SOUTHERN ENVIRONMENTAL LAW CENTER

House Study Committee on Fishing Access to Freshwater Resources

April S. Lipscomb
Senior Attorney

History of Public Fishing Access

English Common Law

- The right to fish was tied to ownership of submerged soils.
- Generally, riparian landowners were deemed to own the beds of waterways running adjacent to their properties to the middle thread of the water, and the entire bed if they owned land on both sides.
- If submerged soils were privately owned, the riparian landowner had the exclusive right to fish.
- If submerged soils were owned by the Crown, the sovereign had the primary right to fish.

Crown ownership of “navigable” waters

The Crown owned the beds of all waters influenced by the ebb and flow of the tide – “arms of the sea”

Also known as “royal rivers”

Became known as “navigable rivers”

“[A]lthough the king is the owner of this great, coast, and as a consequent of his propriety, hath the primary right of fishing in the sea, and creeks and arms thereof, yet the common people of England have, regularly, a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.”

- Sir Mathew Hale

Three Types of Waterways under English Common Law

- Navigable waters
  - Tidal waters, owned by the Crown in trust for public use for fishing and passage
- Public highways
  - Non-tidal waters, privately owned, subject to right of passage by the public
- Wholly private streams
  - Streams so small or shallow as not to be navigable for any purpose

This was the law in the original 13 colonies!

Georgia Law on Riverbed Ownership and Fishing Rights

Young v. Harrison, 6 Ga. 130 (1849)

Three kinds of rivers in Georgia:

1. Wholly and absolutely private property
2. Such as are private property, subject to the servitude of the public interest, by a passage upon them

   Distinguishing test between the two is whether they are susceptible of use for a common passage

3. Rivers where the tide ebbs and flows, which are called arms of the sea

But, riparian property owners hold "no property in the water itself, but a usufruct while it passes along." *Hendrick v. Cook*, 4 Ga. 241 (1848).

State Land Grants

1777-84 Headright Grants (pink)

1805 Land Lottery (blue)

1807 Land Lottery (orange)

1820 Land Lottery (purple)

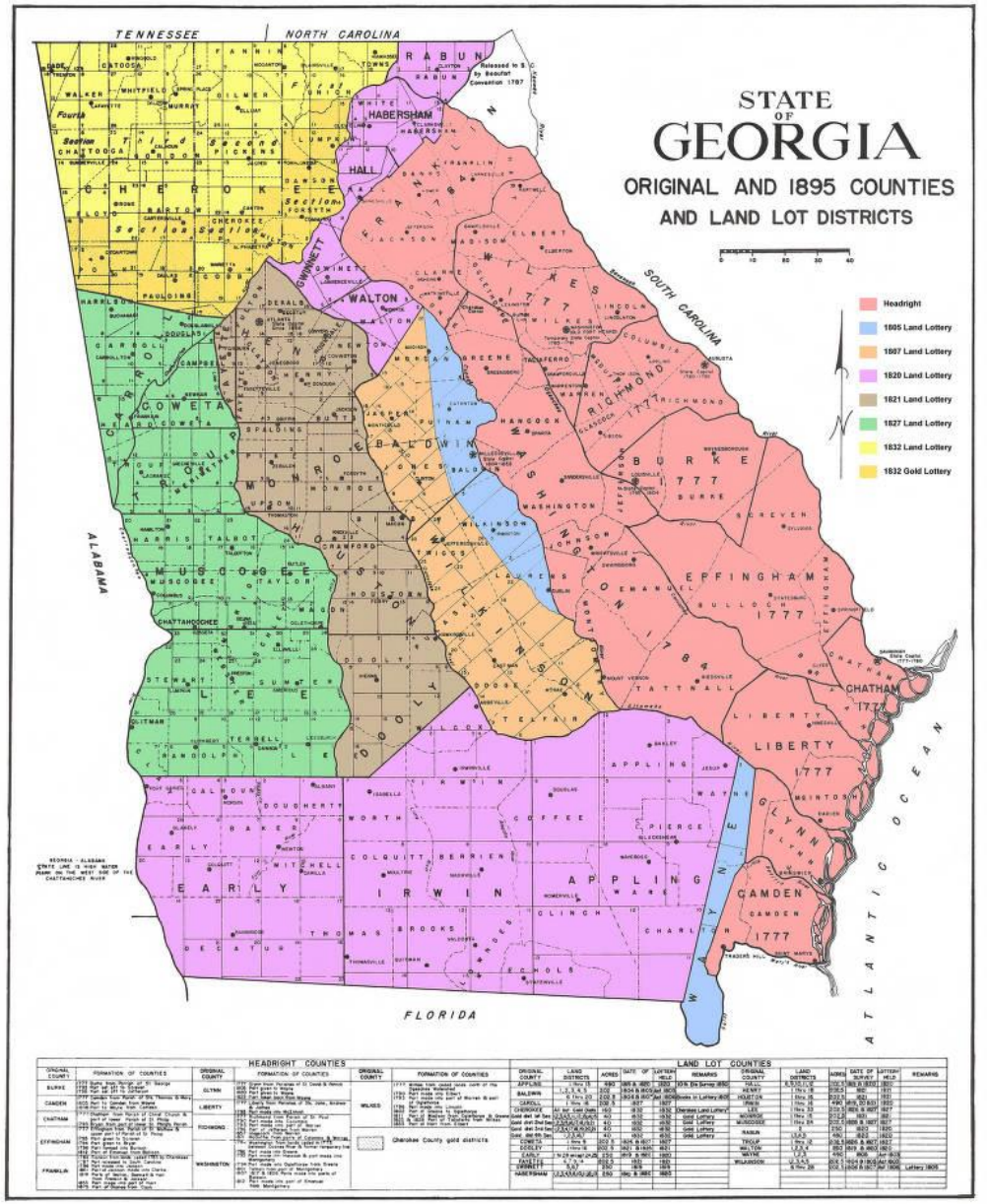
1821 Land Lottery (brown)

