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No. 10-218

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Montana's opposition brief attempts to revive a number of fact-bound arguments that the courts below rejected on their way to establishing a sweeping legal proposition that is contrary to this Court's precedents and effectuated an enormous land grab. That legal proposition is that navigability for title—as distinct from navigability for regulatory purposes (a key distinction Montana repeatedly ignores)—is judged on the basis of the river as a whole and can be determined based on evidence of present-day use. That proposition is flatly inconsistent with *United States v. Utah*, 283 U.S. 64 (1931). It also has enormous practical consequences: the decision below provides a roadmap for cash-strapped states to take (and collect back-rent from) riverbed lands heretofore believed to belong to private landowners and the federal government by the simple expedient of declaring them to have belonged to the State all along. This Court's intervention is clearly needed.

I. The State's Record Distortions Confirm The Need For This Court's Review.

Rather than address the legal issues raised in the petition, Montana attempts to revive a number of factual issues that did not form the basis for the Montana Supreme Court's legal ruling below. Montana repeatedly states, for example, (i) that testimony from a PPL witness confirmed that PPL's title "end[s] at the riverbanks"; (ii) that, under state property law "title to" the riverbeds "has remained with the State since statehood"; and (iii) that this "undisputed evidence is dispositive

and presents no federal question." Opp'n 24; *see also id.* at 1, 16, 30–31. Montana misstates the record and is wrong on the law.

1. Read in context, the quoted testimony makes clear that, although PPL's "[Associate] General Counsel" did not *himself* review PPL's deeds to determine title to the riverbeds, the deeds were reviewed by outside counsel, *see* Tr. 619, and PPL had "no reason to" believe that the riverbeds "were not included in the real property." Tr. 620. Under Montana law (as elsewhere), title runs to the river's edge and the status of the river—whether or not it is navigable for title purposes—determines who owns the riverbeds. The relevant Montana statute, enacted in 1895 and still in force, provides that when land "borders upon a navigable ... stream," the owner "takes to the edge of the ... stream at low-water mark," but when land "borders upon any other water, the owner takes to the middle of the ... stream." Mont. Code Ann. § 70-16-201; *see also Missoula v. Bakke*, 121 Mont. 535, 539 (1948) (same) (citing *Brown v. Huger*, 62 U.S. 305, 320 (1858) ("watercourses not navigable must be '*ad medium filum aquae*'")). Accordingly, whether PPL's deeds include title to riverbeds hinges on a threshold question of *federal* law—were the relevant river stretches navigable at statehood? *See United States v. Oregon*, 295 U.S. 1, 14 (1935) (because "the effect upon the title to [waterbed] lands is the result of federal action in admitting a state to the Union, the question whether [waters] are navigable or non-navigable is a federal, not a local one").

2. Montana also repeatedly asserts that PPL has conceded navigability. Opp'n 3, 25. That assertion is baseless. Indeed, the Montana Supreme Court expressly rejected it, holding that the trial court "improperly relied" on PPL's supposed admissions; and made clear that it did not rely "upon any ostensible admissions made by PPL" in its "analysis regarding" title navigability. App. 62.

Moreover, Montana's imagined concession is a product of Montana's own conflation of the well-settled distinction between navigability for commerce and navigability for title. *See* App. 94–101 (Rice, J., dissenting). PPL has acknowledged that some of the river stretches are navigable for commerce purposes (and, therefore, subject to federal regulation), but it has never conceded that any of the relevant stretches are navigable for title purposes. Montana's appendix omits those portions of PPL's Answer that denied that "[t]itle to the beds and banks ... passed to ... Montana upon its admission to the Union." PPL Fed. Answer ¶ 36 & Fed. Amend. Compl. ¶ 36. In fact, belying its representations to this Court, the State actually sought sanctions below based on PPL's *refusal to admit* that the river stretches were navigable for title purposes. *See* Mont. Summ. J. 13 ("utilities know the rivers at issue are navigable, yet they have refused to admit it").

