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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next today in Case 10-218, PPL Montana v. Montana.

5 Mr. Clement.

6 ORAL ARGUMENT OF PAUL D. CLEMENT

7 ON BEHALF OF THE PETITIONER

8 MR. CLEMENT: Mr. Chief Justice, and may it
9 please the Court:

10 The State's claim to back rent here is truly
11 remarkable. When these dams were built back in the day,
12 PPL's predecessors, Petitioner's predecessors, secured
13 all the necessary property rights and easements. As
14 part of that process, particularly for the dams that
15 created reservoirs, there was an elaborate process of
16 getting flood easements and, in many cases, paying
17 substantial amounts of money. In that process, nothing
18 was hidden; it was open and notorious. Indeed, the
19 State assisted by lending the utilities its eminent
20 domain power to deal with holdouts.

21 But now, a hundred years later, the State
22 comes in with a holdout claim of its own and suggests
23 that it's entitled to massive compensation based on the
24 small strip of riverbed that lies underneath these
25 flooded reservoirs and the dams. The Montana Supreme

1 Court allowed that claim to succeed to the tune of tens
2 of millions of dollars of back rent. Now, it did --

3 JUSTICE KENNEDY: Well, is your point that
4 there should be a Federal rule of laches or estoppel, or
5 are you just building up to the fact that this is
6 traditional, well-recognized doctrine and there's been
7 -- and there's been a sudden change?

8 MR. CLEMENT: That's exactly where I was
9 going, Justice Kennedy. I was suggesting that the
10 Montana Supreme Court could only approve this result,
11 which clearly did unsettle settled expectations, by
12 deviating from well-settled principles of Federal
13 navigability law.

14 Now, the mistakes were a little bit
15 different for each of the rivers at issue. As to the
16 Clark Fork and the Upper Missouri, the critical error I
17 believe with the Montana Supreme Court decision was its
18 failure to focus on the river segments that are directly
19 at issue and instead focus on the river as a whole.

20 With the Madison, the errors are different,
21 because, as the Madison, there's no evidence that any
22 stretch of that river was navigable at statehood. So,
23 there the problem was principally that the court relied
24 on modern-day evidence of recreational use to substitute
25 for true historic evidence of commercial navigation at

1 statehood.

2 JUSTICE ALITO: On the issue of whether we
3 should look to the segments or to the river as a whole,
4 what authorities can we consult? You rely heavily on
5 U.S. v. Utah, and that certainly is a relevant
6 precedent; but there's disagreement about what it means,
7 and the only authority that I see that U.S. v. Utah
8 cited was The Montello, which seems to cite nothing
9 whatsoever. So, where do we -- is that the end of the
10 trail? Is there anyplace else we can look?

11 MR. CLEMENT: Well, I -- I mean, it's close
12 to the end of the trail. I mean, you can go back to The
13 Daniel Ball, but that's not going to help you any more
14 than The Montello. I think, though, that the critical
15 cases really are Utah, but I also think there are other
16 cases that this Court has had. Oklahoma v. Texas would
17 be an example where this Court has looked at a
18 discernible segment of a river. Brewer-Elliott is
19 another one.

20 And I think the starting point for the
21 Court's analysis in every one of these cases has been to
22 look at the segment of the river that's at issue, that
23 has been put at issue. Now, if you have a sovereignty
24 battle between the State and the Federal Government, a
25 lot of times it's the segment of the river within a

1 State, or in Brewer-Elliott it was the segment of the
2 river adjacent to an Indian reservation.

3 JUSTICE ALITO: Well, all of this, I take
4 it, derives from the rule that pre-exists -- pre-existed
5 the adoption of the Constitution, that the sovereign
6 owned the navigable rivers within its borders. Is there
7 some body of common law that addresses this, that would
8 shed some light on whether that means the whole river or
9 it means segments?

10 MR. CLEMENT: There really isn't,
11 Justice Alito, because we get our common law from
12 England. In England, actually, the common law was
13 different. At England, the navigable waters ended at
14 the ebb and flow of the tide. So, every internal stream
15 within Great Britain was viewed as nonnavigable, and the
16 property belonged to the riparians.

17 JUSTICE ALITO: So, what -- what is the
18 origin of the rule that the original 13 States owned the
19 navigable rivers or parts of the rivers but not the
20 parts that weren't. That was some feature of American
21 colonial law?

22 MR. CLEMENT: Sure. I mean, it was -- it
23 was adopted as part of -- the sort of -- just the idea
24 of creating the sovereign republic of the United States.
25 We borrowed our common law. I think initially nobody

1 focused on these navigable segments.

2 And it's important to recognize this issue
3 really doesn't even arise in the eastern United States,
4 because until about 1850 this idea that States could own
5 the riverbeds if they were nonnavigable never really
6 occurred to anyone. So, in most of the eastern States
7 as a matter of State law, whether a river is navigable
8 or nonnavigable, the riparian owns to the middle of the
9 streambed.

10 So, after 1851, this Court recognizes --
11 makes clear to the States that they actually have a
12 choice. And so, the States that come into the Union
13 after 1851, many of them, including Montana, adopt the
14 rule that, well, unless these -- if these streams are
15 nonnavigable, then we take the river stream. And so,
16 that's where the question comes up.

17 So, maybe the reason there isn't a great
18 deal of precedent on this is explained by the fact that
19 this is an issue that largely arises in the western
20 United States. But that's why I think it's such a
21 mistake to kind of look a gift horse in the mouth, so to
22 speak, and not focus on Utah, because Utah is a
23 situation that seems irreconcilable with the Montana
24 Supreme Court decision and the State's basic theory,
25 because there the special master and this Court

1 recognize a nonnavigable segment right in the middle of
2 two navigable portions of stream.

3 JUSTICE SOTOMAYOR: Could you define "de
4 minimis" for me?

5 MR. CLEMENT: Well, I -- I'm -- I'm happy to
6 try, but I think -- I'm not going to give you --

7 JUSTICE SOTOMAYOR: If we can't --

8 MR. CLEMENT: Well, here -- I'm not going
9 to --

10 JUSTICE SOTOMAYOR: -- what's the guidance
11 or limit that we set for States?

12 MR. CLEMENT: I've thought about this a lot,
13 Justice Sotomayor, and I'm not here to give you a sound
14 bite that's a bright-line definition of "de minimis." I
15 think "de minimis" almost by its nature takes its -- its
16 meaning from the context of the inquiry. But let me --
17 let me offer at least three guideposts that I think are
18 helpful.

19 One, as a practical matter, I think this
20 Court can look to its own cases dealing with islands in
21 navigable stream, and those cases are on page 17 of the
22 Government's brief. And this Court's cases say, if
23 there's a small island in navigable stream, under an
24 acre, of negligible value, we basically ignore it.
25 Later cases, though, came along and dealt with islands

1 that were much larger, and the Court analyzed those
2 separately from the navigable stream and said the United
3 States actually retains ownership to the larger islands,
4 and they don't go. So, that's one place to look.

5 The second place to look, I think, is also a
6 practical judgment based on the nature of the lawsuit.
7 And here the State itself has come in and identified
8 stretches of riverbed that they think are significant
9 enough to generate \$50 million in back rent. And I
10 think they, having identified those riverbed stretches
11 as being worth \$50 million, are hard pressed to then
12 turn around and say, oh, but they're de minimis, just
13 ignore them.

14 The third rule I would point to is that I
15 think topography has something of a role to play here.
16 If you look at the special master's report in Utah or
17 some of the other cases that have decided the point at
18 which the navigability stops, they've pointed to
19 features of the river as defining a discernible segment
20 like a tributary coming in or the geology of the -- of
21 the bed over which the river runs. If it shifts from
22 kind of a silty loam to hard rock in a canyon, that's
23 something that you can point to.

24 JUSTICE SOTOMAYOR: I know you've told me
25 that you think Montello is not pertinent because it

1 involved a different issue. But assuming that it were
2 pertinent, because I'm not quite sure how its discussion
3 doesn't fit the needs here, one of the factors you
4 haven't mentioned in terms of de minimis is the portage
5 and its use with respect to commerce. And by that I
6 mean, it appeared to me in Montello, what the Court was
7 saying was the history of use of this river showed that
8 these obstructions didn't stop the flow of commerce,
9 that what people did was, it appeared, some extreme
10 things. They got off -- they got their goods off one
11 boat, walked it a certain distance or drove it by wagon
12 another distance, and then put it on another boat or the
13 same boat that they had lessened the load on and moved
14 it over. And so, it doesn't talk about the distance of
15 that portage; it talks about the impact on commerce.