1827 Land Lottery (green)

1832 Land Lottery (yellow)

1832 Gold Lottery (gold)

“The title to all lands originates in grants from the Government and, since its independence, from the state.” OCGA 44-5-1.



LAND DISTRIBUTION
HEADRIGHT AND BOUNTY (EAST OF OCONEE RIVER) LAND LOTTERIES

Courtesy of Georgia Archives


DISTRICT № 3.
EAST TEN MILES 21 CHAINS 50 LINKS
DISTRICT № 1
NORTH SEVEN MILES 40 CHAINS
Fractional Surveys
Part of HABERSHAM County
4 MILES, 30 CHAINS
SQUIRE RIVER
CHATTAHOOCHEE RIVER
TERRAPIN CREEK
BIG CREEK
MUD CREEK
SHOAL CREEK
GEORGIA
EAST SEVEN MILES 40 CHAINS
HALL COUNTY
Scale of Chains 40 to an Inch

Adoption of the 1863 Code

O.C.G.A. 44-8-3

The owner of a nonnavigable stream is entitled to the same exclusive possession of the stream as he has of any other part of his land. The legislature has no power to compel or interfere with the owner's lawful use of the stream, for the benefit of those above or below him on the stream, except to restrain nuisances.

O.C.G.A. 44-8-5

(a) As used in this chapter, the term “navigable stream” means a stream which is capable of transporting boats loaded with freight in the regular course of trade either for the whole or a part of the year. The mere rafting of timber or the transporting of wood in small boats shall not make a stream navigable.

