Waterway Navigability & Surface Water Bed Ownership after:

*PPL Montana v. Montana*

2012 United States Supreme Court

or
The Role of Navigability in Water Law
Question to be answered –

Who owns the beds of naturally occurring waterways (streams & lakes)?

(stream & lake beds include the shore – dry land - up to the “ordinary high water mark”)
Some Arkansas examples to ponder –

Who owns the beds of the following streams & lakes?
Again - Question to be answered –

Who owns the beds of naturally occurring waterways (streams & lakes)?

Related Question –

Who cares? Why does it make any difference?
Among the possibilities:

• May be gold, other minerals, or oil in them there beds - or

• May want to fish - fly fish - or boat on the stream or lake - or

• May want to build a dam & erect a hydroelectric plant on the stream

Note! - If bed of the stream or lake is in private ownership, owner may exclude public from use
One more time - Who owns the beds of naturally occurring waterways? (streams & lakes)
Answer: Whoever the United States Supreme Court says owns them
United States Supreme Court Analysis
Before there were states – there were colonies (13 to be exact)

Who owned the beds of waterways in the colonies?
Colonies were English colonies governed by English law.

Who owned the beds of waterways in England?
Answer: The Crown

Why? – Doctrine traced to Roman law –

_Institutes of Justinian:_ “Rivers & ports are public; hence the right of fishing in a port, or in rivers are in common.”
So – In England the Crown owned the beds of waterways (subject to the rights of the public to use the waterways for navigation & fishing) –

IF

The waterway was navigable
So – In the colonies the ultimate governmental authority - the Crown - owned the beds of navigable waterways

&

When the colonies became states, the states – the ultimate governmental authority - owned the beds of navigable waterways
Navigable at what time? –

Answer: Under the “equal footing doctrine” -

At the time the state joined the union
So – Who owns the beds of:

The Arkansas River?
The Little Maumelle River?
The Mulberry River?
Coleman Creek?
Lake Chicot?
Answer: The state of Arkansas –

If those waterways are navigable?

Well – Are they?
What question has to be answered before determining who owns the beds of –

The Arkansas River, the Little Maumelle River, the Mulberry River, Coleman Creek, & Lake Chicot?
How is navigable/navigability defined?
Under federal law, as defined by the United States Supreme Court –

Navigable means –

“Navigable in fact” – “Susceptible for use as highways for commerce over which trade & travel may be conducted in the customary modes of trade & travel on water.”
So – For the Arkansas streams & lakes, the state owns the beds if the streams & lakes were navigable, that is, if they were susceptible for use in 1836 as highways for commerce over which trade & travel be conducted in the customary modes of trade & travel on water.
Now let’s apply the definition of “navigable” – Who owns the beds of:

The Arkansas River?
The Little Maumelle River?
The Mulberry River?
Coleman Creek?
Lake Chicot?
The 2012 United States Supreme Court decision of *PPL Montana v. Montana* &

What that decision may have to say about whether – for instance - the Little Maumelle River is navigable
Issue in *PPL Montana v. Montana*:

Is the Missouri River navigable for its entire 2,000 miles?

Or

Must the navigability of each segment of the waterway be examined?
Answer – In short (simplified) –

The navigability of each segment of the Missouri River (& other waterways) must be examined
Back to the Little Maumelle River –

Apply *PPL Montana v. Montana* to the Little Maumelle River

Is the river navigable for each segment?
How about the Mulberry River?
State of Arkansas v. McIlroy
Arkansas Supreme Court - 1980

Under the traditional federal test of navigability - whether waterways are capable of commercial use -

The Mulberry is not navigable - can’t be used to transport goods or people for trade

But -

Arkansas may adopt its own definition of navigability to determine the rights of the public to make use of waterways for recreational use
Under the new Arkansas standard for determining navigability of waterways for public use -

The Mulberry River is navigable because it can be used for recreational purposes
A Note of Caution!

“Navigability” is also the test for use of waterways for a number of other purposes under federal law -

A few Examples: Maritime Jurisdiction, Regulation under the Interstate Commerce Clause, Jurisdiction under the Federal Clean Water Act
And -

The definition of navigability may differ depending on the purpose

(This makes the general subject of navigability wonderfully complicated)

Example: The definition of navigable waters for purposes of the Clean Water Act =
“Waters of the United States”
Note! – Even the most conservative justices of the United States Supreme Court concede –

Under the Clean Water Act “Waters of the United States” - includes waters that do not meet the traditional federal test of navigability for purposes of determining ownership of the beds of waterways