No. 19 – 1025

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROGER HILL,
Appellant-Plaintiff

v.

MARK EVERETT WARSEWA, LINDA JOSEPH,
and the STATE OF COLORADO
Appellee-Defendants

On appeal from the United States District Court for the District of Colorado, Civil Action No. 1:18-cv-0710 (Hon. Kathleen M. Tafoya, Magistrate Judge)

RESPONSE BRIEF OF APPELLEE STATE OF COLORADO

Oral argument requested

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INTRODUCTION

This appeal requires the Court to decide whether Appellant Roger Hill can force the State into a title dispute against homeowners, Mark Warsewa and Linda Joseph (the "Homeowners"), by trespassing on their property and alleging that the river running over their property was navigable at statehood.

For two reasons, Hill lacks prudential standing to force the State into a title dispute with the Homeowners. First, Hill lacks prudential standing because he fails to assert his own interest in the riverbed. Hill fails to assert a title interest in the riverbed, despite established precedent requiring him to do so in this action to quiet title. And contrary to his arguments, no federal common law creates individual interests to litigate navigability or public access to rivers. Neither the equal footing doctrine, nor the test for determining navigability for title creates federal common law. If title vests in the State under the equal footing doctrine, then state law determines rights of public. But no law in Colorado allows Hill to litigate the navigability of its rivers.

Second, Hill lacks prudential standing because he asserts a generalized grievance. Hill alleges harms that are not unique to him,

but instead are shared in equal measure by other members of the public who trespass on the Homeowners' property. Furthermore, those alleged harms are not based on any right of his own, but rather rest entirely on the State's alleged title in the riverbed.

Because Hill lacks prudential standing, the district court was correct in dismissing the Complaint. The district court was not required to determine its jurisdiction before dismissing for lack of prudential standing, and the court correctly dismissed the Complaint.

JURISDICTIONAL STATEMENT

The Court has appellate jurisdiction under 28 U.S.C. §1291. The district court issued a final order and final judgment disposing of all claims. Aplt. App. at 177; 188. Plaintiff, Hill, timely appealed. Aplt. App. at 190. Hill argues this Court may lack jurisdiction because the State's assertion of immunity under the Eleventh Amendment immunity automatically terminated jurisdiction below. That argument is wrong for the reasons addressed in this brief. Yet, even if the argument were correct and the district court lacked jurisdiction, this Court would still have jurisdiction to review the district court's final order under 28 U.S.C. §1291. *Holt v. U.S.*, 46 F.3d 1000, 1001 (10th Cir.

1995) (holding Court of Appeals has jurisdiction under 28 U.S.C. § 1291, and affirming district court's dismissal for lack of subject matter jurisdiction).

STATEMENT OF THE ISSUES

(1) Whether the district court correctly determined Hill lacked prudential standing because he failed to assert his own interest in the riverbed;

(2) Whether the district court correctly determined Hill lacked prudential standing because he asserted a generalized grievance based on his desire for the general public, including himself, to be able to fish on the Homeowners' property; and

(3) Whether the district court correctly dismissed the First Amended Complaint for lack of prudential standing without reaching the issues of sovereign immunity and constitutional standing, and properly denied Hill's motion to remand.

STATEMENT OF THE CASE

I. Private parties hold title to lands underlying the Arkansas River because it was not navigable at statehood.

Hill seeks to invalidate the Homeowners' title to property by

claiming the river was navigable for title in 1876. *See e.g.* Aplt. App. at 15. Yet, his navigability claim contradicts previous holdings that the River was never navigable above Oklahoma, as well as more general pronouncements that rivers in Colorado—including the Arkansas—are not navigable.

In 1922, the Supreme Court held that the Arkansas River was not navigable above the Grand River in Oklahoma. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922) (concluding "the head of navigation is and was the mouth of the Grand river, near which was Fort Gibson"); *see United States v. Brewer-Elliott Oil & Gas Co.*, 249 F. 609, 623 (W.D. Okla. 1918) ("To conclude upon the record . . . that the Arkansas River is or ever has been navigable above Grand river in Oklahoma would be to sustain a theory against a fact."); *also Kansas v. Colorado*, 206 U.S. 46, 50, 54 (1907) (dismissing bill of complaint alleging diversions from the Arkansas River in Colorado interfered with navigation in Kansas after considering the United States' position in briefing that the River "is not navigable in the states of Colorado and Kansas."). Twenty years later, when describing the Arkansas River, the Supreme Court reiterated that it is not navigable in Colorado or

Kansas. *Colorado v. Kansas*, 320 U.S. 383, 384 (1943) (describing Arkansas River in Colorado as a "non-navigable" "mountain torrent").

The Supreme Court's holding and subsequent description are consistent with the general understanding that rivers in this state are too steep, rocky, and shallow, and their flows too variable to support navigation. *In re German Ditch & Reservoir Co.*, 139 P. 2, 9 (Colo. 1913) ("The natural streams of the state are nonnavigable within its limits"); *Stockman v. Leddy*, 129 P. 220, 223 (Colo. 1912) ("The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, nonnavigable within its territorial limits . . . .") (rev'd on other grounds).

