NO. 10-218

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF FOR PETITIONER

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November 28, 2011

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Montana's brief focuses at length on the view that an impassable stretch of river does not necessarily render portions of the river beyond it non-navigable. But *the dispute here centers on the stretches of rivers that Montana concedes were impassable at statehood*. And Montana never explains why the ability to bypass a significant stretch of river, whether by a standard portage, arduous overland journey, or narrow-gauge railway, renders *the bypassed stretch* navigable for title purposes. Because most of PPL's hydroelectric plants lie on the bypassed stretches of the Missouri and Clark Fork, this omission is more than just curious. It is fatal.

Montana does not seek to defend a "whole river" approach to title navigability. Instead, it stakes its case on the closely related proposition that unless there is a "dead end" that precludes all navigation beyond it, the whole river is navigable. But that is no more compatible with this Court's precedents than the whole-river approach the courts below applied and Montana abandons. And what remains critically missing is any explanation why an impassable 17-mile river stretch should be treated as navigable merely because it could be bypassed. The fact that the disputed stretch *was* bypassed affirmatively supports a finding of non-navigability, and the fact that it *could be* bypassed seems irrelevant to the question whether the bypassed stretch *itself* was navigable. And unless there is some reason why the bypassed stretches themselves should be deemed navigable, this case is over for the Clark Fork and almost all of the Missouri.

The situation is even bleaker for Montana when it comes to the Madison. The grant of summary judgment in Montana's favor depended on a "very liberal" rule of construction favoring navigability, evidence of modern-day recreational use, and a single, unsuccessful log float. The state now walks away from the lower court's rule of construction. And its efforts to defend the lower court's reliance on modern-day recreational evidence and the failed log float cannot be squared with this Court's precedents or any sensible test for title navigability.

The difficulties with Montana's position do not end there. The state conflates concepts of regulatory navigability and title navigability in ways that ignore this Court's admonition to keep the concepts separate. And although Montana and its *amici* raise the specter of unregulated rivers, a state does not need to own a riverbed to regulate a river or its beds.

The real threat that lurks in this case is not to state or federal regulatory authority, but to private property owners along riverbanks throughout the nation. The same private property owners who for decades have been paying property taxes or who long ago negotiated easements now face the prospect of states seeking to reopen long-settled titles armed with new evidence of modern-day recreational use and immunity from doctrines of equitable estoppel and laches. The temptation for a state to engage in traditional takings is tempered by the requirement to pay just compensation. But when the demand for just compensation goes in the opposite direction, and states can obtain not only title but back-rent, then the threat to private property is grave indeed. Fortunately, the tools for limiting abuse are already

present in this Court's navigability precedents. The Court need only decline Montana's invitation to rewrite them and reverse the decision below.

ARGUMENT

I. The Title Navigability Test Demands Skepticism Of Belated State Efforts To Claim Title.

Montana's invocations of sovereignty, the public trust, and the mystical qualities of Montana and its trout streams do nothing to justify its massive land grab. This case is not about "the paramount right of public use" of rivers. Mont.Br.24 (internal quotation marks omitted). The relevant river segments have long been and will continue to be open for fishing, recreational pursuits, and other beneficial uses. *See Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984) ("waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability"). Nor does this case threaten the public trust. The Court concluded long ago that it "cannot be pretended that private ownership" of riverbeds, "subject to the public rights" of navigation and fishing, "will impair the interest of the public." *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 452 (1908).

This case is about rent-seeking and Montana's effort to upset long-settled expectations by manipulating federal navigability doctrines in its state courts. While Montana invokes concerns about its own expectations, the settled expectations all belong to PPL and other private landowners. PPL's predecessors-in-title began building these dams

within a year of statehood and arranged for the requisite easements from private landowners and the federal government. PPL continues to pay the federal government for the use of federally owned riverbeds, a fact that, contrary to Montana's assertions, Mont.Br.7 n.2, PPL raised long before the certiorari stage. *See* 2006-10-06 Kinnard Aff. ¶ 12 [Dkt.144]; U.S.Br.3 n.3 (PPL pays "a portion of" its federal rent "for riverbed" land). And Montana has been collecting *property taxes* from PPL, its predecessors-in-title, and other riparians for more than a century for the very riverbeds it now claims to own. *See* MWRA.Br.6-9; 2006-10-06 Young Aff. ¶¶ 3-13 [Dkt.145].