16 MR. CLEMENT: Right.

17 JUSTICE SOTOMAYOR: And so, why isn't that a
18 factor in the de minimis issue?

19 MR. CLEMENT: Well, I mean --

20 JUSTICE SOTOMAYOR: If there were a history
21 here.

22 MR. CLEMENT: Sure, but, Justice Sotomayor,
23 I think -- I mean, there are sort of two portages that
24 are floating around in The Montello, and I think it's
25 important to distinguish between the two. There's kind

1 of the classic overland portage between the Fox River
2 and the Wisconsin River.

3 JUSTICE SOTOMAYOR: There was a canal in
4 there, wasn't there?

5 MR. CLEMENT: Well, afterwards. But
6 originally that was an overland portage. And so, that's
7 really not at issue, but that's kind of the -- you know,
8 the classic portage I have in mind is an overland
9 portage.

10 Now, they're also talking about the extreme
11 efforts, and you could call them portages. I don't
12 think you need to. But there's also talk about the
13 extreme efforts to enable navigation on the Fox before
14 improvement.

15 But that's nothing like what's at issue here
16 because those were efforts basically to use the riverbed
17 to -- and they had to do some extraordinary things: get
18 ox to pull the boat, lift them up over some rocks. But
19 they never really left the bed of the river there.
20 Where they left the bed of the river was the portage
21 over to the Wisconsin.

22 JUSTICE SOTOMAYOR: Well, in Montello, they
23 took the cargo off some boats --

24 MR. CLEMENT: Oh, absolutely.

25 JUSTICE SOTOMAYOR: -- and moved it overland

1 to another spot before they put it back on a boat.

2 MR. CLEMENT: Sure, but my understanding of
3 what was going on there -- and maybe I misunderstood it,
4 but I understand what they're talking about there is a
5 portage where you take the cargo out of the boat in
6 order to lighten the draft of the boat so it's not
7 sitting as deeply in the river, and that allows the
8 lighter boat to be carried over the --

9 JUSTICE SOTOMAYOR: We can both look at the
10 opinion, but I think there is one spot where the Court
11 says that in some areas they had to change boats.

12 MR. CLEMENT: Well -- and that may be, but,
13 I mean, again, I don't think we're talking about
14 anything like the distances that we're talking here, and
15 I also --

16 JUSTICE SOTOMAYOR: I don't disagree with
17 you, but I -- what I'm asking is, if we had a history of
18 navigation of cargo that went to the beginning of one of
19 these rivers -- and I'm not a sailor, so my terms -- the
20 cargo is taken off and driven by wagon or some other
21 mode to another spot and picked up again. Is that a
22 different situation than one where that doesn't happen?
23 That because this -- this length of portage is so long
24 that it is both economically and physically impossible
25 to transport cargo in that way. Is that a different

1 case for the question of navigability?

2 MR. CLEMENT: Well, sure, because these are
3 all matters of degree, and those would be two different
4 cases. But here's what I would point you to, which is,
5 if at the point that you have to take the cargo off of
6 the boats, and then you then have to leave the channel,
7 you don't just do a little cut around some de minimus
8 amount, but you leave the channel and go overland, at
9 that point, I think, that portage demonstrates the
10 non-navigability of the bypassed stretch. And then I
11 think --

12 CHIEF JUSTICE ROBERTS: Well, maybe it
13 demonstrates the non-navigability of the particular
14 stretch, but we would still speak of the transfer of
15 commerce as being along the river.

16 MR. CLEMENT: Well, I don't --

17 CHIEF JUSTICE ROBERTS: The sort of case --
18 the analogy I was thinking of is if I say I fly from
19 Washington to Tokyo; and someone says, no, you didn't,
20 you flew to San Francisco, then you walked however many
21 yards from one gate to another, and then you flew to
22 Tokyo. And I would say, well, yes, there's a gap there
23 when I -- you know, part of the distance where I wasn't
24 flying, but people would still say you flew from D.C. to
25 Tokyo. Now, why isn't this just like that, that the

1 commercial path, the commercial waterway people think of
2 as the Missouri? And, yes, occasionally you've got to
3 get out, and, you know, we can debate how long the
4 portage is, but it doesn't interrupt the notion that
5 that whole pathway would qualify as a navigable
6 waterway.

7 MR. CLEMENT: Well, two things,
8 Mr. Chief Justice. One is I do want to make clear that
9 we very much dispute factually that there ever was this
10 kind of commercial portage over the Great Falls. And
11 the really -- you know, there's very little evidence for
12 the record. The State's own evidence identifies Fort
13 Benton 30 miles below the Great Falls as the head of
14 navigation on the Missouri. So, there is very much a
15 factual issue here.

16 But to answer the legal question you're
17 asking, first of all, I'm not sure I would have the same
18 instinct about the common parlance if you had to go from
19 JFK to LaGuardia in a cab. And I'm even less sure that
20 you would have the same notion if you had to drive from
21 San Francisco to LA to switch planes. And I think the
22 distance here really does matter. And I would submit
23 the way you think about this, the way I would think
24 about this, is that the very need to bypass, especially
25 a substantial bypass where you leave the river channel,

1 is evidence that that part of the channel, that part of
2 the river, is nonnavigable.

3 JUSTICE ALITO: I don't see why --

4 MR. CLEMENT: And then the question that's
5 left is whether that's de minimis.

6 JUSTICE ALITO: I don't see why portage is
7 relevant at all. What's the basis for the rule that the
8 sovereign owns the navigable rivers? I assume it's
9 because they are viewed -- they were viewed as highways
10 for transportation and commerce. And to the extent that
11 there's an obstruction that cannot be traversed by a
12 boat, then there isn't going to be any commerce or
13 transportation along that area.

14 Now, there might be an argument that the
15 sovereign should own the land next to the river so that
16 you could portage around it, but what -- what would be
17 the justification for saying the sovereign owns the
18 portion of the river that can't be traversed at all by
19 boat? I just don't understand it.

20 MR. CLEMENT: Well, I'm with you on that,
21 Justice Alito, and I think, you know, logically, if you
22 think what's the highway of commerce here, if there
23 really was this 18-mile overland portage route, that
24 would be the highway of commerce, but the 17-mile
25 bypassed stretch of the Missouri and the Great Falls

1 Reach would not be a highway of commerce. And I think
2 that gets back to the expectations of the property owner
3 that ultimately underlie these title questions.

4 I mean, if you have boats going by a river
5 in your backyard, I mean, you have -- you're on sort of
6 notice that you don't own the riverbed. But if you're
7 in a part of the river that's -- that's so unnavigable
8 that it has to be bypassed and you've never seen a boat
9 in your experience ever, then I think you have very
10 different expectations, and your expectations would be
11 the same as somebody who --

12 JUSTICE SOTOMAYOR: Seventeen miles is very
13 long.

14 MR. CLEMENT: It is --

15 JUSTICE SOTOMAYOR: I think the Thompson is
16 only 2.8.

17 MR. CLEMENT: Well --

18 JUSTICE SOTOMAYOR: That's really close to
19 Montello, where it talked about, about 2 miles for some
20 portage areas.

21 MR. CLEMENT: Well, with respect, if I could
22 take both points, I mean, you're absolutely right.
23 Seventeen miles is very long. I mean, for the New
24 Yorkers, you know, the East River is 16 miles long, the
25 whole river. The Anacostia River is 8-1/2 miles long.

1 So, this bypass stretch --

2 JUSTICE SOTOMAYOR: But I'm not a
3 Midwesterner, and rivers of 200 miles are normal there,
4 I understand.

5 MR. CLEMENT: Well, these -- this is still a
6 big stretch and I do think, like I said, longer than
7 some entire rivers. But the Thompson Falls -- I mean,
8 the 2 miles of the Thompson Fall, I don't know exactly
9 where that number comes from. It's kind of an
10 artificiality. I mean, there -- again, the State's own
11 evidence, look at JA 57, says that navigation stopped at
12 Thompson Falls. There wasn't a portage around.