3. Montana also contends that certain earlier decisions are "preclus[ive]." Opp'n 24–25. But no court in this case has ever found *any* previous decision to be preclusive. Montana cites cases (at pages 5–10) that it asserts determined that the

relevant river stretches were navigable. In fact, in those cases no party disputed title navigability and, therefore, the issue was never decided. *See* App. 116 (Rice, J., dissenting) ("this issue had never previously been decided by this Court").

Montana likewise contends (at pages 24–26) that certain federal cases discussing *regulatory* navigability are binding because they involved PPL's predecessor-in-title. That is doubly wrong. First, no court has ever concluded that PPL is in privity with The Montana Power Company, and the trial court found the opposite for liability purposes. Second, this is just another example of Montana's conflation of title navigability with regulatory navigability. The cases all addressed regulatory navigability under the Federal Power Act, which requires courts to consider river improvements and ignore interceding falls. None involved title navigability, which requires examining the river in its ordinary, natural condition, including the stand-alone non-navigability of sections with extended rapids and falls. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) ("any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case"); *see also* Pet. 26–29. Indeed, even the federal government does not consider these cases binding. In a 1988 letter, the Bureau of Land Management rejected Montana's claims of title to these riverbeds, emphasizing that the United States recognizes only certain portions of the Missouri, Yellowstone, and Big Horn rivers within Montana "as being navigable for title related purposes." U.S.

Dep't of Interior, Letter to Montana Dep't of State Lands (Aug. 26, 1988).

To the extent the federal cases cited by Montana are relevant, they support reversal. Contrary to the conclusion reached below, the D.C. Circuit's *Montana Power* decision recognized that the Madison River was "concededly" *not* a "navigable water," but found that dams on the river were subject to federal regulation because they occupy federal lands, 185 F.2d 491, 496 (D.C. Cir. 1950), thus belying Montana's assertion that federal interests are a "fiction" and no one else "has disputed the navigability of these rivers for most of a century." Opp'n 31. With respect to the upper Missouri River, the D.C. Circuit found *regulatory* navigability, but its decision depends on evidence of navigation *after* post-statehood river improvements. *Montana Power*, 185 F.2d at 494, 496; App. 251–52, 256–57. The only relevant evidence of navigability before the river improvements—a report by Hubert Bancroft that gold-miners traveled downstream to Fort Benton with a portage around the Falls—has since been proven false. *See* App. 115 (Rice, J., dissenting); App. 196 ("utterly impossible"); App. 277–278 (Bancroft's source "is a puff piece" that is "entirely unbelievable"). The State quibbles that Dr. Emmons misspelled Bancroft's middle name, and proclaims that this Court has "relied on Hubert *Howe* Bancroft for nearly as long as it has considered navigability cases." Opp'n 12 (citing *The Montello*, 87 U.S. 430, 440 (1874)). But that is also false. In *Montello*, the Court cited to *Bancroft's History of the United States*, a treatise authored by

the historian *George* Bancroft. 87 U.S. at 440 n.12. To PPL's knowledge, the Court has never relied on anything by Hubert Bancroft. *See* Historians' Br. 11 (no "reputable historian" would ever rely solely on Hubert Bancroft).

4. Montana offers no meaningful response to the only federal court decision addressing navigability for title—the 1910 federal court decree. Montana asserts that this decision was a "minor water rights case" that did "not analyze navigability." Opp'n 6. In fact, the case specifically addressed navigability for title in determining whether a PPL predecessor held title to the Clark Fork riverbeds so it could build its hydropower dam. The decree states that the Clark Fork "is a non-navigable" river "incapable of carrying the products of the country in the usual manner of water transportation," Supp.App. 11–12, and decrees that PPL's predecessor "owns the bed thereof and both banks thereof" in the section of the river at issue then (and now). Supp.App. 8. As the "Findings of the Court" explain, the court took evidence and found that "Clark's Fork of the Columbia River at all points in Sanders County, Montana, always was and is a non-navigable, torrential, mountain stream, full of rapids and falls." Supp.App. 3.