Against this overwhelming evidence, Montana's claim to settled expectations relies on its own trust land website developed *after* this litigation and on pre-statehood meander lines on federal surveys. Mont.Br.5-7. But a post-litigation website hardly speaks to settled expectations, and this Court has rejected "meander line[s]" as having "little significance" to questions of title navigability. *Oklahoma v. Texas*, 258 U.S. 574, 585 (1922). Although Montana asserts that before this litigation no one "ever claimed title to the riverbeds … as against the State," Mont.Br.7, the fact that no one claimed title *against* the state simply reflects that no one—including the state itself—ever thought, or acted as if, the riverbeds belonged to Montana.

Montana evokes its sovereignty, but Montana's sovereign status and related doctrines of sovereign immunity are precisely why federal law has an important role to play. If a private party waited decades to assert title or actively participated in

regulatory proceedings without so much as mentioning that it had a claim to back-rent, doctrines of laches and equitable estoppel would bar any belated claim to title. Montana's sovereign immunity shielded it from those same doctrines. Tr.591-92. Montana's suggestion that PPL's approach would "require courts to go back and carve up waterways that have long been found navigable," Mont.Br.37, thus gets matters exactly backwards. Equitable doctrines like laches and estoppel are fully applicable against private parties and protect the state's settled expectations. Federal law standards of navigability that put the burden on the party seeking to establish navigability and view modern-day evidence with skepticism are necessary to protect private parties and are an appropriate counterweight to the advantages the sovereign enjoys in its own courts.

Contrary to Montana's assertions, the notion that navigability determinations made by a state's own courts should be viewed with healthy skepticism is not PPL's invention. This Court long ago recognized that "[s]ome states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so." *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922). And the Court has repeatedly declined to defer to state court determinations that further that impermissible end. *See id.* at 87; *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Oklahoma*, 258 U.S. at 591.

To be sure, "[t]his Court generally presumes the good faith of all government actors." Mont.Br.25. But that is no reason to ignore the powerful

structural incentives for self-dealing, as even Montana recognizes on the very next page of its brief when it comes to the *federal* government. Mont.Br.26.

II. The Court Should Confirm The Controlling Federal Test For Determining Navigability For Title Purposes.

The tools for policing the temptation for states to misuse navigability principles to effect improper takings are already present in this Court's title-navigability rules. The Court should clearly and expressly reaffirm those rules, including that (1) title navigability should be decided on a segment-by-segment basis; (2) title navigability should be based on reliable historical evidence of actual commercial use at statehood (except in rare circumstances absent here); and (3) the burden of proof rests on the party asserting navigability. Montana has no convincing responses to these key points.

A. Title Turns On Whether A Particular River Segment Can Be Navigated, Not Whether It Can Be Bypassed.

Montana concedes that this Court's precedent forecloses a whole-river approach and that "interruptions" along a river "can—and do" defeat navigability of the stretches in which they appear. Mont.Br.37. Although Montana denies that the lower courts applied a whole-river approach, that is belied by the record: The trial court rejected PPL's argument "that the appropriate analysis" requires "look[ing] at the relevant reaches of the river," Pet.App.138, and the Montana Supreme Court declared the river-as-a-whole conception of

navigability both "unequivocally … correct" and a "crucial[] aspect of the District Court's" decision. Pet.App.53-54; *see also* U.S.Br.5, 19-23.