13 But the other point is I would also ask you
14 to look at the 1910 court decree because, as I said at
15 the outset, you know, these companies didn't just put
16 these dams up overnight as, you know, kind of -- as a
17 lark. They went through elaborate efforts to secure the
18 property rights. That's what generated that 1910 court
19 decree about the Clark Fork River.

20 The Clark Fork River court decree in 1910
21 addresses a stretch of river specifically that's not
22 just the falls but those 6 miles of the reservoir that's
23 created. And the court holds that that entire region
24 and, indeed, the entire Clark Fork in Sanders County is
25 nonnavigable. So, the stretches that are nonnavigable

1 are much longer than 2 miles.

2 If I may reserve my time.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Kneedler.

5 ORAL ARGUMENT OF EDWIN S. KNEEDLER

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONER

8 MR. KNEEDLER: Mr. Chief Justice, and may it
9 please the Court:

10 The Montana Supreme Court committed three
11 basic errors with respect to all three rivers that
12 require a remand for further proceedings to actually
13 weigh and make factual findings concerning the evidence
14 of the -- of the relevant reaches of the river for
15 purposes of navigability for title. We're not talking
16 about navigability for interstate transportation or
17 admiralty or regulatory jurisdiction under the Rivers
18 and Harbors Act or the Clean Water Act. We're talking
19 about navigability for title.

20 JUSTICE KAGAN: And why does that make a
21 difference, Mr. Kneedler? Why do you think that there
22 are separate tests for title than for regulatory
23 authority?

24 MR. KNEEDLER: Well, in The Montello, for
25 example, the question was whether there was admiralty or

1 regulatory jurisdiction over the use of vessels on the
2 -- on the upper reaches of the river, and that depended,
3 in the Court's view, on whether that stretch was part of
4 an interstate or international highway of commerce. And
5 so, it would make sense to look at the whole river in
6 determining whether there's a highway, and maybe in
7 deciding whether there's a highway, you would look to a
8 bypassed stretch. You would look at the highway, the
9 land highway, to decide whether it's useful in
10 interstate commerce.

11 For title purposes, though, the question is,
12 what happens to the stretch of the river right in front
13 of the riparian owner's land? As Mr. Clement said, that
14 reflects the expectations of the property owner; that if
15 there are no ships or boats going back and forth, that
16 that property is -- adheres to the riparian land more.
17 I also think it pertains to the control or use of the
18 beds of the rivers themselves. If the river --

19 CHIEF JUSTICE ROBERTS: I think, though, if
20 you start drawing these lines, they become very
21 difficult, in some rivers anyway, to -- to apply. I'm
22 sure there are seasonable fluctuations. They may be
23 navigable in some seasons, but not in others. The line
24 at which you pass from navigability to non-navigability
25 may be difficult to ascertain.

1 It seems to me, once you start chopping the
2 highway of commerce up, it does create all those
3 difficulties.

4 MR. KNEEDLER: Well, first of all, we're
5 not -- we're not talking about chopping the river up
6 into narrow slices. I mean, I think there has to be a
7 discernible and substantial segment of the river.
8 Often -- often, it will be self-evident from the
9 topographical features of the area. Are there -- are
10 there major falls and rapids over an extended period of
11 time?

12 But also, the points you're raising are -- I
13 think are inherent, because in deciding where
14 navigability stops under any test or in any
15 circumstance, you could have the difficulties that you
16 have described.

17 JUSTICE SOTOMAYOR: So, what's de minimis?

18 MR. KNEEDLER: Well, I think --

19 JUSTICE SOTOMAYOR: Could 2.8 be de minimis
20 in one situation and not, and how do we tell courts
21 below --

22 MR. KNEEDLER: I think it -- I think it may
23 well be. I think it -- I think a -- an important -- I
24 agree with the points that Mr. Clement made as
25 guideposts. I think another one -- and this pertains

1 to --

2 JUSTICE SOTOMAYOR: If there's no falls but
3 there are riparian waters that don't permit navigability
4 over 2.8, then that's still navigable? I'm not sure --

5 MR. KNEEDLER: No, I -- I think it has to be
6 -- I'm speaking of a situation where the -- where the
7 river is not navigable in fact. And that's the test,
8 navigable in fact, not navigable in law. So, if a -- if
9 a boat cannot pass in front of the riparian land, then
10 that would be nonnavigable. I agree that --

11 JUSTICE SCALIA: And it shouldn't matter
12 whether it's 2.8 miles or 1 mile, right?

13 MR. KNEEDLER: Well, I --

14 JUSTICE SCALIA: I mean, if the land is
15 nonnavigable -- if the river at that point is
16 nonnavigable, it's nonnavigable.

17 MR. KNEEDLER: For title purposes, yes.

18 JUSTICE SCALIA: That's what we're talking
19 about --

20 MR. KNEEDLER: Yes. And, you know, I don't
21 want to --

22 JUSTICE SCALIA: -- the title purpose. I
23 don't see why there ought to be any de minimis
24 exception.

25 MR. KNEEDLER: Well, I -- I think at some --

1 if you -- if you consider part of the -- part of what's
2 going on here is who controls the riverbed, I think it
3 would be unworkable to have a passage or a portion of a
4 river where you had 20 -- 10-foot strips across the
5 river that are riparian owner-owned, and the State owned
6 everything else, or if you had stripes across a river.
7 So, I think -- I think the test also has to take into
8 account --

9 JUSTICE KENNEDY: But how would the boat get
10 up there? Does it just jump over the 10 feet?

11 MR. KNEEDLER: Well, in The Montello, the --
12 there is -- there is evidence that the boat was lifted
13 by -- men got out of the boat and lifted the boat up
14 over the falls.

15 JUSTICE KENNEDY: Okay. Then that would
16 work.

17 MR. KNEEDLER: Pardon me?

18 JUSTICE KENNEDY: Then that would work.

19 MR. KNEEDLER: In that situation, but if you
20 have a long stretch of -- of river where that was not
21 practicable, then you --

22 JUSTICE BREYER: You can't lift a boat over
23 Niagara Falls. And I -- and I read somewhere that -- I
24 hope I'm wrong, but I have a feeling I read somewhere
25 that the land under Niagara Falls has long been

1 considered to be navigable, and, therefore, it's owned
2 by the United States.

3 JUSTICE SCALIA: It's an international
4 boundary.

5 MR. KNEEDLER: It's owned by the State.

6 JUSTICE BREYER: It's owned by the State.
7 Oh, you mean the navigable -- I get mixed up in that.
8 The --

9 MR. KNEEDLER: The reply brief I think
10 describes --

11 JUSTICE BREYER: The navigable ones are
12 owned by the State. Okay. Everybody's thought the land
13 under Niagara Falls is owned by the State. Oh, dear,
14 because that sort of wrecks our nice theory that all the
15 steps, all the little bits of it that are non -- that
16 are --

17 MR. KNEEDLER: That's not an -- I think
18 that's not an extended strip in the way that -- the way
19 that we're discussing here.

20 JUSTICE BREYER: Okay. Now we have to
21 define what's an extended strip.

22 MR. KNEEDLER: Well, if I -- I think --

23 JUSTICE SCALIA: I think -- I thought it's
24 also an international boundary --

25 MR. KNEEDLER: Yes, and that --

1 JUSTICE SCALIA: -- as to which there is a
2 different rule.

3 MR. KNEEDLER: Yes, and the -- or --

4 JUSTICE BREYER: Okay. So, how much are we
5 wrecking if we just say, look, the bit that's
6 nonnavigable is different from the bit that's navigable?

7 MR. KNEEDLER: Well --

8 JUSTICE BREYER: Period. Doesn't matter if
9 it's 5 feet of land or not. What are we wrecking?

10 MR. KNEEDLER: I think it does matter
11 whether it's 5 feet, because the -- because an important
12 point here is that -- who can make sensible use or
13 control the relevant stretch of the river. If it's 5
14 feet or 10 feet and you had strips that stayed
15 private --

16 JUSTICE BREYER: A quick question which you
17 could probably answer just by saying we decided not to.
18 But I was somewhat curious. It's really the United
19 States v. Montana in this, who owns the land, and it's a
20 question of Federal law. It's going to be highly
21 factual no matter what this happens. Made for this
22 Court's original jurisdiction. And -- and normally in
23 original jurisdiction, we appoint a master, it's worked
24 out, and we review the master's report.

