

10-218 PPL MONTANA, LLC V. MONTANA

DECISION BELOW: 229 P.3d 421

LOWER COURT CASE NUMBER: DA 08-0506

QUESTION PRESENTED:

The Montana Supreme Court held on a summary judgment record that the State of Montana owns the riverbeds under more than 500 miles of river, including the riverbeds under multiple hydropower facilities on the upper Missouri, Madison, and Clark Fork rivers. This came as quite a shock, because for more than a century the riverbeds beneath those facilities have been treated as owned by private parties or the federal government. In reaching this result, the lower court concluded that the rivers were navigable when Montana joined the Union in 1889 and, therefore, that Montana held title to the riverbeds. The court upheld summary judgment for the State, notwithstanding a prior federal court decree, as well as 500 pages of expert testimony and exhibits disputing Montana's claim to title, establishing that the relevant sections of the rivers were not navigable at statehood. The consequences are draconian: The court below held that the State is entitled to collect tens of millions in retroactive back rent and millions more in future payments from the owners of the hydropower facilities.

The questions presented are:

1. Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

2. When a hydropower project is licensed under the Federal Power Act, a process that includes an economic analysis of the project and solicits state input, and the hydropower producer has obtained easements from private parties and paid substantial rents to the federal government on the understanding that the riverbeds under the hydropower facilities are owned by those private parties or the federal government, is a State's attempt retroactively to claim title and impose tens of millions of back and future rent obligations for use of the riverbeds preempted?

LIMITED TO QUESTION 1 PRESENTED BY THE PETITION.

CERT. GRANTED 6/20/2011