No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

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

BRIEF FOR RESPONDENT

STEVE BULLOCK
Attorney General
ANTHONY JOHNSTONE
Special Assistant Attorney General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders Street
Helena, MT 59620-1401
(406) 444-2026

GREGORY G. GARRE
Counsel of Record
LORI ALVINO MCGILL
KATYA S. GEORGIEVA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Respondent

(Additional Counsel Listed On Inside Cover)

CANDACE F. WEST
Chief Legal Counsel
MONTANA DEPARTMENT OF
NATURAL RESOURCES
AND CONSERVATION
1625 Eleventh Avenue
Helena, MT 59620-1601
(406) 444-6702

QUESTION PRESENTED

This Court granted certiorari (131 S. Ct. 3019 (2011) (Mem.)) to decide the first question presented by the petition for a writ of certiorari (Pet. i-ii), which asks:

> 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?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

ADDENDUM

TABLE OF AUTHORITIES

Pages(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL AND STATE STATUTORY AND REGULATORY MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

Under the constitutionally grounded equal footing doctrine, all States enter the Union with title to the lands underlying the navigable waters within their borders and "the right to control and regulate navigable streams" on that land. *Coyle v. Smith*, 221 U.S. 559, 573 (1911). This case concerns the State of Montana's title to lands underlying three rivers—the Missouri, Clark Fork, and Madison. Those rivers not only are home to some of the most prized trout fishing in the world, but have served as public highways of commerce since long before frontier times. The importance of the Missouri runs even deeper. The Missouri has long been regarded as one of America's great rivers and is the object of one of the nation's most important explorations—the Lewis and Clark Expedition. From territorial times to this day, the Great Falls of the Missouri have appeared on the official seal of Montana. In a real sense, the question in this case is whether the Great Falls belong to the people of Montana in public trust, or instead to the federal government or petitioner PPL Montana (PPL).

After carefully considering this Court's navigability precedents dating back nearly two centuries, the Montana state courts reached a judgment that would surprise few Montanans: The rivers at issue are navigable, and Montana therefore took title to the riverbeds at statehood, in public trust for Montanans. Indeed, PPL itself *admitted* at the outset of this litigation that the rivers at issue were navigable. *Infra* at 15. PPL now asks this Court to overturn that judgment. PPL's position is grounded on a novel interpretation of this Court's decisions and a selective account of history. If adopted, PPL's position would

upset centuries-old expectations and call into question the navigability of rivers not just in Montana but throughout the United States. That is particularly true for the American West, where rivers remain important highways of commerce, provide vital habitats for fish and wildlife, are generally open to the public for recreational pursuits such as fishing, and have a near-mystical quality in parts like Montana. *Cf. New York v. New Jersey*, 283 U.S. 336, 342 (1931) ("A river is more than an amenity; it is a treasure.") (Holmes, J.).

The "constitutional test" for navigability (Pet. i) articulated by the Montana Supreme Court is grounded on this Court's precedents going back to *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). PPL itself acknowledges that, under "long-settled law," the touchstone of navigability-for-title is whether the river was used, or was susceptible for use, as a highway of commerce at statehood. PPL Br. 27 (citing *The Daniel Ball*, 77 U.S. at 563). As to the Missouri and Clark Fork, PPL argues that this test cannot be met, because the Great Falls (Missouri) and Thompson Falls (Clark Fork) themselves were impassable by boat. But, as the Montana Supreme Court recognized (Pet. App. 54-55), this Court long ago held that natural interruptions do not defeat navigability where the obstacles were portaged so that the river continued to serve as a channel of commerce. Indeed, since at least the Northwest Ordinance of 1787, such "carrying places" have been recognized as facilitating—not defeating—the highways of commerce along America's navigable rivers. Here, it is undeniable that the falls in question were portaged so that the rivers served as continuous highways of commerce before statehood.

As to the Madison, PPL's primary argument is that the Montana Supreme Court erred in considering *post*-statehood use in determining whether the navigability test was met. All agree that, compared to the Missouri and Clark Fork, there is relatively little evidence of the pre-statehood use of the Madison. In that respect, the Madison presents a tougher historical case. But *The Daniel Ball* itself holds that navigability may be based on *susceptibility* for use as a highway of commerce. 77 U.S. at 563. And this Court's precedents support the commonsense conclusion that—while the navigability-for-title test looks to navigability at the time of statehood—post-statehood evidence of navigability is relevant, and thus admissible, insofar as it helps to establish susceptibility of navigation *at statehood.* That is the only basis for which the Montana Supreme Court relied upon evidence of post-statehood use. Pet. App. 56. And this Court's precedents also repudiate PPL's other argument concerning the Madison that log floats and commercial drift boat fishing on the river are not relevant in gauging navigability as of statehood.

PPL goes to extraordinary lengths to attack the Montana Supreme Court's decision. It calls into question the good faith and intentions of the Montana courts, PPL Br. 25, 30, 33, and decries the Montana Supreme Court's decision as a "judicial taking[]," *id.* at 25. But the only potential "taking" in this case is the one that PPL is attempting to accomplish by asking this Court to substantially narrow the centuries-old concept of navigability and thereby deprive Montana—and the people of Montana—of their long-held title to the riverbeds at issue. That effort should be rejected.

STATEMENT OF THE CASE

More than two centuries ago, Captain Meriwether Lewis stood on the banks of the Missouri in the territory that would become Montana. Taken by the sight before him, Lewis observed that he did not believe "that the world can furnish an example of a river running to the extent which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so navigable as they are." JA 162. Within a few years of Lewis and Clark, fur traders established trade routes along Montana's rivers, to both the East and West. Decades later, with the advent of the gold and copper rushes, Montana's population surged and the territory's fledgling economy began to take off. But transportation remained a challenge. The railroad did not reach Montana until the late 19th century, and at the time Montana joined the Union in 1889, the railroad was still in its infancy. *See id.* at 112-13, 215, 236. Cutting through Montana's vast expanse, Montana's network of navigable waterways fueled exploration and the territory's economic growth. That was particularly true for the Missouri—one of America's signature waterways—which, among other things, was used to transport gold mined from the Helena area back East. Ultimately, the history of the Missouri and other rivers at issue in this case well illustrates the indispensable role that navigable waters played in the exploration, economy, and everyday life of early America.

A. Montana's Entry Into The Union

The State of Montana—like all States—holds title to the lands beneath all navigable waters within its borders for the benefit of its citizens. The sovereign's responsibility to hold such lands in trust for its

citizenry can be traced as far back as Justinian in ancient Rome. *See Institutes of Justinian*, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841) ("Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common."). Under English common law dating back to the time of the Magna Carta, the Crown held title to all lands underlying navigable waters "for the benefit of the whole people." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987) (citing *Shively v. Bowlby*, 152 U.S. 1, 11-14 (1894)); *see* Michael Evans & R. Ian Jack, *Sources of English Legal and Constitutional History* 53 (1984).

When the original thirteen Colonies formed the Union, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. *Shively*, 152 U.S. at 15-16. "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845). Because the "right to [the rivers] passes with a transfer of sovereignty, *id.* at 216, new States entered the Union "on an 'equal footing' with the original 13 Colonies and succeed[ed] to the United States' title to the beds of navigable waters within their boundaries," *United States v. Alaska*, 521 U.S. 1, 5 (1997). Montana entered the Union on the same footing in 1889 when it became the 41st State.

From the time of Montana's statehood, it has been generally recognized that the riverbeds at issue belong to the people of Montana in public trust, and not private riparian owners. At or around the time of statehood, the General Land Office (the predecessor agency to the Bureau of Land Management within the

Department of the Interior), "meandered" most of the riverbanks along the rivers at issue to ensure that any later conveyances to private parties ended at the high-water mark—and thus did not purport to convey title to the lands underlying navigable waters. *See* Trial Exh. S-48 at 13 (Jenkins Report). The maps created by the Surveyors General of the United States plainly show that the federal surveyors "returned as navigable" the rivers at issue and therefore excluded the riverbeds from private conveyances. *See, e.g.*, Exhs. S-40, S-41, S-42, S-42B (Thompson Falls); Exh. S-33 (Madison); *see also* Exh. S-44 (Missouri River Commission map). Although such meandering does not conclusively establish navigability, it is precisely the sort of thing on which "settled expectations" are formed "where land titles are concerned." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979).[1]

Likewise, consistent with the understanding that the State owns the riverbeds, the State has long managed the rivers and attendant riverbeds under actual and apparent authority of title. Thus, for example, Montana's Board of Land Commissioners, which manages school trust land across Montana, has

---

[1] Under instructions issued by the Commissioner of the General Land Office in 1881, navigable rivers were to be meandered by federal surveyors on *both* banks, thereby clearly delineating riparian property boundaries, while rivers considered non-navigable were to be meandered on only one bank. *See* U.S. Gen. Land Office, *Instructions of the Commissioner of the General Land Office to the Surveyors General of the United States Relative to the Survey of the Public Lands and Private Land Claims* 33-35 (May 3, 1881). Montana law has long recognized such meandering in determining title to riverbeds. *See* Mont. Code Ann. § 85-1-112.

issued (at least) 97 easements on the Missouri, Clark Fork, and Madison, an additional 85 mineral leases on the Missouri, and eight annual licenses and other leases on the Clark Fork and the Missouri to such private parties.[2] Likewise, in practice, private parties seeking to construct a power line, pipeline, riprap, kayak run, access bridge, or other commercial fixture along the rivers at issue in this case generally have sought permission from the State before doing so.

Not long after statehood, the Montana Supreme Court recognized the navigability of both the Missouri and Clark Fork, describing the latter as "'a matter of common knowledge.'" Opp. App. 31 (citation omitted), 35. To the State's knowledge, until this litigation, no private riparian owner has ever claimed title to the riverbeds at issue as against the State. And, as the Montana trial court found (consistent with the way in which the federal government meandered the rivers at issue long ago), the deeds held by PPL and other private owners show on their face that any private ownership interests end at the riverbank. Opp. App. 59; *see id.* at 37-38; Resp. Mt. S. Ct. Br. 28-29. Nor has the United States ever asserted ownership of the riverbeds at issue—an assertion that would be undermined by the way the federal government's own surveyors meandered the rivers at statehood.[3]

---

[2] Montana Trust Land Management System (TMLA NET) Query, Sept. 27, 2011 (record and ownership repository), http://dnrc.mt.gov/trust/default.asp; *see* Resp. Mont. S. Ct. Br. 13-15 (discussing State's management of trust lands).

[3] In a footnote that refers to *flood* lands, the United States (at 3 n.3) appears to suggest that PPL pays rent to the federal government for some portion of the riverbeds at issue. That is (continued…)

B. The Rivers At Issue

The Missouri, Clark Fork, and Madison Rivers span hundreds of miles of the northwest, central, and southern parts of the State. *See* Add. 1a (map). While each has its own unique history and geography, the rivers—and especially the Missouri—are among the crown jewels of Montana's system of waterways.

Missouri River. The Missouri is the longest river in North America (spanning some 2400 miles) and before the railroads took root provided one of the most important thoroughfares to the West for settlers and pioneers. *See, e.g.*, Francis Parkman, *The Oregon Trail, Sketches of Prairie and Rocky-Mountain Life* (1883); JA 311. It has been cited frequently in court opinions, legislative debates, and historic works as the exemplar of a navigable river.[4] The Missouri has its headwaters at Three Forks, Montana—the junction of the Gallatin, Madison, and Jefferson Rivers—and flows northward through Helena, Great Falls, and Fort Benton, Montana, before turning east and entering

---

(continued)
incorrect. PPL advanced this argument for the first time in its Supplemental Brief in Support of Certiorari (at 2), citing only a letter that PPL itself submitted to FERC just ten days before that Supplemental Brief was filed (*id.* at App. 4-9). In any event, the State's claim for compensation meticulously excluded federally-owned flooded uplands (*see* Ex. S-48 at 22; Sept. 4, 2007 Order ¶¶ 20-29 (Dkt. # 253)), and was based solely on riverbeds to which the United States has never claimed title.

[4] *See, e.g., Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907); 59 Cong. Rec. 7730 (1920).

North Dakota. After passing through six more States, it eventually flows into the Mississippi River.

In 1803, aware of the Missouri's reputation as one of the continent's great waterways, President Jefferson commissioned an expedition whose "object" was "to explore the Missouri River, and such principal streams of it … [that] may offer the most direct and practicable water-communication across the continent." JA 304-05. Lewis and Clark left St. Charles, Missouri, on May 14, 1804, heading up the Missouri for what would become one of America's greatest explorations. They arrived in what today is Montana approximately one year later, having ascended the river in pirogues and bateaux.

