

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC, PETITIONER

v.

STATE OF MONTANA

*ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Petitioner owns federally licensed hydroelectric facilities on three rivers in Montana. The Montana Supreme Court held that the State owns the submerged lands underlying the facilities and that petitioner owes rent for the use of these lands. The question presented is:

Whether the Montana Supreme Court erred in concluding on summary judgment that riverbeds occupied by petitioner's hydroelectric facilities are the property of the State of Montana because they were navigable for title purposes at the time Montana became a state.

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INTEREST OF THE UNITED STATES

When a State enters the Union, title to the bed and banks of navigable waterways ordinarily passes from the United States to the new State. This case involves the proper legal standard for determining whether particular waters were navigable at the time of statehood for purposes of transferring title from the United States to the new State. The United States has a significant interest in the resolution of that question. The federal government owns riparian land throughout the Nation, including along the three rivers whose navigability is at issue in this case. Where the waters were non-navigable at the time of statehood, the United States has asserted its ownership of the riverbeds in various ways, including by issuing patents, leases, and permits.

STATEMENT

This case concerns whether the beds of particular stretches of three rivers—the Missouri, the Clark Fork, and the Madison—became the property of the State of Montana when it entered the Union in 1889.

1. Before American independence, the English Crown held the lands beneath navigable waters in a public trust. The original 13 States succeeded to that trust responsibility. *Shively v. Bowlby*, 152 U.S. 1, 11, 16 (1894). Under the “equal footing” doctrine, subsequently admitted States enter the Union on an equal footing with the original States, so they, too, take title at statehood to the lands under waters that are navigable at that time.¹ See *Utah v. United States*, 403 U.S. 9, 10 (1971). Title to lands beneath waters that are not navigable at the time of statehood, however, is not affected by a State’s entry into the Union. *United States v. Utah*, 283 U.S. 64, 75 (1931). Thus, whether the State or the adjacent riparian landowner owns the submerged lands underlying the relevant portions of the Missouri, Clark Fork, and Madison Rivers depends on whether those portions were navigable when Montana entered the Union. *Ibid.*

2. The Clark Fork originates east of Missoula, Montana, and flows generally northwest to its terminus in Lake Pend Oreille in Idaho. The Madison River originates in Yellowstone National Park in Wyoming, flows west into Montana, and then flows north until it joins two other rivers to form the Missouri River at the town of Three Forks. The Missouri continues flowing north

¹ Lands beneath navigable waters do not transfer at statehood if the United States reserves such lands or grants them to others. See, e.g., *Idaho v. United States*, 533 U.S. 262, 272-273 (2001).

past Helena; through the Stubbs Ferry stretch; north-east past the city of Great Falls and through the “Great Falls reach,” a 17-mile stretch of rapids and falls; past Fort Benton; eastward to North Dakota; and ultimately into the Mississippi River near St. Louis.

Petitioner operates two hydropower projects on those three rivers. Petitioner acquired the projects from the Montana Power Company in 1999. Pet. App. 3. Both projects are licensed by the Federal Energy Regulatory Commission, formerly the Federal Power Commission (FPC), pursuant to its exclusive authority under the Federal Power Act (FPA), 16 U.S.C. 796 *et seq.*

The Thompson Falls Project consists of one dam at Thompson Falls, Montana, on the Clark Fork. The project was constructed in 1915, licensed under the FPA in 1949, and relicensed in 1979. Pet. App. 2. The Missouri-Madison Project consists of nine dams. Two are located on the Madison: Hebgen, near the Wyoming–Montana border, and Madison, north of Ennis, Montana. The other seven dams are located on the Missouri: five dams (Black Eagle, Rainbow, Ryan, Morony, and Cochrane) are on the Great Falls Reach, and the other two (Holter and Hauser) are on the Stubbs Ferry stretch north of Helena.² The Missouri-Madison dams were constructed between 1891 and 1958, were licensed under the FPA in 1956, and were relicensed in 2000.³ *Id.* at 2-3.

² All seven dams on the Missouri are upstream from Fort Benton, where the parties agree the river was navigable in 1889.

³ Petitioner’s six dams not on the Great Falls reach are constructed on or flood some federal lands, for which petitioner pays annual rental charges of approximately \$500,000 to \$600,000. See Pet. Supp. Br. App. 8. Only a portion of the rent is for riverbed rather than flooded upland.

3. In 1931, the Montana Legislature enacted the Montana Hydroelectric Resources Act (HRA), Mont. Code Ann. § 77-4-201 *et seq.* (2009). That statute contains regulatory provisions, such as a limit on the terms of hydropower leases on state-owned lands, *id.* §§ 77-4-205, 77-4-207, 77-4-209, and compensatory provisions, which require the State to charge rent for the use of state-owned lands for hydropower projects. *Id.* §§ 77-4-201, 77-4-208.

4. In November 2004, petitioner filed suit in Montana state court against the State of Montana. Petitioner sought a declaration that it owed the State no compensation for the use of the riverbeds underlying its hydroelectric facilities. Pet. App. 5.

The State counterclaimed. It sought a declaration that it owned submerged lands beneath petitioner's projects and that petitioner owed it compensation for use of those lands. The State also sought damages for petitioner's past uncompensated use. Pet. App. 147; Br. in Opp. App. 1-13.

5. a. The state district court granted the State partial summary judgment on the question of ownership and held that the three rivers were navigable at statehood. Pet. App. 130-143. Petitioner had contended that the stretches of the Missouri and Clark Fork where its dams are located were not navigable at statehood. Although the court agreed that the Great Falls reach "ha[d] never been navigated," *id.* at 137, the court concluded that both rivers were navigable as a general matter and that under *United States v. Utah, supra*, the interruptions to navigation identified by petitioner do not defeat navigability for title purposes. Pet. App. 137-142. The court concluded that the Madison was navigable at statehood, relying in part on modern-day evidence

of “considerable recreational use” of the river. *Id.* at 143.

b. After trial on damages and other issues, the court entered judgment for the State and held that petitioner owed back rent in the amount of \$40,956,180. Pet. App. 45.