It was within this context that, after statehood, the United States issued patents including the riverbed to landowners. *See Hanlon v. Hobson*, 51 P. 433, 435 (Colo. 1897) (explaining that the United States government had authority to convey to private parties "legal title to the bed of a nonnavigable stream" as well as "the lands bordering thereupon"); *see also Brewer-Elliott Oil & Gas Co.*, 260 U.S. at 86–87 (noting "a natural inference that Congress in its grant to the Osage Indians in 1872 made it extend to the main channel of the [Arkansas]

river, only because it knew it was not navigable").

II. By claiming that the River was navigable, Hill seeks to overturn property rights that have been settled for nearly 150 years.

The Homeowners acquired title to their property, including lands underlying the Arkansas River, in 2006. Aplt. App. at 38–42. Their chain of title traces back through private parties to a federal patent, issued after statehood. Aplt. App. at 9.

Mr. Hill likes to fish the Arkansas River and sometimes wades on the Homeowners' property.[1] Aplt. App. at 26. Hill claims the Homeowners have sought to exclude him and other anglers from their property by various, sometimes extreme, means. Aplt. App. at 28-30.

In response to the Homeowners' efforts to exclude him, Hill asked the state court to invalidate the entire chain of title to their property by declaring it "property of the state of Colorado, held by the state of Colorado in trust for the people of Colorado." Aplt. App. at 15 #73.

[1] Notably, from the River's headwaters to the City of Pueblo—a stretch of water that includes the Homeowners' land and 102 miles of "Gold Medal" trout fishing—68% of land along the river is open to public fishing access. *See* Colo. Parks & Wildlife, *Upper Ark. River Fish Survey and Mgmt. Data*, p.1, *available at* https://bit.ly/2LUilP4.

In response to that state court complaint, the Homeowners removed the case to federal district court.[2] Aplt. App. at 18. Hill then filed a First Amended Complaint in district court, and for the first time named the State of Colorado as a defendant. Aplt. App. at 26.

Without answering the First Amended Complaint, the State and the Homeowners each moved to dismiss. Aplt. App. at 62; 45. The State included in its motion every Rule 12(b) defense to the claims in the First Amended Complaint, including lack of standing under Article III, lack of prudential standing, and that the State's sovereignty under the Eleventh Amendment barred the claims. Aplt. App. at 66-75. *See* Fed. R. Civ. P. 12(h)(1)(B)(ii) (a party waives any defense under Rule 12(b)(2)-(5) by failing to include it in a responsive pleading).

Hill moved to remand to state court, Aplt. App. at 77-82 or 78, and responded to the motions to dismiss, Aplt. App. at 97.

The district court issued a single order, granting the motions to dismiss and denying the motion to remand. Aplt. App. at 187. In that

[2] Hill argues that the State "waived sovereign immunity by consenting to removal to federal court." Br. at 6. That argument is unsupported by the record and contradicts his argument that the State terminated jurisdiction in federal court by asserting sovereign immunity.

order, the district court did not determine whether the State's assertion of sovereign immunity automatically terminated jurisdiction. Aplt. App. at 183 (noting, without deciding, that Hill's claims against the State would be barred by the Eleventh Amendment). Instead, the district court found Hill lacked prudential standing for two reasons. First, he failed to assert his own interest. Aplt. App. at 184. Instead, he asserted the State's exclusive title interest. Id; Aplt. App. at 15. Second, he asserted no more than a generalized grievance based on a desire for the public, including himself, to be able to fish in certain spots without facing the consequences of trespassing on private property. Aplt. App. at 184, 185. Therefore, the district court dismissed the Complaint under Fed. R. Civ. P. 12(b)(6). Aplt. App. at 187. Hill appeals that dismissal. Aplt. App. at 190.

SUMMARY OF ARGUMENT

Hill lacks prudential standing to challenge the Homeowners' title because he claims no title interest of his own in the riverbed. And Hill's desire to fish in a particular place is not a property right. This Court has consistently held that when fee title is owned by the state, any incidental right of access for recreational purposes enjoyed by the public

is insufficient to confer standing. Furthermore, no federal common law establishes an individual interest in Hill. Neither the equal footing doctrine nor the test for determining whether a river was navigable for title creates federal common law rights. State law determines the scope of public use of navigable riverbeds. And unlike other states mentioned in Hill's brief, Colorado has not adopted any law allowing individuals to litigate the navigability of rivers within its borders or to quiet title in riverbeds underlying navigable streams.

Hill also lacks prudential standing because he asserts a generalized grievance based on a desire for the public, including himself, to fish in certain spots without facing the consequences of trespassing on private property. Hill admits his alleged injuries are shared equally among other people who trespass on the Homeowners' property. Furthermore, because those alleged injuries rest on the State's alleged title and not Hill's individual rights, he lacks prudential standing to raise that generalized grievance.