On June 13, 1805, Lewis set out ahead of the group to scout the upcoming route. By midday, he had come upon a series of five waterfalls, the largest of which—known as Great Falls—Lewis called "the grandest site I ever beheld." 4 *The Journals of the Lewis & Clark Expedition*, 284 (Gary E. Moulton ed., Univ. of Neb. Press 1987). Within a day, Lewis managed to chart out a roughly 17-mile portage around the falls—a distance that must be viewed in light of the 20 or more miles that Lewis and his team regularly traveled in a day during the course of the expedition. The portage began on June 22. JA 405. Although the land was unfamiliar, the load heavy (JA 407-08), and some members of the party—including Sacagawea—ill (JA 412), the expedition arrived at upper portage camp, just south of the present day city of Great Falls, on July 2—11 days later. App. 2a (map); JA 421. On July 15, the party put

their boats back into water to proceed up the Missouri to its very mouth at Three Forks. JA 433-34.[5]

The Great Falls consists of five different falls along almost eight river miles from the first cascade to the last, with various rapids and calmer waters mixed in between. The largest cascade—Great Falls—is the first in the series moving upriver from Fort Benton. Crooked Falls lies about 4.3 miles upriver from that. Beautiful Falls (or Rainbow Falls) lies about a half mile up river. Colter Falls, which is now fully submerged, lies about one mile upriver. And Black Eagle Falls, the last of the cascades, lies about two miles upriver. *See* JA 687; Add. 2a (map). The 17 miles that has been used in this case to refer to the Great Falls is generally demarked by the confluence with Belt (Portage) Creek, several miles below Great Falls, and Sun (Medicine) River, several miles above Black Eagle Falls. JA 296; Add. 2a. It is undisputed that the falls themselves were not passable by boat at statehood.

Although Lewis and Clark's portage of the Great Falls is certainly the most historic, it was by no means the last. In particular, during the 1860s, amidst the Montana gold rush, large numbers of miners regularly portaged the Great Falls as they traveled the Missouri between Fort Benton and Three Forks. JA 313. A line

---

[5] PPL describes (at 8, 40-41) the portage as taking 33 days. That covers the period from when Lewis first discovered the Great Falls to when the expedition put boats back into water above the falls. The expedition "set out to pass the portage" nine days after Lewis discovered the falls. JA 405. It took the expedition 11 days to travel the 17 miles from the lower to upper portage camps. And the expedition spent the remaining 13 days at upper portage camp preparing to continue the journey upriver. *See* JA 401-434.

of mackinaw boats regularly carried passengers from north of Helena to Fort Benton, making a short portage around the Great Falls, and arriving at Fort Benton in just three days total. From there, passengers embarked onto steamboats and headed East down the Missouri as far as St. Louis. *See* JA 312-13 (citing Hubert Howe Bancroft, *History of Washington, Idaho, and Montana* 732 n.9 (1890)); Add. 3a-6a, 9a-16a (excerpts of federal government briefs in *Montana Power Co. v. Federal Power Comm'n*).[6]

The 260-mile stretch of the Missouri between Three Forks and Fort Benton—encompassing the seven dams that PPL today owns along the Missouri—served as a vital highway of commerce at and before statehood. There is historical evidence that the stretch was used by fur traders and miners to transport their goods, as well as evidence of the use of steamboats above and below the falls, and of log rafting. *See, e.g.*, JA 112, 169, 175-77, 181, 189, 307-08. As the evidence shows—and the Solicitor General of the United States has previously explained in detail to this Court—the Great Falls by no means marked the end of, or impeded, this highway of commerce. Rather, a relatively short portage around the falls allowed commerce to continue along this stretch of the river as part of a continuous highway of commerce. That highway was well-known, and well-traveled, before the railroads arrived in Montana. *See* JA 313 & n.24; Add. 4a-5a, 13a-15a.

---

[6] Although the United States attempts the distinguish *Montana Power Company* on legal grounds (U.S. Br. 26), the Solicitor General's factual description of the "actual use" of the same stretch of the Missouri at issue here is in no way tied to any particular legal argument concerning navigability. Add. 3a-7a.

Clark Fork River. The Clark Fork rises in the Silver Bow Mountains near Butte, Montana. From there, it flows northwest through Missoula where it intersects with the Blackfoot, continues through Thompson Falls, and eventually crosses into Idaho, where it empties into Lake Pend Oreille. The Clark Fork provided a remarkably uniform channel at statehood with few interruptions. The only significant obstruction was the Thompson Falls—which today is the site of one of PPL's dams. The falls occupied less than half a mile and caused a drop in elevation of four to six feet. Including its surrounding rapids, the falls span approximately 2.8 miles. Despite that obstacle, the Clark Fork was regularly navigated by traders and explorers along this stretch, and was used for numerous log drives, before statehood.

Shortly after Lewis and Clark passed through Montana on their way back East, David Thompson—a fur trader and explorer—canoed down the Clark Fork from the Flathead river all the way to Lake Pend Oreille, "portaging at Thompson Falls and Rock Island Rapids." JA 66, 234. Others similarly navigated the Clark Fork from Missoula (above Thompson Falls) down to Lake Pend Oreille. JA 101. During the early fur-trading era, the Kootenai "often traded on the Clark Fork" (referring to the stretch between the lower Flathead and Lake Pend Oreille, encompassing Thompson Falls). JA 105. Many decades later, during the 1860s and 1870s, local newspapers reported boat service along the Clark Fork from points above Thompson Falls to Lake Pend Oreille. JA 118, 131.

This stretch of the Clark Fork also served as a significant channel for log drives. Multiple reports of log floats on the Clark Fork appear in the 1880s, in

tandem with the need to move building materials for construction of the railroads. JA 213. Log drives originated on Ninemile Creek and the Flathead River—both above Thompson Falls—and the logs were driven down the Clark Fork all the way to Idaho. JA 240-41. In 1882, the *Missoulian* announced that logs "can be floated right to the locality down the Missoula and Pen d'Oreille rivers." JA 143. There are numerous additional accounts of log floating and small boat use from Lake Pend Oreille to places above Thompson Falls around the time of statehood and shortly thereafter. *See* JA 126, 129, 223, 234, 356-57.

Steamboat navigation brought heavier traffic to the Clark Fork below Thompson Falls. In the 1860s, during the Montana gold rush, several companies operated steamboats that took miners and others from Lake Pend Oreille to points near Thompson Falls and back, providing for "a complete and reliable line of steamers for a distance of 125 miles, from Pen d'Oreille [sic] landing to Thompson's river." JA 119; *see* JA 113, 116, 119-21, 125, 138-39, 141.

Madison River. The Madison River rises in Yellowstone National Park in Wyoming and flows northward into Montana for 140 miles before joining the Gallatin and Jefferson Rivers at Three Forks to form the Missouri River. When William Clark reached the Three Forks on July 25, 1805, he observed that the Jefferson, Madison, and Gallatin Rivers were "nearly of a Size" (*i.e.*, shared the same characteristics). JA 252. This comparison is significant because Lewis had previously described the Jefferson as an exemplar of a navigable river in "a mountainous country." JA 162. While it has been reported that the Madison was used by trappers and explorers in the 1800s (JA 218, 251),

the evidence of pre-statehood commerce along the river was sparse compared to that of the Missouri and the Clark Fork. The lack of additional historic use no doubt stems in part from the fact that low-land Indian Tribes, such as the Blackfeet, lacked permanent settlements and were notoriously hostile to outsiders—as Lewis himself learned the hard way. JA 189.[7]

The Madison's natural condition between April and July was viewed as ideal for log-driving—this being "the first river in the country that had not a dollar of expenditure before the drive was started." JA 155. Shortly after Montana's entry into the Union, however, several dams were built along the Madison—including the Hebgen and Madison dams owned by PPL—making log floats more difficult by *lowering* water levels during what were previously high-flow months and erecting artificial obstructions. JA 258-59. Nevertheless, not long after statehood, the Madison River Lumber Company floated logs down most of the middle portion of the Madison, despite the relatively lower July waters. JA 155.

The Madison is best known today for its prized fishing—something close to "religion" in Montana. Norman MacLean, *A River Runs Through It and Other Stories* 1 (1976). The river is classified as a "blue ribbon" trout stream and attracts avid fishermen from all around the world. JA 261. Commercial fishing drift

---

[7] On July 27, 1806, the Blackfeet attacked Lewis and his party, stealing some of their guns and attempting to escape with their horses. Lewis and other members of the party took chase to recover the stolen property, eventually apprehended the culprits, and recovered their horses. *See* 5 *Original Journals of the Lewis and Clark Expedition* (R. G. Thwaites ed., 1904) 219-28.

boats regularly navigate the Madison near the Ennis and Hebgen dams. JA 261-62; Opp. App. 63. These drift boats are the historical successors to the shallow-draft pirogues and bateaux used by Lewis and Clark and traders in early commerce. *See generally* Richard Fletcher, *Drift Boats and River Dories* 53-63 (Stackpole Books 2007). The Madison is today among the most heavily used rivers in Montana—just behind the Missouri—in angler days. Opp. App. 63.

C. This Litigation

1. In 2003, parents of Montana school children filed suit in federal district court in Montana against PPL and other privately owned utilities on behalf of Montana's public school children, seeking compensation for defendants' use of state-owned riverbeds at various hydroelectric generation facilities. The suit alleged that the riverbeds occupied by the dams comprised state-owned trust lands for which Montana was obliged under the state constitution to seek compensation in the form of rent for their use. The State intervened in the action and filed its own complaint seeking compensation from defendants for use of the riverbeds. The district court dismissed the action for lack of diversity jurisdiction. Pet. App. 3-5.

2. Before the federal action was dismissed, PPL and other hydroelectric utilities filed a declaratory judgment action against the State in Montana state court, seeking a declaration that Montanans are *not* entitled to compensation for the use of the riverbeds at issue. The State counterclaimed, claiming that it owned the riverbeds at issue and seeking a declaration that it was due compensation for their use. Opp. App. 2-3 (¶¶1-2). PPL admitted that its dams were on "navigable river[s]." *E.g.*, Pet. App. 5-8, 17-20; Opp.

App. 17-20 (¶¶ 16, 17-24, 26-27). Instead of contesting navigability, PPL argued that the State's claims for compensation were preempted by the Federal Power Act and the federal navigational servitude because the plants at issue were federally licensed. But after the district court rejected those preemption arguments, PPL did an about-face on navigability.[8]

The State moved for partial summary judgment on navigability. (PPL did not cross-move.) Both sides submitted affidavits attaching various materials. The State's evidence is summarized at Opp. App. 26-57. PPL's affidavits are reprinted at Pet. App. 190-213. The main point of PPL's lead expert (Emmons) was that the Missouri and Clark Fork were not navigable because it was "impossible" to take a boat down the Great Falls or Thompson Falls *themselves*. *Id.* at 197; *see id.* at 197-201, 203. PPL's other expert (Schumm) focused on the Madison. *Id.* at 205-15. Applying the test for navigability established by *The Daniel Ball*, 77 U.S. at 563—which holds that rivers are "navigable in fact when they are used, or are susceptible of being

---

[8] PPL later tried to disavow its admissions and claimed that it had never admitted navigability for *title* purposes. But neither the State's counterclaims nor PPL's answer contained any limitation in describing the rivers as "navigable." Moreover, the State pleaded that "Montana acquired title to the beds and banks of navigable waters in Montana at issue herein." Opp. App. 2 (¶ 3). PPL made similar concessions in its pleadings and briefs in the preceding federal case. *Id.* at 26-31. Courts have long recognized that such admissions ordinarily are binding. *See, e.g.*, *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988); *see also Peuse v. Malkuch*, 911 P.2d 1153, 1157 (Mont. 1996). And the Montana district court appropriately found that these admissions were binding on PPL here. Pet. App. 139-43.

used, in their ordinary condition, as highways for commerce"—the district court granted summary judgment for the State. Pet. App. 135, 143.

The court rejected PPL's position—which was the crux of its argument concerning the Missouri—that "the Great Falls clearly prevent navigability" because the *falls themselves* are not susceptible to boat traffic. *Id.* at 138. As the court explained, this Court has long found that natural obstacles "requiring portage" do not defeat navigability when, as the evidence showed here, "'the natural navigation of the river is such that it affords a channel for useful commerce.'" *Id.* (quoting *The Montello*, 87 U.S. (20 Wall.) 430, 443 (1874)). The court explained that the same analysis compelled a finding that the Clark Fork was navigable, despite Thompson Falls, given the evidence that the river was used as a "channel of commerce." *Id.* at 142. The court also held that PPL was bound by its admissions that these rivers were navigable. *Id.* at 139, 142.

As for the Madison, the court recognized that, although there is comparatively "little historical documentation" of its use, the available evidence—which includes reports of use "'by explorers, trappers, miners, farmers, and loggers'" as well as a log float in 1913—established navigability. *Id.* at 143. The court also observed that "[t]oday, the Madison River experiences considerable recreational use," and found that, "[a]s with the Missouri and Clark Fork," PPL was "bound by its admissions" on navigability. *Id.*[9]

---

[9] The Montana summary-judgment rule requires that a party present any "opposing affidavits" before the "day of hearing." Mont. R. Civ. P. 56(c). Two months *after* the district court's ruling

(continued…)

The district court subsequently held a trial on the outstanding issues in the case and ultimately entered judgment requiring PPL to compensate the people of the State of Montana for its use of their riverbeds.

3. The Montana Supreme Court affirmed the district court's navigability ruling. The Court explained that its "independent review of the case law in this area" confirmed that the district court's "understanding of the navigability for title test was correct," including as to the two "crucial aspects" of the district court's ruling: the significance of portages (bearing on the navigability of the Missouri and Clark Fork) and use of post-statehood evidence (bearing on the navigability of the Madison). *Id.* at 53-54.