5. Finally, Montana's opposition is riddled with other distortions. For example, Montana continues to cite to supposed "Army Corps" studies that were *not* conducted by the Corps. Opp'n 9–10; *cf.* App. 269–71. It asserts that PPL's expert, Dr. Schumm, "never set foot near any of the rivers at issue," Opp'n 8, when, in fact, the renowned fluvial

geomorphologist drove the Clark Fork, and viewed the entire Madison River and all relevant stretches of the Missouri River by low-level helicopter flight, providing further support for his conclusions that the rivers had changed and were not "conducive to navigation" at statehood. App. 212–13. And it contends that Dr. Emmons's affidavit "disputed just one of the dozens of [supposed] specific recorded instances of navigability on the rivers at issue," Opp'n 11, even though, as Justice Rice recognized, the affidavit critiques all of the State's purported evidence. App. 190–204. Similarly, Montana complains that Dr. Emmons's report (unlike his affidavit) is not part of the summary judgment record. In fact, PPL made a valid offer of proof urging the court to consider the expert navigability report. Tr. 1055–57 (entry of offer of proof regarding expert reports). Dr. Emmons's report thus provides further confirmation that the lower court could not properly resolve the important, federal navigability issue without a full evidentiary trial. *Cf. United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (title navigability is a matter "requiring evidence, and to be determined by proof").

II. The Court Should Clarify The Proper Test For Determining Navigability For Title Purposes.

When the smoke clears, Montana's opposition brief offers no rejoinder to the petition's key points: the Montana Supreme Court departed from precedent by (i) failing to apply a section-by-section approach to determining navigability, and (ii) deeming present-day usage "sufficient" to

establish navigability at statehood. Pet. 19–24, 26–29.

1. Despite Montana's effort to inject irrelevant factual issues, the Montana Supreme Court could not have been clearer that its *legal* conclusions were outcome-determinative. In the Court's view, the "key inquiry" was whether the trial court had correctly applied the navigability-for-title test because that test "sets forth the *legal standard* the State must meet for summary judgment and also indicates the quantum of evidence PPL must present in order to raise a genuine issue of material fact." App. 53 (emphasis added). Moreover, as the petition explains, the Montana Supreme Court erroneously rejected a section-by-section analysis of navigability for title purposes. *See* Pet. 19–23. Although it acknowledged that *Utah* considered "navigability with regard to certain sections of the rivers, as opposed to the rivers themselves as a whole," it deemed *Utah* to have "limited applicability." App. 59; *see also* App. 96 (Rice, J., dissenting) (criticizing majority for assuming "an *entire river* is navigable").

Montana does not defend the lower court's reading of *Utah*. Nor does it grapple with Justice Rice's dissent, App. 96–101, or address the deep conflicts among the lower courts. *See* Pet. 24–25. Instead, it tries to deny the reality that the Montana Supreme Court rejected *Utah*'s section-by-section approach. Opp'n 18 ("river-as-a-whole" approach "does not appear in the opinions below"). That assertion cannot withstand scrutiny. The district court expressly rejected the view "that the

appropriate analysis" requires looking "at the relevant reaches of the river." App. 138. In turn, the Montana Supreme Court deemed the district court's approach "unequivocally correct," expressly rejecting PPL's argument that "particular stretches of a river" that are non-navigable "require a piecemeal classification of navigability—with some stretches declared navigable and others declared non-navigable." App. 54, 58.

2. Shifting gears, Montana contends that the relevant river sections are too "short," Opp'n 18, and that "PPL has cited no case in which a court has held that such a short interruption ... rendered the longer reach of river non-navigable." Opp'n 20. But PPL is not the one arguing for a whole river approach, with stretches of non-navigability controlling the classification of other portions. As Justice Rice recognized, PPL has never argued that "particular stretches of a river which are non-navigable ... can defeat a finding of navigability with respect to the *whole river*"; it "argues only for certain reaches to be declared non-navigable under *Utah*'s approach." App. 99.

Montana also provides no answer to PPL's contention that a "short interruptions" exception would swallow *Utah*'s rule. Pet. 23. In fact, the opposition highlights the absurdity of Montana's position. In contrasting PPL's "short" river sections with the "long" river sections in other cases, including the 19.21 mile section in a Fourth Circuit case, *see* Opp'n 20, Montana neglects to mention that *Utah* focused on a *4.35 mile* river section, while the Montana Supreme Court determined the "Great Falls Reach, even though a roughly *17-mile*

stretch of the Missouri River, is merely a short interruption." App. 57, 59, 61 (emphasis added).