6. The Montana Supreme Court affirmed by a vote of 5 to 2. Pet. App. 1-117.

a. The state supreme court rejected petitioner’s argument that “certain portions of the rivers at issue in this case” were non-navigable. Pet. App. 60. The court agreed with the trial court that “portages do not defeat navigability, so long as the river itself was used, or susceptible of being used, as a channel of commerce at the time of statehood,” and that “short interruptions” to navigability are not separately analyzed as non-navigable segments. *Id.* at 53-54, 60-61. On this basis, the court concluded that the 17-mile stretch of rapids and falls on the Great Falls reach of the Missouri, and the rapids and obstructions to navigation in the vicinity of the Thompson Falls Project on the Clark Fork, were “short interruptions of navigability” that were “insufficient as a matter of law * * * to declare any portions of these rivers non-navigable.” *Id.* at 61.

b. The court then affirmed the summary-judgment ruling that all three rivers were navigable at the time of statehood. The court concluded that “[d]espite the presence of portages along the Clark Fork and Missouri Rivers, the historical evidence establishes that they provided a channel for commerce at the time of statehood, or were susceptible of such use.” Pet. App. 56. The court acknowledged, however, that “the historical usage of the Madison was not as well-established.” *Ibid.*

Although the court acknowledged that navigability for title purposes is assessed as of the time of statehood, Pet. App. 55-56, it stated that “present-day recreational use is sufficient for purposes of ‘commerce.’” *Id.* at 58. With respect to the Madison, the court rejected the submission of petitioner’s expert that the Madison had physically changed since the time of statehood, including through the presence of petitioner’s dams, in ways that improved its susceptibility to navigation. *Ibid.* The court then concluded that post-statehood evidence—“present-day usage” plus “the evidence of a log float on [the Madison’s] middle portion in the 19th century [actually 1913]”—demonstrated that the Madison was navigable in its entirety in 1889. *Id.* at 56.

The court held that petitioner had not established any genuine issue of material fact as to the navigability of any of the rivers, because petitioner’s evidence of non-navigability at statehood was “conclusory.” Pet. App. 57, 58.⁴

c. Justice Rice dissented, joined by Judge Salvagni. Pet. App. 93-117. In the dissent’s view, “in applying the navigability for title test, courts are not to assume an *entire river* is navigable merely because certain reaches of the river are navigable,” but instead should apply “a section-by-section analysis.” *Id.* at 96, 98. The dissent also concluded that the majority erred in holding “that all of the challenged reaches of all the rivers are ‘relatively short’ and thus unable, as a matter of law, to be declared non-navigable for title purposes”; in the dis-

⁴ The court declined to hold that petitioner had admitted navigability, as the State has urged. Pet. App. 62; see Br. in Opp. 25-26. The court also held that the FPA does not preempt the compensatory provisions of the Montana HRA, which are severable from the regulatory provisions. See Pet. App. 70-72.

sent's view, the proper treatment of each segment was a factual question. *Id.* at 100. The dissent concluded that that question could not be answered on summary judgment, because petitioner “ha[d] satisfied its burden to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable.” *Id.* at 117. The dissenters would have remanded for trial. *Ibid.*

SUMMARY OF ARGUMENT

The Montana Supreme Court erred in applying the principles that govern navigability for title purposes, which differ in relevant respects from other navigability tests. The proper analysis would have examined the relevant river segments, divided as the rivers' natural features make appropriate, and asked whether each segment was navigable for title purposes at the time Montana became a State. Instead, the state supreme court erroneously held that every segment of the three rivers was navigable as a matter of law, either because the segments at issue were “relatively short” or because they could be portaged around. But non-navigable segments like the 17-mile Great Falls reach cannot be dismissed as too “short” to be relevant to questions of title. When a discrete and substantial segment is not navigable at statehood, the State does not take title to that segment, whether or not the segment could be portaged. Although portaging may connect *navigable* segments into a continuous highway for commerce, portaging around a non-navigable segment does not make *that* segment navigable for title purposes.

The state supreme court also erred in concluding that evidence of navigation *after* statehood, without more, could establish navigability *at* statehood for title

purposes. Present-day use, including some recreational use, may be probative. To establish its relevance, however, Montana would have to show that evidence of navigation by today's boats under today's river conditions is persuasive evidence that craft used in trade and travel at statehood could have navigated a particular river reach as it existed at statehood. For instance, Montana could present evidence that neither the boats nor the rivers have materially changed since statehood. Montana has not laid that foundation, and indeed petitioner has disputed it. The evidence of post-statehood navigation therefore could not be a basis for summary judgment.

Petitioner presented sufficient evidence to survive summary judgment. This Court should therefore remand for the sort of intensive factual inquiry that navigability for title demands, in which the ultimate question is whether each relevant segment was "navigable in fact" at the time of statehood.

ARGUMENT

I. TITLE TO RIVERBEDS UNDER THE EQUAL-FOOTING DOCTRINE RESTS ON A DISTINCT CONCEPT OF NAVIGABILITY

Concepts of navigability are used not only to determine whether a State gained title to submerged lands at statehood, p. 2, *supra*, but also to delineate admiralty jurisdiction, see, *e.g.*, *The Montello*, 87 U.S. (20 Wall.) 430 (1874), and to aid in determining the extent of federal regulatory authority under statutes adopted pursuant to the Commerce Clause, see, *e.g.*, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). Although those three navigability standards do have some common elements, they are not identical. Navigability

for title purposes is in many ways the most restrictive definition: it looks only at one point in time and only at the river in its natural state. Thus, although a stretch that is navigable for title is likely to be within the scope of federal regulation under the commerce power, the reverse is not necessarily true.

This Court initially set forth a “navigable in fact” standard for determining whether waters are navigable in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), an admiralty case. The Court stated that:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563.