Ultimately, Montana's rejection of the lower courts' approach is more about semantics than substance, because it relies on an only slightly modified river-as-a-whole test. According to Montana, a state holds title to an entire river, including its concededly non-navigable segments, no matter how long or impassable, as long as a non-navigable stretch could be "portaged," such that the river *surrounding* it formed a "continuous highway of commerce." Mont.Br.22. In other words, every non-navigable stretch is state-owned unless it creates "a dead end." *Id.*

Montana's theory suffers from serious practical and analytical flaws. As a practical matter, there is the insurmountable problem that the Missouri and Clark Fork rivers were *not* continuous highways of commerce, because the Great Falls and Thompson Falls created precisely the dead ends even Montana concedes are dispositive. *See infra*, pp. 14, 22-23; Professors.Br.25, 28-29. Moreover, the practical problems with the whole-river approach, including the anomaly of having the rights of riparian property owners turn on the navigability of *different and distant* stretches of the river, *see* PPL.Br.35-36; U.S.Br.18, apply equally to Montana's modified-whole-river-unless-dead-end approach. But the fatal analytical flaw is that Montana never explains why the concededly non-navigable stretch *itself*, as opposed to the purportedly navigable stretches on either side, should be treated as navigable. And in a case about hydroelectric facilities predominantly

situated on segments the state concedes were (and are) impassable, that is no small omission.

Montana complains about the imprecision concerning what makes an interruption *de minimis*, but it never explains what constitutes a "portage," even though its entire theory rests on whether a river is "portageable." It appears to embrace the position that *anything* that allows an impassable stretch to be bypassed to produce a "continuous highway" is sufficient, no matter whether that means carrying a boat a few yards alongside the river's edge, trekking several miles off-bank to undertake an arduous 17-mile overland journey, or riding "a narrow gauge railroad" to bypass 50 miles of non-navigable river. JA319. It is not clear how Montana's approach would *ever* render a river segment so impervious to bypass that the river as a whole would not be at least "susceptible" for use as a highway of commerce. *See* U.S.Br.24 ("*any* river segment that this Court has held non-navigable for title could be portaged in theory"). Nor does Montana ever explain *why* the bypassed stretch should be treated as *navigable* or why any of this would be a sensible rule for ascertaining title navigability. Montana instead insists that *The Montello*, 87 U.S. 430 (1874), compels that bizarre result.

The Montello does no such thing. It is not a case about title to riverbeds, or about whether bypassed river segments are nonetheless navigable. It is a case about whether *an entire river,* including navigable stretches, falls outside the scope of Congress's *regulatory* authority because navigation was "difficult" on some stretches. *Id.* at 442. Faced

with this version of the whole-river approach, the Court rejected it. But in rejecting one variant of the whole-river approach for regulatory purposes, it did not endorse, let alone adopt, the converse rule that the existence of navigable stretches renders the entire river, including bypassed, *impassable* sections, *navigable*.

Nor did *The Montello* say anything about title navigability. Title was never an issue because, under relevant state law, all riverbeds were owned by the riparians, not the state. *See Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254, 271 (1891). Although Montana (like the courts below) dismisses the critical distinction between regulatory and title cases, this Court has emphasized the need to focus on the discrete "*purpose* for which the concept of 'navigability' was invoked." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (internal quotation marks omitted).

Such a focus makes clear that Montana's extensive reliance on *The Montello* is misplaced. When the question is federal regulatory jurisdiction, a focus on whether a river forms part of a *continuous* highway of *interstate* commerce makes sense. That factor is less relevant for title purposes, as even Montana recognizes. Mont.Br.31. Even more important, what is relevant for federal regulatory jurisdiction does not carry any necessary implication for title. After all, the provision at issue in *The Montello* extended federal jurisdiction to overland "carrying places," but no one would suggest that it divested title to such lands. And the Federal Power Act reaches not only navigable waters, but "falls, shallows, or rapids compelling land carriage." 16

U.S.C. § 796(8). It is hard to understand why the latter language is necessary if Montana is correct and bypassed stretches "compelling land carriage" are actually navigable for all purposes, including title. More broadly, Montana's effort to conflate regulatory navigability and title navigability ignores the unique impact of title navigability on property rights. Indeed, the seminal case, on which *The Montello* and *The Daniel Ball*, 77 U.S. 557 (1870), both rest, explained that judicial doctrines of navigability-based admiralty and regulatory jurisdiction can be changed precisely because they do *not* interfere with private property rights. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 458 (1851).