Relying on *The Montello*, the court held that portages do not destroy navigability (*id.)* or "require a piecemeal classification" of the river (*id.* at 58). The court explained that this Court had long recognized that most of the nation's rivers "'originally present[ed] serious obstructions to an uninterrupted navigation,'" but these "'natural barriers'" did not destroy navigability where the river still "'afford[ed] a channel

---

(continued)
on navigability, PPL purported to make an "offer of proof regarding navigability," comprising hundreds of pages of *additional* reports prepared by its paid experts. JA 38. The district court heard that *proffer* but did not accept these reports as part of the summary judgment record—and could not have under Montana Rule 56(c). PPL thus did not put these documents in the appendix before the Montana Supreme Court or refer to them in that court. PPL nevertheless included the late-filed Emmons report in the appendix to its certiorari petition (at 216-312) and continues to rely on both reports in its merits brief. *See, e.g.*, PPL Br. 14, 16, 17, 18. *Cf.* Br. in Opp. 11 n.1.

for useful commerce.'" *Id.* at 54a (quoting *The Montello*, 87 U.S. at 442-43). Applying that settled principle, the court held 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." *Id.* at 56.

As for the post-statehood usage of the Madison, the court explained that, under this Court's decisions in *The Montello* and *United States v. Utah*, 283 U.S. 64 (1931), a river is navigable if "it was 'susceptible' of providing a channel for commerce," even if there is little evidence of "'actual use' at or before the time of statehood." Pet. App. 54. Applying that principle, the court held that, "[w]hile the historical usage of the Madison was not well-established, the evidence of a log float on its middle portion in the 19th century, combined with its present-day usage, demonstrates that this river was susceptible of providing a channel for commerce at the time of statehood." *Id.* at 56.

The court also carefully considered PPL's more particularized, evidence-specific objections to summary judgment. *See id.* at 56-62. Although PPL has suggested that the Montana Supreme Court gave short shrift to the navigability issue, the court's treatment of that issue was entirely consistent with the space devoted to this issue in the parties' briefs—in a case in which PPL presented several issues on appeal.[10]

---

[10] Because it agreed with the district court's conclusion that the State was entitled to judgment under the navigability-for-title test, the Montana Supreme Court did not need to reach PPL's direct admissions of navigability. Pet. App. 62.

SUMMARY OF ARGUMENT

The judgment reached by the Montana Supreme Court in this case would have seemed natural to Lewis and Clark and the many pioneers who followed in their wake and helped settle the State. PPL's sharp-edged attack on the reasoning and even motives of the Montana Supreme Court is unfounded and out of step with this Court's precedents. The judgment of the Montana Supreme Court should be affirmed.

I. Montana's interest in the riverbeds at issue in this case implicates a matter of core federalism. Under the equal footing doctrine, title to the lands beneath navigable waters is conveyed to the States upon their admission into the Union by the Constitution itself. That conveyance is consistent with the ancient public trust doctrine recognizing that the lands beneath navigable waters are held in public trust for all to use as common highways of commerce—a principle embodied in American law since at least as far back as the Northwest Ordinance of 1787. This Court has the final say over whether riverbeds are part of a navigable waterway, and thus conveyed to the States under the equal footing doctrine. But in reviewing a state court's judgment that rivers are navigable, there is no basis for the Court to adopt the extraordinary "rule of skepticism" proposed by PPL. Instead, the Court should approach navigability issues with the same care and respect it reserves for other matters bearing on an essential attribute of state sovereignty.

II. The Montana Supreme Court properly articulated the "constitutional test" (Pet. i) for navigability in determining whether Montana took title at statehood to the riverbeds at issue. Indeed, the test framed by the Montana Supreme Court is faithfully

grounded on this Court's navigability decisions going back to *The Daniel Ball*, which look to whether the river—at the time of statehood—was used, or susceptible of being used, as a public highway for commerce. PPL itself acknowledges (at 27) that *The Daniel Ball* supplies the proper constitutional test. In arguing that the Montana Supreme Court did not abide by that test, PPL really is asking this Court fundamentally to *change* the test. The test that PPL proposes is at odds not only with more than a century of this Court's jurisprudence, but with the concept of navigability—and the role of rivers in American life—that would have been familiar to the Framers at the time the Constitution was adopted.

As to the Missouri and Clark Fork, PPL's overriding complaint is that the Montana Supreme Court did not carve out the Great Falls and Thompson Falls from the surrounding waters and hold that the riverbeds underlying the falls are non-navigable because the *falls themselves* were not passable by boat. But since as far back as *The Montello*, this Court—relying on *The Daniel Ball*—has held that "obstructions" that preclude "unbroken navigation" do *not* defeat navigability, where the obstructions were portaged so that the rivers continued to serve as public highways of commerce. Here, there is undeniable evidence that the Great Falls and Thompson Falls were portaged so that the rivers continued to serve as public highways for commerce at the time of statehood. For example, in the 1860s, during the Montana gold rush, gold was transported down the Missouri from Helena to Fort Benton—and then back East—with the aid of a portage around the Great Falls. Although the falls prevented "unbroken navigation," they did not

stop the rivers from serving as highways of commerce—and thus they do not defeat navigability.

Relying on *United States v. Utah*, 283 U.S. 64 (1931), PPL argues that courts must carve out any non-"*de minimis*" or "negligible" interruption as its own segment and analyze that segment separately for navigability-for-title purposes. But *Utah* does not support PPL's segmentation rule. Unlike the falls at issue in this case (and the interruptions in *The Montello*), the canyon involved in *Utah* was *not* fully portaged, so the highway of commerce came to a dead end at the canyon. Nor does PPL's segmentation rule have much to commend it. PPL does not define what interruptions are "*de minimis*" or "negligible," and its segmentation approach is a recipe for uncertainty and invites litigation by riparian owners seeking to isolate and break off purportedly "non-navigable" bits and pieces. As *The Montello* teaches, what matters is not whether a particular interruption is one mile, 4.35 miles, or 20 miles, but whether the attendant stretch of the river served as a continuous highway of commerce, notwithstanding the interruption. That test is not only consistent with this Court's precedent, it is consistent with the history and geography of North America.

As to the Madison, PPL takes aim at the Montana Supreme Court's consideration of post-statehood evidence of use as relevant to the river's navigability at statehood. But since at least *The Daniel Ball* it has been settled that navigability may be determined not only on *actual* use as a highway for commerce, but *susceptibility* for use as such. The Montana Supreme Court simply recognized—as this Court itself has—that post-statehood evidence may be "relevant upon the issue of the susceptibility of the rivers" when it

shows that the rivers were used as highways of commerce *at statehood*. *Utah*, 283 U.S. at 82. Nor is there any merit to PPL's objection about the "*kind* of commerce that counts" (PPL Br. 49 (emphasis added)) in demonstrating navigability. Log floating was one of the classic commercial uses of rivers in the 19th century, and there is no reason to disregard commercial recreational uses—like drift boat fishing—where the boats used by present-day river-goers are comparable to the boats used by those plying and trading on the waters before statehood.

III. Because this Court granted certiorari solely to address whether the Montana Supreme Court articulated the proper "constitutional test" for navigability (Pet. i), there is no reason for the Court to entertain any record-specific objections to the grant of summary judgment. Nor is there any reason to turn this state court case into a reprisal of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), on when evidence is sufficient to create a material issue of disputed fact. In any event, contrary to PPL's objections, there is nothing inherently problematic—or off limits—about granting summary judgment on navigability issues. Courts and special masters frequently make summary judgment determinations on navigability. PPL's problem is not that the Montana courts improperly applied the standard for summary judgment. Its problem is that it litigated this case based on a mistaken understanding of the legal test for navigability. Thus, for example, PPL did not submit *any* evidence rebutting the fact that the Great Falls and Thompson Falls were portaged so that the rivers served as continuous highways of commerce. Properly

viewed, the summary judgment record supports the judgment of the Montana Supreme Court.

ARGUMENT

I. THE QUESTION PRESENTED RAISES A CORE ISSUE OF FEDERALISM

Montana's title to the riverbeds at issue in this case "uniquely implicate[s]" its sovereign interests. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1997). Indeed, this Court has long recognized that state ownership of "lands underlying navigable waters" is "an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). Under the equal footing doctrine, the States' title to such lands is conferred "by the Constitution itself." *Idaho*, 521 U.S. at 283 (citations and internal quotation marks omitted). State ownership over such lands thus represents a core component of federalism. *See Idaho v. United States*, 533 U.S. 262, 272 (2001); *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *see also* Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 837 & n.69 (1979) (explaining that constitutional equal footing doctrine rests upon considerations of "'dual federalism'").

The equal footing doctrine is grounded on the centuries-old "public trust doctrine," which dates back at least to Ancient Rome and was adopted by the English Crown in the Magna Carta. *See Idaho*, 521 U.S. at 284; *supra* at 4-5. The public trust doctrine protects "'the paramount right of public use of navigable waters,'" and recognizes that the sovereign

holds the submerged lands beneath those waters "'as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse.'" *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892) (citation omitted). This principle was vital to the nation at the time of the founding, and before, when navigable waterways served as the primary arteries for inland travel and commerce. And it is embodied in the Northwest Ordinance of 1787, which was later enacted into federal law by the First Congress, and declares that "[t]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free."[11]

Especially in view of the constitutional foundation for the State's title to lands underlying navigable waters and its responsibility to manage public trust lands, PPL's attack on the motives of the State in seeking to protect the title to the riverbeds at issue is misguided. This Court generally presumes the good faith of all government actors, including the States. There is no reason to proceed from any other understanding when a State asserts title to public trust lands. Yet PPL essentially asks this Court to adopt a constitutional presumption that state claims of navigability are "contriv[ed]," and apply "a particular

---

[11] An Ordinance for the Government of the Territory of the United States North West of the River Ohio (Northwest Ordinance of 1787) (adopted by the First Congress in 1 Stat. 50, 52 (1789)). Because the Northwest Ordinance existed at the time of the founding and was enacted into law by the First Congress, it is strong evidence of how the Framers viewed the public trust doctrine embodied in the equal footing doctrine.

skepticism toward navigability determinations made by a State's own courts in the State's favor." PPL Br. 29-30. That approach would turn upside down cardinal principles of respect for the States, and for the judgments of state courts, that are central to "Our Federalism" and embedded in the constitutional design. This Court of course has the final say over the validity of a State's assertion of title over riverbeds under the equal footing doctrine. But in resolving such claims, there is no basis for proceeding from any premise but that the State has acted in good faith—and on behalf of the public trust it seeks to protect.

Federalism comes into play in another way in this case. To the extent that the riverbeds at issue in this case are held to be *non*-navigable, the United States no doubt would claim title to the lion's share of those lands. *See United States v. Utah*, 283 U.S. 64, 75 (1931); U.S. Br. 1 ("Where the waters were non-navigable at the time of statehood, the United States has asserted its ownership of the riverbeds ...."). As it turns out, the United States government historically has been adverse to the States in cases where title to submerged lands is at issue. *See, e.g.*, *Alaska v. United States*, 545 U.S. 75, 100 (2005); *Utah*, 283 U.S. at 76; *United States v. Oregon*, 295 U.S. 1, 15 (1935); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922). Here, the United States takes the position that the rivers at issue are navigable for *federal* regulatory purposes, but not for state title purposes—a win-win for the federal government.

Ultimately, the constitutional test of navigability advanced by PPL, and fully backed by the United States, would have the effect of stripping the States of sovereignty over the lands underlying navigable waters by fundamentally narrowing the concept of

navigability long recognized by this Court. At a minimum, the Court ought to approach that far-reaching argument with the caution it typically exercises in matters impeding state sovereignty.

II. THE STATE COURT APPLIED THE PROPER CONSTITUTIONAL TEST FOR NAVIGABILITY IN DECIDING THIS CASE

PPL challenges the "constitutional test" (Pet. i) articulated by the Montana Supreme Court in deciding whether the rivers at issue are navigable. As the United States explained in its invitation brief, PPL's attacks on the Montana Supreme Court's decision are based largely on an "overstate[ment of] the Montana Supreme Court's rationale," U.S. Invitation Br. 10, and a misreading of this Court's precedents, *see id.* at 10-17. Fairly read, the navigability test articulated by the Montana Supreme Court is entirely consistent with this Court's precedents going back to *The Daniel Ball* (1870), and with the historical conception of navigability embodied in the Northwest Ordinance. In the end, it is the constitutional test proposed by PPL—not the one articulated by the Montana Supreme Court—that dramatically departs from settled law.

Indeed, although PPL acknowledges that the test for navigability is constitutionally grounded, it bases its position on a conception of the role of rivers—and trade and travel along rivers—that would have been foreign to the Framers. The Framers lived in a time when rivers provided the major arteries of commerce and travel in North America, and when rivers were regularly portaged so that trade and commerce could continue along the waters. The Framers would have appreciated that "there are but few of our fresh-water rivers which did not originally present serious

obstacles to an uninterrupted navigation." *The Montello*, 87 U.S. at 443. And they would not have conceived of a constitutional test for navigability under which portages around such obstacles would destroy navigability or require chopping up the nation's great rivers into navigable and non-navigable pieces based on the presence of such portageable interruptions.