25 We can't do that here because it's a case --

1 why didn't you go into, or why couldn't you go into, a
2 quiet title action in Federal court?

3 MR. KNEEDLER: We could, and we have not
4 given consideration to that, but that might be -- that
5 might be a possibility. The United States is not a
6 party to this case and couldn't be -- and couldn't be
7 bound by the judgment.

8 JUSTICE GINSBURG: Could it have intervened
9 somehow, because the -- the United States has come here
10 rather reluctantly, as you recommended against granting
11 cert in this case. When this was in the Montana courts
12 and it was a question of what is the Federal law,
13 because Federal law is going to control -- everybody
14 agrees that -- could the United States have come into
15 the proceedings in the Montana State court?

16 MR. KNEEDLER: Ordinarily, the United States
17 would not intervene in a State court proceeding, or if
18 it did, it would remove the case to Federal court. So,
19 that -- that would be -- that would be a -- an
20 additional consideration as to whether to get into this
21 suit. The United States would typically bring its own
22 quiet title action in -- in Federal court.

23 CHIEF JUSTICE ROBERTS: Your answer a moment
24 ago gives me pause. You said the United States would
25 not be bound by this litigation but could bring its own

1 quiet title action.

2 MR. KNEEDLER: Well, we would be bound by
3 this Court's decision, obviously. But I was just
4 speaking of the law of -- the law of judgments. And if
5 this Court remands back to the trial court with general
6 directions but doesn't adjudicate particular stretches
7 definitively, then, you know, I think we -- that's the
8 situation that we would -- that we would be in.

9 JUSTICE GINSBURG: And if we -- if it were
10 remanded, the United States would still stay out of it
11 because it's going to be in the State --

12 MR. KNEEDLER: I assume so. Obviously, that
13 would be a -- that would be a further consideration.

14 JUSTICE SOTOMAYOR: Am I to take that "de
15 minimis" to you means small enough so that they get the
16 boat physically over the portage?

17 MR. KNEEDLER: Physically --

18 JUSTICE SOTOMAYOR: Whether they carry it --

19 MR. KNEEDLER: No, I think if they --

20 JUSTICE SOTOMAYOR: -- drag it.

21 MR. KNEEDLER: I think if they can take it
22 through the river, it's not an interruption at all. But
23 if -- if you have -- if you have something that can't be
24 transversed by a boat at all and it's long enough that
25 it could sensibly be thought of as a -- as a separate

1 parcel adhering to the -- to the riparian land, that
2 would be --

3 JUSTICE SOTOMAYOR: Go back to carrying
4 their boat on their shoulders, which apparently in The
5 Montello they did. What's the answer to --

6 MR. KNEEDLER: They didn't carry the boat
7 out of the river. These were Durham boats that were
8 70-feet long and -- and weighed quite a bit. Now, maybe
9 there were small canoes that could have been done. I --
10 I think a small portage -- again, I don't think it's the
11 length of the portage; I think it's the interruption of
12 the -- of the navigable portion of the river that --
13 that is -- that is relevant, and if it's large enough to
14 constitute a -- a sensible administrable parcel, that
15 that should be enough.

16 I did want to take one moment to discuss the
17 Madison River because there, as Mr. Clement discussed,
18 the considerations are somewhat different.

19 I mean, first of all, the court made a
20 similar mistake there by discussing the river as a whole
21 and a log float in the middle stretch of the river, but
22 not focusing on the relevant stretches where the dams
23 are located. But it also put a lot of emphasis on
24 current recreational use by drift boats and whatnot,
25 without a proper foundation to determine whether that

1 was relevant for title purposes at statehood, because
 2 the relevant question is whether whatever boats are used
 3 now are ones that would have been used as -- this is the
 4 language from *The Daniel Ball* -- as "the customary modes
 5 of travel and transportation" at the -- at the time of
 6 statehood. It had to be general --

7 CHIEF JUSTICE ROBERTS: It's kind of odd.
 8 Maybe this is -- maybe this is Justice Alito's earlier
 9 question. It's kind of odd that the more navigable the
 10 river is, the more claim the State has. The less
 11 navigable -- where you're talking about sports boats and
 12 drift fishing -- then it's Federal.

13 MR. KNEEDLER: Well, that's -- that's a
 14 product of the -- of the equal footing doctrine. And
 15 the Court has long said that the State gets the beds of
 16 navigable waters.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
 18 Mr. Garre.

19 ORAL ARGUMENT OF GREGORY G. GARRE

20 ON BEHALF OF THE RESPONDENT

21 MR. GARRE: Thank you, Mr. Chief Justice,
 22 and may it please the Court:

23 This case is about who owns the riverbeds
 24 underlying the rivers at issue. It's not about flood
 25 lands; it's about the riverbeds. And under this Court's

1 precedents, it's settled that title to the riverbeds
2 conveyed to the State under the Constitution if they are
3 navigable.

4 It's been understood in Montana for more
5 than a century that these rivers are navigable. The
6 rivers were meandered as navigable. PPL's deeds -- and
7 this is at page 172 of the appendix to the opposition
8 brief -- specifically exclude the riverbeds. The test
9 for navigability that this Court has applied for
10 140 years, going back to The Montello and The Daniel
11 Ball, is whether the river served as a continuous
12 highway of commerce.

13 In The Montello, the Court recognized the
14 fact that few of the nation's great rivers did not
15 include some, quote, "serious interruptions to
16 uninterrupted navigation." And the -- and the Court's
17 answer to that geographic fact was not to say then let's
18 carve out the interruptions and say those aren't
19 navigable. The Court's answer was to say unbroken
20 navigation is not required to establish navigability.

21 JUSTICE SOTOMAYOR: Under your theory, if
22 there's a fall like this of 17 miles, and a train is
23 50 miles away and traverses that 17 miles, that
24 portage --

25 MR. GARRE: Under this Court's precedents --

1 JUSTICE SOTOMAYOR: -- is good enough to
2 make that area navigable?

3 MR. GARRE: -- you have to show that the
4 commerce traveled along the river under the customary
5 modes of trade and travel.

6 JUSTICE SOTOMAYOR: Outside of your fur
7 traders and your gold miners, has that happened in any
8 other situation -- your alleged gold miners and fur
9 traders? Has that happened on -- on the -- in the Great
10 Falls?

11 MR. GARRE: If you take the Great Falls, the
12 history of portage from 1864 to 1868 was lively commerce
13 of millions of dollars, in today's value, billions of
14 dollars of gold, from Helena to Fort Benton back east.
15 This is covered in detail by the Solicitor General
16 briefs that we've appended here.

17 JUSTICE SOTOMAYOR: Could you -- could you
18 do me a favor and you tell me again -- I'm having real
19 trouble with the competing evidence in this case with
20 respect to every one of the three areas in dispute, and
21 I have some serious questions about whether the court
22 properly granted summary judgment. Your brief seems to
23 suggest that I can't do -- we can't do anything about
24 that because it wasn't a part of the question presented.

25 MR. GARRE: I --

1 JUSTICE SOTOMAYOR: Your adversary says that
2 it's a fair question if we determine there's an illegal
3 approach -- error in the legal approach of the court
4 below. I'm assuming that also means on their weighing
5 of evidentiary matters. So, why shouldn't we address
6 the summary judgment issue?

7 MR. GARRE: The question presented is
8 whether the Montana Supreme Court or whether a court --
9 a court -- what the constitutional test would be for a
10 court in this situation. It's not even limited to the
11 Montana Supreme Court here. It presents a legal
12 question.

13 With respect to summary judgment, the
14 problem for PPL is not that it didn't present enough
15 paper; the problem is, is it litigated the case under a
16 wrong legal theory. It litigated the case that the --
17 that the Missouri, for example, was not navigable
18 because you couldn't take a boat down the falls. This
19 Court's precedents for more than 140 years asked the
20 question of whether the river served as a continuous
21 highway of commerce. We presented evidence,
22 summarized --

23 JUSTICE SCALIA: For what purpose? Were
24 they -- were they -- were we answering the question for
25 the same purpose, or were we asking it for purposes of

1 whether Federal regulation could extend to the whole
2 river? For that purpose, it's easy to say if the whole
3 river is, you know, used for commerce, the Federal
4 Government can regulate even those portions of the river
5 that are nonnavigable, that have -- but that have to be
6 portaged around. But that's a different question from
7 who -- who owns title to the -- to the bed under the
8 portions that have to be portaged.