Because Hill lacks prudential standing, the district court correctly dismissed the Complaint. The district court was free to choose between threshold issues and was not required to determine its jurisdiction.

Allowing this case to proceed on remand would ignore settled precedent limiting third-party standing and litigation of public grievances. In doing so, it would also violate the important policy considerations underlying those limitations. Specifically, allowing this case to proceed would allow a trespassing angler to litigate issues of statewide significance on behalf of the State without the State's consent or public accountability. Furthermore, it would disrupt the settled expectations of property owners by forcing each to defend his title against the State whenever a trespasser claimed a river running over the land was navigable in 1876.

The dangerous consequences of allowing this case to proceed show why courts maintain rules against third-party standing. Without such limitations, courts would be required "to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions." *Warth v. Seldin*, 422 U.S. 490, 500, (1975). Like most questions of wide public significance, in this case, whether the State should assert title to riverbeds is a question best determined by elected officials after considering all of the

consequences of such a determination—not just the grievances of one trespasser.

Because Hill lacks prudential standing, the district court did not err in dismissing the Complaint. The court was not required to determine its jurisdiction because there is no hierarchy of jurisdictional issues. Furthermore, none of the defects in this case can be resolved by remanding to state court.

ARGUMENT

I. Hill lacks prudential standing because he fails to assert his own interest in the riverbed.

A. The Court reviews the district court's dismissal for lack of prudential standing de novo.

Review of dismissal under Rule 12(b)(6) is de novo. *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017); *see also Wilderness Soc. v. Kane Cnty.,* 632 F.3d 1162, 1168 (10th Cir. 2011) (reviewing de novo district court's dismissal for lack of prudential standing). While the Court must accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff, the Court need not accept the validity of legal conclusions. *Safe Streets All.*, 859 F.3d at 878.

B. Hill is required to demonstrate prudential standing.

Prudential standing must exist in all cases. *Bennett v. Spear*, 520 U.S. 154, 163 (1997). The doctrine applies "unless it is expressly negated." *Id.* Prudential standing limits jurisdiction on three broad principles: (1) "the general prohibition on a litigant's raising another person's legal rights"; (2) "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches"; and (3) "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *see RMA Ventures Cali. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1073 (10th Cir. 2009) (explaining that under doctrine of prudential standing, litigants cannot sue to enforce the rights of others); *Wilderness Soc. v.*, 632 F.3d at 1170 (determining that a plaintiff lacked prudential standing where it rested its claims on the government's property rights instead of asserting a valid right to relief of its own).

Hill argues both that he satisfies the first two conditions, and that *Lexmark* eliminated them. *See* Aplt. Opening Br. at 38-39 (arguing third-party standing is "no longer a viable doctrine" after *Lexmark*).

Lexmark did no such thing. *Lexmark* involved only the third part of prudential standing—the zone-of-interests test—which is not at issue in this case. *See Lexmark*, 572 U.S. at 128 (finding the question presented "is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under § 1125(a)"). Because *Lexmark* deals only with the zone-of-interests test and not with the requirement that a party assert his own rights or the prohibition against asserting a generalized grievance, *Lexmark* does not change the standard in this case. *Id.* at 127 n.3 ("This case does not present any issue of third-party standing, and consideration of that doctrine's proper place in the standing firmament can await another day."). And this Court has continued to apply the prudential standing requirement after *Lexmark*. *See VR Acquisitions, LLC v. Wasatch Cnty.*, 853 F.3d 1142, 1149 (10th Cir. 2017) (affirming dismissal for lack of prudential standing).

C. Hill lacks prudential standing to quiet title in the riverbed because he asserts no independent property rights of his own and his claims rest entirely on the State's property rights.

i. Hill does not assert his own title interest in the riverbed.

Hill does not assert his own title interest and does not request a declaration of any title interest in himself. His Complaint seeks an order "[q]uieting title and decreeing that title to the disputed real property is held *exclusively* by the State of Colorado in trust for the public." Aplt. App. at 16 (emphasis added). He argues that failure to assert a title interest is not fatal because Colorado law does not require him to assert his own title interest. Aplt. Opening Br. at 29–31. That argument is wrong.

Under Colorado law, a "plaintiff in action to quiet title must show title in himself." *Buell v. Redding Miller, Inc.*, 430 P.2d 471, 473 (Colo. 1967). Plaintiffs must "rely on the strength of their own title, and not on the weakness or supposed weakness of their adversaries." *Goodrich v. Union Oil Co. of Cal.*, 274 P. 935, 938 (Colo. 1928). If the plaintiff has no title, he cannot complain that someone else asserts an interest in the land. *Fastenau v. Engel*, 270 P.2d 1019, 1021 (Colo. 1954).