Although the *Daniel Ball* standard plays a role in all three sorts of navigability determinations, each context calls for its own variations on the concept of “navigability in fact.” See *Appalachian Elec. Power*, 311 U.S. at 406 (noting that “[e]ach application of [the *Daniel Ball*] test * * * is apt to uncover variations and refinements which require further elaboration”). For example: Navigability for title must be determined as of the time a State entered the Union and based on the river’s “ordinary condition.” Navigability for admiralty jurisdiction extends to waters that are currently navigable, even if they were non-navigable in the past. *E.g.*, *id.* at 408. And navigability for purposes of federal regulatory authority encompasses waters that were once navigable but are no longer, see, *e.g.*, *Economy Light & Power Co.*

v. *United States*, 256 U.S. 113, 123-124 (1921), or only recently have become passable, see, e.g., *Philadelphia Co. v. Stimson*, 223 U.S. 605, 634-635 (1912), or are not now and never have been navigable but may become so, by improvements, in the future, see, e.g., *Appalachian Elec. Power*, 311 U.S. at 409. Furthermore, navigability in fact is not the only basis of federal regulatory jurisdiction under the commerce power, which can encompass particular stretches that are non-navigable. See, e.g., *id.* at 426-427; *FPC v. Union Elec. Co.*, 381 U.S. 90, 105 & n.21 (1965); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Kaiser Aetna v. United States*, 444 U.S. 164, 173-174 (1979).

Given these differences, this Court has cautioned that “any reliance upon judicial precedent [in this area] must be predicated upon careful appraisal of the *purpose* for which the concept of navigability was invoked in a particular case.” *Kaiser Aetna*, 444 U.S. at 171 (internal quotation marks and citation omitted). That a river segment is navigable (or non-navigable) for one purpose does not establish whether it is navigable for another purpose. This case involves only navigability for title.

II. THE MONTANA SUPREME COURT ERRED IN HOLDING THAT SOME SEGMENTS WERE NAVIGABLE AS A MATTER OF LAW DESPITE NOT BEING NAVIGABLE IN FACT

The Montana Supreme Court erred in its conclusion that, as a matter of law, the riverbeds at issue in this litigation were navigable at statehood based on the court’s view that other stretches of the Missouri, Clark Fork, and Madison Rivers were or are navigable. See Pet. App. 60-61. Indeed, the state supreme court expressed skepticism that it would ever be appropriate to

adopt a “piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable.” *Id.* at 58; see *id.* at 58-60. That skepticism was misplaced. This Court has long considered navigability for title on a segment-by-segment basis, because navigation on one part of a river does not necessarily establish that the remainder is navigable for title purposes. Only portions of a river that were capable of serving as part of a highway of commerce at statehood should be held to be navigable for title purposes. Although those portions may not themselves be contiguous (*e.g.*, navigable portions may be linked by portages), discrete and substantial portions that could not be navigated at all (but could only be portaged around) are not “short interruptions” to navigability and thus are not navigable for title purposes.

A. A State Does Not Acquire Title To River Segments That Are Not Navigable At The Time Of Statehood

1. Navigability may vary by segment

Many navigable rivers are navigable only in part. Between a river’s headwaters and mouth—which in the Missouri’s case are more than 2000 river miles apart—the conditions that affect navigability may vary significantly. As a result, this Court has never suggested that determinations of navigability for title purposes must focus on the river as a whole, or presume as a matter of law that a representative showing is enough to establish the navigability of an entire river. To the contrary: for purposes of title, rivers are “navigable rivers in law” when they are “navigable in fact.” *E.g.*, *Utah v. United States*, 403 U.S. 9, 10 (1971) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563); *United States v. Utah*, 283 U.S. 64, 76 (1931) (same); *United States v.*

Holt State Bank, 270 U.S. 49, 56 (1926). And when this Court has examined that factual question in the title context, the evidence has often divided the relevant rivers into “long reaches with particular characteristics of navigability or non-navigability.” *United States v. Utah*, 283 U.S. at 77. In places where the river was actually navigated as a highway for commerce at the time of statehood, or was susceptible of such use even though not actually navigated, the State takes title. In places where the river was *not* susceptible of such navigation, the State has no claim to title under the equal-footing doctrine. See, e.g., *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86-87 (1922).⁵ The state supreme court called that approach “piecemeal,” but the test for title is navigability *in fact*; when the facts show that conditions of a river’s navigability varied from segment to segment at statehood, the State’s ownership will vary as well.

Thus, in *United States v. Utah* the Court awarded title not to rivers as a whole, but to particular segments of the Colorado River and three of its tributaries: the Green and Grand, which flowed together to form the Colorado, and the San Juan, which met the Colorado downriver. 283 U.S. at 73-74, 89.⁶ The Court concluded that when Utah entered the Union, the Colorado River was navigable for its first 4.35 miles; that the next 36.15 miles, which flowed through Cataract Canyon, were not

⁵ For an exception not relevant here, see *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476-480 (1988) (States also take title at statehood to lands beneath waters subject to the ebb and flow of the tide, even if non-navigable).

⁶ The Grand River is now considered to be the upper part of the Colorado. 283 U.S. at 73.

navigable; and that the next 149 miles were navigable.⁷ Similarly, the Court held that the last 95 miles of the Green River, beginning roughly where that river receives a major tributary, were navigable at the time of statehood; the Court did not address the remainder of that river (nearly 600 miles). See *id.* at 73-74, 77-78, 89.⁸ Indeed, although the parties had introduced evidence about conditions on portions of the Green and Grand Rivers upriver from the segments at issue, the Special Master declined to make findings on that subject because the water and navigation conditions were “essentially different” upriver. Report of the Special Master at 53, *United States v. Utah*, *supra* (No. 14, Original) (*Utah Report*). The Court approved of the Special Master’s approach to particular segments, “in view of the physical characteristics of the streams.” 283 U.S. at 77. In fact, the Court concluded that the Special Master had been insufficiently precise in segmenting the river and that navigability ended at the beginning of Cataract Canyon, rather than 4.35 miles upriver. See *id.* at 89. The Court stated that “the exact point at which naviga-

⁷ Although Utah initially disputed the United States’ title to the segment within Cataract Canyon, based on a river-as-a-whole approach, the Special Master found that the discrete segment was not navigable, and Utah did not except. *United States v. Utah*, 283 U.S. at 79-80; see Report of the Special Master at 5, 7, 127, *United States v. Utah*, *supra* (No. 14, Original) (*Utah Report*).