9 MR. GARRE: Your Honor, PPL recognizes that
10 The Daniel Ball supplies the test for navigability for
11 title. This Court recognized that in the Utah case, the
12 vanguard title case that they hold out. So, the only
13 question is, did The Montello apply The Daniel Ball test
14 or did it apply something else? And the first paragraph
15 of the Court's decision in The Montello said it applied
16 The Daniel Ball test.

17 Courts -- this Court and lower courts for
18 more than a century have understood The Daniel Ball and
19 The Montello to supply the test for navigability of
20 title. What they're asking this Court to do is upend
21 more than 140 years of precedent. And the amicus brief
22 filed by the States in this case gives -- gives the
23 Court a sense of the disruption that this would cause.

24 JUSTICE ALITO: What do -- what do you
25 understand to be the reason for the rule that the States

1 own the navigable rivers?

2 MR. GARRE: The reason for the rule was the
3 public trust doctrine which -- which sought to keep
4 these rivers free for the public to use for navigation,
5 for fishing, and for other uses. And this court's
6 precedents --

7 JUSTICE ALITO: What do fishing and
8 navigation have to do with -- for -- what does fishing
9 have to do with navigability?

10 MR. GARRE: Well, it gets back to the -- the
11 public trust doctrine, Your Honor. Fishing doesn't
12 have -- fishing is a purpose of the public trust
13 doctrine, which is why it was understood --

14 JUSTICE ALITO: Let me put it this way:
15 Why -- why should -- why does the State own a navigable
16 river but not a nonnavigable river?

17 MR. GARRE: Because the navigable rivers
18 were the arteries of commerce in this country, and at
19 the time of the founding, it was understood -- and this
20 gets to the core issue of federalism in this case --
21 that the States ought to be the ones that control the
22 navigable rivers --

23 JUSTICE ALITO: Yes, and if that's the
24 reason --

25 MR. GARRE: -- not the Federal Government.

1 JUSTICE ALITO: If that's the reason for the
2 rule, than what is the justification for State ownership
3 of a portion of the river that is not navigable?

4 MR. GARRE: I think this gets back to the
5 question of whether you can just chop up the rivers into
6 navigable and nonnavigable bits. And we're talking --
7 this Court, Justice O'Connor observed in her dissent in
8 the Phillips Petroleum case that navigability wasn't
9 decided inch by inch. What the other side is asking you
10 to adopt here is a test of navigability that's at least
11 mile by mile, if not acre by acre, which is completely
12 different than this Court has ever assessed
13 navigability.

14 JUSTICE ALITO: The rule that you're arguing
15 for might be an established rule that we should follow,
16 but as a matter of theory, I don't understand what the
17 justification is for State ownership of a nonnavigable
18 portion of the river if the reason for the underlying
19 rule is so that people will not put up obstructions on
20 the river so that they -- it can be maintained as an --
21 as an avenue of commerce. I can see that you -- why the
22 State would own that, because otherwise riparian owners
23 could put up fences and obstructions and charge tolls
24 and -- and that sort of thing. But if it's not
25 navigable, I don't see what it has to do with -- with

1 commerce or transportation.

2 MR. GARRE: What -- what the Framers were
3 concerned about -- and this is also reflected in the
4 Northwest Ordinance 2 -- was ensuring that the navigable
5 rivers, the major arteries of commerce in this country,
6 remained open. And so, they -- they applied a much
7 more -- much broader conception of navigability than
8 is suggested --

9 JUSTICE SCALIA: But -- but they're closed
10 where they're -- they're impassable for ships anyway.
11 They're closed. What do you mean, remain open?

12 MR. GARRE: And so, that was the argument --

13 JUSTICE SCALIA: You've -- you've got falls.
14 You got waterfalls. You got rapids. What does it mean
15 to -- to be sure that that river remains open to
16 commerce? Commerce is impossible over it.

17 MR. GARRE: And so, that was the argument
18 that the district court adopted in The Montello case,
19 and this Court emphatically rejected it. And by the
20 way, the portage in The Montello case was 5 miles long.
21 That's reflected in the -- the record in that case
22 before this Court.

23 JUSTICE GINSBURG: Mr. Garre, what is -- you
24 say that you're not taking just -- you look at the whole
25 river as a whole. You're saying that, no, that isn't

1 your position?

2 MR. GARRE: No, it's not.

3 JUSTICE GINSBURG: And it is also not inch
4 by inch. So, what's -- when is segmentation
5 appropriate?

6 MR. GARRE: I think the relevant stretch or
7 segmentation is really a litigation term. Our position
8 is this Court's test: continuous highway of commerce.
9 You would take the part of the river at issue in a case,
10 take that part and look -- ask the question, was that
11 part of a continuous highway of commerce or not?

12 So, if you found yourself in Cataract Canyon
13 in the Utah case, you'd ask yourself that question, and
14 you would say, no, this is not part of a continuous
15 highway of commerce, because no one argued either that
16 the canyon was portaged or that goods were traveling
17 down the Colorado River through the canyon and out into
18 Arizona.

19 If you ask yourself that question in this
20 case, along the Great Falls, you would say yes, because
21 the evidence was unrebutted that millions of dollars of
22 gold was traveled up from Helena to Fort Benton along
23 the -- the Missouri River with the aid of a portage and
24 that that was unquestionably a highway of commerce.

25 What they're asking this Court to do is chop

1 rivers up into navigable and nonnavigable pieces. How
2 would that impact the public trust doctrine? The -- the
3 brief filed by the National --

4 JUSTICE GINSBURG: So, you just -- so, you
5 are disagreeing with the United States, which has given
6 us its view of what the Federal law is. It doesn't
7 coincide with Montana's.

8 MR. GARRE: The United States has sided
9 completely with Montana. The answer it gives for what
10 is a short interruption in its brief is an interruption
11 that doesn't warrant separate consideration. That's on
12 page 17 of its brief. That's the epitome of a circular
13 test, and --

14 JUSTICE BREYER: Just out of -- I mean, to
15 waste your time for a second, why do the feds own the
16 land underneath the -- and why -- under the nonnavigable
17 parts? And why do the feds own the land under a
18 nonnavigable stream?

19 MR. GARRE: I think if -- if you applied the
20 proper test here, you would conclude that the river --

21 JUSTICE BREYER: I mean, little creeks
22 somewhere which you'd think, gee, those belong to the
23 State, but turns out the feds own the land underneath
24 the little creek; is that right?

25 MR. GARRE: I think what -- the nonnavigable

1 parts --

2 JUSTICE BREYER: Yes.

3 MR. GARRE: -- didn't transfer under the
4 equal footing doctrine. Oftentimes, those were subject
5 to separate conveyances. So, they might come into
6 private property. I think --

7 JUSTICE BREYER: I see. So, the rule is, on
8 the nonnavigable streams, it depends on what the
9 conveyance was at the time of statehood, and those are
10 individual matters, and sometimes --

11 MR. GARRE: Right.

12 JUSTICE BREYER: -- you'll see the feds own
13 them and sometimes the States.

14 MR. GARRE: And what was --

15 JUSTICE BREYER: Is that right?

16 MR. GARRE: Yes, I think that's right.

17 JUSTICE BREYER: Okay.

18 MR. GARRE: And what was critically
19 important to the -- to the Framers was that the States
20 would have control over the navigable waterways. This
21 Court has described that as an essential attribute of
22 State sovereignty.

23 CHIEF JUSTICE ROBERTS: But we're talking
24 about the land at the bottom of the -- the river. What
25 is it that the State can't do on the navigable waterways

1 that it wants to do?

2 MR. GARRE: Well, owner -- the ownership --
3 along with ownership goes the right to control whether
4 facilities can be built on them, bridges or pipelines.
5 It goes -- along with that goes the rights to mineral
6 leases --

7 JUSTICE KENNEDY: But as -- but as the Chief
8 Justice is indicating, I think, this concerns who owns
9 the bed; and that's different from navigable waters of
10 the United States.

11 And some of the answers you gave to
12 Justice Alito about -- that the purposes and the reasons
13 for navigable waters of the United States are quite
14 different, really, than for the considerations we have
15 about riparian ownership. Navigable waters of the
16 United States can be controlled by the United States for
17 many purposes, but that is concurrent with a separate
18 document -- doctrine for underlying ownership of the
19 bed.

