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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SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDICES

Appendix A

IN THE CIRCUIT COURT OF
THE UNITED STATES, NINTH CIRCUIT,
DISTRICT OF MONTANA

Fred M. Steele, Edward Maher
and Zaidah E. Wenham,

Complainants.

vs IN EQUITY No. 950

Edward Donlan and Northwestern
Development Company, a Corporation,
Defendants,

and

Charles F. Wenham,
Defendant added by Court order.

FINDINGS OF THE COURT.

BE IT REMEMBERED: In this cause the plaintiffs Fred H. Steele, Edward Maher and Zaldah E. Wenham filed their bill of complaint against defendants in December, 1909, the defendant Donlan filed a disclaimer thereto and the defendant Northwestern Development Company, a corporation, filed an answer to said bill of complaint likewise in December, 1909, and then and there obtained of the Court an order granting it leave to file a bill of cross-complaint seeking affirmative relief against the plaintiffs and one Charles F. Wenham, who the court then duly ordered to be made a party defendant and who was accordingly made such party defendant, and that

subpoena was issued on the said cross bill, which was theretofore filed, and was duly served on said plaintiffs and said Charles F. Wenham, and each and all of said plaintiffs and the said Charles F. Wenham thereafter duly appears to and jointly answered the said cross bill to which answer the said Northwestern Development Company filed its reply, and thereafter the whole cause was, by consent of all the parties, set down for trial and hearing before the Court, without reference to a master, for July 5th, 1910, and at the request of said plaintiffs and said Charles F. Wenham the said hearing was later postponed and reset for Monday, July 18th, 1910, at 10 o'clock a.m.

At the last named time, and in open court, the cause was by the Court duly called for hearing and trial, counsel for said plaintiffs and said Charles F. Wenham was present but produced no evidence in support of their answer to the said bill of cross complaint, or any in support of plaintiffs' bill of complaint, but consented that the hearing proceed. The defendant Northwestern Development Company appeared by counsel and introduced upon the trial and hearing evidence to support all the allegations of the answer to the bill of complaint and of its bill of cross complaint, and thereupon the Court, after deliberation, finds:

(1) That the allegations of the plaintiffs' bill of complaint which are controverted by the answer of the defendant Northwestern Development Company and are all untrue in fact.

(2) That each allegation of the bill of cross complaint of the Northwestern Development

Company, — are in all respects true, and the contrary averments in said answer to said bill of cross complaint are false.

(3) 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 and incapable of being used to transport the products of the country in the usual manner of water transportation; and that its waters always were, until appropriated by said Northwestern Development Company or its predecessor, subject to appropriation; and that the flow of the waters of said stream ranges from a minimum of six thousand cubic-second feet, to a maximum of two hundred thousand cubic-second feet.

(4) That on and after February 16th, 1905, and until he sold to said Northwestern Development Company, the defendant Donlan owned in fee simple absolute lots numbered four (4) and five (5) in section eight (8) of township twenty-one (21) north of range twenty-nine (29) west of the Montana Principal Meridian, and likewise owned all the shore line and for a considerable distance back therefrom of lots six (6) and seven (7) in said section and all the flooding rights upon the whole of said last named lots and likewise the entire bed of said River at all points between and opposite said lots four (4) and five (5) on the one side and lots six (6) and seven (7) on the other side of said River; and that all of said four lots, according to the public survey under which they were patented, runs to the said River, and that the patents included the bed of the River on which were and are the falls known as

Thompson Falls and for over a quarter of a mile above said Falls; and also that there was at all of said times a natural channel or gorge lying upon said lots four (4) and five (5), and then entirely owned by said Donlan, which afforded the only practical means of diverting water for practical power development purposes in that vicinity, and that but one power development project is possible in that vicinity.

(5) That said Donlan acquired by purchase a very old water right of six hundred and twenty-five (625) cubic-second feet of the waters of said River and by virtue of his ownership of the banks and bed of said stream as aforesaid likewise owned the right to have the waters thereof flow down to and past said lots four (4), five (5), six (6) and seven (7) undiminished in quantity and unimpaired in quality with also, as an incident thereto, the right to reasonably use said waters in their passage in and over his lands; and that a water power development use was and is such a reasonable use of said waters, this right being what is commonly known as a riparian right.

