d 137 (Miss. 1970). **Nebraska**: Valder v. Wallis, 196 Neb. 222, 242 N.W.2d 112 (1976). **Oregon**: Luscher v. Reynolds, 153 Or. 625, 56 P.2d 1158 (1936) (by implication; tidal waters and large rivers).
69. Arkansas, California, Florida, Idaho, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nevada, Oklahoma, Tennessee, Utah, Washington, and Wyoming are states created from federal territories which define navigable inland waters as those which are commercially used in trade and commerce. *See, e.g.*, **Arkansas**: Parker v. Moore, 222 Ark. 811, 262 S.W.2d 891 (1953). **California**: People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935). **Florida**: Baker v. State *ex rel.* Jones, 87 So. 2d 497 (Fla. 1956). **Idaho**: United States v. Ladley, 4 F. Supp. 580 (D. Idaho 1933); Northern Pac. Ry. Co. v. Hirzel, 29 Idaho 438, 161 P. 854 (1916). **Indiana**: State *ex rel.* Indiana Dep't of Conservation v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950). **Iowa**: State v. Nichols, 241 Iowa 952, 44 N.W.2d 49 (1950) (by implication). **Louisiana**: Transcontinental Petroleum Corp. v. Texas Co., 209 La. 52, 24 So. 2d 248 (1946); Sinclair Oil & Gas Co. v. Delacroix Corp., 285 So. 2d 845 (La. App. 1973). **Minnesota**: State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957). **Missouri**:

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includes more streams, rivers, and lakes than does the federal test. These more expansive definitions frequently are characterized as sawlog or recreational boating tests.[70] A few states determine the navigability of particular watercourses by statute or judicial decree without otherwise defining navigability.[71] Under those navigability definitions, some states grant the beds of navigable waters to the owners of the abutting uplands.[72] Others retain title to the beds of such waters.[73]

E. Beds of Federally Nonnavigable Inland Waters

The law concerning the location of title to beds of federally nonnavigable inland waters in states created from federal territories is not fully settled. Although the law concerning private titles is clear, the law concerning state titles is open to question.

Clearly, the United States retains title to beds of all federally nonnavigable inland waters when the state within which they lie is admitted to the Union.[74] The federal government may dispose of those beds in any manner it chooses; it may expressly convey such beds to private persons or to the state,[75] or it may expressly

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Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954). **Montana:** Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895). **Nevada:** State Eng'r v. Cowles Bros., 86 Nev. 872, 487 P.2d 159 (1970). **Oklahoma:** Aladdin Petroleum Corp. v. State, 200 Okla. 134, 191 P.2d 224 (1948). **Tennessee:** Tallassee Power Co. v. Clark, 77 F.2d 601 (6th Cir. 1935) (by implication). **Utah:** Utah State Road Comm'n v. Hardy Salt Co., 26 Utah 2d 143, 486 P.2d 391 (1971). **Washington:** Diking Dist. No. 2 v. Calispel Duck Club, 11 Wash. 2d 131, 118 P.2d 780 (1941); Knutson v. Reichel, 10 Wash. App. 293, 518 P.2d 233 (1973). **Wyoming:** Day v. Armstrong, 362 P.2d 137 (Wyo. 1971).

70. North Dakota, South Dakota, and Wisconsin are states created from federal territories which employ a definition of navigability calling for capability of floating sawlogs or recreational boats. *See, e.g.*, **North Dakota:** State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949). **South Dakota:** Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937). **Wisconsin:** Muench v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514, *aff'd*, 261 Wis. 492, 55 N.W.2d 40 (1952).
71. Kansas is a state created from a federal territory which designates particular inland waters to be navigable although they would not be navigable under the commercial navigability definition. *See, e.g.*, Wear v. Kansas *ex rel.* Brewster, 245 U.S. 154 (1917) (judicial or statutory declaration); Jackson-Walker Coal & Material Co. v. Hodges, 283 F. 457 (D. Kan. 1918) (judicial or statutory declaration); Webb v. Board of Comm'rs of Neosho County, 124 Kan. 38, 257 P. 966 (1927) (judicial declaration).
72. *See* note 50 *supra*.
73. *See* note 51 *supra*.
74. United States v. Oregon, 295 U.S. 1, 14 (1935); United States v. Utah, 283 U.S. 64, 75 (1931); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 88 (1922) (by implication); Oklahoma v. Texas, 258 U.S. 574, 591-92, 594 (1922).
75. The federal government conveyed huge areas suitable for draining to the states under the Swamp Lands Acts, 43 U.S.C. §§ 981-994 (1970). Most of the beneficiary states lie within the Mississippi River and Great Lakes basins.

reserve and retain them prior to or at the time of conveyance of the abutting uplands.[76] In the absence of any such express action, the law of federal land patents applies, which means that, as a matter of federal law,[77] interpretation of and incidents to the title conveyed by the federal patent will be determined by state law.[78] Therefore, if the state rule gives bed title to the owner of the abutting upland, the federal patent will carry such bed title with it.[79] But if the state rule is that the state, not the abutting upland owner, has title to the beds of federally nonnavigable inland waters, then the precedent is contradictory and the result is unclear.

III. LOCATION OF TITLE TO BEDS OF FEDERALLY NONNAVIGABLE INLAND WATERS WHICH ARE CLAIMED BY THE STATES

The United States, not the individual states, probably retains title to beds of federally nonnavigable inland waters in states created from federal territories when the state law denies title to the abutting upland owner and asserts state title. The abutting upland owner does not acquire such bed titles. Although some cases hold that the states have acquired such bed titles, the better view is expressed by dicta in a few cases which suggest that the United States has retained the bed titles.

The cases can be divided into three groups: (1) those holding that the state has title to the beds of federally nonnavigable inland waters; (2) those holding that the United States has retained title; and (3) those leaving the question unresolved. None of those groups of cases definitively answers the question of the location of title to the beds.

See Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS § 41.3(C), at 263-64 (R. Clark ed. 1967).

76. United States v. Oregon, 295 U.S. 1, 25, 29 (1935); Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922) (dictum).

77. *See* note 48 *supra*.

78. United States v. Oregon, 295 U.S. 1, 28 (1935) (dictum); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 88 (1922) (dictum); Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922); Hardin v. Shedd, 190 U.S. 508, 519 (1903); Kean v. Calumet Canal Co., 190 U.S. 452, 459 (1903); Hardin v. Jordan, 140 U.S. 371, 384 (1891); Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272, 289 (1868).

79. Oklahoma v. Texas, 258 U.S. 574, 591 (1922); Donnelly v. United States, 228 U.S. 243, 263-64 (1913); Kean v. Calumet Canal Co., 190 U.S. 452, 459 (1903); Grand Rapids & Ind. R.R. v. Butler, 159 U.S. 87, 93-95 (1895). For state cases placing title to the beds of federally nonnavigable inland waters in the abutting upland owners, see note 152 *infra*.