This Court should reject PPL's invitation to adopt such an ahistorical conception of navigability now.

A. The Montana Supreme Court Applied This Court's Constitutional Test

The Montana Supreme Court based its conclusion that the State owns the riverbeds at issue on its determination that the evidence showed that the Missouri and Clark Fork "provided a channel for commerce at the time of statehood," and that the Madison was "susceptible of providing a channel for commerce at the time of statehood." Pet. App. 56. That analysis comes right out of this Court's decisions.

1. More than a century ago, in *The Daniel Ball*, this Court held that "rivers must be regarded as public navigable rivers in law" if they "are navigable in fact." 77 U.S. (10 Wall.) at 563. Rivers "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.*

Four years later, this Court elaborated on that basic test in *The Montello*, explaining that "the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." 87 U.S. at 441. "If this be so," the Court held, "the river is navigable in fact, although its

navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars." *Id.* The Court rejected "the rule laid down by the district judge as a test of navigability," under which a river is non-navigable insofar as "obstructions" requiring portage prevent "unbroken navigation." *Id.* at 442. As the Court explained, the Northwest Ordinance itself had recognized such "carrying-places," where "boats must be partially or wholly unloaded and their cargoes carried on land," and the district court's test "would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break." *Id.* at 442-43. "Indeed," the Court continued, "there are but few of our fresh-water rivers which did not originally present serious obstacles to an uninterrupted navigation." *Id.* at 443.

Applying *The Daniel Ball* test, the Court held that the Fox River is navigable, notwithstanding "several rapids and falls" in its natural state that impeded "unbroken navigation," even with the use of small "Durham boats," and thus required "a few portages." *Id.* at 439, 441, 442. The Court focused on the history of the Fox River as means of trade—*i.e.*, "highway of commerce"—in the region and further explained that its test was consistent with "the purpose of the [Northwest] Ordinance of 1787." *Id.* at 442, 444.[12]

---

[12] The United States asserts (at 25) that "the obstructions to navigation [in *The Montello*] were removed by artificial navigation (locks and canals)." That is true—but misleading—because the Court determined that the Fox River was navigable based on the natural state of the river "*before* the navigation of the river was improved." 87 U.S. at 443 (emphasis added).

2. PPL acknowledges (at 27) that *The Daniel Ball* states the proper test, but claims that the Montana Supreme Court improperly relied on *The Montello* and so-called non-title cases. According to PPL, because *The Montello* did not address "*title* navigability," it does not count. PPL Br. 42 (emphasis added). PPL's attempt to sink *The Montello* is understandable—it answers PPL's theory that portaged interruptions destroy navigability. But PPL's argument fails.

The Montello Court did not believe that it was doing anything but applying *The Daniel Ball* test to the Fox River stretch at issue. The very first sentence of the decision refers to *The Daniel Ball*; the following sentences set forth the constitutional test established by *The Daniel Ball*; and the decision then states that the Court's holding is based on the "[a]ppl[ication]" of that test. 87 U.S. at 439. Moreover, far from purporting to break new ground, the Court observed that "[t]he views that we have presented on this subject receive support from the courts of this country that have had occasion to discuss the question of what is a navigable stream." *Id.* at 443 & n.16 (citing cases).

In the 140 years since they were decided, this Court has consistently relied on *The Daniel Ball* and *The Montello* in stating the constitutional test for state title to submerged lands. The Court did just that in *Utah*—the "title" case on which PPL and the United States principally rely. There, the Court drew the "test for navigability"—as "frequently stated by this Court"—directly from *The Daniel Ball* and *The Montello*. *Utah*, 283 U.S. at 76; *see also, e.g.*, *Packer v. Bird*, 137 U.S. 661, 667 (1891) (relying on *The Daniel Ball*); *Oklahoma*, 258 U.S. at 586 (citing *The Daniel Ball* and *The Montello*); *Brewer-Elliott Oil & Gas Co. v. United*

States, 260 U.S. 77, 86 (1922) (invoking *The Montello*'s "channel for useful commerce" test); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (citing *The Montello*); *Oregon*, 295 U.S. at 15 (relying on *The Daniel Ball*).

This Court also has observed that courts should be mindful of "the purpose for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979). And the Court has adapted *The Daniel Ball* and *The Montello*'s test for navigability in three specific respects depending on the context in which it is invoked: (1) for title cases, the Court looks to the river's natural state, whereas for regulatory cases it considers the river's natural *and* improved condition; (2) for title cases, the Court determines navigability as of the time of statehood, whereas for regulatory cases it considers the river's condition today; and (3) for title cases, the Court asks whether the river was part of a useful channel for commerce, local or otherwise, whereas for regulatory cases it requires the river to be part of a channel of *interstate* commerce. *See* U.S. Br. 9-10. But these settled variations are in no way implicated by the decision under review: The Montana Supreme Court considered navigability at the time of statehood, looked to the rivers' natural state, and considered whether the rivers were part of a useful channel of commerce. Pet. App. 54-62.

It simply does not follow, as PPL suggests, that navigability cases from one context are categorically inapposite—and should be rigorously segregated from—cases that arise in other contexts. The inquiries overlap far more than they diverge. That is why this Court has relied on title and regulatory cases

interchangeably, except insofar as the settled distinctions above are implicated. Indeed, even PPL does not follow its own proposed dichotomy, because it relies affirmatively on regulatory cases, when it suits its own interests to do so. *See* PPL Br. 37, 49, 54 (relying on non-title cases); Pet. 21, 24. The dichotomy that PPL and the United States now try to create between *The Daniel Ball* and *The Montello* is completely artificial and out of step with precedent.

Principles of *stare decisis*, not to mention the need for "certainty and predictability" that PPL itself touts (at 33), counsel strongly against reconceiving more than a century of this Court's navigability precedents by retroactively holding that this Court's title and regulatory cases must be rigidly compartmentalized in a way that is completely at odds with this Court's own reliance on and use of those precedents.

B. The Montana Supreme Court Properly Considered The Stretches That Comprised The Relevant Channels Of Commerce

PPL argues (at 40) that the Montana Supreme Court erred by taking a "'whole river' approach" (at 40) to navigability, without considering navigability on a "segment-by-segment basis" (at 34). That argument is a straw man. The phrase "river as a whole" (or anything like it) does not appear in the Montana Supreme Court's decision. And the State has never argued, and the Montana courts did not hold, that a river that is navigable "as a whole" is necessarily navigable in fact along its entire length. At the certiorari stage, the United States recognized that PPL's "river as a whole" argument was based on an "overstat[ement of] the Montana Supreme Court's rationale" (U.S. Invitation Br. 10), though in its merits-

stage brief it chooses to perpetuate that mischaracterization itself (U.S. Br. 11-12, 18).

The Montana Supreme Court analyzed whether the rivers at issue were navigable by looking not to the rivers "as a whole," and not to natural interruptions in isolation (as PPL proposes), but by considering whether the stretches of the rivers that included the interruptions on which PPL focuses formed a continuous highway for commerce, notwithstanding the interruptions. Pet. App. 56. That analysis is perfectly consistent with this Court's precedents.

1. The crux of PPL's challenge to the navigability of the Missouri and Clark Fork is that the Montana Supreme Court should have focused exclusively on the natural interruptions—on which PPL's power plants generally sit—and should have disregarded the surrounding stretches of the rivers. *See, e.g.*, PPL Br. 40, 41, 59. As PPL sees it, because "boats … could not pass the falls area itself," the riverbeds at issue are not navigable—end of story. *Id.* at 12; *see id.* at 8, 15-16, 46; *see also* Pet. App. 198 (emphasizing that "there has *never* been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it") (Emmons); *id.* at 202 (same concerning Thompson Falls). The United States repeats this refrain. U.S. Br. 22 (emphasizing that the *falls themselves* were "impassable"). The Montana Supreme Court properly rejected that line of analysis.

PPL's argument is based almost entirely on *Utah*, which PPL says (at 36) "exemplifies the segment-by-segment approach." According to PPL, *Utah* holds that a court must analyze not just "the specific river sections at issue" but any "stretches *within* those sections that [have] distinct topographical

characteristics." PPL Br. 37 (emphasis added). Anything but a "*de minimis*" or "negligible" obstacle, PPL maintains (at 38), must be analyzed separately—and would almost certainly be deemed non-navigable in PPL's view, since an obstacle is by definition impassable. That approach finds no footing in *Utah*.

The *Utah* Court did not carve up the Colorado River like a Thanksgiving turkey, hacking away at every non-*de minimis* portion containing a natural obstacle and considering it in isolation as a new "stretch" with each change in the river's physical characteristics. Rather, the Court analyzed the head of navigation and concluded that, despite many obstructions in its natural state, the entire Colorado river was navigable, with the exception of a 36-mile stretch (Cataract Canyon), which had *never* been entirely portaged and had geological features making that portage infeasible. The Court therefore concluded that the Colorado ceased to be navigable at that point. *See* 283 U.S. at 77; *see also* PPL Supp. Br. App. 10-13.

Cataract Canyon is completely different than the Great Falls and Thompson Falls, and not just because—at 36 miles long—Cataract Canyon is more than *twice* as long as Lewis and Clark's 17-mile portage around the Great Falls. Unlike the Great Falls and Thompson Falls, Cataract Canyon was "not … fully portaged." U.S. Br. 23 n.13. *Parts* of the canyon were portaged. *See* PPL Supp. Br. App. 12. But there is no evidence that the canyon was portaged so that the waterway—above and below the canyon—served as a continuous highway of commerce, or even that the canyon was susceptible to such use. Instead, it was uncontested that the canyon, and its forbidding terrain (*see id.*), created a dead end. In this case, by contrast,

it is undeniable that trade and travel portaged around the falls in question and that the river stretches served as *continuous* public highways of commerce.

PPL also points to *Oklahoma v. Texas*, 258 U.S. 574 (1922), and argues (at 38) that instead of analyzing the entire 1360-mile Red River the Court considered "the much shorter segment at issue." But that "much shorter segment" was 539 miles long—*i.e.*, *the entire length* of the Red River in the State of Oklahoma. 258 U.S. at 582, 585 & n.4. Moreover, the Court considered that entire 539-mile stretch even though the dispute between Oklahoma and Texas concerned "the proceeds of oil and gas taken from 43 miles" of the riverbed. *Id.* at 579. *Oklahoma* thus provides no support for the kind of piecemeal segmentation approach that PPL advances here, which requires a court to break a river up into navigable and non-navigable segments for any interruption that is not *de minimis*.[13]

2. PPL does not define what counts as a "*de minimis*," or "negligible," interruption for purposes of its über-segmentation approach. But it latches on to *Utah*'s consideration of "the first 4.35 miles of the stretch of the Colorado river" at issue in that case and argues that that stretch is not *de minimis*. PPL Br. 38. As the United States explained in its invitation brief (at 11), "*Utah* does not stand for the legal proposition that any 4.35-mile interruption in navigability must be treated as a distinct segment." Indeed, the "4.35-mile

---

[13] The other cases relied upon by PPL for its novel segmentation regime are also inapposite. *See* U.S. Invitation Br. 12-13 (explaining that these cases "did not address how to treat non-navigable 'middle section[s] of an otherwise-navigable river'") (quoting Pet. 20) (alteration in original)).

segment" relied upon by PPL (at 38) is not an *interruption* at all. Rather, Utah argued (and this Court agreed) that those 4.35 river miles properly belonged with the navigable waters upstream (the Green and Grand Rivers, which came together to form the Colorado), not the Cataract Canyon stretch that everyone agreed was non-navigable. *See Utah*, 283 U.S. at 89; *see also* U.S. Invitation Br. 12.

Moreover, elsewhere in *Utah* the Court made clear that it did not view a distance of 4.35 miles as significant in the context of a river like the Colorado, calling the 4.35 miles a "short stretch." 283 U.S. at 89. Likewise, the *Utah* Court saw no problem with the special master's reference to one stretch of the Grand River as "*only* six miles in all." *Id.* at 85 (emphasis added). Characterizing a stretch of several miles as "short" might seem odd in the abstract, but it is not in the context of *a river*. *Cf. Nebraska v. Wyoming*, 325 U.S. 589, 596 (1945) (referring to "short stretch" of "40-odd miles" of a river). And in the same vein, to the extent that it has any constitutional relevance to the navigability inquiry here, the stretches at issue in this case are likewise properly regarded as "short."

But as cases like *The Montello* teach, what matters in gauging navigability is not whether an interruption is one mile, 4.35 miles, or 20 miles long. What matters is whether the attendant stretch of the river served as a continuous highway of commerce—notwithstanding the interruption. *Supra* at 28-30. If PPL's position had been law, then the Court's decision in *The Montello* would have simply focused on identifying the impassable segments of the Fox River, isolated those segments from the rest of the river, and declared them to be non-navigable. That, in essence, is what the

district court did in *The Montello*. *See* 87 U.S. at 442. But this Court rejected that approach and looked to whether the rivers served as continuous highways of commerce—despite the obstacles. *Id.* at 442-43.