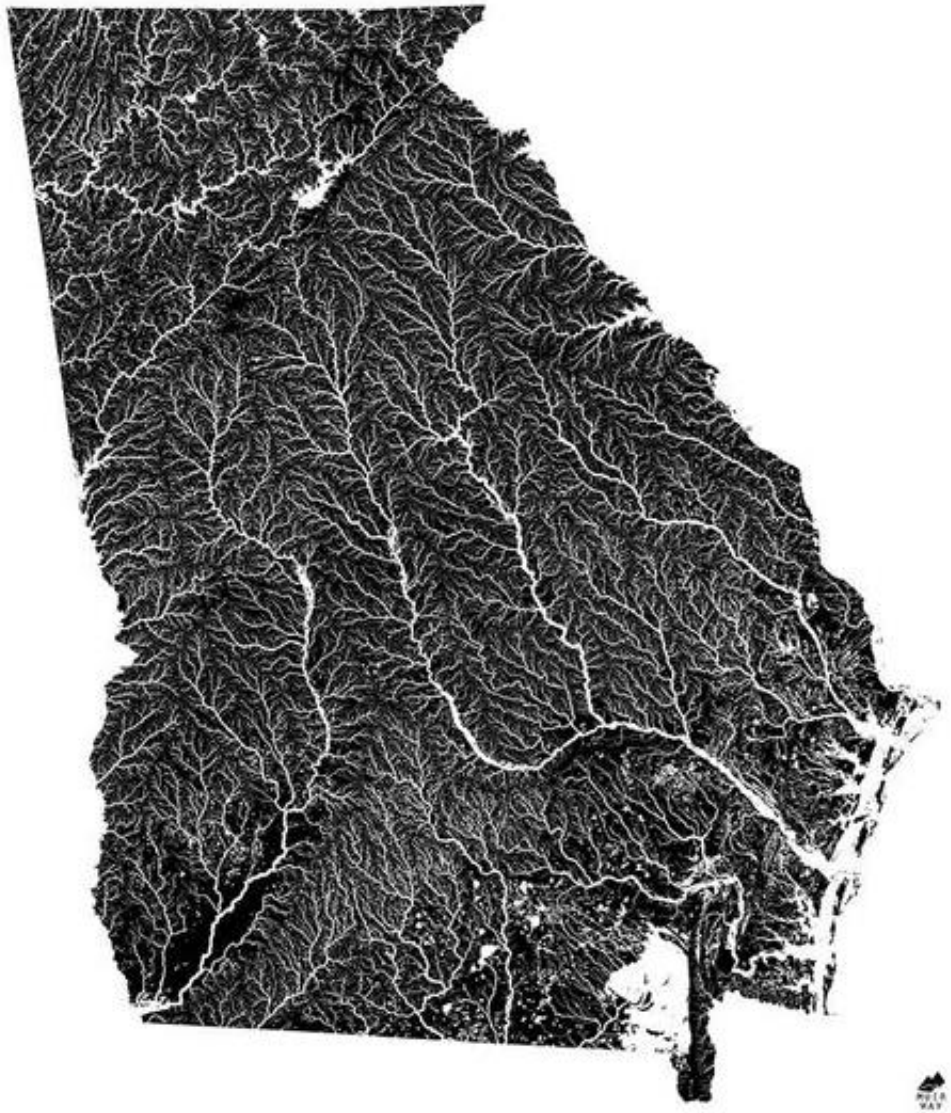
(b) The rights of the owner of lands which are adjacent to navigable streams extend to the low-water mark in the bed of the stream.

Parker v. Durham, 258 Ga. 140 (1988)

OCGA § 44–8–5, providing that where the river is navigable, the rights of the owner of adjacent land extend only to the low-water mark of the riverbed, became effective with the adoption of the Code of 1863. In Florida Gravel Co. v. Capital City Sand Co., . . . , this court held that OCGA § 44–8–5 "will not be construed to apply to grants of land by the State prior to the adoption of that code." Under this authority, appellee Durham, who traces her chain of title to a grant from the state in 1857, owns the entire bed of the Hughes Old River.

"By common law the right to take fish belongs essentially to the right of soil in the streams where the tide does not ebb and flow. If the riparian owner owns upon both sides of the stream, no one but himself may come within the limits of his land and take fish there. The same right applies so far as his land extends to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his rights of fishery are sole and exclusive." . . . Therefore, Durham holds the exclusive right of fishery in the Hughes Old River, ...

Which waters may be deemed private?



SB 115 – O.C.G.A. 44-8-5(c)

The General Assembly finds that the state procured ownership of all navigable stream beds within its jurisdiction upon statehood and, as sovereign, is trustee of its peoples' rights to use and enjoy all navigable streams capable of use for fishing, hunting, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine. The state continues to hold title to all such stream beds, except where title in a private party originates from a valid Crown or state grant before 1863. The General Assembly further finds that the public retained the aforementioned rights under such doctrine even where private title to beds originates from a valid grant.

Development of Public Trust Doctrine in America

Roots in English Common Law

As interpreted by the U.S. Supreme Court:

"The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown, for the benefit and advantage of the whole community. . . . it will not be presumed, that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it."

Martin v. Waddell's Lessee, 41 U.S. 367, 411 (1842) (emphasis added).