Nor does Montana cite a single case—in either the title *or* regulatory context—in which this Court applied a "portageability" rule. Montana states that *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921), "confirmed the navigability of a river stretch that included … a 7-mile portage, and a land transfer of over 11 miles." Mont.Br.38 (internal quotation marks omitted). But that case has nothing to do with portageability. Moreover, the portages and land transfers were descriptions of the modern state of the river. And the premise of *Economy Light* was that *artificial* obstructions rendered the river "incapable" of supporting navigation in its then-present state. 256 U.S. at 123. The Court nonetheless upheld regulatory jurisdiction because the river originally "ha[d] actual navigable capacity in its natural state." *Id.* *Economy Light* thus supports the commonsense notion that long portages and land transfers cut *against* navigability.

Montana also offers *St. Anthony Falls Water-Power Co. v. Board of Water Commissioners of City of St. Paul*, 168 U.S. 349, 359 (1897), as an example of the Court holding a "river stretch navigable 'at all points' including [a] waterfall and surrounding rapids." Mont.Br.39. But that was a case about water use rights, not about riverbed ownership, and the Court did not even mention portaging. 168 U.S. at 359; *see also Minneapolis Mill Co. v. Board of Water Comm'rs*, 58 N.W. 33 (Minn. 1894). Nor did New York's courts apply Montana's approach when concluding that the riverbeds underlying Niagara Falls are state property. Those decisions were rooted "neither in the common or civil law" of navigability but in a different rule for rivers, like the Niagara River, that "constitute[] the natural boundary between this and another country." *In re State Reservation at Niagara*, 37 Hun. 537, 18 Abb. N. Cas. 395, 407 (N.Y. 1885). Under New York law, because most riverbeds are owned by the riparians, not the state, New York's title claim was based not on title navigability but on the river's status as a "public *and international boundary* stream." *Niagara Falls Power Co. v. Duryea*, 57 N.Y.S.2d 777, 784 (Sup. Ct. 1945) (emphasis added).

Besides failing to identify any cases that apply its novel approach, Montana also fails to distinguish the case that squarely rejects it. In *Utah*, the Court held that a 36-mile stretch of the Colorado River was non-navigable, despite finding the same river navigable above *and* below that stretch. *United States v. Utah*, 283 U.S. 801 (1931) (decree). Moreover, the special master made that finding, and the Court affirmed it, notwithstanding Utah's

contention that "if the Master shall find that the remainder of the River was navigable, he should also find that the River was as a whole (including this section) navigable." 2d.Supp.Pet.App.13.

Montana attempts to minimize *Utah* as a narrow exception for river stretches that cannot be "portaged" and therefore "create[] a dead end" to navigation. Mont.Br.34. It fashions that exception out of a single line in the master's report where, after finding "portaging" along the river's banks "possible at most places," the master noted one short place where it was not. 2d.Supp.Pet.App.12. That says nothing about whether the Cataract Canyon stretch as a whole could be bypassed or portaged. In fact, it could be: At statehood, there were rough trails along the canyon rim and one person who crashed his boat walked out of the canyon "on a sheep grazer's trail." Master's Report (No. 14 Original) 81. In all events, the relevant portion of the master's report focuses not on whether the river above and below Cataract Canyon could be connected, but on whether the river within the canyon could be safely navigated for commerce. Tellingly, when this Court explained the evidence supporting the finding that the whole stretch (not just the non-portageable part) was non-navigable, it highlighted the master's findings as to the commercial navigability, not portageability, of the stretch. *Utah*, 283 U.S. at 80 (stretch "has a rapid descent or slope of about 399 feet, a drop of 11 feet per mile, with a long series of high and dangerous rapids").

Montana also fails to reconcile its portageability theory with other aspects of *Utah*. For example, the

Court noted that four "small rapids" elsewhere on the Colorado did not impede navigation because they "d[id] not ordinarily make necessary any portage of boat or cargo," an odd observation if portaging renders the segments navigable, but a perfectly sensible one if the *need to portage supports* a finding of *non-navigability*. *Id.* at 85. And although Montana makes much of the fact that the Cataract Canyon stretch is longer than the Great Falls Reach, Montana elsewhere declares that distinction irrelevant, as it insists that "any interruption that was in fact portaged to allow the river to continue to serve as a highway of commerce is 'short' enough for any constitutionally relevant navigability purpose." Mont.Br.42.