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A. Cases Which Give Title to the States

The cases holding that the states created from federal territories have title to the beds of federally nonnavigable inland waters when the state law so provides begin their analysis with the general rule for the interpretation of federal land patents. If the federal government has not shown any express intention to convey the bed title or to reserve it, the United States is presumed in general to have assented that conveyance of that title and its incidents should be construed and given effect according to the rule of the state in which the land lies.[80] The United States Supreme Court described this general rule in *Packer v. Bird*:[81]

> The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.[82]

In the absence of express intention to the contrary, title to the beds of federally nonnavigable waters will be conveyed according to the local state rule regarding ownership of stream and lake beds.[83] This rule was best stated in *Hardin v. Jordan*:[84] "[T]he grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."[85]

1. Hardin v. Shedd

The United States Supreme Court has held specifically that the state can acquire title to the beds of federally nonnavigable inland waters. The first and most important case so holding is *Hardin v. Shedd*.[86] Hardin sought to establish record title to the bed of Wolf Lake from the State of Illinois under the Burnt

80. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 88 (1922); Packer v. Bird, 137 U.S. 661, 669 (1891).
81. 137 U.S. 661 (1891).
82. *Id.* at 669.
83. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 88-89 (1922); Oklahoma v. Texas, 258 U.S. 574, 594 (1922); Hardin v. Shedd, 190 U.S. 508, 519 (1903); Grand Rapids & Ind. R.R. v. Butler, 159 U.S. 87, 92-94 (1895); Hardin v. Jordan, 140 U.S. 371, 384 (1891); Packer v. Bird, 137 U.S. 661, 669 (1891).
84. 140 U.S. 371 (1891).
85. *Id.* at 384 (pursuant to the Illinois state law of that time, an owner of abutting upland acquired title to center of navigable and nonnavigable lakes).
86. 190 U.S. 508 (1903).

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Records Act. Shedd claimed the bed as successor in title to the upland patentee. The lake was nonnavigable under both the federal and state definitions. Illinois law at that time provided that the beds of all lakes, navigable and nonnavigable, belonged to the state. In confirming Hardin's title from the state, the Court stated:

> In the case of land bounded on a nonnavigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned . . . . The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water . . . passed to the State on its admission or otherwise, . . . but is simply a convenient, possibly the most convenient, way of determining the effect of a grant.[87]

2. *Kansas Cases*

In a later case, the Court refused to upset a determination by the Kansas Supreme Court that the Kansas River was navigable in law at Topeka and that, as a result, the bed of the river belonged to the state.[88] Two lower federal courts followed that decision and refused to upset Kansas's later assertions of title.[89] In one of these cases, the district court commented:

> [T]here can be no possible doubt whatever the Arkansas River at the point in controversy in this case is not now, and has not, since its known history, been navigable in point of fact. . . . However . . . it must . . . be held, in this case, the navigability of the stream in point of fact is not the true test. On the contrary, the true test is whether the Arkansas River at the locus in quo must be regarded as navigable under the local laws of the state of Kansas, as ordained and established for the purpose of the unvarying determination of the property rights of riparian owners along its course through the state. That by the local property rule established in this state, once for all, the title to the bed of the Arkansas River within the state is vested in the state and not in the adjoining riparian owner.[90]

3. *Discussion*

In each of these cases the state did not receive title to the bed of the federally nonnavigable inland water by a grant from the United States; instead, there was no expression of federal intention whatever. In each of these cases the court held that the state acquired title to the bed by operation of the federal land patent interpretation rule by reference to the local state bed title rule

87. Hardin v. Shedd, 190 U.S. 508, 519 (1903) (citations omitted).
88. Wear v. Kansas, 245 U.S. 154, 157 (1917).
89. Shore v. Shell Petroleum Corp., 60 F.2d 1 (10th Cir. 1932); Jackson-Walker Coal & Material Co. v. Hodges, 283 F. 457 (D. Kan. 1918).
90. Jackson-Walker Coal & Material Co. v. Hodges, 283 F. 457, 464-65 (D. Kan. 1918) (citations omitted).

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when the abutting upland was granted to individual patentees by the United States. The only way by which the states could have received that bed title is by implied grant.

One other factor should be noted about all of these cases—the United States was not a party. Each of the bed title disputes was between the state and the private owner of the abutting fast land. The validity of the title of the United States *vis a vis* the state's title was not being litigated.

B. Cases Which Give Title to the United States

There are several cases which expressly hold that the federal government, not the individual states, holds title to the beds of federally nonnavigable inland waters in states created from federal territories even though the state rule confers title on the state. However, none of these decisions can be regarded as squarely holding that a state cannot acquire bed title by operation of law. In each of these cases, retention of title by the United States can be explained more simply and directly on other grounds.

1. Oklahoma v. Texas

The first of these cases is *Oklahoma v. Texas*.[91] Oklahoma claimed title to the bed of the Red River where oil and gas had been found. The United States intervened to assert title in its own right and as trustee for Indians whose land lay on the Oklahoma shore. The private shore owners also intervened. (A previous decision had held that the Texas boundary ran along the south bank of the river so its claims were not involved in this part of the case.)

Oklahoma claimed title to the entire bed of the river because the river was declared navigable in law under state court decisions and under a state statute. Therefore, it argued that the bed had passed to it upon its admission to statehood. The United States claimed the south half of the bed, asserting that (1) the river was not navigable in fact under the federal test, (2) the beds of nonnavigable waters did not pass to the state upon its admission to the Union, and (3) the common law of Oklahoma conveyed the bed to the upland owners only as far as the middle of the stream. The United States, as trustee for the Indians, and private upland owners claimed portions of the north half of the bed as riparian upland owners.[92]

91. 258 U.S. 574 (1922).
92. *Id.* at 583, 591, 594-96.

After finding the Red River to be nonnavigable under the federal definition, the Court made its landmark pronouncement that title to beds of nonnavigable waters is retained by the federal government after the state is admitted to the Union:

> We conclude that no part of the river within Oklahoma is navigable and therefore that the title to the bed did not pass to the State on its admission into the Union. If the State has a lawful claim to any part of the bed, it is only such as may be incidental to its ownership of riparian lands on the northerly bank.[93]

Finding that there was no intention by the United States to separate the bed from the upland, the Court followed the rule of land patent interpretation laid down in *Hardin v. Jordan*[94] and looked to the property law of Oklahoma to determine the disposal of the bed.