Martin v. Waddell's Lessee, 41 U.S. 367 (1842)

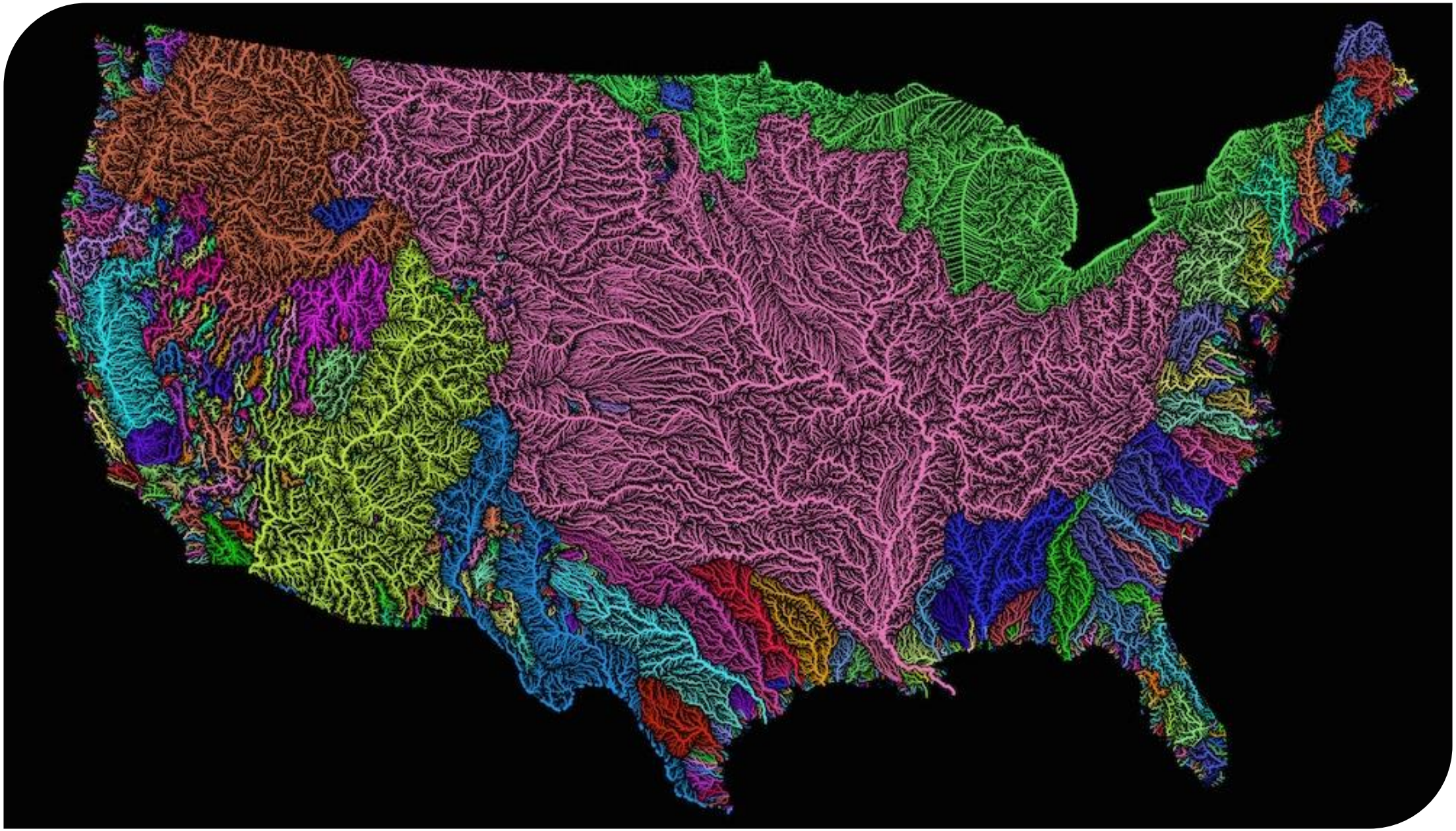
"For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."

Which waters are "navigable"?

Rejection of English Definition of “Navigable” Waters

- England’s tidal definition made sense due to dominant coastal geography
- United States has vast inland streams that are navigable for hundreds of miles above the influence of the tide
- “A different test must, therefore, be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact.”

  Packer v. Bird, 137 U.S. 661, 667 (1891).



State Riverbed Title under Equal Footing Doctrine

- Newly admitted states enter the union on “equal footing” as the original 13 states.

- Thus, newly admitted states took “title to the navigable waters and their beds in trust for the public” on equal footing with the original 13.

  PPL Montana, LLC v. Montana, 565 U.S. 576, 604 (2012).

- “Questions of navigability for determining state riverbed title are governed by federal law.”

  PPL Montana, 565 U.S. at 591.