This does not mean that interruptions cannot defeat navigability. They can—and do. The longer or more severe the interruption, the more difficult it will likely be to establish navigability. In *Utah*, for example, it was clear that the highway of commerce *stopped* at the 36-mile Cataract Canyon; no one argued that the canyon was portaged to connect a trade route along the river above and below the canyon. This case is just the opposite. As the Montana Supreme Court explained, on the Missouri the Great Falls was portaged so that trade flowed from Three Forks to Fort Benton. Pet. App. 61. And on the Clark Fork, Thompson Falls was portaged to establish a trade route from the confluence of the Flathead River (above the falls) to Lake Pend Oreille in Idaho. *Id.; see supra* at 9-12.

The focus on whether the pertinent stretches were used as (or are susceptible for use as) a highway of commerce establishes a workable and time-honored principle grounded on more than a century of case law. By contrast, PPL's hyper-segmentation rule is highly manipulable and seems designed primarily to aid hydroelectric generators whose plants generally sit on interruptions. PPL offers little guidance, other than its vague "*de minimis*" or "negligible part" exception, on what interruptions do *not* qualify for segmentation. PPL's test thus is a recipe for uncertainty in an area in which PPL itself (at 33) demands "predictability," and will require courts to go back and carve up waterways that have long been found navigable into "navigable" and "non-navigable" pieces. After all, "there are but

few of our fresh-water rivers which did not originally present serious obstacles to an uninterrupted navigation." *The Montello*, 87 U.S. at 443.

C. The Montana Supreme Court Properly Recognized That Portaging Does Not Automatically Defeat Navigability

In a variation on their segmentation argument, PPL and the United States argue that portaged interruptions on a river are not "themselves navigable for the … purpose of establishing title." PPL Br. 42; *see* U.S. Br. 23-27. In other words, according to PPL and the United States, any non-*de minimis* interruption requiring portage is non-navigable for title purposes. That position is inconsistent with the purposes of the public trust and equal footing doctrines as well as more than a hundred years of precedent.

1. As discussed, this Court has recognized since *The Montello* that falls, rapids, or other interruptions requiring portage do not destroy navigability—so long as the surrounding stretch of the river served as a useful channel for commerce. *Supra* at 28-30. And this Court has repeatedly reaffirmed—pointing to *The Daniel Ball* and *The Montello*—that "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921); *see id.* at 121-22. Indeed, in *Economy Light & Power Company*, the Court confirmed the navigability of a river stretch that included over 24 miles of nearly-consecutive interruptions, including "a 7-mile portage," and a land "transfer of over 11 miles." *Economy Light & Power Co. v. United States*, 256 F. 792, 795-96 (7th Cir. 1919); 256 U.S. at 124 (affirming); *see also St. Anthony Falls*

Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 359 (1897) (holding river stretch navigable "at all points" including waterfall and surrounding rapids).

Likewise, other federal and state courts—in both the title and regulatory contexts—have recognized that portageable obstacles do not destroy navigability, and settled expectations have formed based on this rule.[14] To take just one example, it has been settled for more than 50 years that the riverbeds underlying Niagara Falls, which of course required a portage, are owned by the State of New York—"even at the point of the falls." *Niagara Falls Power Co. v. Duryea*, 57 N.Y.S.2d 777, 784 (Sup. Ct. 1945); *see also In re State Reservation at Niagara*, 37 Hun. 537, 16 Abb. No. Cas. 395 (N.Y. Sup. Ct. 1885), *appeal dismissed*, 7 N.E. 916 (1886). Under PPL's rule, however, the riverbeds underlying the falls would have to be carved out and declared non-navigable for title purposes.

2. PPL tries to tackle *The Montello*'s rule that portaging does not defeat navigability in two different ways. First, it argues that *The Montello* "addressed *regulatory* navigability, not title navigability." PPL Br. 42. But that is beside the point because, as

---

[14] *See, e.g., Knott v. FERC*, 386 F.3d 368, 372-73 (1st Cir. 2004); *Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1433 (9th Cir. 1993); *Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992); *Montana Power Co. v. FPC*, 185 F.2d 491, 493-94 (D.C. Cir. 1950); *Pennsylvania Water & Power Co. v. FPC*, 123 F.2d 155, 163 (D.C. Cir. 1941); *Alaska v. United States*, 662 F. Supp. 455, 466-67 (D. Alaska 1987), *aff'd*, *Alaska v. Ahtha*, 891 F.2d 1401 (9th Cir. 1989); *see also* 27 William Mark McKinney & Burdett Alberto Rich, *Ruling Case Law*, Waters, § 218, at 1310 (1920); *see generally* John A. Humbach, *Public Rights in the Navigable Streams of New York*, 6 Pace Envtl. L. Rev. 461(1989).

discussed, this Court has for more than a century relied upon *The Montello* interchangeably with *The Daniel Ball* in describing the constitutional test for navigability—and even did so in *Utah*, the case that PPL itself holds out as the vanguard for "title navigability." *See supra* at 31-32. Second, PPL argues that *Utah* establishes that "portageable interruptions" *do* defeat navigability, pointing to the fact that the Court held that the Cataract Canyon stretch was not navigable. PPL Br. 42. As discussed, however, Cataract Canyon was not fully portaged and so commerce came to a dead end at the canyon. In that key respect, *Utah* is entirely different from *The Montello*—and this case. *Supra* at 34-35.

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) (*AEP*), cited by the United States, is not to the contrary. As the United States itself concedes (at 25), that case did not involve "any obstructions requiring a portage." Moreover, in the passage relied upon by the government, the Court simply noted differences between the title and regulatory inquiries that are not pertinent here—namely, the fact that the regulatory inquiry is not confined to the time of statehood or the rivers' natural state. *See* 311 U.S. at 407-08. But, as the Montana Supreme Court recognized (Pet. App. 56), the State's assertion of title to the Missouri and Clark Fork here is based on evidence of actual use of the rivers in their natural state and before statehood. *Supra* at 18-19.[15]

---

[15] The United States suggests (at 24-25) that this Court should draw a negative inference from Congress's definition of "navigable waters" in 16 U.S.C. § 796. This is a 180-degree change from the government's position before this Court in *Montana Power* (continued…)

3. As a fallback, PPL suggests (at 42) that "this Court's precedent at most might permit treating a portageable stretch of an otherwise navigable river as itself navigable for title purposes only if it qualified as a 'short interruption' or 'negligible part' within the meaning of *Utah*." *See* U.S. Br. 24. PPL takes this Court's language out of context and fails to account for the fact that "short" is a relative term when it comes to describing something like a river. *Supra* at 36. But in any event, that standard is unworkable for the same reasons that PPL's "*de minimis*" or "negligible part" exception to its segmentation rule is impracticable. *See supra* at 35-37. And once it is recognized (as this Court has held since *The Montello*) that portages do *not* defeat navigability where the river is used as a continuous highway of commerce, then there is no constitutional or principled basis for arbitrarily cutting off navigability at a particular mile marker.

PPL argues (at 42) that the 17-mile portage of the Great Falls was too long and "arduous" to qualify under this test. Early Americans, particularly those who helped settle the West, had a hardier conception of distances than the typical modern day city slicker.

(continued)
Company, where the Solicitor General told the Court that "this definition is *in accord with* established principles," and specifically invoked the holding in *The Montello*. Add. 8a (emphasis added). The United States was right then. Section 796 expands the navigability inquiry in certain respects for regulatory purposes (natural vs. improved condition and statehood v. present-day use), but not insofar as it recognizes that portages do not destroy navigability. More important, nothing in § 796 could narrow the *constitutional* definition of navigability for title purposes.

Lewis and Clark, for example, regularly traveled 20 or more miles a day during their expedition. There is no reason why the Constitution would draw a distinction between a 17-mile portage and a one-, five-, or 10-mile portage. *Cf. Economy Light & Power*, *supra* (7-mile portage). Actions speak louder than labels. By definition, any interruption that was in fact portaged to allow the river to continue to serve as a highway of commerce is "short" enough for any constitutionally relevant navigability purpose.

Moreover, the question for purposes of this case is not how long it took *Lewis and Clark* to portage the Great Falls—on the first try by any explorer, in an unknown territory roamed by grizzlies, with a full expedition (and a seriously ill Sacagawea) in tow. It is whether the falls were portaged at statehood so that the river was used as a highway of commerce. They were. By the 1860s, the portage was conducted regularly by large numbers of miners under far less "arduous" conditions and in a fraction of the time. *See supra* at 10-11. This history conclusively refutes PPL's suggestion (at 41) that the Great Falls portage was "wholly incompatible with commercial navigation."[16]

---

[16] The possibility that a river "could be portaged *in theory*" does not establish navigability. U.S. Br. 24 (emphasis added). Just as the application of the "susceptibility for use" prong of *The Daniel Ball*'s navigability test must be based on a realistic assessment of what is susceptible, so too must an assessment of the feasibility of portage. For example, given the history and geography of Cataract Canyon (*see supra* at 34), the theoretical possibility that an Ernest Shackleton might find a way to portage the canyon is not enough to establish navigability. Moreover, the key point is not simply whether the river was portaged, but whether it was portaged so that the river served *as a continuous highway of*

(continued…)

4. Finally, PPL's and the United States' position that portage always (or invariably) defeats navigability is out of step with the history of the nation—and the geography of North America. As *The Montello* recognizes in discussing the travels of the likes of Marquette and Joliet (87 U.S. at 440), portaging was a common means of overcoming obstructions along waterways that indisputably served as key channels of commerce and trade. The many towns and rivers across the country with "portage" in their name—like Portage City, Wisconsin (*id.* at 439) and Portage Creek, Montana—not to mention the reference to the "carrying places" in the Northwest Ordinance, speak volumes about how deeply ingrained the practice of portage was in early American travel and commerce. Adopting PPL's position would disregard the deeply rooted historical fact that interruptions necessitating portages did not prevent a river from serving as a public highway of commerce in America.

D. The Montana Supreme Court Properly Considered The Madison's Susceptibility For Use As A Highway Of Commerce

PPL's remaining criticisms of the Montana Supreme Court's decision relate principally to the Madison River and focus on its articulation of the "susceptible-for-use" prong of the navigability test. Here again, PPL's attacks prove unfounded.

(continued)
commerce. As discussed, the river stretches here were not simply portageable "in theory"; they were regularly portaged *in fact* by those using the rivers as public highways of commerce.

1. PPL acknowledges that *The Daniel Ball* test considers not only whether a river was actually used as a highway of commerce at statehood, but whether it is "'*susceptible* of being used'" as such. PPL Br. 27 (quoting *The Daniel Ball*, 77 U.S. at 563 (emphasis added)). But PPL argues that this Court should convert the *alternative* "susceptibility" prong into a "rare" exception that can be invoked only when there is "limited or non-existent settlement in the region, and even then only if river conditions are the same today as at statehood." *Id.* at 26; *see id.* at 43, 45. In other words, without asking this Court to overrule any precedent, PPL essentially asks this Court to all but scuttle the "susceptibility for use" prong.

The "susceptibility for use" prong has been a fixture of the constitutional test for 140 years. *The Daniel Ball*, 77 U.S. at 563; *Utah*, 283 U.S. at 76; *Holt State Bank*, 270 U.S. at 56. There is no evidence that it has proved unworkable or ineffectual in screening navigability claims. To the contrary, the "susceptibility for use" inquiry makes perfect sense in light of the purposes of the equal footing and public trust doctrines. The Founders no doubt understood that not all navigable rivers in America would have documented instances of commercial trade at the time of statehood. And although the navigability test is focused on navigability *at the time of statehood*, there is no reason to deny States title to rivers that were capable of meeting the navigability test at statehood.

Under well-settled law, the Montana Supreme Court in no way erred in holding that the Madison was navigable based on its conclusion that the Madison "was susceptible of providing a channel for commerce at the time of statehood." Pet. App. 56.

2. PPL tries a backdoor attack on the "susceptibility for use" prong by arguing (at 47) that this Court should adopt a rule that reliance on "modern-day usage" is "strongly disfavored." But there is no reason for this Court to adopt a special evidentiary rule for navigability determinations. The ordinary rules of evidence, including the rule of relevance (*e.g.*, Mont. R. Evid. 401), suffice. This Court has long recognized that post-statehood evidence may be "relevant upon the issue of the susceptibility of the rivers" when it shows that the rivers were used as highways of commerce at the time of statehood. *Utah*, 283 U.S. at 82; *see* U.S. Invitation Br. 15 (recognizing that such evidence "may be probative of navigability at statehood"). The Montana Supreme Court simply recognized that commonsense rule. *See* Pet. App. 55-56 (given that navigability be based on actual use or susceptibility for use, "present-day usage of a river *may be probative* of its status as a navigable river *at the time of statehood*") (emphasis added).