In the end, Montana's focus on "portageability" is inconsistent with far more than just *Utah*. Montana's test would focus on the river-as-a-whole and allow almost any non-navigable stretch to be ignored. That approach is flatly inconsistent with this Court's repeated focus in its title-navigability cases on river segments. *See Brewer-Elliott*, 260 U.S. at 85 (examining whether Arkansas River was "navigable in fact at the locus in quo"); *Donnelly v. United States*, 228 U.S. 708, 709 (1913) (same for Klamath River); *Oklahoma*, 258 U.S. at 589 (addressing navigability of three different segments of Red River); *Utah*, 283 U.S. at 71, 77-78 (examining six river segments and leaving others for future adjudication). Focusing on segments does not require, as Montana suggests, "carving up" the rivers; it merely requires application of the bedrock principle that navigability in law depends on

navigability in fact, and the relevant facts vary along a river's course.

In all events, Montana's modified river-as-a-whole approach cannot rescue the decision below. PPL provided compelling evidence that commercial navigation above the Great Falls and Thompson Falls was not possible *at all*, let alone connectable to navigation below. PPL.Br.15-17, 19-20; Professors. Br.5-32. For example, PPL relied on a 1915 Army Corps report concluding that "[a]s far as navigation is concerned the headwaters of the Missouri are completely and permanently separated from the river below." JA919. To the extent Montana attempted to prove otherwise, its limited evidence of navigability largely ended *at the falls*. *See* JA315-25 (recounting unsuccessful travails of two steamboats above Great Falls); JA236-37 (recounting short-lived line of tag-teaming steamboats with multiple portages below Thompson Falls). Even Montana's flawed navigability reports acknowledged that "Fort Benton was the practical head of navigation" on the Missouri, JA317, and that a federal court in 1910 had decreed the Clark Fork non-navigable above *and* below Thompson Falls, JA217. Accordingly, in addition to its far more serious—indeed, fatal—legal flaws, Montana's test fails to justify the decision below.

B. Modern-Day Recreational Use And Isolated Log Floats Do Not Establish Title Navigability.

The Montana courts deemed the Madison River navigable, despite "admittedly 'sparse'" evidence of navigation near the time of statehood, based on

modern-day recreational use and a single log float that proved an abject failure, while largely dismissing historical evidence of non-navigability. Pet.App.26, 56, 143. That was doubly erroneous: Contemporaneous evidence that the Madison was not navigated at statehood should have raised a strong inference that it was not navigable, particularly when coupled with powerful, unrefuted evidence that the Madison is far more amenable to navigation now than at statehood.

Montana insists there is "no reason for this Court to adopt" a rule disfavoring reliance on modern-day use. Mont.Br.45. But there is an obvious reason to do so when the relevant question is navigability *at statehood*. In the title context, evidence of modern-day use is irrelevant without an explanation for the absence of historical evidence and a demonstration that river conditions have not materially changed. Indeed, modern-day evidence is inherently suspect because rivers change over time, and any probative value such evidence may have will almost always be outweighed by the danger of unsettling long-recognized property rights. PPL.Br.46-47. On these points, Montana's brief is silent.

Montana emphasizes that navigability can be based on "susceptibility" to use at statehood. But Montana ignores the important caveat that "susceptibility" is relevant only "where conditions of exploration and settlement explain the infrequency or limited nature of" contemporaneous use. *Utah*, 283 U.S. at 82; *see also id.* at 83 ("the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed

had made recourse to navigation a late adventure"). That caveat is critical. Unless "conditions of exploration and settlement explain" it, then the absence of evidence of actual navigation at statehood supports a conclusion of non-navigability. Here, both opportunities and incentives for commercial navigation were plentiful. *See* PPL.Br.45-46. In those circumstances, there is no need to inquire into susceptibility for use or consider modern-day evidence. The combination of ample incentives for navigation at statehood with the absence of evidence of navigation demonstrates that the river was neither used for commerce nor susceptible to such use at statehood.