3. Finally, Montana argues that the lower court did not improperly rely on evidence of present-day usage. But it does not dispute that the lower courts have taken widely different positions on the relevance of post-statehood evidence when determining title navigability. *See* Pet. 26–29. Nor can it reasonably dispute that the Montana Supreme Court deepened this conflict in holding that present-day recreational use is "sufficient" to establish title navigability. App. 58. Indeed, in declaring that this Court's precedents "embrace[] the notion that emerging and newly discovered forms of commerce can be retroactively applied to considerations of navigability," App. 55, the lower court made no caveats explaining that such reliance must be contingent on the waterway's hydrology remaining in its ordinary condition unchanged since statehood (and ignored extensive evidence that the rivers *had* changed). App. 58, 102–104, 251–57, *cf. Utah v. United States*, 403 U.S. 9, 11–12 (1971) (emphasizing that facts from the 1870s had not changed by 1896).

Montana cryptically asserts that "PPL fails to cite a single instance of such misuse of post-statehood evidence." Opp'n 22. In fact, PPL's petition explains precisely why the decision below misuses post-statehood evidence. Pet. 19, 26–29. Where, as here, historical usage is neither "well-documented" nor "well-established," App. 54, 56, and the rivers' hydrology has substantially changed, considering present-day recreational

usage as "sufficient" to determine navigability is flatly at odds with this Court's precedent.

III. The Court Should Clarify The Preemptive Reach Of The Federal Power Act.

Montana also offers no meaningful response to the petition's legal argument that the State's belated attempts to impose retroactive rental obligations are preempted under federal law.

1. Montana contends that, because the lower court held that the Hydroelectric Resource Act's rental provisions are severable from its "more explicit regulatory provisions," there is no conflict with federal law. Opp'n 27. But that ignores that the massive rental obligations were imposed under the Act, and that the massive, retroactive rent payments are preempted wholly apart from the more obviously preempted regulatory provisions the rental provisions complement. Those massive, retroactive state-law rental obligations fundamentally undermine the judgment struck in the federal license as to the economics and financial viability of the project.

Montana attempts to shift the blame to PPL, asserting that a licensee must "obtain all rights necessary" to operate a hydropower project, and that PPL's failure to determine that the riverbeds were state-owned and proffer unasked-for rent, reflected PPL's "failure of diligence." Opp'n 28–29. That blinks reality. The Federal Power Act does not require that licensees anticipate every conceivable legal argument that might be conjured up decades in the future by enterprising state lawyers seeking new sources of revenue. Unlike

the cases cited by Montana, this is not a situation where a claimed right to payment based on a claimed right to title has been delayed due to prolonged litigation. Instead, the riverbeds have always been thought to belong not to Montana but to the federal government and private parties and, on that basis, PPL has made extensive payments to the federal government. If anyone hid the ball here, it was Montana. Montana actively participated in the licensing proceedings and *never* claimed title to any of the riverbeds. Indeed, its own "lack of diligence" was recognized by the Montana Supreme Court. App. 68–69.

2. Of course, there is an explanation for the State's otherwise inexplicable lack of vigilance in asserting its property rights to the riverbeds back in the federal licensing process—*viz.*, that everyone involved understood that title lay elsewhere. Montana's opposition brief suggests that the decision below only confirmed what had been obvious since statehood. But the State's own actions in the licensing proceedings, and its failure to seek compensation for the use of the riverbeds for the previous 100 years, speaks much louder than anything in its brief. The reality, as reflected in the extensive evidence disregarded by the lower courts, is that the State had no title to these lands until it was conveyed by the decision below. That decision conflicts with this Court's precedents, renders important aspects of the federal licensing process a nullity, and, as the amicus briefs filed by concerned landowners, irrigators, industry participants, and distinguished historians attest,

effectuates a massive land grab that should not be allowed to stand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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