Oklahoma argued that the common law rule had been impliedly abrogated by the Oklahoma legislature when it declared the Red River to be navigable, and that beds of rivers declared navigable under the state definition belonged to the state as do the beds of tidal rivers under the common law. The Court rejected this argument stating that the Oklahoma statute in question was addressed to public use rights to the water and not to ownership of the bed. "The rule as to either could be displaced without affecting the other."[95]

The Court, therefore, applied the common law rule, which provides that the bed of a nonnavigable stream to the medial line, but not beyond, is conveyed with the upland.[96] The Court held that the United States owned the south half of the bed and

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93. *Id.* at 591-92.
94. 140 U.S. 371 (1891).
95. Oklahoma v. Texas, 258 U.S. at 596.
96. In a recent case involving the common law of Oklahoma, a lower federal court held that where the entire bed of a nonnavigable stream is in one state which borders on the river, the entire bed is attached to the upland tracts in that state.

> When . . . the grantor owns the entire bed of the stream, but no part of the upland on the opposite side, in the absence of a clear indication of a contrary intention from the terms of the grant and the attendant circumstances, the grant will be construed to convey to the grantee the entire bed of the stream.
>
> The rule is bottomed on two reasons: (1) A grantor will be presumed not to have reserved a strip of land covered by water, which would be of little practical value to him; (2) It is a wise public policy, to prevent vexatious litigation likely to arise from retention of title to the river bed in the grantor, on the happening of some unexpected event.

Choctaw & Chickasaw Nations v. Seay, 235 F.2d 30, 35 (10th Cir. 1956).

Query, was the Supreme Court or the circuit court in error about the common law of Oklahoma? The answer will not affect the analysis of Oklahoma v. Texas.

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the upland proprietors the north half. Since the Court ruled that the property law of Oklahoma did not convey the bed of a river which was nonnavigable under the federal definition to the state but rather to the upland patentee, and since the United States retained ownership of the south half of that bed under that same common law, *Oklahoma v. Texas* cannot be construed as a decision overruling the implied grant line of cases following *Hardin v. Shedd*.[97] Rather it must be considered as another case supporting the general rule of state law interpretation of federal patents announced in *Hardin v. Jordan*.[98]

2. *Two Later Cases*

Two later cases have held that the federal definition must be used to determine navigability for the purpose of deciding whether the bed was transferred to the state upon admission to the Union or was retained by the United States.[99] The common law of these states gives title to the beds of nonnavigable waters to the upland proprietor, which in these cases was the United States. This is the correct result under *Hardin v. Jordan*.

3. *United States v. Oregon*

The most recent case is *United States v. Oregon*.[100] Professor Bade asserts[101] that *United States v. Oregon* stands for the proposition that a state cannot become owner of the bed of a nonnavigable water under the federal definition by virtue of grants of the upland to individual patentees. He argues that there is a limitation to the general rule of *Hardin v. Jordan*,[102]

97. 190 U.S. 508 (1903).
98. 140 U.S. 371 (1891).
99. In United States v. Utah, 283 U.S. 64 (1931), the Court held that portions of the Colorado River were not navigable under the federal definition and that title to the beds of those portions remained in the United States after Utah was admitted to the Union. *Id.* at 83. Utah did not allege a property rule making the beds of nonnavigable rivers property of the state. The United States was the upland proprietor on both sides of the river.

In United States v. Ladley, 4 F. Supp. 580 (D. Idaho 1933), the district court held that a lake was nonnavigable under the federal definition, that the United States had retained ownership of the bed after Idaho's admission to the Union, and that the United States owned the bed as upland proprietor, as trustee for the Indians. *Id.* at 583-84. Idaho did not assert a property rule making it the owner of the beds of nonnavigable waters.
100. 295 U.S. 1 (1935).
101. Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305 (1940).
102. 140 U.S. 371 (1891).

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that the local state property rule concerning incidents of ownership should be followed in the absence of contrary evidence of intention by the federal government. Hence, if the local state rule provides that the upland owner shall not obtain title to the bed of a nonnavigable water under the state definition, then its title remains in the United States.[103]

The contention that the *Hardin v. Jordan* rule does not comprehend conveyance of the bed of a nonnavigable water to the state by operation of law when the upland is patented must come from the following language in *United States v. Oregon*:

> [I]n no case has this Court held that a state could deprive the United States of its title to land under non-navigable waters without its consent, or that a grant of uplands to private individuals, which does not in terms or by implication include the adjacent land under water, nevertheless operates to pass it to the State. . . .
>
> The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control. . . .
>
> The State, in making its present contention, does not claim as a grantee designated or named in any grant of the United States. It points to no rule ever recognized or declared by the courts of the State that a grant to individual upland proprietors impliedly grants to the State the adjacent land under water. . . . The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, as far as they have not passed to the individual upland proprietors, remain the property of the United States.[104]

A close reading of *United States v. Oregon* reveals that it does not support Professor Bade's assertion. The United States brought an action against Oregon to quiet title to the bed of Malheur Lake and four other bodies of water located within surveyed meander lines. The United States claimed that the beds were its property because the lakes were nonnavigable in fact under the federal definition and the beds had never been disposed of. Oregon asserted ownership to the beds on two grounds: (1) the lakes were navigable and, therefore, the beds of the lakes had passed to it upon its admission to the Union, and (2) the beds passed to it by operation of law when the upland was conveyed either to the individual patentees or to the state as school or indemnity lands.[105] For the latter assertion, Oregon relied on the *Hardin v. Jordan* rule and upon a 1921 state statute declaring that lakes meandered by public surveys were navigable public waters and title to beds of such lakes was in the state.[106]

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103. Bade, *supra* note 101, at 317-18 (quoted at note 124 *infra*).
104. 295 U.S. 1, 27-29 (1935).
105. *Id.* at 6.
106. *Id.* at 7.

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It was not necessary for the Court to state that the bed of nonnavigable inland water is not impliedly conveyed to the State since the Court stated three other reasons for its decision. First, the 1921 Oregon statute, which repudiated the common law "*ad medium filum aquae*" rule and declared the title of beds of meandered lakes to be in the state, was enacted subsequent to all of the conveyances of the upland and constituted an *ex post facto* taking of property. Second, the statute operated as an unlawful forfeiture to the state of bed title attached to uplands retained by the United States[107] in violation of the constitutional power of the United States to regulate its own property. Third, there were no facts to support an intent by the United States to abandon or surrender any part of the lake bed.[108] Therefore, the Court followed the "express intention" exception stated in *Hardin v. Jordan* and did not rely on the general rule of state law interpretation of federal patents.

The third basis for decision was applied backwards by the Court, for *Hardin v. Jordan* requires a positive indication of intent to reserve the bed of a navigable water by the United States in order to take the case out of the general rule. The fact that the United States established a bird reserve on the lake bed in 1908, merely thirteen years after the survey, could be considered to be sufficient positive indication to negate application of the general rule.[109] Therefore, *United States v. Oregon* does not reject the rules of construction of federal grants announced in *Hardin v. Jordan*, but, in fact, supports and follows them.