⁸ The United States sought to quiet title only to the 95-mile segment. *United States v. Utah*, 283 U.S. at 71. Similarly, the United States sought to quiet its title only to the last 133 miles of the San Juan River; although Utah initially opposed, the Master agreed that that segment was not navigable, and Utah did not except. *Id.* at 71, 74; see *Utah Report* 5,7; see also *Utah v. United States*, 304 F.2d 23 (10th Cir.) (subsequent dispute over different, 55-mile segment of San Juan), cert. denied, 371 U.S. 826 (1962).

bility may be deemed to end * * * should be determined precisely.” *Id.* at 90.⁹

The Court has applied a similar approach to other cases involving title to riverbeds beneath allegedly navigable waters. For instance, in *Oklahoma v. Texas*, 258 U.S. 574 (1922), the question was whether the portion of the Red River along the Oklahoma-Texas border was navigable. *Id.* at 583. Within that segment, the Court evaluated navigability for title in two separate sections. The first section, above the confluence with the Washita River, was not navigable because of low flow. *Id.* at 587-588. The second section, below that point, had a more constant flow, but navigation in that section was not regularly or readily feasible because of shifting sandbars. *Id.* at 589-590. The river became navigable only once it left Oklahoma and entered Arkansas. *Id.* at 589.

Similarly, in *Brewer-Elliott, supra*, the Court recognized that the correct question was whether, at the time of statehood, the Arkansas River was navigable “at the place where the river bed lots * * * in controversy[] are.” 260 U.S. at 86. The dispute was confined to the portions of the riverbed adjacent to the Osage Reservation. *Id.* at 79. The court held that although the lower Arkansas was apparently navigable, the portion at issue in the case was above the head of navigation and so not navigable. *Id.* at 86.

Each of these decisions establishes that, for purposes of title, the mere fact that a river is navigable downstream does not establish that all segments upstream are navigable. Rather, “how far navigability extends” must “be determined upon evidence.” *United States v.*

⁹ The parties subsequently resolved that dispute in a stipulated decree. See *United States v. Utah*, 283 U.S. 801, 801 (1931).

Utah, 283 U.S. at 77. The facts relevant to determining navigability for title often serve to divide a watercourse into segments—for example, where the gradient changes, cf. *id.* at 77-79, or where a tributary adds flow to the main river, cf. *Oklahoma v. Texas*, 258 U.S. at 589. For title purposes, the ultimate question to be resolved remains whether the particular part of the river, “in its natural and ordinary condition[,] afford[ed] a channel for useful commerce” at statehood. *Holt State Bank*, 270 U.S. at 56.

2. A segment may be non-navigable for title purposes even though it interrupts two navigable segments

Some rivers may neatly divide into two segments—above and below the “head of navigation.” But because navigability for title turns on the evidence of particular conditions along particular river segments, some rivers—especially those as long and varied as the rivers in this case—will alternate between non-navigable and navigable stretches. That is an appropriate application of the segment-by-segment approach.

Where an upstream stretch is “navigable in fact” in its own right, it does not matter that the next segment downstream is non-navigable. That was the case in *United States v. Utah*: the lower Green and Grand Rivers were navigable, and so was the Colorado River above and below Cataract Canyon, even though the navigable segments were divided from one another by the non-navigable 36-mile stretch passing through Cataract Canyon. Thus, the State took title to the segments that were navigable in fact; the United States retained title to the non-navigable segment between them. Indeed, Utah did not challenge the Special Master’s decision

that a middle segment was non-navigable. See note 7, *supra*.

This Court did suggest in *United States v. Utah* that to constitute a distinct segment, a stretch of river must be of greater than “negligible” length. 283 U.S. at 77. The Court noted that the facts of that case did not present “a short interruption of navigability in a stream otherwise navigable,” nor did they present “a negligible part, which boats may use, of a stream otherwise non-navigable.” *Ibid*. Rather, the case concerned “long reaches” that shared “particular characteristics of navigability or non-navigability.” *Ibid*.

Because the facts of *United States v. Utah* involved “long reaches” rather than “negligible” or “short interruptions,” the Court’s holding did not involve any segment that boats could not navigate but that was too short to warrant separate treatment. The Court gave separate consideration to a three-mile segment of the Grand River that had “three small rapids” and was “not characteristic” of the Grand as a whole. 283 U.S. at 79, 85. And the Court affirmed the Special Master’s finding that although the rapids made the three-mile stretch “less susceptible of practical navigation” than the rest of the river, even that three-mile stretch could be, and regularly was, navigated for commercial purposes by lumber rafts. *Id.* at 79.

Indeed, none of the disputed river segments in *United States v. Utah* was completely impassable to navigation at any point. The United States did not seek title to any one fixed spot where navigation was interrupted altogether; rather, it pointed to shifting sandbars that somewhat impeded navigation and, the United States contended, showed that the entire river segment was not a useful highway of commerce. The Court concluded

that although shifting sandbars sometimes made navigation difficult, the sandbars did not actually interrupt navigation on any of the rivers in question; those rivers were usable as channels for commerce at the time of statehood and, therefore, navigable for title. 283 U.S. at 85-87.