Nor is there anything suspect about the *way* in which the Montana Supreme Court consulted post-statehood evidence. PPL claims (at 48) that the court failed to take into account that the flow of the river was altered by PPL's dams. But the Montana Supreme Court specifically recognized that the flow of the river had been "altered" by PPL's dams, albeit not in the way PPL would have liked. Pet. App. 58; *see id.* at 57. As the court—and PPL's own expert—recognized, the dams *reduced* the flow of water along the Madison during most of the year. *Id.*; *see* Pet. App. 210-11 (Schumm). The Montana Supreme Court could take that asserted change into account and conclude that—since the river would have been only *more* navigable

before the dams at least part of the year—the evidence of substantial drift boat use on the Madison today was relevant to, and supported, a finding of navigability at statehood. Resp. Mont. S. Ct. Br. 31-32.

3. PPL's highly restrictive test for the "*kind* of commerce that counts" (at 49 (emphasis added)) in gauging navigability also should be rejected. This Court has admonished that navigability for title "'does not depend on *the mode* by which commerce is, or may be, conducted.'" *Utah*, 283 U.S. at 76 (emphasis added). And the Court has recognized log-floating, in particular, as a legitimate form of "commerce" for purposes of determining a State's title to navigable waters for at least 114 years. *St. Anthony Falls Water Power Co.*, 168 U.S. at 359 (relying on fact that river stretch had been used for floating "logs with chutes that are artificially prepared" in finding navigability, even though it was asserted that the stretch could not support boat traffic); *see also The Montello*, 87 U.S. at 441 (including as navigable "many of the large rivers of the country over which *rafts of lumber of great value* are constantly taken to market") (emphasis added).

The West's lumber industry in the late 19th century depended on rivers to transport lumber to market. *See Wisconsin Pub. Serv. Corp. v. FPC*, 147 F.2d 743, 746 (7th Cir. 1945). Logs were as much a commodity on rivers as the load of any steamboat. In line with this Court's cases, the lower courts have long treated commercial log-driving as a commercial use sufficient to establish navigability. *See, e.g.*, *Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992); *City of Centralia v. FERC*, 851 F.2d 278, 281-82 (9th Cir. 1988); *Wisconsin v. FPC*, 214 F.2d 334, 336-37 (7th Cir. 1954). In considering evidence of log floating to assess

the navigability of the Madison, therefore, the Montana Supreme Court took a well-worn path.

There also is no reason categorically to exclude evidence of "recreational" uses of a river—especially when it comes to recreational uses like drift-boat fishing or rafting with both a substantial commercial and boating component. PPL Br. 49-52. This Court has recognized that recreational boat use of a river is probative of navigability, because "personal or private use by boats demonstrates the *availability* of the stream for the simpler type of commercial navigation." *Appalachian Elec. Power*, 311 U.S. at 416 (emphasis added). That is certainly true in the case of the Madison, which is floated in commercial drift boats by thousands of anglers each year. Opp. App. 63.[17]

---

[17] PPL also criticizes (at 22, 54-58) the Montana Supreme Court's statement that "[t]he concept of navigability for title purposes is very liberally construed by [this Court]." Pet. App. 54. But that statement must be read in context. The very next sentence refers to the fact that this Court's own precedents compel a finding of navigability not only where a river was actually used as a highway of commerce at statehood, but where it was *susceptible* for use as such. Presumably the reason that PPL asks this Court to discard the susceptibility-for-use test is that it believes the test *is* expansive. In any event, the rest of its decision makes clear that the Montana Supreme Court framed the proper constitutional test in deciding the navigability of the rivers at issue. And this Court, of course, "'reviews judgments, not statements in opinions.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011).

III. THE STATE COURT CORRECTLY FOUND THAT SUMMARY JUDGMENT WAS PROPER ON THE HEARING RECORD

1. PPL sought certiorari on a purely legal question concerning the "constitutional test" for navigability. Pet. i. It framed the question in terms of what the "constitutional test" for navigability requires "*a* trial court" to do. *Id.* (emphasis added). No doubt appreciating that this Court ordinarily does not second-guess the fact-specific determinations of state courts, PPL did not seek certiorari on whether the Montana trial court correctly held that summary judgment was proper on the particular record before it—assuming the court articulated the proper "constitutional test." That issue is outside the question on which this Court granted certiorari. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193 (1997) (where the petition asked the Court to decide the legal rule, we "shall not go beyond the writ's question to reexamine the fact-based rule-application issue that the [petitioners] now raise"). Thus, if this Court agrees with the State that the Montana Supreme Court framed the correct constitutional test for navigability, it should affirm.

2. In any event, PPL's argument that the Montana courts improperly granted summary judgment in this case suffers from several basic methodological flaws. To begin with, PPL has exaggerated the evidence that it properly presented to the Montana trial court on summary judgment. *Supra* 18 & n. 9. In addition, PPL erroneously suggests (*e.g.*, PPL Br. 2) that there is something inherently problematic about granting summary judgment on navigability, or navigability-for-title issues. That suggestion is refuted by this Court's precedents and widespread practice before the courts

and special masters. Trial courts across the country frequently make summary judgment determinations on matters of navigability or the like, as do special masters appointed by this Court in original actions.[18]

Alaska v. United States, 545 U.S. 75 (2005), for example, involved a dispute over title to submerged lands that—like this case—turned in large part on historical materials. And like this case, *Alaska* was resolved on summary judgment. Special Master Gregory Maggs explained that despite numerous "genuine disagreements" between the parties, "summary judgment is an appropriate mechanism" for resolving the underlying title claim because the parties' disagreements were "really over the interpretation of the available undisputed facts" and the relative legal significance of available documents. *Alaska v. United States*, No. 128, original, Special Master's Report at 17-22 (2004), *available at* http://docs.law.gwu.edu/facweb/gmaggs/128orig/summary_judgment_report.pdf. This Court affirmed the special master's "thorough, commendable report" and findings. 545 U.S. at 83, 96.

Here, the "genuine disagreements" among the parties relate primarily to the proper *legal significance* of undisputed, or indisputable, historic facts. That is especially true for the Missouri and Clark Fork Rivers, where there is indisputable evidence that Great Falls and Thompson Falls did not prevent the rivers from

---

[18] *See, e.g.*, *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1406 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *Illinois v. Army Corps of Eng'rs*, No. 79 C 5406, 1981 U.S. Dist. LEXIS 14165, at *6-7 (N.D. Ill. Jan. 9, 1981); *Alaska v. United States*, 662 F. Supp. 455, 468 (D. Alaska 1987); *United States v. Underwood*, 344 F. Supp. 486, 496 (M.D. Fla. 1972).

serving as continuous highways of commerce, with the aid of portage. *See supra* at 10-12. PPL did not offer any evidence disputing the historical fact that the falls were portaged so that the rivers could serve as highways for commerce at statehood. Instead, PPL argued that there was no evidence that anyone boated the falls themselves. *See supra* 33. As explained, that legal theory is incorrect.[19]

While a closer call, PPL has presented no reason for this Court to overturn the Montana courts' summary judgment determination as to the Madison either. The State presented evidence that the Madison was susceptible for use as a highway of commerce at statehood and, indeed, was ideal for log driving. *See supra* at 14. Even the dissent on the Montana Supreme Court acknowledged that "the State met its initial burden to prove navigability under the title test." Pet. App. 116. PPL points to a Corps Report that evaluated—more than 40 years after statehood—the river's potential for improvements for *modern-day* use. JA 485-86. But that report has no bearing on

---

[19] As to the Clark Fork, PPL has pointed to a 1910 federal district court decree—a judgment issued two decades after statehood concerning alleged property rights as between two *private* parties—that referred in dictum to the Clark Fork generally as "not navigable" without any underlying findings of fact relevant to that conclusion. *See* Supp. Pet. App. 11. The Montana Supreme Courts properly concluded that this statement—which was not binding on the Montana courts or any party in the case—was the epitome of the kind of conclusory statement that does not create a genuine issue of material fact. Pet. App. 57; *see Williams v. Union Fid. Life Ins. Co.*, 123 P.3d 213, 218 (Mont. 2005) ("[M]ere conclusory … statements" do not raise a genuine issue of material fact.).

whether and to what extent the river was susceptible for use by the common modes of navigation at statehood. PPL also relies heavily on Schumm's testimony that the flow of the Madison changed after the dams were built. But, as the State explained (Resp. Mont. S. Ct. Br. 31-32), Schumm's own conclusions on the changes in flow made it *more* likely that the Madison was susceptible for use as a highway of commerce for at least part of the year. *See Utah*, 283 U.S. at 87 (river need not be navigable year-round).

3. Finally, PPL attacks the State's historical evidence, suggesting (at 15) that frontier newspapers and similar historical sources are somehow off limits in determining navigability. PPL's paid expert Emmons argued below (as he does in this Court, as "amicus curiae") that these materials are categorically unreliable, because they supposedly rely on sources given to "hyperbole" or "fabrication." Br. of Professors 20-21. But this Court itself has relied on such sources in determining navigability. *See, e.g.*, *The Montello*, 87 U.S. at 440-42; *see also, e.g.*, *Alaska*, 545 U.S. at 82, 96 (Special Master Report relies on historical accounts); *Montana Power Co. v. FPC*, 185 F.2d 491, 498 (D.C. Cir. 1950) (relying on advertisements of boat service in contemporary Helena newspapers and holding that newspaper accounts "are among the source materials of history"). The Montana Supreme Court in no way erred in considering such historical materials.[20]

---

[20] Paradoxically, Emmons himself has relied heavily on the same frontier newspapers. *See, e.g.*, JA 758 nn. 24-25, 760 n.27, 765 n.32, 791 n.67, 792 n. 68, 797 n.74, 798 n.75, 801 n.78.

Contrary to the caricature of judicial proceedings that PPL tries to paint, the Montana courts carefully considered the summary judgment record under the constitutional test for navigability established by this Court's precedents and reasonably concluded that PPL had failed to create a genuine issue of disputed fact precluding summary judgment. There is no reason for this Court to re-do the summary judgment determination for the Montana courts. The Court should address the question presented and affirm.

* * * * *

Adoption of PPL's novel constitutional test for navigability would have the immediate practical effect of stripping Montana—and Montanans—of the title that they gained to the riverbeds at issue upon admission into the Union in 1889. That includes title to the Great Falls of Montana—a symbol of Montana since territorial times.[21] But the impact of such a ruling would extend much further. PPL's test would call into question the navigability of rivers throughout the United States—at least in any place where there exists (or existed) a non-*de minimis* interruption. At a minimum, that test is a recipe for confusion and litigation over title to submerged lands throughout the country. And worse, the test is likely to result in the balkanization of rivers, like the Missouri, that always have been regarded as navigable, into bits and pieces of navigable and non-navigable "segments." That result almost certainly would interfere with the management of fish and wildlife along such waterways and hinder

---

[21] For the history of the Great Seal of the State of Montana, see http://sos.mt.gov/about_office/State_Seal.asp.

public access to the waters for fishing. And it could scarcely be more at odds with the public trust doctrine—embodied in the constitutional equal footing doctrine—which sought to ensure that America's great rivers and waterways would remain "common highways, and forever free," for the benefit of the people. Northwest Ordinance of 1787, 1 Stat. at 52.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Montana should be affirmed.

Respectfully submitted,

STEVE BULLOCK
Attorney General
ANTHONY JOHNSTONE
Special Assistant Attorney General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders Street
Helena, MT 59620-1401
(406) 444-2026

CANDACE F. WEST
Chief Legal Counsel
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1625 Eleventh Avenue
Helena, MT 59620-1601
(406) 444-6702

GREGORY G. GARRE
Counsel of Record
LORI ALVINO MCGILL
KATYA S. GEORGIEVA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Respondent