Since the case decided that the Oregon statute which declared that state title to the beds of meandered lakes can have no effect either on private titles established prior to 1921 or on title to lands never patented by the United States, *United States v. Oregon* cannot be said to address itself directly to the question whether a State can by operation of law acquire title to the bed of a water it declares to be navigable when the upland is conveyed to an individual patentee. Nonetheless, *United States*

107. *Id.* at 28-29.
108. *Id.* at 28.
109. This third ground for rejecting Oregon's assertion of title appears to be weak factually. In United States v. Otley, 127 F.2d 988 (9th Cir. 1942), the United States sought to quiet title to the lake bed against the shoreland patentees on Malheur Lake. The court of appeals found title in the patentees since it found not only no intention by the United States to reserve the bed, but also a positive intention as early as 1895 to convey the bed with the upland. *Id.* at 996-98. Such an intention would also apply to the upland which the United States had never sold. Since it owned 80 percent of the abutting fast lands, the United States would retain title to that portion of the bed as a private proprietor under the Oregon common and statutory law in effect prior to 1921.

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v. Oregon is strongly indicative of the Court's attitude on this question.

4. Discussion

In none of the cases giving bed title to the United States did the states have a local property rule at the time the uplands were patented which stated either that the bed of a nonnavigable inland water was the property of the state or that the bed was conveyed to the state by operation of law when the upland was granted to the individual patentee. In two cases, the state had a different definition for navigability than the federal definition, but one was held to apply only to water use rights and not to bed title,[110] and the other was held to cause an unlawful *ex post facto* divestiture of property.[111] As a result, the courts applied the general rule of construction announced in *Hardin v. Jordan*[112] (which uses the local state rule of property as a guide to determine the disposition of incidents of ownership of the upland) and attached title to the bed of the nonnavigable inland waters to the upland. In some cases the upland title holder was an individual patentee; in others it was the United States. The rule announced by *Hardin v. Shedd*[113] (that the bed is conveyed to the state by operation of law when the upland is conveyed to an individual patentee) was neither discussed nor applied in these cases.

C. Cases Which Leave the Location of Title in Doubt

1. Marshall Dental Manufacturing Co. v. Iowa

There is only one federal case which recognized that giving states created from federal territories title to the beds of federally nonnavigable inland waters when the upland is patented involves an implied grant by the United States. In *Marshall Dental Manufacturing Co. v. Iowa*,[114] the company, owner of the entire shoreland of Goose Lake, sought to drain the lake. It claimed title through the State of Iowa and Greene County under the Swamp Lands Acts[115] and a state statute conveying swamplands to the counties. Iowa sought to enjoin the drainage and to quiet title, basing its claim on a state law giving title to

110. Oklahoma v. Texas, 258 U.S. 574 (1922).
111. United States v. Oregon, 295 U.S. 1 (1935).
112. 140 U.S. 371 (1891).
113. 190 U.S. 508 (1903).
114. 226 U.S. 460 (1913).
115. Swamp Lands Acts, 43 U.S.C. §§ 981-994 (1970).

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beds of meandered lakes to the state. The lake had been meandered as a lake in an 1853 public survey. A request by the state in 1903 to have it surveyed as swamplands was refused by the Secretary of the Interior because there was insufficient proof that it was not a lake. Accepting a state court decision that the lake was nonnavigable but proper to be meandered,[116] the Court refused to give title to the upland owner:

> By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining land by the United States did not convey the land under the lake. . . . It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the State.[117]

The Court held that Iowa had a sufficient interest in the lakebed to maintain suit against an intruder without title. Therefore, it was not necessary to decide whether title was in Iowa or in the

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116. State v. Jones, 143 Iowa 398, 122 N.W. 241 (1909).

117. Marshall Dental Mfg. Co. v. Iowa, 226 U.S. 460, 461 (1913).

The Iowa Supreme Court below raised the same issue and also declined to resolve it because it was not necessary to the decision:

> What becomes of the title to the bed of the lake when the riparian owner takes to the water's edge only? Is it retained by the United States, or does it pass to the state in which the body of water is located? . . . If title is within the state, when and how was it acquired? . . .
>
> . . . .
>
> Prior to the admission of Iowa as a state the title to this lake bed was in the United States, and it was not thereby divested. . . .
>
> . . . Manifestly nonnavigable waters are not within [the equal footing] doctrine, and upon what theory it may be said that title to the beds of nonnavigable lakes pass from the [federal] government to the state upon its admission to the Union, courts so holding have not taken the trouble to explain.
>
> . . . There seems no ground for saying that the state acquired title to the nonnavigable lakes upon admission of the state to the Union. . . . The conclusion is unavoidable that the [federal] government, in reserving the numerous small [meandered] lakes of the state from sale, intended them for the public use. No attention has been bestowed thereon since by the [federal] government, and in all respects, save in the regulation of commerce, nonnavigable lakes like those which are navigable, have been treated as under the control and sovereignty of the state.

State v. Jones, 143 Iowa 398, 403-07, 122 N.W. 241, 242-44 (1909) (citations omitted).

In concluding that the state had authority to designate the boundary of lands abutting upon meandered nonnavigable lakes at the water's edge and to bring actions to restrain the abutting owners from adversely affecting the waters of the lakes, the Iowa court commented:

> We are not now concerned with the inquiry as to whether the state may dispose of these lake beds in a manner inimicable to the purposes of their reservation by the general government. It is enough to dispose of the case at bar to decide . . . that the state has such an interest in Goose Lake as will support an action to restrain defendants, who are without title, from draining the waters therefrom, or otherwise exercising proprietary control over the same.

Id. at 409, 122 N.W. at 244.

United States. That disclaimer is significant because it recognized the paramount fact existing in all the cases in which the state asserted title to the beds of federally nonnavigable waters—that the United States was not a party and that the validity of its title *vis a vis* the state's was not being litigated.

Great weight should be given the comment in *Marshall Dental Manufacturing Co. v. Iowa* that when the local state property rule gives title to the bed of a nonnavigable inland water to the state, and not to the upland patentee, it means only that the upland owner does not obtain title to the bed; it does not determine whether the state obtains title instead or whether the United States retains title. The cases giving title to the state should be viewed as deciding only that the state has better title than the upland owner, but not that the state necessarily has better title than the United States. Instead, the dictum in *United States v. Oregon*,[118] which repudiated a rule divesting property of the United States by operation of state law, should apply.