Thus, *United States v. Utah* did not present the question whether the State acquires title to non-navigable “short interruptions” at the time of statehood. This Court’s previous cases suggest, however, that where a non-navigable segment can be defined with sufficient precision (unlike, *e.g.*, the “shifting sandbars” in *United States v. Utah*, 283 U.S. at 85), and where that segment is more than just a “negligible” or “short interruption,” *id.* at 77, the test for title remains what it always has been: “navigability in fact” at statehood. The Court has suggested that segments as short as a few miles may be “long reaches” rather than “short interruptions.” *Ibid.* A “short interruption” is a segment that is not sufficiently distinct to warrant separate consideration. Cf. *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 451 (1908) (holding that a State took title at statehood to two tiny islands “of no apparent value” that were “little more than rocks, rising very slightly above the level of the water [of a navigable river], * * * contain[ing] respectively a small fraction of an acre and a little more than an acre”); *Scott v. Lattig*, 227 U.S. 229, 240, 244-245 (1913) (distinguishing *Chandler-Dunbar* and holding that a State did not take title to a much larger island of more significant value).

3. Examining navigability by segment is consistent with the need to determine each new State's rights as it enters the Union

Navigability, in this context, determines a question of significant practical significance to a property owner along the river: does his title to the riparian land also include title to the riverbed, or does he own only the riparian land while the State owns the riverbed? The very nature of that question suggests an answer based on conditions on a particular stretch of river, or conditions adjacent to a particular piece of riparian land, at a particular time (statehood). See, e.g., *Brewer-Elliott*, 260 U.S. at 86.

If title to a particular stretch of riverbed turned on the navigability not of that stretch alone, but on the much broader question whether the river is navigable as a whole, any one owner's title would become dependent on conditions elsewhere—potentially hundreds of river miles away. This Court has recognized “the special need for certainty and predictability where land titles are concerned.” *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-688 (1979). A riparian owner will naturally form his expectations as to whether or not he owns the adjacent riverbed based on conditions at his location, not somewhere else. A river-as-a-whole approach would impede riparian landowners' ability to settle their own expectations of title soon after statehood.¹⁰ Cf. *Brewer-Elliott*, 260 U.S. at 88 (rejecting any “retroactive rule for determining navigability which would destroy a title already

¹⁰ Indeed, although this case arises long after Montana entered the Union, navigability for title has often been litigated and decided with the benefit of firsthand evidence of conditions at statehood. See, e.g., *Utah Report* 52 (eyewitness testimony).

accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked”).

Those expectations are significant ones. For instance, the United States owns millions of acres of riverbed, and it undertakes numerous actions in reliance on its settled expectation of ownership: *e.g.*, issuing leases for minerals underlying the riverbeds, installing facilities such as dams and docks, and patenting interests to third parties. By requiring that a State’s title to a riverbed accrue *at statehood*, the equal-footing doctrine allows federal, state, and private landowners to settle their expectations and act on them.

B. In Concluding That The Rivers Were Navigable As A Matter Of Law, The Montana Supreme Court Misapplied The Relevant Test For Navigability In Fact

The Montana Supreme Court did not correctly apply the foregoing principles to the summary-judgment record before it. Rather, the state supreme court made three crucial legal errors, and as a result its judgment cannot be sustained. First, the state supreme court treated evidence that one segment was navigable as applying to other segments as well, without basing that inference on actual facts about river conditions. Second, the state supreme court incorrectly concluded that, even though on certain stretches Montana presented no evidence that navigation *ever* occurred, those stretches were too short as a matter of law to be non-navigable in their own right. Third, and relatedly, the state supreme court incorrectly held that portaging around those substantial stretches amounts to navigating those stretches in fact. Summary judgment for Montana was inappro-

priate for each of those reasons. Under Montana law, as under Rule 56 of the Federal Rules of Civil Procedure, the burden rested on Montana to establish the absence of any genuine issue of material fact.¹¹ Under the correct principles of navigability for title, Montana did not carry that burden.

1. Montana’s evidence of navigability on one segment was not sufficient to show navigability on other segments

As shown above, the test for navigability for title contemplates that, based on all the evidence, “some stretches [may be] declared navigable, and others declared non-navigable”—precisely the result that the state supreme court skeptically called a “piecemeal classification.” Pet. App. 58. The court incorrectly perceived petitioner as arguing that “particular stretches of a river which are non-navigable * * * can defeat a finding of navigability with respect to the whole river.” *Ibid.* In fact, petitioner argues—correctly—that evidence that a particular stretch is non-navigable for title can defeat a finding of navigability *with respect to that stretch*.

The state court further misapplied the test when it merged evidence from various different segments to come to a conclusion that an entire river was navigable. Although evidence of navigation on one segment might

¹¹ See, *e.g.*, Mont. R. Civ. P. 56(c); *Roe v. City of Missoula*, 221 P.3d 1200, 1204 (Mont. 2009). Petitioner suggests (Br. 54-57) that the burden always lies with the party seeking to prove navigability. This Court has never adopted such a categorical rule, and it need not do so here, because the navigability question is presented by a grant of summary judgment for Montana on a counterclaim brought by Montana. The burden therefore clearly rests with Montana in this context.

help to show that another, *comparable* segment was also navigable, the record did not establish beyond dispute that navigation took place (or could have) on the segments at issue in this case or on a comparable segment.

On the Madison River, the state supreme court relied in part on one occasion in 1913—after statehood and after petitioner’s dams were built—when logs were floated on the river’s “middle portion.” Pet. App. 26, 56.¹² That log float occurred between the mouth of one tributary, the West Fork Madison River, and the town of Varney. *Id.* at 26. That stretch is only about 55 miles of the 140-mile-long Madison River, and it is located between petitioner’s dams (Varney is ten miles upriver from Madison Dam). See J.A. 219, 248, 257-259. The State’s own evidence stated that the Madison has four physically “distinct natural subdivisions” in Montana, and that physical obstructions such as shallows and rapids increase as one travels upstream. J.A. 247-249. Hebgen Dam, at least, was upstream from the log float and on a different river segment. *Ibid.*; see also J.A. 679-680. A reasonable factfinder could conclude from that evidence that a log float to Varney (even if successful, but see Pet. Br. 10, 59) simply was not probative of navigability on the stretches that are at issue in this case.