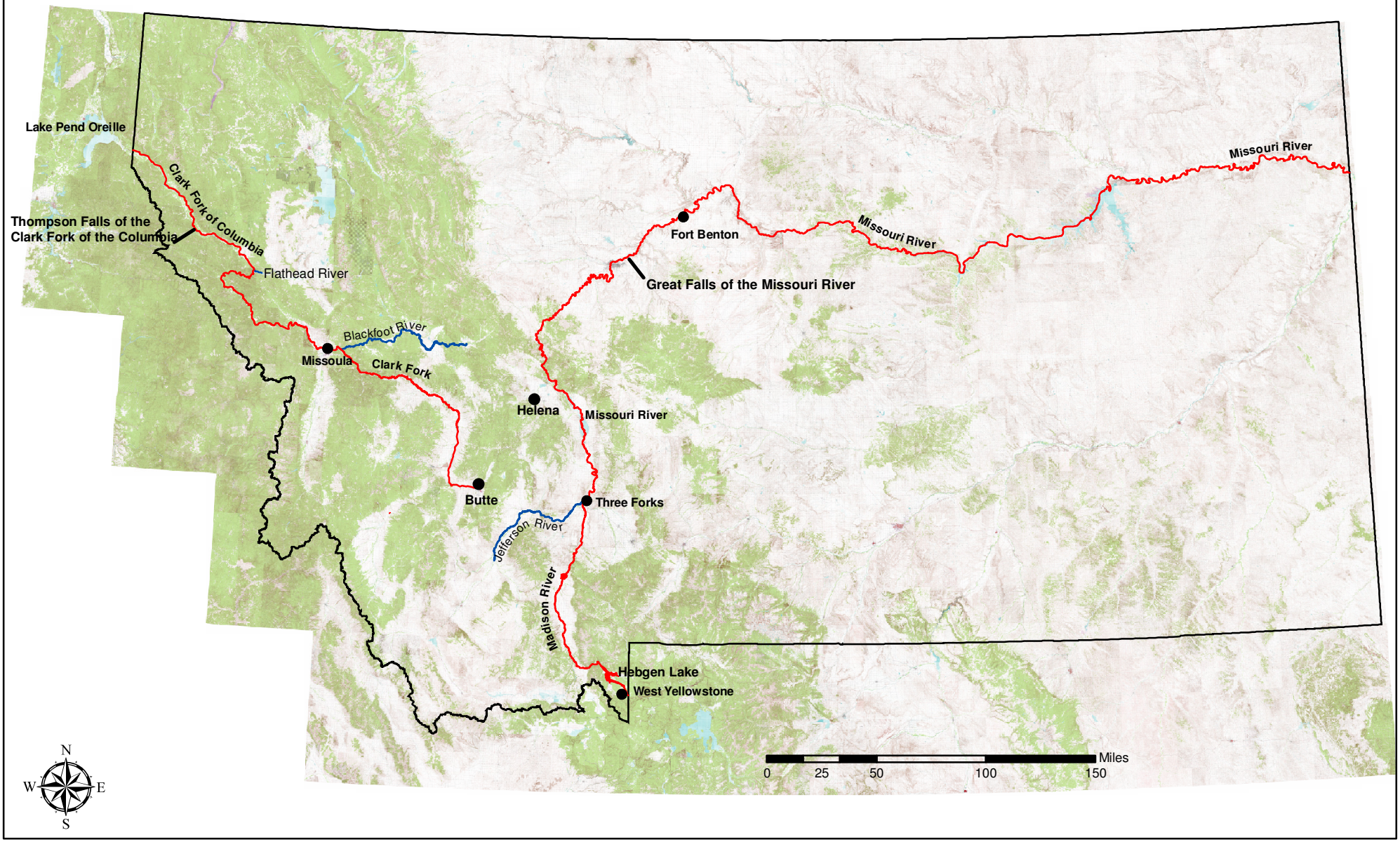
OCTOBER 27, 2011

ADDENDUM

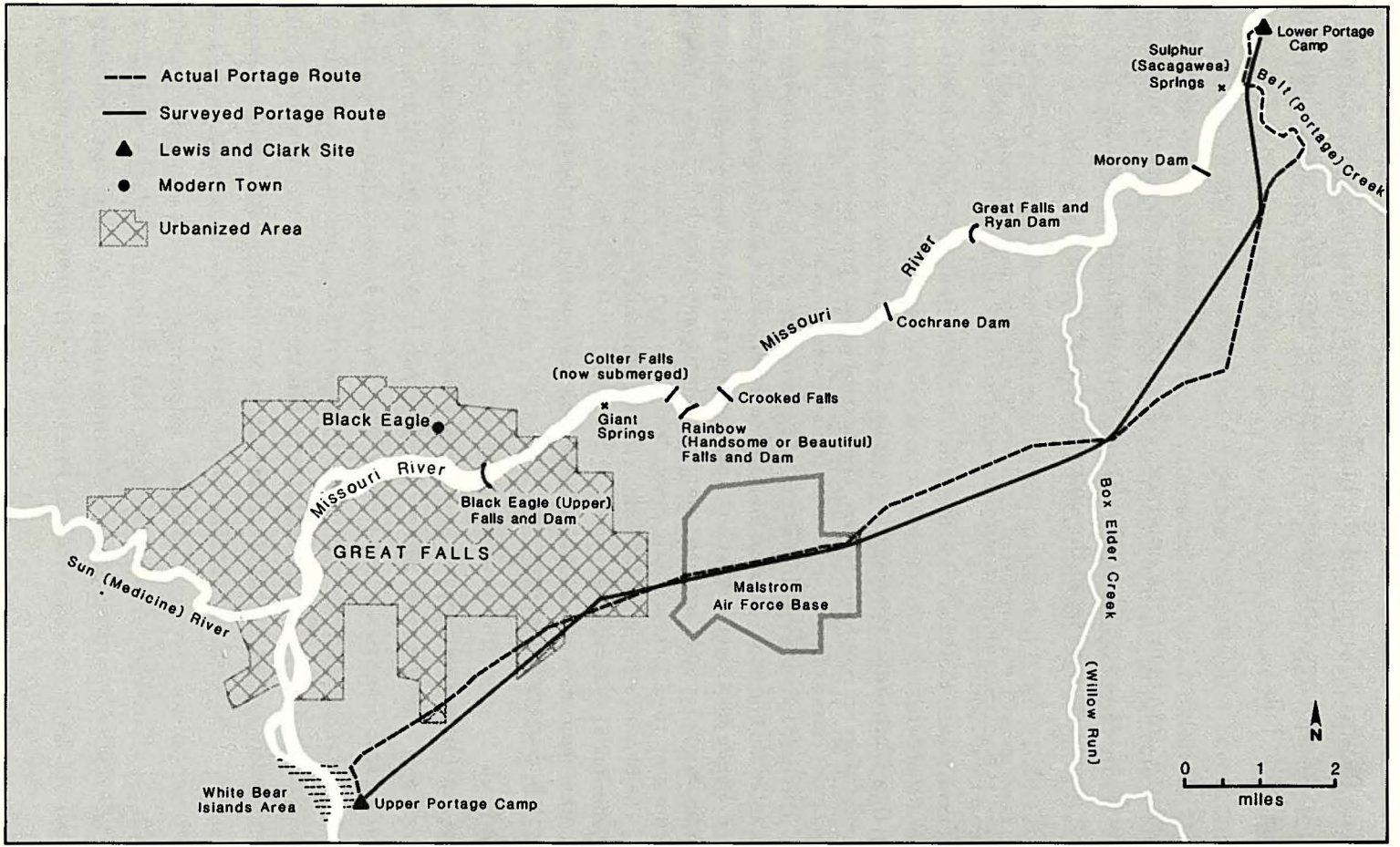
ADDENDUM

TABLE OF CONTENTS

MISSOURI, CLARK FORK, MADISON RIVERS IN MONTANA



Montana Trust Land Management Division, Montana Department of Natural Resources and Conservation. (Teresa Kinley, ed. 2011)



3. Portage and Falls of the Missouri River

[Source: 4 The Journals of the Lewis & Clark Expedition 322 (Gary E. Moulton ed., Univ. of Neb. Press 1987)]

No. 518

In the Supreme Court of the United States

OCTOBER TERM 1950

THE MONTANA POWER COMPANY, a corporation,

PETITIONER

V.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

* * *

STATEMENT

* * *

Actual Use: For the steamboats which came up the River from St. Louis, the Great. Falls presented a natural barrier (R. 65). As a result, Fort Benton was sometimes labelled [sic] the "head of navigation," and until 1888, when the advent of the railroads curtailed the demand for water transportation, steamboat traffic up to Fort Benton flourished (R. 64-65, 543-558, 1014-15, 1434). The record shows, however, that three steamboats from Fort Benton successfully navigated the River to points more than 30 miles upstream from

Fort Benton and back (R. 65, 215-216, 1013, 1141-1142, 1207, 1450). Similarly, steamboats operating above the Great Falls were confined there, portages being made around the Falls only with smaller craft; for this upper part of the River, the "foot of navigation" was sometimes placed just above the Falls (R. 1207; Ex. 17(a) (1880), p, 1474).

Before 1900, there was considerable use of the 263-mile reach of the River above Fort Benton, the Falls always requiring a portage around them. A number of exploratory and Government survey trips were made in manually-powered crafts of various sizes, notably the 1805 expedition under Lewis and Clark, whose party made a successful ascent to Three Forks and beyond (R. 64-65, 1357-1383, 1549-1575). In 1872, Thomas P. Roberts, an engineer for the Northern Pacific Railroad, in the course of a survey of this part of the River, descended the River from Three Forks to Fort Benton in a skiff (R. 66, 1147-1208).[7] In addition, Hubert Howe Bancroft's (1890) "History of the Pacific States" records the use of the River between Stubbs Ferry (mile 2390), about 85 miles below Three Forks, and Fort Benton for the transportation of large numbers of miners returning to the States following the 1864 discovery of gold where Helena is now located; according to Bancroft, a stage line was established to carry passengers from Helena to a point

---

[7] Roberts concluded that the River above Fort Benton could be relied upon for navigation without improvement and his report supported a plan for a steamboat link between Fort Benton and Three Forks, trans-shipping freight around the Falls (R. 66, 1195-99). The Roberts' report was regarded as so useful that the Secretary of War approved its publication for use of the Army Engineers (R. 1147).

on the River whence was operated a line of mackinaw boats carrying passengers to Fort Benton, portaging around the Falls (R. 66-67, 1415-1419).[8] This use of the River apparently started soon after the 1864 discovery of gold in Helena, probably diminished soon after 1868 when most of the gold had been extracted, and ceased around 1870 when the placers were exhausted; clearly, however, the business was lively around 1866-1867 (R. 67).[9]

Between 1867 and 1900, there was extensive intrastate use of the River between Stubbs Ferry and Great Falls for the downstream transportation of loose logs and large rafts of lumber (R. 66, 417-418, 1142-1146, 1209, 1224-1228, 1263-1265, 1328-1329). Also, several small steamboats were placed on the River above the Falls, for the most part in the period after the close of the navigation era below Benton (R. 66). This operation continued around 1900 and was confined principally to the 55-mile stretch known as "Long Pool," located immediately above the Great Falls (R. 66, 391-397, 563-564, 1313-1315, 1323-1327, 1343, 1354, Ex. 17(b) (1892) p. 1906, (1895) p. 2227, (1898) p. 1850). Some steamboats were engaged in the local,

---

[8] Although no description of those boats is available, it seems certain that they were manually-powered and probably were large sharpended bateaux (R. 67).

[9] Bancroft's account is confirmed (1) by advertisements of the boat service in contemporary Helena newspapers (R. 67, 1417, 1139-1141, 1210), and (2) by an 1867 legislative grant of an exclusive privilege for a portage-toll road to the Missouri River Falls Wagon Road Company (Mont. Laws, Territory, 1867, 4th Reg. Sess., p. 109.) (R. 67)

commercial carrying of freight and passengers (R. 66).[10]

* * *

ARGUMENT

* * *

[1.] (b) The Company claims that since the Great Falls preclude literal through use of the River and thus prevent it from forming an unbroken highway, the portion of the River here involved could not be a "navigable water" of the United States (Pet. 3, 22). But while no stream can by itself constitute an unbroken highway if at any point a land carriage or portage is necessary, such a condition is not a prerequisite to a finding of navigability. This is clear from the Act's definition of "navigable waters" which expressly includes "all falls, shallows, or rapids compelling land carriage" where the stream is used or suitable for use despite such interruptions between the navigable parts. And this definition is in accord with established principles. In *The Montello*, 20 Wall. 430, this Court rejected the lower court holding that the Fox River was not navigable by reason of "several rapids and falls" and concluded that it had always been navigable in fact, saying (20 Wall. at 442-443):

> the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country

---

[10] The Annual Report of the Chief of Engineers for the Year 1901 (Ex. 17 (b)) combining figures for traffic between Great Falls and Cascade with those for traffic between Cascade and Stubbs Ferry shows a total of 2,528 tons of freight and 11,175 passengers carried (p. 2394).

> which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation.

In the *Economy Light Co.* case, the Court stated that (256 U.S. at 122):

> navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages * * *.

And the *Appalachian* case declares that (311 U.S. at 408-9) "There never has been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries, or shifting currents."

In the instant case, the interrupting Falls cover a 17-mile section, never navigated in fact, and require a portage of about 18 miles (R. 69). But, as shown *supra*, pp. 7-8, many trips along the River were made via portage around the Falls. Such an interruption does not sever the upper 214 miles of the Missourri from the lower 2,244, but rather is merely an obstruction notwithstanding which the River was used as a continued highway in interstate commerce at least as far upstream as Stubbs Ferry. Cf. *The Daniel Ball*, 10 Wall. 557, 563; *Pennsylvania Water &: Power Co.* v. *Federal Power Commission*, 123 F.2d 155, 161 (C.A.D.C.), certiorari denied, 315 U.S. 806. It follows that the presence of the Falls does not destroy the

River's status as a navigable water of the United States.[20]

* * *

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

PAUL A. SWEENEY,

MELVIN RICHTER,

HERMAN MARCUSE,
Attorneys.

BRADFORD ROSS,
General Counsel.

WILLARD W. GATCHELL,
Assistant General Counsel.

BERNARD A. FOSTER, JR.,
Special Counsel,
FEDERAL POWER COMMISSION

FEBRUARY, 1951.

---

[20] Even if the Act's definition of navigable waters does not fully correspond with established judicial criteria, Congress clearly has the power, and the legislative history plainly indicates that it intended to exercise it (H. Rep. No. 910, 66th Cong., 2d Sess., p. 7), to regulate waters in such an interrupting reach of a navigable stream. Otherwise, its admitted power to regulate lower navigable portions of the stream could be destroyed through the location of obstructions in the interrupting reach.