The lower courts' heavy reliance on modern-day evidence was especially inappropriate given PPL's compelling evidence that the Madison has materially changed since statehood. As Dr. Schumm explained, PPL's hydropower projects "have made the river more susceptible now to commercial navigation" by reducing flow during the high season and increasing flow during the low season. Pet.App.208. Remarkably, Montana draws the opposite conclusion from Dr. Schumm's findings. Mont.Br.45. Montana's felt need to dispute Dr. Schumm's conclusions from his own findings demonstrates the absurdity of granting summary judgment in Montana's favor.

Dr. Schumm also explained that, even apart from changes in flow, "relevant portions of the river appear to have been either anastomosing or braided" and therefore "*not susceptible to navigation*" at statehood. JA574 (emphasis added). Like the courts below, Montana simply ignores that unrefuted

evidence, which defeats whatever relevance modern-day use might have. *See* U.S.Br.32.

The Montana courts' improper reliance on modern-day evidence was amplified by their heavy reliance on mere *recreational* use. Montana insists that evidence of recreational use is probative, Mont.Br.47, but it fails to acknowledge that a navigable river must be capable of supporting "*commercial* utilization on a large scale." *Utah*, 283 U.S. at 83 (emphasis added). And it makes no attempt either to distinguish cases holding recreational use insufficient to establish title navigability, *see* PPL.Br.50-51, or to defend the single (Ninth Circuit) case on which the Montana Supreme Court relied for the contrary proposition.

Montana instead relies solely on *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), a case finding a river navigable for *regulatory* purposes. But the "personal or private use by boats" deemed relevant there was worlds apart from the recreational use here. *Id.* at 416. In *Appalachian*, the disputed river segment had been navigated end-to-end by larger vessels (like bateaux and derrick boats) capable of carrying goods and passengers. *See id.* at 414-16 & n.52. Reliance on such evidence does not make "recreational use" by "fishing guides and their clients" in small, modern drift boats sufficient to establish title navigability. Pet.App.18, 26. Not every body of water "large enough to float a boat" is navigable. *United States v. Oregon*, 295 U.S. 1, 23 (1935).

The only other evidence proffered by Montana was a single, unsuccessful log float. Montana insists

that log floats count as "commerce," but fails to explain why log floats qualify as "navigation," or how they can be sufficient given this Court's insistence that a navigable river support "trade *and travel*." *Oklahoma*, 258 U.S. at 586 (emphasis added). This Court has never held that successful log floats, let alone disastrous ones, suffice to establish title navigability. *The Montello* referenced as navigable "the large rivers of the country over which *rafts* of lumber … are constantly taken to market," but it elaborated that navigability refers to *vessels*, 87 U.S. at 441-42 (emphasis added), and "likely had in mind the great log rafts" that were "so large they supported crews [and] sleeping quarters." J. Bricker, *Navigability and Public Use*, 38 Willamette L. Rev. 93, 97 (2002). This Court has made clear that "occasional[]," *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899), or "sporadic and ineffective," *Oregon*, 295 U.S. at 23, log floats will not do. If anything, the abysmal failure of the never-repeated 1913 log float, JA803-04, only confirms that the Madison was *not* navigable at statehood.

C. There Is No Presumption In Favor Of Navigability.

Montana does not dispute that as the party seeking to establish title navigability—on summary judgment, no less—it has the burden of proof. And it effectively concedes that the Montana Supreme Court erred in holding that "[t]he concept of navigability for title purposes is very liberally construed." Pet.App.54. Montana nonetheless asks this Court to overlook that egregious misstatement because "*the rest* of [the] decision" supposedly

"framed the proper constitutional test." Mont.Br.47 n.17 (emphasis added). But even indulging the dubious assumption that the lower court committed no other constitutional errors, one cannot ignore the court's application of a fundamentally backwards rule of "very liberal[] constru[ction]." Far from being inconsequential dictum, the court's rule of construction, coupled with its failure to acknowledge Montana's burden of proof, contributed to the court's otherwise inexplicable grant of summary judgment on a record rife with factual disputes.