On the Clark Fork, too, the state supreme court stated that “actual use” was “documented from the Pend Oreille Lake at least to this river’s confluence with the

¹² The relevance of post-statehood evidence is discussed below. See pp. 27-33, *infra*. Evidence limited to a single log float might be inadequate to show navigability for title in any event, cf. *United States v. Utah*, 283 U.S. at 79 (repeated use by lumber rafts), unless the evidence also showed that the relevant stretch was *susceptible* of greater use. Cf. *Utah v. United States*, 403 U.S. at 11.

Blackfoot River,” a stretch that includes Thompson Falls. Pet. App. 61. But the court appeared to acknowledge that there was no evidence of actual use “in the vicinity of [petitioner’s] Thompson Falls project.” *Ibid.* Montana did not establish beyond dispute that the evidence of “actual use” was relevant to the contested river segment.

2. Montana did not show that the segments at issue here were “short interruptions” as a matter of law

The record contains no evidence that, at the time of statehood, anyone had ever navigated the 17-mile Great Falls reach, or could have navigated that stretch. Pet. App. 137 (stating that “the falls have never been navigated”). The falls were not merely an impediment, like a sandbar that slows navigation or a shallow stretch over which boats sometimes had to be dragged. Rather, the falls were completely impassable by boat. Similarly, as the state supreme court acknowledged, petitioner presented evidence that navigation of the Clark Fork was interrupted at Thompson Falls. *Id.* at 61.

The state supreme court erred in dismissing these segments as “relatively short interruptions” that were “insufficient as a matter of law.” Pet. App. 60-61. There is no basis for that conclusion in the record or in any decision of this Court. To the contrary: in *United States v. Utah* the Special Master and the Court examined stretches even shorter than the 17-mile Great Falls reach. See pp. 12-13, 16-17, *supra*. Although 17 miles may be a fraction of the Missouri’s 2400-mile length, petitioner has presented evidence that the 17-mile stretch is a physically distinct portion of that river. The State cannot claim title to a distinct, non-navigable 17-mile stretch merely because it is characterized as rela-

tively short—no matter whether the river has other stretches that are navigable or how long those stretches may be. To be sure, the question of navigability is not “answered * * * inch by inch.” *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 490 (1988) (O’Connor, J., dissenting). But the 17-mile Great Falls reach—which is longer than some entire rivers—is no “short interruption.”

The state supreme court did not identify the characteristics of the other disputed stretches (such as Thompson Falls on the Clark Fork) with any precision. Reversing and remanding will permit the state courts to apply the correct segment-by-segment approach to the factual record without being artificially constrained by the notion that all of the relevant stretches, even if navigationally distinct, are too short to be considered distinct for title purposes.

3. *Montana did not establish title to non-navigable stretches by showing that those stretches could be portaged*

The Montana Supreme Court acknowledged that the Special Master in *United States v. Utah* had concluded that Cataract Canyon was not navigable, even though it could be said to “interrupt” two navigable segments. The state supreme court thought, however, that the State nonetheless took title to the Great Falls and other interruptions at issue in this case, because those interruptions could be portaged around—*i.e.*, commerce could continue despite the interruption, by leaving the river altogether and bypassing the falls on land.¹³ Pet.

¹³ Cataract Canyon could not be fully portaged, at least not without bypassing the canyon altogether. *Utah* Report 126-127 (although part

App. 60, 61. That reasoning was incorrect. Although portaging can establish that the *navigable* river segments connected over land by the portage are part of a single highway of commerce, portaging cannot establish that the *bypassed* segment (if that segment is too long to be a “short interruption”) is navigable in fact under the test for title.

Treating portaging as a substitute for navigation would significantly alter the test for title and expand the long-held understanding of what a State takes at statehood. Indeed, *any* river segment that this Court has held non-navigable for title could be portaged in theory, with enough time and effort; it is physically possible to travel over land from the head of navigation on the Arkansas or Red River to the sources of those rivers, or to travel from above Cataract Canyon to below it. Cf. pp. 12-14, *supra*. If any portage counts—even Lewis and Clark’s arduous 33-day journey around the Great Falls reach, see J.A. 375-376—then the role of navigability in determining a State’s title is significantly diminished.

In other cases involving admiralty jurisdiction or the exercise of Congress’s commerce power, rather than navigability for title, this Court has sometimes stated that interruptions do not defeat navigability for *those* purposes. Indeed, that is why petitioner’s dams are subject to federal regulation under the Federal Power Act. But those holdings cannot be divorced from the context in which they arise.

In the FPA, Congress “broadly defined” the term “navigable waters” in a way that differs from the *Daniel Ball* test. *Union Electric*, 381 U.S. at 102. “[P]arts of

of the canyon had sufficient footing to allow portaging, the rest was too steep, so boats could not transit the canyon by portage).

streams” meet that definition if they “are used or suitable for use * * * in interstate or foreign commerce,” or can be made so through improvement. 16 U.S.C. 796(8). And the definition expressly *also* includes “falls, shallows, or rapids compelling land carriage” that amount to “interruptions between the navigable parts of such streams or waters.” *Ibid.* That expanded definition ensured that the FPA would encompass many hydropower sites. *Union Electric*, 381 U.S. at 102 n.18.