The same is true under federal law. "[I]t is the law without exception that in all actions to recover possession of land or an interest therein one must prevail upon the strength of his own title and not on the weakness of his adversary's title." *Kanab Uranium Corp. v. Consol. Uranium Mines*, 227 F.2d 434, 436 (10th Cir. 1955).

Hill does not assert his own title interest in the riverbed. *See* Aplt. App. at 16 (seeking an order "quieting title and decreeing that title to the disputed real property is held *exclusively* by the State of Colorado in trust for the public" (emphasis added)); *see also* Aplt. Opening Br. at 30–31 (arguing Colorado law does not require title interest and, therefore, alleged easement interest sufficient to maintain quiet title action). Thus, he fails to assert his own interest and cannot establish prudential standing. *See Wilderness Soc.*, 632 F.3d at 1170.

ii. Hill's desire to fish is not a property right.

Any argument that Hill's desire to fish in a particular place is a property interest must fail. *See* Aplt. Opening Br. 29–30 (arguing Hill has "a property interest in the bed of the river"). Public rights of use are not property interests in the underlying public lands. For example, the public's interest in using existing public roads over government-owned

property is not a title interest sufficient to establish prudential standing. *Kinscherff v. U.S.*, 586 F.2d 159 (10th Cir. 1978).

In *Kinscherff*, the plaintiffs sued the federal government to enforce their rights to use an existing public road to develop their property that was adjacent to the road. The plaintiffs tried to establish prudential standing by arguing they had a real property interest in a public road as members of the public. *Id.* at 160. This Court found that plaintiffs lacked prudential standing to raise that claim, because their rights to use the public road did not rise to a title interest. *Id.* at 160. The Court held that "[m]embers of the public as such do not have a 'title' in public roads. To hold otherwise would signify some degree of ownership as an easement. It is apparent that a member of the public cannot assert such an ownership in a public road." *Id.* at 160; *see also id.* at 161 ("[T]he 'interest' plaintiffs seek to assert as part of the public is not of such a nature to enable them to bring a suit to quiet title.").

Hill fails to overcome the rule expressed in *Kinscherff*. He lacks any independent property right of his own in the riverbed and his claims rest entirely on the State's property rights. Aplt. App. at 16. His desire to fish in a particular place is not a property right. *See Southwest*

Four Wheel Drive Ass'n. v. Bureau of Land Management, 363 F.3d 1069 (10th Cir. 2004) (finding users of off-highway vehicles did not have title in public roads across government property and, therefore, could not state claim under Quiet Title Act).

Furthermore, Hill's desire to fish is even more attenuated than the plaintiffs' interests in *Kinscherff* or *Southwest Four Wheel Drive Ass'n.* In both of those cases, the government already held title to the underlying land and public roads had been constructed across the land. But in this case, the State does not hold title to the riverbed. *See* Aplt. App. at 27, ¶¶7–12 (admitting Homeowner's title to the riverbed traces to federal patent). Thus, whatever interest Hill might derive if the State obtains title remains hypothetical unless and until the State holds title. His *hypothetical* fishing interest cannot create standing, especially because *existing* recreational interests do not.

Because Hill's alleged interests—hypothetical or not—do not rise to a title interest, he does not assert an interest of his own and this Court should affirm the district court's dismissal for lack of prudential standing.

D. Neither the equal footing doctrine nor the test for determining navigability for title establishes individual interests in Hill.

Hill argues federal common law creates individual interests in him that establish prudential standing. Yet, contrary to that argument, neither the equal footing doctrine nor the doctrine of navigability for title creates an individual interest in the use of navigable riverbeds. Instead, these doctrines confer rights on the State exclusively. To the extent members of the public have an interest in using State lands acquired under the equal footing doctrine, that interest is defined by state law.

The equal footing doctrine establishes rights in States. It is grounded in the idea that new states enter the Union with the same rights as the original states. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 230 (1845) ("The new states have the same rights, sovereignty, and jurisdiction ... as the original states."). Among those rights, new states acquired absolute title to the lands under the navigable waters within their borders. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977).

The equal footing doctrine does not create federal common law governing those lands after title vests in a State. *Id.* If title vests in the State, "thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State." *Id.* at 376. Thus, contrary to Hill's argument, the equal footing doctrine does not create an "easement" in the public.

Similarly, no case holds that the test for determining navigability for title creates an "easement" in the public. While some equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public, state law determines the scope of that trust over waters within their borders. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012). ("Unlike the equal-footing doctrine…the public trust doctrine remains a matter of state law.").