Although Montana does not deny its burden, some of its *amici* do, asserting that a "well established presumption … favors state ownership." Cal.Sportfishing.Br.6. But that presumption applies only to waters already conceded or determined to be navigable. *See Idaho v. United States*, 533 U.S. 262, 272-73 (2001) (presumption applies when "deciding a question of title to the bed of *navigable* water") (emphasis added). In that context, courts disfavor pre-statehood conveyances or reservations by the federal government that would defeat a state's ability, upon entering the Union, to take title to lands under navigable waters. *See, e.g.*, *United States v. Alaska*, 521 U.S. 1, 36 (1997); *Holt*, 270 U.S. at 55. But that presumption has no place in the threshold navigability determination where the burden is on the proponent of navigability. *See* PPL.Br.55; *Oklahoma*, 258 U.S. at 583 (Oklahoma bore "burden of showing that the rights in the river bed" had "passed or been transferred" to Oklahoma because river was navigable).

III. Under A Correct Application Of This Court's Precedents, The Decision Below Cannot Stand.

Implicitly recognizing the weakness of its position, Montana attempts to limit this Court's consideration to the Montana Supreme Court's erroneous legal test, without considering its application and how overwhelming evidence of non-navigability was ignored to grant summary judgment to Montana. But critical and clear guidance is needed lest the same errors and temptations resurface on remand.

A. There Are No Procedural Hurdles To Applying The Proper Test.

Contrary to the state's position, the Montana Supreme Court's application of the navigability test is not "outside the question" presented. Mont.Br.48. In navigability cases, "[b]oth the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied." *Appalachian*, 311 U.S. at 404. Nothing about the question presented confines this Court to the artificial review Montana proposes.

Montana also resurrects its contention that PPL waived the argument that the relevant river stretches are non-navigable. That contention is wrong. As Montana acknowledges, any supposed concessions were made in the context of determining Congress's *regulatory* authority. Although Montana points to an early pleading in which it asserted title to the riverbeds, it omits PPL's responses, which did not concede title to the riverbeds *in question*, but instead emphasized that federal preemption

rendered title irrelevant. Opp.App.15 (¶ 3). That PPL challenged title navigability when the issue arose is clear from Montana's request for *sanctions* based on PPL's decision to challenge the state's title claim. *See* Mont.Summ.J.13 ("[u]tilities know the rivers at issue are navigable, yet they have refused to admit it"). The Montana Supreme Court thus correctly declined to "rel[y] upon any ostensible admissions" when it resolved the constitutional navigability question. Pet.App.62.

Notwithstanding its suggestion that this case turns on "undisputed, or indisputable, historic facts," Mont.Br.49, Montana continues its attempts to preclude consideration of evidence it claims PPL did not properly submit. But Montana is again wrong. Before the district court's summary judgment order became final, PPL submitted an offer of proof consisting of additional reports from its experts. Although Montana initially objected to PPL's offer, it ultimately suggested that the court accept both PPL's additional evidence and a counteroffer of proof from Montana, which is how the trial court proceeded. *See* 2007-10-29 Tr. 1055; JA38 [Dkt.420]. Accordingly, both the affidavits and the additional reports from PPL's experts were properly before the courts below.

In any event, most of the evidence discussed in PPL's opening brief comes from materials that are indisputably part of the summary judgment record. Those materials include "a 'mountain'—over 500 pages—of affidavits and exhibits demonstrating that the portions of the Missouri, Madison, and Clark Fork Rivers at issue were non-navigable at the time of statehood." Pet.App.100; *see also* JA347-628.

Applying the correct title navigability test, without a rule of "very liberal[] construc[tion]" in Montana's favor, Pet.App.54, that evidence was more than sufficient to defeat Montana's summary judgment motion.

B. The Evidence Overwhelmingly Supports PPL's Position.

Montana's contention that this case merely turns on "the proper *legal significance* of undisputed, or indisputable, historic facts," Mont.Br.49, is only partially correct. Montana's concession that the Great Falls Reach and the vicinity of Thompson Falls are impassable should dispose of Montana's claims to the riverbeds under those stretches as a matter of law. But Montana's assertion of indisputable evidence concerning other stretches is manifestly wrong.