2. *State Cases*

A few state courts have recognized the problem of resolving how the state could acquire title to the beds of federally nonnavigable inland waters. Three Iowa decisions suggested in dicta that title to the beds must have remained in the United States' but held that a determination of the location of bed title was unnecessary to the question whether the state could restrain private upland owners from adversely affecting the waters in meandered nonnavigable lakes.[119] A Wisconsin decision found it

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118. 295 U.S. 1 (1935).

119. The earliest Iowa decision is State v. Jones, 143 Iowa 398, 122 N.W. 241 (1909). *See* note 117 *supra*. The second is State v. Livingston, 164 Iowa 31, 145 N.W. 91 (1914), in which the state sought to quiet title to the bed of Boyer Lake, a meandered nonnavigable lake, the bed of which had been drained by the upland owners. The state based its claim on the doctrine of State v. Jones:

> In *State v. Jones* . . . this court has recognized the right of the state to maintain action to prevent persons without title from exercising a proprietary interest over a lake or lake bed, the theory of the decision being that the title to the bed of a nonnavigable meandered lake does not pass to the owners of platted lands bordering upon it, but, in the absence of conveyance by patent, remains in the general government, reserved in trust for all the people of the state in which it lies. Upon this rule plaintiff rests its right to sue.

164 Iowa at 36-37, 145 N.W. at 93. The court quieted title in the upland owners because it found that the beds were under a river, not a lake, and that title to the beds of nonnavigable rivers belonged to the upland owners.

The third decision is State v. Nichols, 241 Iowa 952, 44 N.W.2d 49 (1950), in which the state sought to quiet title to the bed of a lake which had been patented after the General Land Office determined that it had been mean-

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unnecessary to make such a determination about the bed of a drained nonnavigable lake in a quiet title action brought successfully by the upland owner against the patentee of the drained lake bed.[120] A Minnesota decision referred to the issue, but did not reach it because it held that the state could assert title only to the beds of federally navigable waters.[121]

D. Discussion

No case to date has held squarely whether a state created from a federal territory can acquire title to the bed of a federally

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dered by mistake and was available for entry and purchase. Besides holding that such a determination could not be challenged collaterally by the state, the court commented that the state need not depend on a determination that the lake was navigable for its right to maintain the action. It noted that under Iowa law the beds of meandered nonnavigable lakes do not belong to the upland owners. On the question whether the state could maintain an action to restrain the upland owners from exercising proprietary rights over the lake beds, the court quoted *State v. Jones* and *State v. Livingston*, and commented, "The state may take such action as may seem necessary to protect and preserve such a lake, and while it is not necessary to pass upon the question, and we do not, it is a pertinent inquiry whether the state could ever quiet title to such a lake." 241 Iowa at 968, 44 N.W.2d at 58.

120. The Wisconsin Supreme Court stated in Boorman v. Sunnuchs, 42 Wis. 233, 246 (1877):

> The exigencies of the case do not require us to determine whether the United States or the state of Wisconsin is the owner of that portion of the bed of the pond to which the plaintiff may fail to establish title. The question is an important one, and not free from difficulty, but it is immaterial to the determination of this case. The plaintiff is entitled to the relief prayed in respect to the lands in controversy to which he establishes title in himself, and no further. Failing to show title in himself, he fails in the action, and it is of no consequence whether the title is in the defendant under his patent from the United States, or in the state, notwithstanding the patent.

121. The Minnesota Supreme Court in State v. Adams, 251 Minn. 521, 552, 556, 89 N.W.2d 661, 682, 685 (1957), twice referred to the state bed title issue without either introduction or analysis. First, the court quoted United States v. Oregon, 295 U.S. 1, 27-29 (1935) (language quoted in the text at note 104 *supra*). Second, it quoted from Professor Bade's article, *supra* note 101, at 317 (language quoted at note 126 *infra*). Both quotations were gratuitous since neither was necessary to the decision in the case. However, the state bed title question would have to have been decided if the court had accepted the state's assertion of title and rejected the upland owner's titles. The state had argued that its recreational boating navigability test determined which beds of federally nonnavigable lakes belonged to the private upland owners and which belonged to the state. Since the court decided that the federal navigability test not only determined which lake beds the state acquired at statehood under the equal footing rule but also decided that the beds of all federally nonnavigable lakes belonged to the private upland owners, the state bed title question was rendered moot. Therefore, the court concluded that the state had no proprietorship over the beds of several northern lakes, the draining of which it sought to license for iron ore mining purposes.

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nonnavigable inland water by implied grant or operation of law when the upland is patented by the United States to a private individual. The cases which held that the states do acquire bed title applied the general rule announced in *Hardin v. Jordan* that incidents to the title conferred by the patent will be interpreted by the law of the state in which the bed is located. None of those cases considered the implied grant problem. In none of them was the United States a party. The cases which held that the United States retains bed title where the state law denies title to the upland owners did consider the implied grant problem, either expressly or impliedly. However, in none of these cases did the state have a rule at the time the upland was patented that the state acquired bed title. Those cases were decided on other grounds.

The state bed title issue has existed ever since the United States Supreme Court handed down its decision in *Hardin v. Shedd*,[122] in which state title to the bed of Wolf Lake in Illinois, a federally nonnavigable lake, was confirmed and title in the upland owner was rejected. Two justices dissented in that case on the ground that to give the state the title to the bed was to cause an appropriation of property of the United States.

> *Hardin v. Jordan* . . . , whilst recognizing that the ownership of the beds of non-navigable lakes on the public domain was in the United States, simply decided that when the United States sold lots bordering on such a lake the question whether or not the bed of the lake passed by the grant of the border lots was to be determined by the principles of conveyancing in force under the local law of the State where the lake was situated. Now, as the settled rule in Illinois is that under the principles of conveyancing prevailing in that State no title to the bed of a lake passes to the patentees of the United States by the sale of border lots, I do not perceive how the United States has been divested of its title to the bed of Wolf Lake. To say that, although on the principles of conveyancing under the local law, the bed did not pass, nevertheless, because the United States sold the border lots, the State of Illinois thereby became the owner of the bed of the lake, is, as I understand it, to declare that it is in the power of the State of Illinois to appropriate the property of the United States.[123]

Nonetheless, with the exception of the Iowa and Wisconsin decisions, the state bed title issue was not recognized by any state or federal court in concrete terms until the 1935 decision in *United States v. Oregon*.[124] That decision was not determinative, although highly suggestive of the Court's attitude. Subsequently, no federal court and no state courts, except those in Iowa and Minnesota, have dealt with the issue. By contrast a few state courts since 1935 have held that the state does acquire title to the

122. Hardin v. Shedd, 190 U.S. 508 (1903).
123. *Id.* at 522-23.
124. 295 U.S. 1 (1935).

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beds of federally nonnavigable inland waters when the upland is patented to private individuals.[125] Therefore, the question cannot be considered settled.