20 MR. GARRE: Right.

21 JUSTICE KENNEDY: And it's not clear to me
22 that the test for navigable waters is the same in each
23 case as to the whole river.

24 MR. GARRE: I think that the test that we're
25 articulating is The Daniel Ball and The Montello test --

1 continuous highway test. I think with respect to the
2 riverbeds, it's always been understood that with control
3 of the riverbeds along navigable waters, States have a
4 right to control fishing and navigation and other
5 aspects.

6 JUSTICE BREYER: But, now, Montello was a
7 case -- to follow up this same question. Montello, I
8 take it, was not a title case. Montello was a
9 regulation of the stream case. So, I can understand
10 perfectly well why that language in Montello applies for
11 the reason Justice Kennedy just said. Now, I grant you
12 that they -- in later title cases, this Court has taken
13 the same words and written them. But is there an
14 instance in the later title cases where that language
15 has played a controlling role?

16 MR. GARRE: Well, the --

17 JUSTICE BREYER: What case should I look at
18 to see that it was really meant that that -- this --
19 see, start where Justice Scalia was and then say what
20 Justice Kennedy just said --

21 MR. GARRE: There's certainly --

22 JUSTICE BREYER: -- and then thinking,
23 well -- I'm thinking, well, Montello was a case that
24 involved a different purpose, and now the later cases,
25 although they quoted the language, it didn't have a

1 role. Am I right or not?

2 MR. GARRE: This case has recognized always
3 that The Daniel Ball and The Montello is the test for
4 navigability for title as well as admiralty. It has
5 never drawn the kind of distinction that PPL and the
6 United States ask you to draw here.

7 JUSTICE SCALIA: The question is, has it
8 held that? Do you have a case where it would have made
9 a difference?

10 MR. GARRE: Not -- not of this Court.

11 JUSTICE SCALIA: Okay.

12 MR. GARRE: And the lower courts have relied
13 upon The Daniel Ball and The Montello in plenty of
14 circumstances adjudicating title. I think the Court has
15 to think about what the world would look like if the
16 Court adopted PPL and the United States' views.

17 JUSTICE SCALIA: Well, if this is such an
18 understood and traditional rule, why -- why didn't
19 Montana make its rights known earlier when these private
20 owners bought the land? Indeed, the State gave them
21 condemnation power to flood adjacent lands so that they
22 could build their dams.

23 MR. GARRE: Again --

24 JUSTICE SCALIA: And you say while all this
25 was going on, well, of course, everybody knew that

1 Montana owned this land.

2 And now they come back, what, a hundred
3 years later, and they not only want to get the land
4 back, they want to tax them for their use of it over --
5 over all these hundred years.

6 MR. GARRE: PPL's deeds --

7 JUSTICE SCALIA: That's extraordinary.

8 MR. GARRE: Your Honor, PPL's deeds
9 specifically exclude the riverbeds at issue in this
10 case. So, PPL can have no claim to those lands and, in
11 fact, in its supplemental brief says that the United
12 States owns the lands. We're not talking about the
13 flood lands here; we're talking about the -- between the
14 low-water marks. Those lands were surveyed and
15 meandered at statehood to show that they did not convey
16 to private parties.

17 Montana courts have recognized for more than
18 a century that these waters are not navigable.
19 Everybody understood that they were navigable. The
20 reason why this issue only arises now is because of a
21 1999 decision of the Montana Supreme Court that said
22 that the State -- made clear that the State had a
23 fiduciary obligation to seek compensation for the use of
24 the riverbeds. So, that -- that then teed up the
25 question of whether the State could actually charge rent

1 for the riverbeds. The State in this case --

2 JUSTICE KAGAN: And what about other
3 landowners on the riverbeds? If Montana wins this case,
4 will they be paying rent as well?

5 MR. GARRE: They're not using the riverbeds,
6 Your Honor. The reason why the facilities here are
7 using the riverbeds is because they actually sit on it.
8 There are other instances where private landowners have
9 easements and leases, like mineral leases with the
10 State, under the -- because of the accepted
11 understanding that the State does own those lands. And
12 this is not at all unusual.

13 If you look at the State's brief, Washington
14 and Oregon have thousands of these types of permits
15 because it's established that if the water is navigable,
16 then the State owns the riverbeds, and there are
17 consequences that flow over this. But this really isn't
18 a fight between the State and the private landowners.
19 It's -- it's a fight between the State and the United
20 States, because if this case --

21 JUSTICE KAGAN: Just if I could understand
22 then, you think that this is a one of a kind landowner;
23 there are no other landowners in Montana who are in the
24 situation of PPL?

25 MR. GARRE: No, I think there are other

1 landowners who have asserted -- who want rights to use
 2 -- to get minerals along rivers or have piers or
 3 bridges, and in those situations, they get permits from
 4 the State to use it. But I think what's going to happen
 5 is, if this Court declares that every mile or so that is
 6 an interruption is nonnavigable, then title is going to
 7 transfer to the United States because, under this
 8 Court's precedent in Utah, the Court held that if waters
 9 were not navigable, the United States would have --

10 JUSTICE SOTOMAYOR: Is there a mile stretch
 11 anywhere on this river?

12 MR. GARRE: A mile stretch?

13 JUSTICE SOTOMAYOR: Yes. Is there a mile
 14 stretch in which the boats stop?

15 MR. GARRE: Well --

16 JUSTICE SOTOMAYOR: There's some water in
 17 the middle, and they --

18 MR. GARRE: There are two areas at issue
 19 here: the Great Falls stretch --

20 JUSTICE SOTOMAYOR: I know the two at issue.
 21 But you're saying, if we rule the way we do, we're going
 22 to slice it up and so does the Attorney -- the Solicitor
 23 General's office say, we're going to slice it up half
 24 mile or half acre by half acre. I'm not sure how that
 25 happens. I go back to Justice Kennedy's question, which

1 is, does a boat stop midstream?

2 MR. GARRE: So, the test would be any non-de
3 minimis interruption. That's the one that PPL and the
4 United States are urging here. There are thousands of
5 dams in the country. There's the Niagara Falls, which
6 for more than a century, it's been understood that the
7 State owns it, not because it's an international
8 boundary; that's a line plucked out of a decision. Read
9 the decision --

10 JUSTICE BREYER: All right. So, how do I
11 find that out? If I start with a practical premise of
12 not wanting to interrupt expectations, I also believe
13 that it's the most common thing in the world for
14 electric power companies to put hydroelectric facilities
15 where there are waterfalls or rapids, and that's true
16 all over the country. So, what's the status quo with
17 the -- you know, somebody could count up how many
18 hydroelectric plants there are on waterfalls.

19 And what's the general view? Have those
20 hydroelectric companies been thinking that they are
21 leasing or buying from the feds or from the States? I
22 mean, I don't know what's happened in the past. And I
23 have looked at the briefs. I can't get a very good
24 picture.

25 MR. GARRE: The best evidence I think we

1 have about this question of the implications comes from
2 the brief filed by 26 States, which explains that if
3 this Court adopts the kind of segmentation approach, any
4 interruption that is -- that is not de minimis has to be
5 carved out, it's going to wreak havoc in States across
6 the country, especially in the western States. Again,
7 getting back to --

8 JUSTICE BREYER: When you say "wreak havoc,"
9 do you mean to say that the States have leased those
10 strips with the waterfalls which are impassable to
11 hydroelectric companies, and the leases will have to be
12 renegotiated or something like that?

13 MR. GARRE: I'm not referring to specific
14 leases on that. I'm talking about things like public
15 access for fishing, for example. The States have cited
16 the Steelheader case in Oregon. And this is what's
17 going to happen: Either the public -- private
18 landowners are going to claim people coming along my
19 banks to fish, they don't have access to these waters.
20 If they were navigable -- understood as navigable waters
21 owned by the State, it's clear that they had would have
22 access. There's going to be clashes. There's going to
23 be --

24 JUSTICE SCALIA: I thought you say it
25 doesn't belong to the private individuals. I thought

1 you said it belongs to the United States if it doesn't
2 belong to the State.