(6) That on each occasion intending to and believing he was appropriating all the waters in said stream and for the purpose of securing the same, if necessary, by appropriation, in addition to his said riparian rights and without in any manner relinquishing or impairing them, said Donlan in March, 1905, in January, 1906, and in December, 1906, respectively, duly appropriated, for water power development and other industrial purposes, respectively twelve hundred and fifty (1250) cubic-second feet, two thousand (2,000) additional cubic-

second fee and five thousand (5,000) additional cubic-second feet of the waters of said stream, and thereafter and in June, 1909, said Northwestern Development Company, with like purpose, intention and belief, duly appropriated an additional seven thousand five hundred (7,500) cubic-second feet of the waters of said stream; and that this belief on the part of said Donlan and said Northwestern Development Company was reasonably induced from time to time by different reports of hydraulic engineers and each appropriation was additional to and independent of the preceding ones and each was regularly made by duly posting a notice at the point of intended diversion and thereafter duly recording a properly verified notice likewise in due form, with the County Recorder of Sanders County, Montana, and on December, 1909, a single amended notice covering all of said preceding appropriations, and likewise in due form and properly verified, was also properly recorded in said Sanders County, the same covering fifteen thousand two hundred and fifty (15,250) cubic-second feet of the waters of said stream.

(7) That the said power development enterprise was a large and costly one involving protracted exploration of the River bed for a suitable dam foundation, and prolonged expert examination to determine a suitable point for the development of said power, and the location of the primary and secondary dams, forebays and powerhouse essential therefore, also involving extensive survey operations to determine the probable flood line to result from the construction

of the proposed dam when its nature was determined upon and thereby the areas of land above on the River to be flooded, and involving the acquisition of titles or flooding rights for the lands so determined to be flooded for not less than six miles up the stream, as well as the clearing of ground and the performance of much other preliminary work; that said Donlan honestly intended to appropriate said waters so appropriated by him for the purposes named, and forthwith after the posting of said first named and each one of said succeeding notices of appropriation began to carry on with reasonable diligence the vigorous prosecution of work directed to subject said waters to said uses, and he continued so to do until he sold to said Northwestern Development Company, which after its purchase likewise continued in the same manner the prosecution of said work at all times, and is still so continuing the same; and that there has been actually and reasonably expanded either by said Donlan or by said Northwestern Development Company an average of over sixty-six dollars per day, over nineteen hundred dollars per month, and over twenty-three thousand hundred dollars per year on said work since March 1st, 1905, or a total to this date of upwards of one hundred and seventeen thousand dollars; and that the work for which said sums were so expended was of the nature in this finding first outlined.

(8) That in the year 1907 said Donlan, for a valuable consideration, sold and conveyed all his rights of every nature as above outlined, to the defendant Northwestern Development Company,

which has since actually, necessarily and reasonably expended upwards of sixty-five thousand dollars in the diligent prosecution of said work, and has just completed the acquisition of the last of the needed flooding rights at points above its proposed dam, and is, therefore, now first prepared to enter upon the prosecution of the work of building and mechanical structures incident to the lifting of said waters for the development of said power.

(9) That said rights and claims of defendants stood unchallenged until the year 1909, when in the month of July defendant Charles F. Wenham entered upon said lot five (5) without the consent and against the will of defendant Northwestern Development Company and posted a notice whereby he pretended to appropriate the waters of said stream in defiance of said appropriations by said Donlan and said Northwestern Development Company, and thereafter, but all prior to October 15, 1909, he expended about six hundred dollars in a crib and boom built likewise on the lands of said Northwestern Development Company against its will and without its consent; and that said work as not calculated in any manner to aid in the development of any proposed water power at said point; and that neither said Charles F. Wenham nor any of the plaintiffs ever got any right to enter on any of said lands for the purpose of attempting to appropriate water or for working, by either grant or eminent domain or otherwise; that the recorded and posted notice of appropriation so made by said Charles F. Wenham in July, 1909, in Sanders County, Montana, does not state the dimensions of

the ditch, canal or means or diversion, or refer to any monument or any natural object to identify the point of diversion; and that none of the plaintiffs or the same Charles F. Wenham ever had any genuine claim in or to the waters of said stream, and the claims urged by each of them are and were false and made and intended to embarrass the operations of said Northwestern Development Company and cast a cloud upon its said lands and said water rights and its said power development enterprise, as are also the deeds purported to be executed between said Charles F. Wenham and one or more of plaintiffs, in October, 1909; and that the claims of each of the plaintiffs and the defendant Charles F. Wenham in and to the said water and in and to the right of entry upon said land are not and were not made in good faith; and that they have been insisting upon such claims for the purpose of clouding the title of defendant Northwestern Development Company and would continue to insist thereon unless enjoined by order of this court.