BRIEF AND APPENDIX FOR RESPONDENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 10200

THE MONTANA POWER COMPANY, PETITIONER

V.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

---

* * *

ARGUMENT

* * *

The historic actual use of the Missouri River in Interstate and Intrastate Commerce.—The Missouri River is formed by the confluence of the Jefferson, Madison and Gallatin Rivers at Three Forks in southwestern Montana. Generally, it flows northeastward to a point approximately 30 miles beyond Fort Benton and thence in an easterly and southeasterly direction to its junction with the Mississippi River about 17 miles above St. Louis, Missouri. Between its headwaters and its mouth the Missouri flows across or along seven States. In round figures its length is 2,475 miles; its drainage basin 529,000 square miles; and its fall 3,630 feet.

The Commission noted several facts with respect to the past actual use of the river from its mouth to Fort Benton (App. 64, 65). These facts seemingly have not been controverted by the Petitioner and the Commission's determination that the Missouri River from its mouth to Fort Benton is a navigable water of the United States is not questioned (Pet. Br. 15). Petitioner has made one contention, however, with respect to this stretch of the river which may be related to the Commission's over-all finding. That contention is that Congress by its authorization and construction of the Fort Peck Dam has abandoned "navigability" insofar as the exercise of its jurisdiction is concerned from the site of the dam upstream (Pet. Br. 18, 19; 96-102). This particular contention is discussed *infra*, p. 33.

The facts in the record with respect to the St. Louis-Fort Benton section of the river establish so completely that this part of the river was used both in its natural and improved condition for the transportation of persons and property in interstate commerce that the Commission gave only brief mention of that evidence in its opinion (App. 64-65). The opinion notes that in this so-called lower section steamboat traffic flourished from 1819 until 1888 and that this traffic between Fort Benton and points on the Missouri River downstream therefrom involved millions of dollars worth of freight and thousands of passengers.

The record in this case is clear as to the reasons for the decline of the steamboat traffic in the lower section. The Commission observed that in 1859, the very year the Missouri River steamboat reached its perfection, the railroad invasion began (App. 65). With each

westward step of the rails steamboat traffic was sharply curtailed (App. 1014). Service to Fort Benton ceased in 1888. During the period of heavy use of the lower section for navigation the river above Fort Benton was not used to any extent comparable to the use made of the lower section. The upstream terminal of large steamboats was Fort Benton (App. 64).

The real controversy in this case is related to the section of the river between Fort Benton and Three Forks. This section of the river is about 263 miles long. All of the Petitioner's hydroelectric installations on the Missouri River are located in this stretch.

Beginning about 32 miles above Fort Benton is a series of rapids and sheer falls descending about 520 feet in 17 miles known as the Great Falls of the Missouri. It has been recognized by all throughout the proceeding before the Commission that the Great Falls presented a natural barrier to steamboat traffic originating at points below. Fort Benton was sometimes labeled the "head of navigation" (App. 1008, 1013, 1448) although the record shows that three steamboats from Fort Benton successfully navigated the river to and from points more than 30 miles upstream from Fort Benton (App. 215, 216, 1450; 1141). Similarly, steamboats operating above the Great Falls were confined there, portages being made around the Falls only with smaller craft. For this upper part of the river, therefore, the "foot of navigation" was sometimes placed just above the Falls (App. 1207).

Before 1900 there was considerable use of this 263-mile reach between Fort Benton and Three Forks, the Great Falls always requiring a portage around them. In this section a number of exploratory and Government survey trips were made in manually

powered craft of various sizes. The 1805 trip under the famous explorers Lewis and Clark is perhaps the best known trip of exploration (App. 1357, 1549, 1577). These explorers with their party made a successful ascent with crude handpowered craft to Three Forks and beyond. There are only two rapids above the Falls section which have ever presented difficulty in continous [sic] navigation. These are known as Half-Breed Rapids (mile 2327) and Beartooth Rapids (mile 2365). The "Journals of Lewis and Clark" are quite detailed, particularly with respect to the difficulties encountered on this 1805 trip. The two rapids sections, however, received only casual mention.

In 1872 Thomas P. Roberts, an engineer for the Northern Pacific Railroad, made a detailed and informative survey of the 263-mile section of the stream (App. 1181). Roberts' purpose was to provide his employer with information so that plans might be laid by the railroad company for a combination boat and rail route through this area. Roberts considered his report so important that he sent it to the Chief of Engineers of the U. S. Army for the information of that officer, who in turn regarded it as so significant that it was published under the auspices of the War Department. Roberts descended the river from Three Forks to Fort Benton in a skiff. He concluded that the Missouri in the section that he had examined could be relied upon for navigation without improvement and he set forth in his report a tentative plan for utilization of this upper portion of the river with a rail link for trans-shipping freight around the Falls (App. 1197, 1198).

In the period from 1867 until around 1900 there was extensive intrastate use of the river between Stubbs Ferry (mile 2390), which is 85 miles below Three Forks,

and the City of Great Falls (mile 2260) for the downstream transportation of loose logs and large rafts of lumber. (App. 1142, 1210, 1256, 1264-5, 1283, 1297, 1308, 1311, 1313, 1355, 414 *et seq.*, 385 *et seq.*, 398 *et seq.*, 225 *et seq.*, 236 *et seq.*). Also, several small steamboats were placed on the river above the Falls. These boats were operated in the period after the close of the navigation era below Fort Benton and continued until around 1900 (Ex. 17-B, *lodged)*. Most of the steamboat traffic in the upper section of the Missouri River took place within a 55-mile stretch known as the "Long Pool" located just above the Great Falls. This traffic consisted of a local commercial carrying of freight and passengers. One steamboat operated for a relatively long period in a scenic section of the river known as the "Gates of the Mountains." This boat was used for the purpose of carrying excursion passengers on a sightseeing trip. The vessel could and did operate over a larger section, however (App. 392, 397, 1435, 1436, 1444).

The uses of the river above Fort Benton for navigation were, for the most part, either intrastate or noncommercial in character. However, the record shows that the river between Stubbs Ferry and Fort Benton served as an artery for downstream transportation in interstate commerce of large numbers of miners following the 1864 discovery of gold where Helena is now located.

Hubert Howe Bancroft's *History of the Pacific States*, published in 1890, records such use of this part of the river for the transportation of miners returning to the States (App. 1415, 1139, 1140). A stage line was established to carry passengers from Helena to a point on the Missouri River whence Kennedy & Company

operated a line of mackinaw boats carrying passengers to Fort Benton, portaging around the Falls (App. 1140, 1417). From its general study of the navigation of the area, the Commission, in the absence of a specific description of these boats, concluded that they were probably manually powered and probably were large sharp-ended bateaux. The Commission noted in its opinion that it was not possible to fix the beginning and ending of this particular use of the river. From its study of the general historical facts relating to the area, the Commission estimated that it started soon after the 1864 discovery of gold at Helena and that it diminished soon after 1868 when most of the gold had been extracted. It assumed that any transportation of this kind must have ceased around 1870 because history records that the placers were exhausted at about that date. The evidence in the record established satisfactorily to the Commission, however, that the business was most lively in the years 1866 and 1867 (App. 1417).

Petitioner has attacked this aspect of the Commission's findings of fact particularly and claims that this use of the river has not been established as a fact (Pet. Br. 74-8). The primary source of the information upon which the Commission relied is the historical writings of Hubert Howe Bancroft, generally acknowledged to be the foremost historian of the northwestern part of the United States as of the time his works were published. His books are considered today, by modern historians, to be an invaluable source of historical information (App. 204, 212).

It has been the use of this information derived from the Bancroft volume which has disturbed the Petitioner most, and in its briefs both before the

Commission and this Court, Petitioner has made an attempt to relate this material entirely to what it considers an improper use by the Commission of newspaper accounts as evidence. It suggests that the only real evidence of actual use of the upper section of the river in conjunction with the lower section for purposes of interstate commerce is this data respecting the movement of gold miners. It is clear from the record that the Commission did not rely solely upon the newspaper remarks and advertisements in arriving at its findings of fact. The Bancroft volume of history was the primary source of the information used by the Commission, and this Bancroft material was *corroborated* by information from contemporary newspapers of the period. It is noted further that an expert witness who was acknowledged by Petitioner to be a specialist in historical research found the Bancroft data and the newspaper material to be acceptable for purposes of historical research and so testified (App. 212). Attention will be given to the legal aspect of the claims of the Petitioner with respect to the character of the evidence used by the Commission in this proceeding in a later section of this brief, *infra,* p. 30. However, it is submitted, that the evidence of the interstate movement of the gold miners as used by the Commission is not evidence based upon conjecture, speculation, or uncorroborated hearsay. Any historical evidence respecting the movement of persons and property nearly a century ago is necessarily "hearsay" from a technical standpoint. The use by an administrative fact-finding agency of *probative* hearsay has never been proscribed.

The evidence of actual use of the upper section of the Missouri River, as summarized in its opinion (App.

65-6-7), led the Commission to the conclusion that this stream is a navigable water of the United States and within the meaning of Sec. 3 (8) of the Act.

* * *

Comparison With Other Rivers Established as Navigable Waters.—Petitioner points out in its brief that the Commission in its opinion did not discuss the physical characteristics of the streams held navigable in any of the cases it cited or the evidence of use or suitability for use found in any of them; nor did the Commission make any comparison between facts in any of those cases and the facts in this case (Pet. Br. 55). The absence in the Commission's opinion of such comparisons does not mean, of course, that such comparisons were not made by the Commission in arriving at its decision. This Missouri River case is but one of many cases of its same type which have been heard and decided by the Commission. Thorough treatment of the comparable physical characteristics of the Missouri River and adjudicated streams was furnished to the Commission by its staff in the briefs filed. Comparisons between the Missouri River and the Fox River and the New River were presented to the Commission in this proceeding during an oral argument heard by it prior to its final determination.

The Missouri River between Fort Benton and Three Forks compares favorably with the New River held navigable in *United States* v. *Appalachian Electric Power Co., supra,* with the Fox River held navigable in *The Montello, supra,* with the DesPlaines River, held navigable in *Economy Light and Power Company* v. *United States, supra,* and with some parts of the Colorado River, held navigable in *United States*

v. *Utah*, *supra.* The space permitted in this brief will not allow a detailed presentation with respect to these other rivers, but a few of the salient facts relating to the physical characteristics of the rivers named, and the navigation which had taken place will be given.

(A) The New River

The fall between Allisonia and Hinton was established by a survey to average about 4.5 feet per mile. Comparative slope profiles of portions of the New River, held navigable by the Supreme Court in *United States* v. *Appalachian Electric Power Company*, *supra,* and the portions of the Missouri River here in question have been included in this Brief as Appendix B.

(B) The Fox River

The portion of the Fox River involved in *The Montello*, *supra*, was 37 miles in length, the upper 18 miles of which in their natural condition had an average fall of approximately 8 feet per mile. Within this reach the maximum fall was 29.5 feet within a distance of only three-fourths of a mile, while within another portion of 2.5 miles there was a fall of 38 feet. (Annual Report of the Chief of Engineers, 1876, p. 235; I, p.204.) Continuous navigation by boats of shallow depth was not possible because of the obstruction by shoals, rapids and falls which made portages necessary. For this reason the trial court held the entire lower Fox River nonnavigable; but the decision was reversed by the Supreme Court. Prior to its improvement by locks and dams such commerce as existed was by Durham boats propelled by animal power. These Durham boats, in size, draft and capacity, were not unlike the mackinaws used by the gold miners on the upper Missouri. A reproduction of the only available profile

of the Fox River in the portion in question has been included in this Brief as Appendix A.

(C) The DesPlaines River

The portion of the DesPlaines River in controversy in the *Economy* case, *supra*, was only 45 miles in length, 60 percent of which was pool water and 40 percent shoal water. The discharge was as much as 600 c. f. s. during an average of only 73.2 days per year. This amazing deficiency in streamflow, as computed from gage [sic] readings made daily over a 20-year period, rendered it incapable of floating a boat through 40 percent of its length during an average of 175 days per year, while lengthy portages, either of the entire cargo or parts thereof, were required during an average of 248 days per year. With the exception of an average period of 4.3 days per year, the controlling depths over the rapids were never more than 15 inches, and such controlling depths were found only during an average period of 116.2 days per year. At all other times the controlling depths were 12 inches or less, and a number of portages were required, totalling [sic] in excess of 12 miles, and consisting either of part of the cargo, the entire cargo, or both cargo and boat. During a period of 175 days it was necessary to portage not only the entire cargo, but also the boat, over 40 percent of the entire distance from Riverside to the mouth of the river, a distance of approximately 18 miles (256 F. 792, 795-6).

(D) The Colorado River

The case of *United States* v. *Utah*, *supra*, came to the Supreme Court as the court of original jurisdiction, and a Special Master was appointed to hear the evidence and submit findings and conclusions. The Special Master found that the Colorado River from

mile 176 above Lees Ferry south to the Utah-Arizona boundary was navigable. His findings were sustained by the Supreme Court (283 U.S. 64, 80-1, 82-3). This case did not involve a determination of whether the Colorado River was a "navigable water of the United States," but the same tests of navigability were used, and the Special Master stated unequivocably [sic] that he had utilized the Federal rule.

* * *