Colorado's constitution does not have a public easement for fishing *Hartman v. Tresise,* 84 P. 685, 688 (Colo. 1905) (rejecting as unconstitutional statue that would have created public easement for fishing). Nor does it have a public trust doctrine.[3] *See City of Longmont*

[3] In the briefs below, Hill argued that his right to fish is guaranteed by the public trust. *See e.g.* Aplt. App. at 107–108. He now argues his

v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 586 (Colo. 2016). The rights of the public in the state's natural streams are enumerated in COLO. CONST. art. XVI, § 5. That section "preserve[s] the historical appropriation system of water rights upon which the irrigation economy in Colorado was founded"; it does not "assure public access to waters for purposes other than appropriation." *People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979). While the parties in *Emmert* stipulated that the Colorado River was not navigable, the Court's holding that the Colorado constitution protects the right of appropriation on natural streams, and not the right of access for recreation, still stands.[4]

There have been numerous efforts to amend Article 16, Section 5 to create a public trust. Those efforts have failed. *See In re Title, Ballot*

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interest is guaranteed by an "easement." *Compare* Aplt. App. at 107–108 *with* Aplt. Opening Br. at 20. Hill offers no explanation for the change in terminology and appears to have simply interchanged the terms. The Law Professors as Amici argue Hill's right to fish is guaranteed by the public trust. Prof. Amici Br. at 10.

[4] The constitution also protects access for the purpose of applying water to beneficial use. COLO. CONST. art XVI, § 7 provides: "All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation." The constitution does not protect access for fishing.

Title, Submission Clause for 2011-2012 No. 3, 2012 CO 25*, ¶ 2*, 274 P.3d 562, 564 (describing proposed amendments to art. XVI, §5 to create public access "along, and on, the wetted natural perimeter" of any "natural stream in Colorado," and would extend this public access right to the "naturally wetted high water mark of the stream"); *In re Title, Ballot Title, Submission Clause, & Summary Adopted Mar. 20, 1996, By the Title Bd. Pertaining to Proposed Initiative 1996-6*, 917 P.2d 1277, 1278 n.2 (Colo. 1996) (quoting proposed initiative1996-6: "The State of Colorado shall adopt, and defend, a public trust doctrine to protect the public's rights and ownership in and of the waters in Colorado, and to protect the natural environment."); *In re Title, Ballot Title, Submission Clause, & Summary Adopted Apr. 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II*, 898 P.2d 1076, 1077 (Colo. 1995), as modified on denial of reh'g (July 31, 1995) (quoting proposed amendment "to adopt and defend a strong public trust doctrine regarding the public's rights and ownership in and of the waters in Colorado"). These failed attempts confirm that the constitution does not include a public trust.

None of the cases cited by Hill or the Law Professors as Amici establish an easement or a public trust under federal common-law. *See generally Oregon ex rel. State Land Bd.,* 429 U.S. at 372 (stating that the "application of federal common law is required neither by the equal-footing doctrine nor by any other claim of federal right"). Instead, those cases confirm that individuals may litigate access and navigability only when state statutes allow.

For example, *Utah Stream Access Coal. v. Orange Street Development*, 416 P.3d 553, 562 (Utah 2017), does not hold that individuals have standing to bring quiet title claims under the federal doctrine of navigability for title. Instead, that decision was decided under Utah's Public Water Access Act. Id. at 557 (holding "the question of 'navigability' under the Public Waters Access Act is decidedly a question of state law"); *see also id.* at 561 ("We also vacate the district court's decision quieting title in the State."). Utah's Act entitles any person to use "public waters" for recreation, Utah Code Ann. § 73-29-203, and any person may file suit to enforce rights to public recreational access. Utah Code Ann. § 73-29-204. Hill cites the opinion of one Utah Supreme Court Justice for the proposition that a " 'federal navigability-

for-title claim is a quiet title to claim,' " Aplt. Opening Br. 31, but that statement appears in the Justice's dissenting opinion; it is contrary to the majority's decision and Utah law. *Utah Stream Access Coal.*, 416 P.3d at 562 (Utah 2017) (Durham, J., concurring in part, dissenting in part). Contrary to Hill's argument, the dissent does not establish that "the easement for public fishing and wading encumbering the State's title to the riverbed is a sufficient interest" for a member of the public to challenge private title in Colorado. Aplt. Opening Br. at 31.

Hill argues that "every court in every other state" has found that "public rights encumber a state's title." Aplt. Opening Br. at 18. But each case Hill cites was decided under state law, and none holds that federal common law encumbers State title. *See Kramer v. City of Lake Oswego*, 395 P.3d 592, 610 (Or. Ct. App. 2017) (holding that Oregon public trust doctrine "does not impose on the state (or upland landowners) an obligation to provide public access over uplands to reach navigable waters, and no Oregon case has held otherwise"); *Ariz. Ctr. For law in Pub. Interest v. Hassell*, 837 P.2d 158, 168 (Ariz. C.t App. 1991) (concluding that under public trust doctrine adopted by Arizona Supreme Court and gift clause of the Arizona constitution, the state

could not quitclaim the state's interest in navigable riverbeds without compensation); *Winters v. Myers*, 140 P. 1033, 1035 (Kan. 1914) (finding that under Kansas law, the title to the bed of a navigable river is vested in the state and law to divest title without compensation would violate Kansas constitution); *Crawford Co. v. Hathaway*, 93 N.W. 781, 789 (Neb. 1903) (holding "[t]he [Nebraska] irrigation act of 1895 is valid when construed as not interfering with vested property rights which have been acquired by riparian proprietors") *overruled by Wasserbuger v.Coffee*, 141 N. W. 2d 738 (Neb.1966); *Provo v. City of Jacobsen*, 176 P.2d 130, 133 (Utah 1947) (finding State of Utah failed to meet its burden of showing "lands were below the high water mark of the lake at the time Utah became a state").