The Court applied the FPA in *Appalachian Electric Power* and concluded that its broad scope is within the scope of the federal commerce power. The case did not directly involve any obstructions requiring a portage. See 311 U.S. at 414, 416. Rather, the Court held that the commerce power extended to rivers that could be, but had not yet been, made navigable through improvements. And the Court expressly contrasted cases involving navigability for title, which “is determine * * * as of the formation of the Union * * * or the admission to statehood.” *Id.* at 408. A more relevant “analogy,” the Court held, was a line of admiralty cases in which navigability was found “despite the obstruction of falls, rapids, sand bars, carries or shifting currents.” *Id.* at 408-409 & n.34. In *The Montello*, for example, the obstructions to navigation were removed by artificial navigation (locks and canals). 87 U.S. at 433-434. Navigation, under those cases, is still navigation within the commerce power (or the admiralty jurisdiction) even if it is difficult or treacherous or requires artificial improvements. That holding has no bearing on title to substantial river segments where navigation is impossible, such as the Great Falls reach.

For that reason, the FPC’s conclusion that the Great Falls reach and petitioner’s dams on the Madison River

may be regulated under the FPA does not resolve the question presented here.¹⁴ The FPC concluded that the Missouri River was generally navigable, although the Great Falls reach had never been navigated. See *Montana Power Co. v. FPC*, 185 F.2d 491, 493-494 (D.C. Cir. 1950) (“evidence of actual use of the river upstream from Fort Benton to the foot of the falls, and from above the falls to Three Forks”), cert. denied, 340 U.S. 947 (1951); *id.* at 494 (travel around the falls required “the aid of a portage or ‘land carriage’”); see also *The Montana Power Co.*, 8 F.P.C. 751, 753 (1949) (relevant portion of Clark Fork navigable “within the meaning of” FPA). Because the FPA encompasses both navigable-in-fact waters *and* “interrupting falls” between the “navigable parts,” 16 U.S.C. 796(8), the Great Falls reach was subject to regulation under the FPA. 185 F.2d at 494. Congress’s commerce power permits the FPA to regulate those interrupting falls even though they are not navigable in fact for purposes of title. See *Appalachian Elec. Power*, 311 U.S. at 409; FPC Br. in Opp. at 23 & n.20, *Montana Power Co. v. FPC*, 340 U.S. 947 (1951) (No. 518, O.T. 1950); see also *Union Electric*, 381 U.S. at 105-106 n.21. This Court has upheld applying the commerce power to non-navigable falls and segments in other contexts as well.¹⁵

¹⁴ The segments at issue here may also be within the scope of other federal statutes exercising the commerce power. See U.S. Invitation Br. 15 n.5.

¹⁵ See *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 66, 76 (1913) (government had dominion over water power of “substantially unnavigable” falls and rapids that were bypassed by canals and locks); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (flood-control dam and reservoir on Red River,

As for the Madison River, the FPC proceeded on the view that it was *not* navigable. *In re Mont. Power Co.*, 7 F.P.C. 163, 168 (1948), aff'd in part and remanded in part, 185 F.2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951). Petitioner's dams there were nonetheless subject to regulation under the commerce power, effected by the FPA, because their operation could and did affect the capacity for navigation of waters downstream that *were* conceded to be navigable (below Fort Benton). *Id.* at 190-194.

As the FPC proceedings demonstrate, the commerce power extends to "interrupting falls" connected to navigable waters, and to non-navigable waters that affect the flow of navigable waters. But neither of those principles establishes that interrupting falls are themselves navigable for title merely because they lie between navigable segments and may be portaged around. The Montana Supreme Court erred in concluding otherwise.

III. THE MONTANA SUPREME COURT ERRED IN ISSUING SUMMARY JUDGMENT ON POST-STATEHOOD EVIDENCE OF NAVIGABILITY WITHOUT A PROPER FOUNDATION

Navigability for title "is determined * * * as of the formation of the Union in the original states or the admission to statehood of those formed later." *Appalachian Elec. Power*, 311 U.S. at 408; accord *United States v. Utah*, 283 U.S. at 75; *United States v. Oregon*, 295 U.S. 1, 14 (1935). Because title must pass based on conditions at that time, as this Court observed in *Brewer-Elliott*, title cannot depend on a "retroactive rule for

previously held non-navigable for title in *Oklahoma v. Texas*, were within commerce power); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 232-233 (1960).

determining navigability.” 260 U.S. at 88. If a river was not navigable at statehood, its navigability today does not affect title to its riverbed.

The state supreme court misapplied that principle. Evidence of present-day boating is relevant to navigability for title only to the extent it shows that the river was navigable at the time of statehood. The state supreme court did recognize that statehood is the relevant timeframe, *e.g.*, Pet. App. 53-56, but it then held that the evidence of “present-day usage of the Madison, Clark Fork, and Missouri Rivers *demonstrates* that these rivers were [navigable] * * * at the time of statehood.” *Id.* at 61-62 (emphasis added); see *id.* at 58 (“present-day recreational use is sufficient”). The summary-judgment record was insufficient to support such a holding, because it does not show beyond dispute whether boating or navigation conditions have materially changed since statehood.

A. To Support A Title Determination, Evidence Of Post-Statehood Navigation Must Be Substantially Probative Of Pre-Statehood Capacity

Showing navigability for title requires proof that the river, “in [its] ordinary condition” at the time of statehood, was navigable for commerce “in the customary modes of trade and travel on water” that existed at the time. *United States v. Utah*, 283 U.S. at 76. Evidence of post-statehood boating is probative for title purposes only if (1) the watercraft are similar in relevant respects to those in customary use for trade and travel at the time of statehood; and (2) the post-statehood condition of the river is not materially different from its physical condition at statehood.

Courts examining post-statehood evidence of navigability have examined whether the post-statehood craft were comparable to those in use at statehood, such as by considering their draft—that is, the depth to which their hull extends underwater—or their weight-bearing capacity. See, e.g., *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (accepting evidence of current-day use by boats whose weight-carrying capacity was equivalent to the capacity of boats in use at statehood), cert. denied, 495 U.S. 919 (1990); *Northwest Steelheaders Ass’n, Inc. v. Simantel*, 112 P.3d 383, 392, 393 (Or. Ct. App.) (concluding that the river segments “were susceptible to both travel and trade by craft common to [the] time” of statehood), review denied, 122 P.3d 65 (Or. 2005), cert. denied, 547 U.S. 1003 (2006). Cf. *Utah Report 126-127* (Cataract Canyon had been navigated since statehood, but only in boats of “special construction” with airtight compartments). Thus, although proof of navigability for title need not involve navigation by a particular type of vessel, *Holt State Bank*, 270 U.S. at 56 (“whether by steamboats, sailing vessels or flatboats”), the vessels must be comparable to those in use at the time of statehood.