Montana states that it provided "indisputable evidence that Great Falls and Thompson Falls did not prevent the [Missouri and Clark Fork] rivers from serving as continuous highways of commerce." Mont.Br.49-50. But that is not true. The affidavit from PPL's expert specifically challenged Montana's evidence as "unreliable from a historical perspective," JA370, and set forth detailed objections to Montana's heavy reliance on hearsay from untrustworthy frontier-era newspapers with reports of 28-pound radishes and other misleading sources. JA371-74. PPL's expert attested that, in his "opinion as a historian, the State's evidence lacks the credibility to prove *anything* about the historical use of these rivers." JA373.

Montana's claim that "PPL did not submit *any* evidence rebutting the fact that the Great Falls and Thompson Falls were portaged so that the rivers served as continuous highways of commerce," Mont.Br.23, is even more astounding. PPL's expert opined not only that the Great Falls Reach *itself* was not navigated, but that "the reach of the Missouri River between Great Falls and Stubbs Ferry"—the stretch *above* the falls—did not support commercial navigation and "would have required post-statehood improvements" to do so. JA378; *see also* JA743-801. In contrast, the only evidence of "continuous" navigation Montana has ever offered is Hubert Howe Bancroft's uncorroborated report of portaging mackinaws, Mont.Br.11, the credibility of which PPL's expert specifically challenged. JA374. "Today, no reputable historian would use Bancroft as a sole source," Professors.Br.23, and it is telling that Montana has to reach back to sixty-year-old briefs addressing regulatory navigability to find support for its position.

PPL's expert similarly opined that the Clark Fork above and below Thompson Falls was non-navigable at statehood. JA381. He based that conclusion on contemporaneous sources including 1891 and 1940 Army Corps findings of non-navigability and a 1910 federal district court decree granting title to the riverbeds to PPL's predecessor after finding the same river stretch non-navigable. JA379-81, JA566-69; Supp.Pet.App.11. Montana follows the lead of the court below in dismissing that near-contemporaneous finding as "the epitome of the kind of conclusory statement that does not create a genuine issue of material fact." Mont.Br.50 n.19.

The decision of a federal court is not a "conclusory statement," particularly when, as here, it is supported by detailed factual findings. Supp.Pet.App.3.

Even Montana concedes, with considerable understatement, that the Madison River is a "closer call." Mont.Br.50. Montana nonetheless claims summary judgment in its favor should be affirmed because the Madison "was viewed as ideal for log driving." Mont.Br.14, 50. But the document Montana cites recounts that the single, unsuccessful log drive on a river stretch where neither of PPL's dams is located was "a task which for many years ha[d] been ridiculed and deemed by many impossible," and was attempted only because of post-statehood "water power" from the dams. JA154-55. Without even pausing to acknowledge the inconsistency in its position, Montana dismisses a 1931 Army Corps finding of non-navigability as too far removed from statehood to have *any* relevance, all the while continuing to defend the lower courts' reliance on *present*-day usage to demonstrate navigability more than a century ago.

* * *

Montana's brief, and even more recent public statements of Montana's Governor at a Land Board meeting, confirm the need for this Court to lay down clear rules to govern any remand. At a minimum, the Court should make clear that Montana's concession concerning the impassability of the Great Falls Reach and Thompson Falls ends the litigation with respect to the Great Falls Reach of the Missouri and the Clark Fork. Beyond that, this Court should emphasize that what matters is the navigability of

the particular stretches at issue. What is good for hydroelectric generation is bad for navigation. Thus, a focus on the relevant stretches—without the distorting effects of irrelevant modern-day evidence, "very liberal" rules of construction, or undue weight being given to isolated log floats—will restore settled expectations and prevent this unprecedented land grab.

CONCLUSION

The Court should reverse and remand with instructions for the Montana courts to apply the correct title-navigability test.

Respectfully submitted,

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November 28, 2011