Federal Navigability Test for Riverbed Title

A waterbody is navigable if, at the time of statehood, in its natural and ordinary condition, the waterbody was used, or was susceptible of being used as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

Determined on a segment-by-segment basis.

Note: this test differs from Georgia's definition of navigable stream under OCGA 44-8-5.

The Public Trust Doctrine Cases

Development of the Public Trust Doctrine

Illinois Cent. Railroad Co. v. Illinois, 146 U.S. 387 (1892)

Title to the lands under navigable waters "is a title different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."

"The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

Illinois Central RR Co. v. Illinois (1892)

"The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

The "power to resume the trust whenever the state judges best is, we think, incontrovertible."

Public Trust Doctrine in Other States

SCOTUS has clarified since *Illinois Central* that the scope of the public trust doctrine is determined by state law.

> While "the State takes title to the navigable waters and their beds in trust for the public, . . . , the contours of that public trust do not depend on the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."
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> *PPL Montana*, 565 U.S. at 604.

After a State takes title to the beds of navigable streams, it may "allocate and govern those lands under state law." *Id.* at 591.

The overwhelming majority of states (~40) have expressly adopted the public trust doctrine to protect public uses of waterways.

Examples from Other States

Florida - *5F, LLC v. Dresing*, 142 So.3d 936 (2014)

- "Finally, though it is apparent the authority to control and manage submerged lands is restricted by the public trust doctrine, we do not believe that such authority can be stripped from the State even if the submerged land becomes privately owned."

Nevada – *Lawrence v. Clark County*, 127 Nev. 390 (2011)

- "Although Nevada has never expressly adopted the public trust doctrine, . . . this state has previously embraced the tenets on which it is based."
- "The public trust doctrine is based on that same principle upheld by the gift clause [in the Nevada constitution]: the state must carefully safeguard public trust lands by dispensing them only when in the public's interest."
- "In sum, although the public trust doctrine has roots in the common law, it is distinct from other common law principles because it is based on a policy reflected in the Nevada Constitution, Nevada statutes, and the inherent limitations on the state's sovereign power, as recognized by *Illinois Central*. Accordingly, in the words of Justice Rose, it is "appropriate, if not our constitutional duty," to expressly adopt the doctrine to ensure that the state does not breach its duties as a sovereign trustee, and we do so here."

Additional State Examples

North Carolina – *State ex rel. Rorher v. Credle*, 322 N.C. 522 (1988)

- "Navigable waters, then, are subject to the public trust doctrine, insofar as this Court has held that where the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public. A land grant in fee embracing such submerged lands is void."
- "[T]he benefit and enjoyment of North Carolina's submerged lands is available to all its citizens, subject to reasonable legislative regulation, for navigation, fishing and commerce."

Oregon – *Chernaik v. Brown*, 367 Or. 143 (2020)

- "[T]he public trust doctrine is not fixed but is capable of change and expansion. The public trust doctrine has evolved from its original narrow conception, when it applied only to lands underlying waters subject to the ebb and flow of the tide. And although the expansions relate to different aspects of the public trust doctrine (protected resources, protected uses, and government actors), they all resulted from disputes involving a specific body of water and furthered the primary purpose of the doctrine—protecting the public's right to use navigable waters for fishing and navigation."

Public Trust Doctrine in Georgia Cases

- No discussion of the public trust doctrine in caselaw for navigable, non-tidal streams.
  - For instance, in *Parker v. Durham*, there was no discussion of whether the state owned the beds of navigable waters in trust for the public at statehood and what that meant.

- But, Georgia caselaw has recognized a public right of passage on all rivers and streams that are susceptible of use for a common passage. *E.g.*, *Young v. Harrison.*

Public Trust Concepts in Georgia

Georgia Constitution

"The tradition of fishing and hunting and the taking of fish and wildlife shall be preserved for the people and shall be managed by law and regulation for the public good. Ga. Const. art. I, § 1, ¶ XXVIII"

"Except as otherwise provided in the Constitution, (1) the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public." Ga. Const. art. III, § 6, ¶ VI

Georgia Code

"The General Assembly further finds that the State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine." OCGA § 52-1-2.

"Wildlife is held in trust by the state for the benefit of its citizens and shall not be reduced to private ownership except as specifically provided for in this title." OCGA § 27-1-3(b).

Public Funds for River Access and Robust Fisheries

DNR uses public funds to build and maintain boat ramps and to stock fish.

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