And as conclusions of law the Court finds:

(1) That the defendant Northwestern Development Company is the owner of the first and prior right to use, for the purposes herein, named, fifteen thousand two hundred and fifty (15250) cubic feet of water per second of time of the water of said stream; that said stream is a non-navigable stream, and that said defendant Northwestern Development Company owns the bed thereof and both banks thereof at all points up stream from the north and west lines of section seven (7) in township twenty-one (21) north of range twenty-

nine (29) west, Montana Principal Meridian, eastward continuously to the Thompson Falls and for one-quarter of a mile above on said stream, and also owns either the fee or flooding rights to all the land on both banks for a distance of six (7) miles above Thompson Falls in said stream, and is, therefore, the owner of all riparian rights so herein above set forth found to belong thereto, and the whole thereof was and is honestly intended by said defendant Northwestern Development Company, and was by its predecessor Donlan honestly intended to be devoted to the public power development use set forth in said cross-bill.

(2) That said pretended appropriation by defendant Charles F. Wenham and the said record thereof are each and both null and void and a cloud upon the title of said defendant Northwestern Development Company in said waters, as are likewise the deeds each of July 22, 1909, from said Charles F. Wenham to plaintiffs Steele and Maher, and of October 23, 1909, from said Charles F. Wenham to one Ida M. Rock, and from said Ida M. Rock to Zaidah E. Wenham, wife of said Charles F. Wenham; and each and all constitute clouds upon the title of said Northwestern Development Company in said waters; and that the said defendant Northwestern Development Company is entitled to have its title to said waters and its said lands quieted against the claims of said plaintiffs and said defendant Charles F. Wenham, and to have a decree perpetually enjoining said plaintiffs and said Charles F. Wenham and all persons acting or claiming to act by, through or under them from in any manner trespassing upon any of said lands

or the shore of said River, on either side, for six (6) miles above the falls known as Thompson Falls in said River, or at any point between said Falls and the north and west lines of section seven (7) aforesaid, or from in any manner interfering with said Northwestern Development Company in the prosecution of its said water power development enterprise, or its use or enjoyment of said river bed, or banks, or the waters of said stream as aforesaid.

Dated, Helena, Montana, July 19th, 1910.

Carl Rasch
District Judge

Appendix B

IN THE CIRCUIT COURT OF
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DISTRICT OF MONTANA

Fred M. Steele, Edward Maher
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vs IN EQUITY No. 950

Edward Donlan and Northwestern
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Defendant added by Court crder.

D E C R E E.

This entire cause came on to be heard at this term, by consent, before the Court instead of by reference to a master, and upon the bill, answer and reply and the cross bill, answer thereto and reply to said answer, on July 18th, 1910, at ten o'clock a.m., and the Court then heard the evidence, and after consideration made its findings of fact and conclusions of law, which were duly filed in said cause on July 19th, 1910, and thereupon it was ordered, adjudged and decreed as follows, viz:

(1) That the Clark's Fork of the Columbia River in Sanders County, Montana, was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of

water transportation, and its waters were at all times subject to appropriation for useful purposes under the laws of the State of Montana; and that the defendant Northwestern Development Company and its predecessors, since February 16th, 1905, have owned lots four (4) and five (5) in section eight (8) of township twenty-one (21) north of range twenty-nine (29) west of Montana Principal Meridian, carrying the north bank of said Stream and the shore lines for a considerable depth along, and carrying the south bank of said stream in lots six (6) and seven (7) in said section immediately opposite said first named lots, and has owned and now owns all of both the banks of said stream from the north and west lines of section seven (7) in said township and range, eastward to the east lines of the two easternmost of the four first named lots in section eight (8), and the whole bed of said stream at all points opposite the said bank lands from the north and west lines of said sections six (6) and seven (7) to the east line of said last named lots including that portion of the bed carrying that portion of said River known as Thompson Falls, and also owns the bed of said River and either the fee or flooding rights to all of the land carrying both banks of said River for a distance of six (6) miles above said Thompson Falls in said stream as hereinafter described, and owns all riparian rights incident thereto, among others, the right to have the waters of said stream flow to and across its said lands unimpaired in quality and undiminished in quantity with the privilege of using the same while passing for power development purposes; and that the whole of said property was and is honestly intended by said