3 MR. GARRE: I think -- what this Court has
4 said is if it's not navigable, the United States has it.
5 But there would be the question --

6 JUSTICE SCALIA: Well, there you are. And
7 you think the United States is going to keep off these
8 fishermen?

9 MR. GARRE: The question is whether there'd
10 be a separate conveyance from the United States.
11 There's certainly going to be plenty of private
12 landowners, I think, who are going to claim private
13 ownership. So, there is going to be some sorting out to
14 do.

15 JUSTICE SCALIA: But you think they're
16 wrong, right?

17 MR. GARRE: Well, no. They're -- if -- if
18 the river is not navigable, then the lands didn't convey
19 under the equal footing doctrine.

20 JUSTICE SCALIA: Right.

21 MR. GARRE: There'd be a separate question
22 of whether they conveyed by some other Federal patent,
23 land patent, or the like. And there are -- certainly
24 are plenty of those. But I think what's clear is --

25 JUSTICE GINSBURG: Mr. Garre, you -- you

1 have said this is genuinely a controversy between the
2 State and the United States, but the United States is
3 not a party to this -- to this litigation. And we know
4 from the briefing before us, the United States takes a
5 different position than Montana. It doesn't agree with
6 you. But if this case -- how can a case be decided
7 without any input from the United States when you say
8 that's the true dispute; it is between the State and the
9 nation?

10 MR. GARRE: Well, the United States is here.
11 It has given its views. It's true that it didn't
12 participate below, and that is a little bit unusual.
13 What's weird is that the United States has never
14 actually asserted ownership to the riverbeds in this
15 case. But I think --

16 JUSTICE KAGAN: Does PPL pay rent to the
17 United States?

18 MR. GARRE: Not with respect to the
19 riverbeds. There's a statement in the brief that
20 suggests that they pay rent. That's with respect to the
21 upland, the flooded lands, for example, along the
22 reservoir. The United States has never charged rent for
23 the use of the riverbeds themselves between the
24 low-water marks.

25 JUSTICE KENNEDY: Would you help me with

1 this? Navigable waters of the United States for
2 purposes of Federal jurisdiction over many activities
3 such as boating is one concept. Navigable waters of the
4 United States for purposes of State ownership of the bed
5 serves different purposes.

6 Are the -- are the boundaries and the
7 definitions of what is navigable co-extensive and
8 parallel and -- and precisely the same in each case?
9 Or, on the other hand, are there some cases where a body
10 of water, say the falls, is navigable waters of the
11 United States but not navigable waters of the United
12 States for purposes of bed ownership by the State?

13 MR. GARRE: I mean, certainly --

14 JUSTICE KENNEDY: And -- and if there is a
15 difference, can you tell me a case? And I think
16 Justice Scalia basically was asking this earlier.

17 MR. GARRE: There are two -- well, there's
18 three distinctions between the test for title --

19 JUSTICE KENNEDY: Yes.

20 MR. GARRE: -- and the test for regulatory
21 purposes --

22 JUSTICE KENNEDY: Yes.

23 MR. GARRE: -- none of which bear on the
24 dispute in this case. One is for title. You look at
25 the time of statehood. You don't look at the river at a

1 later time. The next is, is that, for purposes of
2 title, you look at the river in its natural state. You
3 don't look at improvements. And the third is, for
4 purposes of title, the kind of commerce you consider is
5 actually more expansive than the type you could consider
6 for regulatory purposes.

7 This case, the focus has been on the rivers
8 at the time of statehood, their use as highways of
9 commerce without improvements, which is in the heartland
10 of the test for title for navigability under The Daniel
11 Ball and The Montello.

12 None of the distinctions that this Court has
13 ever recognized would bear on this, nor would it make
14 any sense, I think, to say that the rule that we
15 identified in The Montello as -- that has -- for more
16 than a century, has been established as the test for
17 title for navigability somehow has to be applied
18 differently in this case in a way that would require
19 breaking up the rivers. And I think --

20 JUSTICE KENNEDY: But it is conceded, is it
21 not, that -- if we rule for the power companies in this
22 case, there still may be a situation in which these
23 waters can be navigable waters of the United States for
24 other purposes, other than ownership of the bed? Or am
25 I wrong on that?

1 MR. GARRE: No, I think the United States'
2 position is say they're navigable for Federal purposes
3 but not for State purposes. And I think -- and they've
4 taken what I think is a pretty remarkable position.

5 If you look at the briefs that we've
6 appended to our brief, the United States' in the Montana
7 Power Company case, the United States is saying that the
8 very same stretch of the Missouri along the Great Falls
9 is navigable because it served as a continuous highway
10 of commerce, and the falls did not prevent the river
11 from being used as a continuous highway; and, therefore,
12 it's navigable under The Montello and The Daniel Ball,
13 which is the theory that they recognize.

14 And now they're here saying, well, that was
15 only for regulatory purposes, not for title purposes.
16 But it's the same test in both cases, and that's the
17 test that the nation has understood for more than
18 50 years.

19 CHIEF JUSTICE ROBERTS: No, but I'm not sure
20 it has the same consequences. It seems to me that
21 regardless of who prevails in this case, the State will
22 be able to exercise regulatory jurisdiction over the
23 waters. You know, you can't fish during these seasons,
24 or there are different limits on how many fish you can
25 take. And so will the Federal Government. It will be

1 able to apply Federal law to the river regardless of who
2 owns parts of the river, regardless of who owns the land
3 underneath.

4 MR. GARRE: And so, this Court has always
5 recognized the States' authority to make those decisions
6 as an essential attribute of their sovereignty. And
7 that's why the States --

8 CHIEF JUSTICE ROBERTS: Without regard --
9 but I would say without regard to whether they happened
10 to own the land under the -- under the river or not.

11 MR. GARRE: No, when they -- when they own
12 the land under the river, that -- the ability to control
13 access along those rivers -- river and fishing and the
14 like is an essential attribute of State sovereignty.
15 So, just saying that, well, the Federal Government and
16 the State can regulate together is, I think, an
17 important intrusion on State sovereignty as this Court
18 has always understood under the equal footing doctrine
19 and the public trust doctrine.

20 And you also have the problem of competing
21 regulation of these rivers when you go from mile to
22 mile, interruption to interruption, potentially
23 thousands along rivers. And that's laid out in the
24 brief by the environmental groups here, the National
25 Wildlife Foundation and Trout Unlimited and other

1 groups, that talk about the problems with fragmented
2 regulatory jurisdiction.

3 And you also get into the question of public
4 access for fishing, too. The rivers are used for
5 commerce, but the public trust doctrine was always used
6 to protect access to rivers for fishing, too. And so,
7 if you look at a place like the Great Falls or the
8 Thompson Falls, these are among the most sought-after
9 fishing rivers in the world.

10 JUSTICE SCALIA: You're willing to concede
11 on behalf of the State that if we find that the State
12 does not have ownership of the bed, the State does not
13 have regulatory jurisdiction for all of these purposes
14 that you're now describing?

15 MR. GARRE: Absolutely not, Justice Scalia.

16 JUSTICE SCALIA: Well, then your argument
17 doesn't carry much weight.

18 MR. GARRE: Well --

19 JUSTICE ALITO: The State can continue to
20 regulate all those things whether or not it owns the
21 bed.

22 MR. GARRE: And so, every time this Court
23 has said that the ability to do that is an essential
24 attribute of sovereignty, it must not have meant it
25 because the United States could do it, too. I mean, it

1 is important to the States because having the sovereign
2 capacity over those riverbeds as navigable waters under
3 the public trust doctrine is critical to the States'
4 authority.

5 JUSTICE SCALIA: Well, you have sovereignty
6 over the land owned, owned by other private persons.

7 MR. GARRE: And -- and I think it gets back
8 to the public trust doctrine, the equal footing
9 doctrine, what this Court has said in the Utah case and
10 other cases about the role of States in regulating
11 navigable rivers and owning title to the riverbeds
12 underlying those rivers.

13 CHIEF JUSTICE ROBERTS: We haven't talked
14 much about the Madison. What -- what is your best piece
15 of evidence with respect to the Madison for the
16 proposition that it was navigable at statehood?

17 MR. GARRE: Well, there was some evidence of
18 use by fur trappers and the like. It was not extensive
19 because this area was relatively sparse. I think --

20 CHIEF JUSTICE ROBERTS: Well, fur trappers
21 are going to go -- they don't need a lot of -- a lot of
22 water to ply their canoes up the river.