The equal footing doctrine and the doctrine of navigability for title establish rights exclusively in the State. Neither doctrine creates federal common-law rights in the public to litigate navigability or access to those lands. Instead, any interest in the public under those doctrines is defined by state law. Colorado's constitution has no public trust doctrine and instead limits the public's rights in the state's natural streams to appropriation for beneficial use. *See* COLO. CONST. art. XVI, §

5. Therefore, Colorado law would not create an easement or a public trust even if the State held title to the riverbed.

II. Hill also lacks prudential standing because he asserts only a generalized grievance.

Hill asserts a generalized grievance based on a desire for the general public, including himself, to be able to fish in certain spots without facing the consequences of trespassing on private property. Aplt. App. at 185. Even if the State owned the riverbed and state law created public rights to use the riverbed, those rights would not vest in Hill individually. Instead, they would vest in the public generally. *See Kinscherff*, 586 F.2d at 160 ("If [a right to use a public road] exists, it is vested in the public generally.")

Even if a right is vested in the public, injury to the right does not create standing in an individual. When an alleged harm is shared in substantially equal measure by all or a large class of citizens, that harm alone does not invoke jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Even when the plaintiff has alleged injury sufficient to meet the case or controversy requirement, the Supreme Court has held that "the plaintiff generally must assert his own legal rights and interests, and

cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*

Thus, even accepting as true Hill's allegations of harm, he lacks prudential standing because his claim rests entirely on the State's alleged title in the riverbed. Furthermore, his allegations confirm that his alleged harm is shared in equal measure by other members of the public who trespass on the Homeowners' property. Hill admits other anglers have suffered even greater harm than he has. It was two others—not Hill—who suffered the alleged shooting. Aplt. App. at 11 (describing alleged shooting involving Defendant Warsewa and Charles Pugsley and Gary Jordan, but not alleging Hill's presence). Similarly, it was another angler—not Hill—who allegedly received a note threatening to charge him with trespassing. Aplt. App. at 29; Aplt. App. at 44. The harms Hill alleges are no different than those that "could plausibly be shared by any members of the public who willfully trespass on land claimed to be owned by private individuals." Aplt. App. at 179, n.4.

As part of his injury argument, Hill claims he should be allowed to bring this action, because if he were arrested for criminal trespass, "he

would surely have the right to defend himself on the grounds that he has a legal right to be there." Aplt. Br. at 35. This Court should not base its decision in this case on claims of future defenses in a hypothetical case. Even so, Hill would lack prudential standing to obtain a declaration of the State's title in the riverbed in that hypothetical case for all the same reasons he lacks standing in this case.

III. The district court did not err by dismissing for lack of prudential standing without reaching issues of sovereign immunity and constitutional standing.

Review of denial of a motion for remand under 28 U.S.C. 1447(c) is de novo. *See Kellogg v. Energy Safety Servs. Inc.*, 544 F.3d 1121, 1125 (10th Cir. 2008) ("The interpretation of a federal statute is a question of law which this court reviews de novo.").

In cases removed from state to federal court, "there is no unyielding jurisdictional hierarchy." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). Courts are not required to determine jurisdiction when other clear defects warrant dismissal. Prudential standing is the kind of "threshold question" that "may be resolved before addressing jurisdiction." *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (deciding threshold question prior to sovereign immunity issue); *see*

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 431 (2007); *Wilderness Soc.*, 632 F.3d 1162 (proceeding directly to prudential standing without considering constitutional standing); *VR Acquisitions, LLC v. Wasatch Cty.*, 853 F.3d 1142, 1146 n.3 (10th Cir. 2017).

None of the cases Hill cites required the district court to determine jurisdiction before any other threshold issue. First, *Ruhrgas AG* held that dismissal, not remand, is an appropriate remedy when a plaintiff fails to satisfy threshold requirements. 526 U.S. at 585. It did not say the Court must deal with subject matter jurisdiction before prudential standing if a case has been removed. Second, *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th Cir. 2000) held that if a court determines it is without jurisdiction, then remand is obligatory under §1447(c). (holding that district court recognized its lack of subject matter jurisdiction "when [it] *concluded* that the state defendants had raised a valid Eleventh Amendment defense.") (emphasis added). It does not establish a hierarchy requiring a court to determine jurisdiction before deciding any other threshold issue. Third, *Gadlin v. Sybron Int'l Corp.*, 222 F.3d 797, 799 (10th Cir. 2000) does not apply to

this case. That case originated in federal court and did not involve remand. *Id.* at 798 ("Plaintiffs…brought this wrongful death action in federal district court …"). Moreover, the court noted "there is no unyielding jurisdictional hierarchy, requiring federal courts to sequence one jurisdictional issue before another." *Id.* at 799.