Northwestern Development Company, and was so intended by its predecessor Donlan, to be devoted to the public power development use setforth in said cross bill.

(2) That said Northwestern Development Company was and is the owner of the first and prior right to the use for power development and other industrial purposes of fifteen thousand two hundred and fifty (15,250) cubic feet of water per second of time of the waters of said River for use in sections seven (7) and eight (8) of township twenty-one (21) north of range twenty-nine (29) west of Montana Principal Meridian.

(3) That said Northwestern Development Company acquired said rights, not only as riparian owner, but by virtue of four certain appropriations and one amended appropriation of said waters, each made in compliance with the laws of the State of Montana, and respectively for twelve hundred and fifty (1250) cubic-second feet in March, 1905, for two thousand (2,000) cubic-second feet additional in January, 1906, for five thousand (5,000) cubic-second feet additional in December, 1906, and for seventy-five hundred (7500) cubic-second feet additional in June, 1909; and that each of said appropriations was made in good faith by the appropriator named therein for the purpose therein stated; and that by mesne conveyance the right in the case of each was duly transferred to the defendant Northwestern Development Company, save as to the last appropriation which was made by said Company; and that the work calculated to subject said waters to the proposed use named in said appropriation was begun in each instance by

the appropriator forthwith after the posting of notice, and prosecuted with reasonable diligence by the appropriator, of his successor Northwestern Development Company, since and until the present time.

(4) That the attempted appropriation by defendant Charles F. Wenham by a notice posted in July, 1909, on said lot five (5) was invalid and void and conferred no rights in the waters of said stream; and that the record of the notice of said attempted appropriation made by said Wenham in the Recorder's office of Sanders County, Montana, which is recorded in Volume I. of Water Rights Records, on page 311, because it fails to state the dimension of the intended means of diversion, or to refer to the point of intended diversion by sufficient reference to any natural or permanent monument and because it was based on a trespass on said lot five (5), is likewise null and void, and therefore the deeds or agreements or transfer pretending to transfer said alleged water right under date of July 22nd, 1909, from Charles F. Wenham and Zadiah E. Wenham, his wife, to plaintiffs Frederick M. Steele and Edward Maher, which deed is dated July 22nd, 1909, and is recorded in Volume 18 of Deed Records of the Recorder's office of Sanders County, Montana, on page 57, and that certain other deed or agreement, bearing, date October 20th, 1909, between Charles F. Wenham and Zadiah E. Wenham, his wife, and Ida G. Rock, which is recorded in Volume 18 of said Deed Records, on page 64, and that certain other deed or agreement bearing date October 21st, 1909, between Ida G. Rock and the plaintiff Zadiah E.

Wenham and recorded in said Volume 18 of Deed Records, on page 67, are each and all likewise null and void, and the said water right record and the said three named deeds and agreements each constitute and are clouds upon the title of said Northwestern Development Company to said fifteen thousand two hundred and fifty (15,250) cubic-second feet of water so owned by it in said stream; that under the said record notice and the said deeds the said plaintiffs and the said Charles F. Wenham were, and, unless restrained by order of this Court, would be claiming rights in the waters aforesaid to the detriment and irreparable injury of the defendant Northwestern Development Company and rights to enter upon the banks or bed of said stream at points aforesaid, owned by said Northwestern Development Company.

It is, therefore, further ordered, adjudged and decreed, that the said recorded notices of attempted appropriation of water found recorded on page 311 and following of volume 1. of the Water Rights Records of Sanders County, Montana, and the said deeds recorded respectively on pages fifty-seven, sixty-four and sixty-seven of said Book 18 of Deed Records of Sanders County, Montana, be and they are each hereby annulled as being clouds upon the title of said Northwestern Development Company to said water.