Commentators generally agree that the United States does retain title to the beds of federally nonnavigable inland waters in states created from federal territories where state law denies title to the upland owners and purports to place it in the state.[126]

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125. *See, e.g.*, Grape v. Laiblin, 181 Kan. 677, 314 P.2d 335 (1957); State v. Brace, 76 N.D. 314, 36 N.W.2d 330 (1949); State v. McDonald Lumber Co., 18 Wis. 2d 173, 118 N.W.2d 152 (1962) (lake).

126. Professor Bade was the first to argue that the United States retains title to the beds of federally nonnavigable inland waters where state law denies such title to the upland owners. Relying on United States v. Oregon, 295 U.S. 1, 27-29 (1935) (quoted in text accompanying note 104 *supra*), Bade states:

> The United States retained the full proprietary powers over all parts of the public domain which did not pass to the state . . . and which had not been previously disposed of.
>
> . . . .
>
> Since the United States retained the beds of non-navigable waters (non-navigable according to the federal test applied at the time the state was admitted), it may dispose of those beds as it sees fit. . . . If the beds of non-navigable waters do not pass with a grant of the adjacent upland, then they remain in the United States. The state cannot claim to become the owner of the beds of such non-navigable waters by virtue of grants of the abutting upland to individual patentees.

Bade, *supra* note 101, at 317-18. *See also id.* at 323.

Harold Ellis and his colleagues twice have examined the question. They first discussed the issue in a study of Illinois water law:

> It would appear . . . that the federal courts, unless a contrary intention was manifested in a federal patent or grant, ordinarily may construe such patents or grants issued after statehood to lands bordering on meandered Illinois lakes that are not navigable (by federal criteria) in conformity with the general rule followed by Illinois courts that the grantee did *not* thereby acquire title to the bed of such a lake. But it would seem that federal courts also might hold that the ownership of the beds of such lakes is in the federal government, not the State of Illinois, on the ground that it retained title to land not conveyed . . . . The state, while acquiring title to the beds of navigable waters upon statehood, did not acquire title to beds of nonnavigable waters.

F. MANN, H. ELLIS & N. KRAUSZ, WATER-USE LAW IN ILLINOIS 95-96 (1964). *See id.* at 91-95 (extensive analysis of the cases). The authors point out that one effect of federal retained title might be the necessity to obtain a federal license for construction of a structure in the bed of a federally nonnaviable inland water. *Id.* at 94 n.38a.

Ellis and his colleagues examined the question again in a study of Wisconsin water law:

> It would appear . . . that federal law regarding bed ownership ordinarily would allow a state's rules [about bed ownership] to be applied so as to preclude the grantees under federal patents or grants after statehood from acquiring title to the bed. . . . If a lake were non-navigable by the federal test of navigability, the state would not have obtained title to its bed upon statehood . . . .

An analysis of the existing law indicates that the United States retains title in the absence of express grant. The analysis starts with the proposition, previously discussed, that upon its admission to the Union, a state acquires title only to the beds of waters which are then navigable under the federal test.[127] Title to the beds of federally nonnavigable inland waters is retained by the United States.[128] Subsequent to statehood, the federal government may convey the beds by express grant or patent, either to private individuals or to the state.[129] In addition, under the federal law incorporating the state's rules concerning incidents to title, title to such beds may pass to the patentees of uplands by operation of federal law.[130] Therefore, all beds of federally nonnavigable inland waters not disposed of by express or implied grant continue to be owned by the United States.

Since there usually is not an express grant to the state of the beds of federally nonnavigable inland waters when the upland is patented to private individuals, the only way the state could acquire title to such beds is by implied grant or operation of law. Many state courts have assumed without discussion that title

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> . . . .
> . . . [I]t would appear that to the extent that riparian grantees under federal patents or grants did *not* acquire title to the beds of non-navigable lakes by federal criteria, the federal courts might hold that the ownership is in the federal government, not the state of Wisconsin, on the ground that the federal government retained title to the land not [*sic*] conveyed. They especially might so hold in any case in which the federal government is a party and asserts its interests, as it did in *United States v. Oregon*.

H. ELLIS, J. BEUSCHER, C. HOWARD & J. DEBRAAL, *supra* note 28, at 64, 66 (footnotes omitted). They reiterate the proposition that federal licenses may be required for structures erected in the beds of federally nonnavigable inland water and suggest further that dredging and mineral licenses might be similarly required. *Id.* at 67.

Wells Hutchins more recently examined the state bed title question in his treatise on western water law and reached the same conclusion:

> Where waters are not navigable in fact at the time of establishment of a new State, title of the United States to land underlying them remains unaffected by the change to statehood.
> . . . .
> In no case has the United States Supreme Court held that a State can deprive the United States of its title to lands underlying nonnavigable waters without its consent, or that a grant of uplands to private individuals, which does not in terms or by implication include the adjacent land under water, nevertheless operates to pass it to the State.

1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 134-35 (completed by H. Ellis & J. DeBrall, U.S. Dep't of Agric. Misc. Pub. No. 1206, 1971).

127. *See* note 13 *supra*.
128. *See* note 74 *supra*.
129. *See* note 75 *supra*.
130. *See* note 79 *supra*.

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passes to the state in that manner.[131] But title should not pass to the state in that manner since implied grants against the sovereign never are presumed.

Only federal laws, not the laws of the individual states, can control the disposition of lands owned by the United States. *United States v. Oregon* made that clear in the bed title context.[132] The federal courts long have held that the interpretation of federal land patents is a matter of federal law, not state law,[133] and have stated that it is federal policy to incorporate state title interpretation rules by reference in order to create a uniformity of title law in each state.[134]

Nonetheless, the United States Supreme Court, in *Hardin v. Shedd*,[135] and many state courts have recognized state title to beds of federally nonnavigable inland waters.[136] The Supreme Court has justified that position by arguing that after statehood, the federal government is nothing more than a private proprietor of retained beds.[137] Since the United States no longer has sovereign prerogatives over its own property under this view, the states can determine the location of title to the beds and can place that title in themselves.

That view is unsupportable. The United States Supreme Court has indicated subsequent to *Hardin v. Shedd* that the federal government retains sovereign prerogatives over retained public domain which the states are powerless to affect. When presented with the question whether a state could determine the nature of water rights attached to public domain lands after statehood, the Court stated:

> If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the [Desert Land Act of 1877], cannot be doubted.[138]

The Court found that Congress had expressly granted the power to determine water use rights on public domain lands by that legislation. However, neither Congress nor the federal courts have granted to the states analogous power to determine the

131. *See* notes 16 and 24 *supra*.
132. 295 U.S. 1, 27-29 (1935). *See* note 104 *supra*.
133. *See* note 48 *supra*.
134. *Id.*
135. 190 U.S. 508 (1903).
136. *See* notes 16 and 24 *supra*.
137. Hardin v. Shedd, 190 U.S. 508, 519 (1903).
138. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935).