In this case, the district court was not required to follow a jurisdictional hierarchy. *See Ruhrgas AG*, 526 U.S. at 578. Instead, it could choose between threshold issues for dismissal. *See Tenet*, 544 U.S. at 6 n.4; *Wilderness Soc.*, 632 F.3d 1162. Because the district court chose to dismiss for lack of prudential standing without determining its jurisdiction, it was not required to remand the case to state court under § 1447(c).

IV. Hill's arguments would require this Court decide questions of public policy that are best left to elected officials.

Hill argues this case must be remanded and litigated on the merits because dismissal would improperly eliminate the public's interest in using riverbeds underlying navigable waters.[5] Aplt. Opening

[5] Hill also argues the district court "found" the State does not want ownership of the riverbed. Br. 16. That overstates the district court's

Br. at 16–17; *see also* Prof. Amici Br. 9–14. Yet, those interests are determined by state law and are not before the Court. The question before the Court is whether an individual who asserts no title of his own can force the State into a title dispute with a private landowner. He cannot.

The law prohibits individuals from asserting the rights of others and forcing courts to decide questions of wide public significance. *See Wilderness Soc.*, 632 F.3d at 1171–72 (holding courts "must hesitate before resolving a controversy on the basis of the rights of third persons" (internal quotations omitted)). Courts should not adjudicate rights unnecessarily because the holders of those rights might not wish to assert them. *Id.* The parties themselves are the best proponents of their own rights, and the courts should only construe rights when the most effective advocates are willing to appear before them. *Id.* And without limitations on third-party standing, courts would be required "to decide abstract questions of wide public significance even though

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order and the State's position. The State has not taken a position on whether it wants ownership of the riverbed. Instead, its position is that Hill cannot force the State into a title dispute with Homeowners.

other governmental institutions may be more competent to address the questions." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

At this time, the State does not wish to litigate the merits of a putative title claim in the riverbed. Forcing the State to litigate the merits would upset nearly 150 years of settled property rights, not only for the Homeowners, but for every landowner along every river in the State. If Hill has standing to maintain this action, so might any other person who is willing to trespass on private land. Anyone who desired access to private land underlying a river could force the landowner and the State into a title dispute by alleging the river was navigable at statehood. The State and thousands of landowners could be thrust unwillingly into litigation against each other, regardless of the statewide impacts. And according to the Law Professors as Amici, if the trespasser succeeded in proving the river was navigable, the State would take title without having to compensate property owners. Prof. Amici Br. at 23–28. Even if the State agreed with that argument, it is elected officials—not Hill and the Law Professors—who are the best position to determine the wisdom of taking private land without compensation. Any decision to pursue such litigation should be made

only after careful consideration of the public policy implications and the far-reaching effects on the State's sovereign obligations, including under tax laws and other regulations. For example, declaring the Arkansas to be "navigable" could expand federal jurisdiction over the river, which would be a direct infringement on Colorado's sovereignty.

Such dangerous consequences illustrate why courts maintain rules against third-party standing. In this case, whether to expand Colorado's title to land underlying the Arkansas River is a question best left to the State's elected officials.

V. The Court should not remand because the Complaint suffers the same defects in any venue.

Hill argues that the Complaint must be remanded because this Court lacks jurisdiction. Aplt. Opening Br. at 40. Yet, none of the defects in this case will disappear if this Court remands to state court.

State law is clear that Hill lacks authority to litigate the State's perceived title in lands even in state court. Unless a statute provides otherwise, the Attorney General has exclusive authority to represent the State's interests in court. *Mtn. States Legal Found. v. Costle*, 630 F.2d 754, 771 (10th Cir. 1980) (holding that a member of the public

lacks standing to raise claims on behalf of the State). Colorado law provides that the Attorney General is to appear "for the state" in all actions in which the State "is a party or interested." § 24-31-101(1)(a), C.R.S.; *see Virginia House of Delegates v. Bethune-Hill,* No. 18-281, 2019 WL 2493922, at *1 (U.S. June 17, 2019) (dismissing House of Delegates' complaint for lack of standing under Art. III because under Virginia law, "authority and responsibility for representing the State's interests in civil litigation rest exclusively with the State's Attorney General."). Therefore, an action by a member of the public to quiet title in public lands must be dismissed. *See Kinscherff*, 586 F.2d at 160. Thus, even if remanded, Hill's claims would fail for lack of standing.