And it is further ordered, adjudged and decreed that the plaintiffs Fred M. Steele, Edward Maher and Zadiah E. Wenham and the defendant Charles F. Wenham and each and all of them and the agents, servants and employees of each and every of them and all persons claiming to act by, through

or under them be and they are each hereby forever and perpetually enjoined from in any manner claiming any part of the waters of said stream so hereby decreed in use to the defendant Northwestern Development Company, or from in any manner interfering with the use and enjoyment thereof by said defendant Northwestern Development Company, its successors or assigns, and from in any manner trespassing upon or entering upon or in any manner interfering with the use and enjoyment by said defendant Northwestern Development Company or its successors or assigns, of the lands so owned by it or in which it so owns said flooding rights, or of the bed of said stream along the banks so owned or held by said defendant Northwestern Development Company, or any part thereof.

The said lands so carrying the banks of said stream being the lands between the west and north side lines of section seven (7) in said township and range along the River upward continuously to the east side line of said township, and they are more particularly described as follows, to-wit:

All of lots one (1), two (2), three (3), four (4), five (5), six (6), seven(7), eight (8), nine (9) and twelve (12) of section seven (7), township twenty-one (21) north of range twenty-nine (29) west; the south half of lot four (4), and all of lots five (5), six (6), seven (7) and eight (8), in section eight (8); together with the flowage rights on the south half of the southwest quarter of said section eight (8); and also all those portions of the following described tracts lying on the right or north bank of the Clark's Fork of the Columbia River, and all

lying between or below a contour line twenty-four hundred and twenty (2420) feet above sea level, according to the data of the United States Geological Survey on said Clark's Fork of the Columbia River, to-wit: Lots one (1), two (2) and three (3) of section eight (8); lots one (1) and three (3), and the northeast quarter (NE ¼) of the southwest quarter (SW ¼) of section nine (9); lots one (1), two (2), five (5), six (6) and nine (9), and the northeast quarter (NE ¼) of the southeast quarter (SE ¼) of section sixteen (16); lot two (2) of section fifteen (15); lots five (5), six (6) and seven (7) of section twenty-two (22); lots one (1), two (2), three (3) and four (4) of section twenty-three (23); lot four (4) of section twenty-four (24); and lots one (1), two (2) and three (3) of section thirteen (13); also all those portions of the following described tracts lying on the south or left bank of the Clark's Fork of the Columbia River, all lying between or below a contour line twenty-four hundred and twenty (2420) feet above sea level, according to the data of the United States Geological Survey of the said Clark's Fork of the Columbia River; all in township twenty-one (21) north of range twenty-nine (29) west, in Sanders County, Montana, to-wit: lot nine (9), and the southeast quarter (SE ¼) of the southeast quarter (SE ¼) of section eight (8); lot two (2) of section nine (9); lots three (3), four (4), seven (7) and eight (8), and the southeast quarter (SE ¼) of the southeast quarter (SE ¼) of section sixteen (16), lot one (1) of section fifteen (15), and the northeast quarter (NE ¼) of northeast quarter (NE ¼) of section seventeen (17); lots one (1), two (2), three (3), and four (4), of section twenty-two (22); lots five (5), six (6), seven (7) and eight (8), of

section twenty-three (23); and lots three (3) and five (5) of section twenty-four (24); and lots four (4) and five (5) of section thirteen (13).

All of the above described property and flowage rights embrace and include both banks of the said Clark's Fork of the Columbia River, as it flows through said township twenty-one (21) north of range twenty-nine (29) west of Montana Principal Meridian, in Sanders County, Montana.

And it is further ordered, adjudged and decreed that defendant Northwestern Development Company have and recover of the plaintiffs Fred M. Steele, Edward Maher, Zadiah E. Wenham, and the defendant Charles F. Wenham, its legally taxable costs and expenses incurred in this action, to be taxed as provided by law and rule of Court; and that it have execution against said plaintiffs and said Charles F. Wenham and each of them therefore. Costs taxed of $174.80.

This decree is final and upon the merits.

Ordered entered this 19th day of July, 1910.

Carl Rasch
District Judge