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location of title to beds of federally nonnavigable inland waters in states created from federal territories where state law denies it to the upland proprietors. Therefore, the Court's statement strongly suggests that the states have no power to affect the federal title to the beds. The statement assumes that the United States retains its sovereign prerogatives over the beds as part of the public domain.

Another reason the states do not acquire title to the beds of federally nonnavigable inland waters when the upland is patented also stems from the sovereign rights of the United States over the public domain. Title to lands owned by the sovereign are not transferred to a grantee by implication, but only by express grant or affirmative operation of law. The sovereign is presumed to have retained title to all lands not expressly granted. Federal courts have recognized that principle with respect to public domain lands and federal purchased lands in general[139] and with respect to beds of federally nonnavigable waters in particular.[140] State courts have recognized the same principle with respect to state public lands.[141] Furthermore, grants by the sovereign are construed against the grantee; ambiguities are resolved in favor of the sovereign grantor.[142] The Supreme Court has also stated that states do not have power to divest the United States of title to its lands,[143] including beds of federally nonnavigable inland waters.[144] Therefore, the conclusion is inescapable that in states created from federal territories the beds of federally nonnavigable inland waters retained by the United States at statehood, and neither expressly granted nor impliedly conveyed with patents to the abutting uplands by affirmative operation of law, must still be owned by the United States.

E. States in Which the Bed Title Problem Exists

The question whether a state created from a federal territory can acquire title to the beds of federally nonnavigable inland waters by implied grant exists only in a few states. The question can arise under only two combinations of state bed title rules. The first combination consists of a navigability definition more

139. Massachusetts v. New York, 271 U.S. 65, 89 (1926); Shively v. Bowlby, 152 U.S. 1, 10 (1893); Packer v. Bird, 137 U.S. 661, 672-73 (1891) (by implication); Martin v. Waddell, 41 U.S. (16 Pet.) *367, *411 (1842).
140. United States v. Oregon, 295 U.S. 1, 25, 27-28 (1935).
141. Strayhorn v. Jones, 157 Tex. 136, 300 S.W.2d 623 (1957).
142. Massachusetts v. New York, 271 U.S. 65, 89 (1926); Shively v. Bowlby, 152 U.S. 1, 10 (1893); Martin v. Waddell, 41 U.S. (16 Pet.) *367, *411 (1842).
143. United States v. Oregon, 295 U.S. 1, 27-29 (1935); Wilcox v. Jackson, 38 U.S. (13 Pet.) *498, *516-17 (1839) (upland).
144. United States v. Utah, 283 U.S. 64, 75 (1931) (by implication).

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extensive than the federal commercial navigability definition[145] and an assertion of state title to the beds of those navigable inland waters.[146] The states using this combination are Kansas, North Dakota, South Dakota, and Wisconsin.[147] The second combination consists of a navigability definition equivalent to or more restrictive than the federal definition[148] and an assertion of state title to beds of certain of the nonnavigable inland waters.[149] The states using this combination are Illinois, Iowa, and possibly Oregon.[150] The state bed title question cannot arise in any state which has a combination of rules whereby the state has a navigability definition equivalent to or more restrictive than the federal definition[151] and title to beds of nonnavigable inland waters is placed in the abutting upland owners.[152] States

145. For states which have such definitions, see notes 70 and 71 *supra*.
146. For states which assert state title over state navigable inland waters, see note 51 *supra*.
147. *See* notes 51(3) and (4) *supra*; appendix *infra*.
148. For states which have such definitions, see notes 68 and 69 *supra*.
149. Illinois, Iowa, and Oregon assert state title over beds of certain nonnavigable inland waters. *See, e.g.*, **Illinois**: Wilton v. Van Hessen, 249 Ill. 182, 94 N.E. 134 (1911) (dictum) (meandered); ILL. ANN. STAT. ch. 19, § 71 (Smith-Hurd Supp. 1977) (meandered lakes). **Iowa**: Carr v. Moore, 119 Iowa 152, 93 N.W. 52 (1903) (meandered). **Oregon**: OR. REV. STAT. § 274.430 (1975) (meandered lakes). *But see* United States v. Oregon, 295 U.S. 1 (1935).
150. *See* notes 51(1)-(2) and 148 *supra*; appendix *infra*.
151. For states which have such definitions, see notes 68 and 69 *supra*.
152. States created from federal territories which transfer title to beds of nonnavigable inland waters to the abutting upland owners fall into five groups (Alaska has no bed title cases).
    1. Colorado, Illinois, Mississippi, Nebraska, and Oregon employ the tidal definition of navigability to designate inland waters as nonnavigable although navigable in fact. *See, e.g.*, **Colorado**: Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905). **Illinois**: Leitch v. Sanitary Dist., 369 Ill. 469, 17 N.E.2d 34 (1938) (except meandered waters; *see* note 157 *supra*). **Mississippi**: Wilson v. St. Regis Pulp & Paper Corp., 240 So. 2d 137 (Miss. 1970). **Nebraska**: Valder v. Wallis, 196 Neb. 222, 242 N.W.2d 112 (1976). **Oregon**: Belmont v. Umpqua Sand & Gravel, Inc., 273 Or. 581, 542 P.2d 884 (1975). OR. REV. STAT. § 93.310(4) (1975) (except, query, meandered lakes; *see* note 149 *supra*).
    2. Arkansas, California, Florida, Idaho, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nevada, Oklahoma, Tennessee, Utah, Washington, and Wyoming employ the commercial navigability definition of navigability. *See, e.g.*, **Arkansas**: Gill v. Porter, 248 Ark. 140, 450 S.W.2d 306 (1970). **California**: Bishel v. Faria, 53 Cal. 2d 254, 347 P.2d 289, 1 Cal. Rptr. 153 (1959); CAL. CIV. CODE § 830 (West 1954). **Florida**: South Venice Corp. v. Caspersen, 229 So. 2d 652 (Fla. App. 1969). **Idaho**: United States v. Ladley, 4 F. Supp. 580 (D. Idaho 1933); A.B. Moss & Bro. v. Ramey, 25 Idaho 1, 136 P. 608 (1913), *aff'd*, 239 U.S. 538 (1916). **Indiana**: State *ex rel.* Indiana Dep't of Conservation v. Kivett, 228 Ind. 623, 95 N.E.2d 145 (1950). **Iowa**: Simpson v. Iowa State Highway Comm'n, 195 N.W.2d 528 (Iowa 1972) (except meandered waters; *see* note 149 *supra*). **Louisiana**: Begnaud v. Gruff & Hawkins,

employing this combination are Arkansas, California, Florida, Idaho, Indiana, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, Oklahoma, Oregon, Tennessee, Utah, Washington, and Wyoming.[153] There is no bed title question in states which place bed title in the abutting upland owners whether the inland water is navigable or nonnavigable. Those states are Colorado, Kentucky, Michigan, Nebraska, and Ohio.[154] The bed title question could arise in the future in Alabama, Alaska, Arizona, and New Mexico, since they have not ruled on their choices of navigability definition.[155] As the above lists make