In addition, the State's sovereign immunity bars the claims even in state court. Determining whether a river was navigable-for-title at the time of a State's founding is a question of federal law. *United States v. Oregon*, 295 U.S. 1, 14, (1935); *PPL Montana*, 565 U.S. at 591 ("[A]ny ensuing questions of navigability for determining state riverbed title are governed by federal law."). "[N]avigability of the stream is not a local question for the state tribunals to settle." *Brewer-Elliott Oil & Gas Co*. 260 U.S. at 87.

When federal courts lack jurisdiction over a federal question—as Hill argues here—state courts are also without jurisdiction. *Alden v. Maine*, 527 U.S. 706, 753 (1999) (explaining that Article III "in no way suggests … that state courts may be required to assume jurisdiction that could not be vested in the federal courts"). Congress cannot expand the jurisdiction of state courts to consider federal questions over which the federal courts lack jurisdiction. *Id.* at 752–53.

The State of Colorado could choose to entertain river navigability claims, as some other States have done. But the Colorado General Assembly has not abrogated the State's immunity from suit in cases seeking to affect the State's sovereign interest in lands based on questions of navigability. The Colorado Governmental Immunity Act, for example, COLO. REV. STAT. §§ 24-10-101 et seq., which allows certain suits against the State and its officials to proceed, does not expand the jurisdiction of state courts to adjudicate sovereign interests like those at issue here. Instead, the Governmental Immunity Act circumscribes the State's immunity specifically with respect to tortious conduct by state employees. *See* COLO. REV. STAT. § 24-10-102 (explaining that the Act sets forth "circumstances under which the state … may be liable in

actions which lie in tort or could lie in tort"). The Act was adopted after the Colorado Supreme Court abrogated state sovereign immunity for injury suffered by private persons. *See Evans v. Bd. of Cnty. Comm'rs*, 482 P.2d 968, 969 (Colo. 1971) (discussing the need to allow "recovery against governmental units for the negligence of their employees") *superseded by* Colo. Gov't Immunity Act, COLO. REV. STAT. §§ 24-10-101 et seq. Neither *Evans* nor the Colorado Governmental Immunity Act abrogated the State's immunity from suit for actions affecting the State's sovereign interests in land subject to the navigability doctrine.

VI. The Court should not certify a question to the Colorado Supreme Court that is neither dispositive to this appeal nor unsettled under state law.

Finally, Hill asks this Court to certify to the Colorado Supreme Court the question of the nature of the State's title in navigable riverbeds. Aplt. Opening Br. at 45–46. Yet, Hill does not argue that the district court improperly denied his motion for certification below and he does not appeal that portion of the district court's opinion. *Contra*. Docketing Statement, Document: 010110122739 at 4 (filed Feb. 6, 2019) *with* Aplt. Opening Br. at 8. Because Hill's Statement of the Issues and substance of his brief does not address the district court's denial of his

motion to certify, he has waived the issue. *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1174 (10th Cir. 2005) (An issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal). Even if this Court determines it may consider whether to certify an issue to the Colorado Supreme Court, despite Hill's waiver, the Court should deny Hill's request because the issue is neither dispositive nor unsettled.

Whether to certify a question of state law to the state Supreme Court is within the discretion of the federal court. *Lehman Brothers v. Schein*, 416 U.S. 386, 391–392 (1974); *Holler v. United States*, 724 F.2d 104, 105–06 (10th Cir. 1983). Colorado permits federal courts to certify questions directly to the Colorado Supreme Court if: (i) the question of state law would be dispositive of the case, and (ii) it appears that there is no controlling precedent from the Colorado Supreme Court on the issue. Colo. App. R. 21.1 (2018). Because Hill fails to demonstrate that the question is dispositive and unsettled under Colorado law, the Court should not certify the question to the Colorado Supreme Court.

In briefing below, Hill conceded that the question is not dispositive of this case and argued that the district court need not even

reach the issue. Aplt. App. at 1 ("Plaintiff, of course, believes that this Court need not reach the issue of the nature of the State's title."); *id.* ("The issue does not bear on whether the Court should remand for lack of subject matter jurisdiction."). For this reason alone, the Court should not certify the question.

In addition, the question is settled under Colorado law. As explained the arguments above, Colorado has rejected the public trust doctrine, and has not adopted any law allowing individuals to litigate the navigability of rivers within its borders. Because the issue is neither dispositive nor unsettled, the Court should not certify the question to the Colorado Supreme Court.

CONCLUSION

The Court should affirm the district court's dismissal.

ORAL ARGUMENT REQUESTED

Because of the far-reaching consequences of Hill's arguments on public policy and land ownership the State believes oral argument would be helpful.

Respectfully Submitted,

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Date: June 21, 2019

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I hereby certify that with respect to the foregoing document:

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Date: June 21, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 21nd day of June, 2019 I electronically filed the foregoing **Response Brief of Appellee-Defendant State of Colorado** with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system, which will send notification of such filing to all parties that have appeared.

Date: June 21, 2019

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