Courts have also examined whether the physical characteristics of a river are similar in relevant respects to its condition at statehood. In *United States v. Oregon*, for example, the “physical condition of the bodies of water * * * ha[d] not varied substantially, so as to affect the possibility of their use in navigation,” since statehood. 295 U.S. at 18. It was therefore appropriate for the Special Master to consider evidence of later usage. See also *Ahtna*, 891 F.2d at 1405 (parties stipulated that the physical condition of the river “ha[d] remained unchanged since statehood”). By contrast, in *North Da-*

kota ex rel. Board of University & School Lands v. United States, 972 F.2d 235 (8th Cir. 1992), for example, the court of appeals affirmed the district court’s finding that “modern day canoe use and modern day ‘boatability’ data are not reliable indicators of the River’s navigability at statehood”—despite the State’s argument that the modern day canoes had the same draft as boats used at statehood—based on the United States’ evidence that the river had physically changed subsequent to statehood, at which time it was not susceptible to commercial navigation. *Id.* at 240.

B. The Montana Supreme Court Failed To Assess The Materiality Of Post-Statehood Evidence On Summary Judgment

Although present-day use “may be probative,” Pet. App. 56, the Montana Supreme Court failed to examine whether in this case the State had laid a sufficient foundation for such evidence as a basis for summary judgment. *Id.* at 55. Instead, the court stated that present-day use was sufficient to show that a river was “susceptible of use” at statehood, under a “broad definition” of navigability. *Ibid.* The state court thus concluded, with respect to the Madison River, that “[t]he present-day recreational use is sufficient for purposes of ‘commerce’ under [*United States v. Utah and Ahtna.*]” *Id.* at 58.

The state supreme court’s reliance on *United States v. Utah* for the proposition that navigability for title may be determined based on newly discovered forms of commerce, and present-day boating without more, was misplaced. “Susceptibility of use” in the title context refers to waters that could have been navigated at statehood, but were not, for reasons unrelated to navigability, such as sparse settlement. 283 U.S. at 82. Thus, the Court

approved the admission of evidence of post-statehood navigation “as being relevant upon the issue of the *susceptibility of the rivers to use as highways of commerce at the time Utah was admitted to the Union.*” *Ibid.* (emphasis added). The multiple types of boats in use, including steamboats, were consistent with the types of boats customarily used in trade and travel at statehood and thus provided probative evidence of the rivers’ navigability at statehood. See *ibid.* (noting that the Special Master gave a “full description of the size and character of boats” historically used on the rivers”). See also *Ahtna*, 891 F.2d at 1405 (concluding that “the watercraft customary at statehood could have at least supported commercial activity of the type carried on today, with minor modifications”).

In this case, by contrast, the state supreme court undertook no such examination. At summary judgment, the State’s evidence of present-day use consisted of statistical information about fishing activity on the rivers, J.A. 46-48, and contained no information about the types of boats in use. Contrary to petitioner’s suggestion (Br. 49-52), that evidence is deficient not because the boats carry their paying passengers for recreational rather than other commercial purposes,¹⁶ but because it may not be probative of navigation at statehood at all. Modern-day recreational boats, such as rafts, lightweight canoes, and kayaks, may be able to navigate wa-

¹⁶ Even “personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation,” *Appalachian Elec. Power*, 311 U.S. at 416, regardless of the reasons for the transportation. Furthermore, even if Montana’s evidence of extensive commercial recreation ultimately is not probative of title, it is a further basis for concluding that the rivers are subject to regulation under the commerce power.

ters considerably shallower than those that were navigable by watercraft that existed at statehood.

Furthermore, petitioner presented expert evidence that the Madison had physically changed in relevant ways since statehood, both with respect to the nature of the river channel and the amount of flow in the river. First, petitioner's expert averred that portions of the Madison are either "anastomosing" or "braided," both of which mean that the river channel is likely to shift over time. J.A. 577-578. Indeed, "[t]hat the river appears to have been a braided river at statehood" led the expert "to conclude that significant reaches of the Madison River were not susceptible to navigation at that time." J.A. 578. Second, petitioner's expert concluded that petitioner's dams had caused significant change in the flow of the Madison River by modulating it, making it easier to navigate in both high-flow and low-flow periods. J.A. 575, 577.

The state supreme court offered no adequate basis for disregarding petitioner's evidence. The court addressed only one of the expert's two points—the discussion of the change in flow over time—and asserted that petitioner's evidence "fail[ed] to demonstrate that the Madison was not susceptible for use as a channel of commerce at the time of statehood," because the Madison would be navigable "so long as [it] was susceptible for use during portions of the year." Pet. App. 58. That does not adequately respond to petitioner's contentions, nor—especially in the absence of any foundation laid by the State—does it justify the consideration of present-day boat use. And the court failed entirely to address the evidence that navigation would have been impeded at statehood by the anastomosing or braiding of the Madison's channels. See *North Dakota*, 972 F.2d at 240

(finding river non-navigable due in part to comparable evidence).

* * * *

Summary judgment should have been denied. Montana presented evidence that each river was navigable for title at statehood, at least in part; petitioner presented evidence that some segments were not navigable for title and that Montana's evidence was not probative. The state supreme court did not resolve the resulting factual questions, but bypassed them based on erroneous application of navigability-for-title principles. This Court should correct those legal errors and remand for application of the correct standard, which may require a trial.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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SEPTEMBER 2011