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209 La. 826, 25 So. 2d 606 (1946); Sinclair Oil & Gas Co. v. Delacroix Corp., 285 So. 2d 845 (La. App. 1973).**Minnesota**: State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957), *cert. denied*, 358 U.S. 826 (1958). **Missouri**: Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Burke v. Colley, 495 S.W.2d 699 (Mo. App. 1973). **Montana**: City of Missoula v. Bakke, 121 Mont. 534, 198 P.2d 769 (1948); MONT. REV. CODES ANN. § 67-712 (1970). **Nevada**: State Eng'r v. Cowles Bros., 86 Nev. 872, 478 P.2d 159 (1970) (by implication). **Oklahoma**: Curry v. Hill, 460 P.2d 933 (Okla. 1969); OKLA. STAT. ANN. tit. 60, § 338 (West 1971). **Tennessee**: Huxley v. American Enka Corp., 93 F. Supp. 98 (E.D. Tenn. 1950). **Utah**: Nephi Irr. Co. v. Bailey, 111 Utah 402, 181 P.2d 215 (1947). **Washington**: Shively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956); Knutson v. Reichel, 10 Wash. App. 293, 518 P.2d 233 (1973). **Wyoming**: Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

3. North Dakota, South Dakota, and Wisconsin employ the sawlog or recreational boat definition of navigability. *See, e.g.*, **North Dakota**: Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949). **South Dakota**: Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937); S.D. COMPILED LAWS ANN. § 43-17-4 (1967). **Wisconsin**: Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 38 N.W.2d 712 (1949).
4. Kansas employs other definitions of navigability more extensive than the commercial navigability definition. *See, e.g.*, Dougan v. Shawnee County Comm'rs, 141 Kan. 554, 43 P.2d 223 (1935).
5. Alabama, Arizona, Kentucky, Michigan, New Mexico, and Ohio have not defined navigability for bed title purposes. *See, e.g.*, **Alabama**: Hood v. Murphy, 231 Ala. 408, 165 So. 219 (1936). **Arizona**: State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), *aff'd on rehearing*, 108 Ariz. 258, 495 P.2d 1312 (1972), *rev'd on other grounds*, 414 U.S. 313 (1973) (dictum). **Kentucky**: City of Princeton v. Martin, 293 Ky. 815, 170 S.W.2d 660 (1943). **Michigan**: Bourgeois v. United States, 545 F.2d 727 (Ct. Cl. 1976); Ottawa Shores Home Owners Ass'n v. Lechlak, 344 Mich. 366, 73 N.W.2d 840 (1955). **New Mexico**: State *ex rel.* State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945) (dictum). **Ohio**: Lembeck v. Nye, 47 Ohio St. 336, 24 N.E. 686 (1890); Akron Canal & Hydraulic Co. v. Fontaine, 72 Ohio App. 93, 50 N.E.2d 897 (1943).

For state navigability definition cases, see notes 68-71 *supra*.

153. *See* note 152(1)-(2) *supra*; appendix *infra*.
154. For states which finesse the bed title question in that manner, see notes 50 and 152 *supra*; appendix *infra*.
155. *See* note 51(5) *supra*.

clear, the state bed title question exists in only six of the thirty-two states created from federal territories.

III. SUMMARY

The following set of rules concerning ownership of beds of navigable and nonnavigable inland waters in states created from federal territories can be derived from existing case law.

1. Title to beds of inland waters which are navigable under the federal definition pass to a state upon its admission to the Union unless there has been a previous conveyance by the United States. The state may dispose of titles to those beds in any manner it pleases.
2. Title to beds of inland waters which are nonnavigable under the federal definition remain in the United States at statehood.
   a. The United States by express indication of intention may sever title to the bed of the waters from the upland and retain ownership of the bed when it conveys the upland.
   b. In the absence of express intent, title to the bed of the waters will be disposed of, as a matter of federal law, using the local state property rule as a guide.
      (1) If the local state property rule attaches ownership of the bed of federally nonnavigable inland waters to the upland, the patentees of the upland will receive title to the bed as well.
      (2) If the local state property rule places ownership of the bed of waters in the state, title to the bed remains in the United States, which may dispose of title to these beds as it pleases. This result would occur in Illinois, Iowa, Kansas, North Dakota, South Dakota, Wisconsin, and possibly Oregon.[156]

156. *See* appendix *infra*.

Appendix

NAVIGABILITY DEFINITION AND BED OWNERSHIP RULES IN STATES CREATED FROM FEDERAL TERRITORIES

State	Navigability Definition			
	Tidal (note 68)	Federal (note 69)	Expanded (note 70)	No Reported Cases
Alabama				X
Alaska				X
Arizona				X
Arkansas		X		
California		X		
Colorado	X			
Florida		X		
Idaho		X		
Illinois	X			
Indiana		X		
Iowa		X		
Kansas			Statutory Declaration (note 71)	
Kentucky		X		
Louisiana		X		
Michigan				X
Minnesota		X		
Mississippi	X			
Missouri		X		
Montana		X		
Nebraska	X			
Nevada		X		
New Mexico				X
North Dakota			X	
Ohio				X
Oklahoma		X		
Oregon	X			
South Dakota			X	
Tennessee		X		
Utah		X		
Washington		X		
Wisconsin			X	
Wyoming	X			

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Bed Ownership				Implied Grant Problem
Navigable Waters		Nonnavigable Waters		
Riparian (note 50)	State (note 51)	Riparian (note 152)	State (note 149)	
	X	X	X	?
No Cases	No Cases	No Cases	No Cases	?
	X	X		?
	X	X		No
	X	X		No
X		X		No
	X	X		No
	X	X		No
X	Great Lakes	X	Meandered Lakes	Yes
	X	X		No
	X	X	Meandered Waters	Yes
	X	X		Yes
X		X		No
	X	X		No
X	Great Lakes and Connecting Waters	X		No
	X	X		No
	X	X		No
	X	X		No
	X	X		No
X		X		No
	X	X		No
	X	X		?
	X	X		Yes
X	Great Lakes	X		No
	X	X		No
	X	X	Meandered Lakes—?	?
	X	X		Yes
	X	X		No
	X	X		No
	X	X		No
Rivers	Lakes	X		Yes
	X	X		No