23 MR. GARRE: Well, and this Court has
24 recognized that things like pirogues and bateaux were
25 sufficient to establish the continuous highway of

1 commerce.

2 I think the point on the Madison is the
3 susceptibility for use as a navigable river. And the
4 main point that we made below is that where their own
5 expert recognized that PPL's dams had impeded the flow
6 of water over of the river, that if those dams impede
7 the flow of water over the river but yet today there are
8 thousands of drift boats similar to the boats that would
9 have used it at the time of statehood, then it's good
10 evidence that it was susceptible for use.

11 But I think the Madison is in a different
12 category than the Missouri and the Clark Fork.

13 I do want to answer the question about the
14 17 miles. The Desplaines River in the Economy Light
15 case, there was an 18-mile portage. That's made clear
16 at page 18a of our addendum, where the Government
17 recognized that. In Montello, it was a 5-mile portage.
18 In -- there are other examples of portages.

19 JUSTICE SOTOMAYOR: Five miles, was that --
20 was that the canal? What subsequently became the canal
21 area?

22 MR. GARRE: I -- I think that's right. It's
23 in the testimony in that decision. But, certainly,
24 17 miles -- and the other thing is, is that in the
25 amicus brief, on page 27 of the Tubbs brief, she

1 suggests that the actual portage before statehood was
2 only 8 miles. I don't think you could draw a
3 constitutional line between 5, 7, or even 10 miles and
4 17 miles.

5 We think the line the Constitution draws is
6 whether -- asks whether the river was -- served as a
7 continuous highway of commerce, notwithstanding any
8 interruption along that way.

9 JUSTICE SOTOMAYOR: I think that then the
10 simplest rule is, is the river from shore to opposite
11 shore -- any portion of it -- did boats traverse it?
12 That would be I think what Justice Alito was asking.

13 MR. GARRE: But it's not even the rule that
14 PPL was asking for, because they acknowledge that some
15 interruptions would be navigable. They call it "non-de
16 minimis." It's not clear how you get there.

17 If you go between the low-water marks,
18 there's only a part of the way that you could actually
19 bring a boat up, but, yet, it's established that the
20 State owns the entire riverbeds between low-water mark
21 to low-water mark.

22 After traversing the Missouri and the very
23 falls at issue in this case, Meriwether Lewis described
24 that he didn't think the world could furnish a finer
25 example of a navigable river through a mountainous

1 country than the Missouri. That assessment made by the
2 President's own agent, charged with assessing the
3 suitability of the Missouri for commerce, was consistent
4 with more than 140 years of this precedent --

5 JUSTICE KENNEDY: Did he write that during
6 his 30-day -- 32-day portage?

7 (Laughter.)

8 MR. GARRE: Your Honor, it was an 11-day
9 portage. At the time of statehood, it was a 1-day
10 portage. I think what's significant is he wrote it
11 after that portage. And yet, he recognized there was
12 not a finer example of a navigable river through
13 mountainous country. That assessment was consistent
14 with this Court's precedents for more than 140 years.
15 It's consistent with the actual use of the Missouri as a
16 continuous highway of commerce along the very stretch at
17 issue here.

18 We don't believe that PPL or the United
19 States has provided a legal reason for this Court to
20 overturn the judgment of the Montana Supreme Court that
21 the Missouri or the other rivers at issue in this case
22 are navigable.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Clement, you have 4 minutes remaining.

25 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

1 ON BEHALF OF THE PETITIONER

2 MR. CLEMENT: Thank you, Mr. Chief Justice.

3 A few points in rebuttal: First, it's --

4 JUSTICE SOTOMAYOR: Can you point to some
5 portages that are de minimis? Point me -- I don't care
6 where they are in the United States. Give me a list of
7 some that are de minimis.

8 MR. CLEMENT: I mean, I don't have any de
9 minimis portages for you. The portages he's talking
10 about, as far as I can tell, the 5-mile and the 8-mile,
11 are portages between rivers, and that has nothing to do
12 with whether the bypassed stretch of a river would be
13 nonnavigable because it's de minimis, because if you
14 portage between two rivers, you're not bypassing
15 anything.

16 Where I can talk about sort of portages
17 being de minimis, if you look at the special master's
18 report in the Utah case, there are a few places in the
19 Cataract Canyon where he talks about portages, and he
20 talks -- you know, in parts where they got boats to.
21 But the key point is, whenever the Court has talked
22 about portages in the context of navigability, they've
23 pointed to them as suggesting non-navigability, and in
24 certain circumstances said, well, you had to portage a
25 little bit, but that's not enough to make the stretch

1 nonnavigable.

2 JUSTICE KENNEDY: And what were your -- what
3 were your other four points you were going to give us?

4 MR. CLEMENT: Well, I was going to give you
5 a couple, Your Honor. I'd start with the deeds. You
6 know, the State wants to make something of the fact that
7 the deeds stop at the river. But that's true throughout
8 the State. And the question then becomes, what rule
9 governs the ownership of the riverbeds? And that's
10 where navigability versus non-navigability. So, the
11 deeds don't prove anything. That's just the way the
12 deeds were written.

13 The next point: Justice Kagan, you asked
14 about, you know, do the other owner -- other people on
15 the river have anything to fear. And the answer as far
16 as I heard was, well, these are different. They sit on
17 the riverbed. Well, two things, Your Honor: So do some
18 of the piers, and that's why people have filed amicus
19 briefs and are very concerned.

20 But more to the point, these things have not
21 moved under the riverbed recently. They've been sitting
22 there for a hundred years, and the State lent its
23 eminent domain power to us to help us build these dams.
24 These dams were critical to developing energy and
25 development in this area. And now a hundred years

1 later, they want compensation for the little river
2 strip under that.

3 JUSTICE SCALIA: Could the United States
4 demand compensation?

5 MR. CLEMENT: We pay the United States
6 compensation right now. The difference is the United
7 States isn't going in afterwards and trying to put a
8 hold-up to us and saying they want \$50 million for this.
9 We pay rents to FERC for some of these lands. Actually,
10 the State gets 37.5 percent of that back.

11 JUSTICE SCALIA: For the riverbed? For the
12 riverbed land --

13 MR. CLEMENT: Well, look at footnote 3 of
14 the Government's brief. I mean, again, the problem here
15 is if you want people to have deeds that really parse
16 out whether it's riverbed or upland, they don't because
17 everybody defaults to the bottom line -- the background
18 rule. The background rule is if it's a nonnavigable
19 river, the riparian owners, whether it be the United
20 States or private property owners, get to midway, or if
21 they own both on both sides, they get the whole thing.

22 I think on "de minimis," we talk about it a
23 lot, but I would point out that the one thing we know
24 that's not de minimis from Utah is 4.35 miles, because
25 that's what the Court analyzes separately in the portion

1 of Cataract Canyon.

2 Every stretch at issue here, every dam at
3 issue here, is more than 4.35 miles. Fully five of the
4 dams are on the 17-mile Great Falls stretch, which they
5 agree is impassable. The other five are reservoir dams
6 that create reservoirs that extend over 4.35 miles.

7 So, there's nothing de minimis in the best
8 evidence that is the \$50 million in compensation. I
9 think the \$50 million in back rent also shows that
10 although this is a dispute between Montana and the
11 United States, my client is caught in the middle of it,
12 and they're obviously concerned about it, too.

13 I want to talk about what's disputed and
14 what's undisputed. What is undisputed is the 17 miles
15 is impassable. That's enough, as I say, to give us
16 judgment as a matter of law for the five dams on that
17 stretch. What is hotly disputed, despite my friend's
18 representation, is whether or not there was through
19 commerce through this bypass route. He suggests it's
20 undisputed that gold went from Helena down to Fort
21 Benton down to St. Louis. And that, of course, is not
22 disputed, but it went on roads. It didn't go on the
23 upper -- on the upper Missouri.

24 And if you want to know who's got the better
25 of this argument, I ask you to think about this

1 question: The United States Army built a 600-mile
2 overland road from Fort Benton, the traditional head of
3 navigation on the Missouri, to Walla Walla, Washington.
4 Now, if the State is right and the upper Missouri and
5 the Clark Fork were navigable, all they had to do is --
6 is have a 60-mile road to connect the two. They were
7 never navigable.

8 Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 12:09 p.m., the case in the
13 above-entitled matter was submitted.)

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