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No. 10-218

In the
Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF PROFESSORS DAVID M. EMMONS, THOMAS NOEL, CHARLES E. RANKIN, CARLOS A. SCHWANTES, AND DAVID M. WROBEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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September 15, 2010 * Admitted only in Virginia

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37, Professors David M. Emmons, Thomas Noel, Charles E. Rankin, Carlos A. Schwantes, and David M. Wrobel respectfully request leave to file the following *amicus curiae* brief in support of petitioner, PPL Montana, LLC ("PPL"). PPL has consented to the filing of this brief. Respondent, the State of Montana, has withheld its consent.

Amici are professors of history with particular emphasis on the history—and historiography—of the American West. All have published extensively on the West. All are concerned with the public's familiarity with and regard for history as an intellectual discipline. David M. Emmons is professor emeritus on the history faculty of the University of Montana in Missoula, Montana, where he has taught since 1967. Professor Emmons has developed and taught an historical methods course

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored any part of this brief, and that no counsel or any other party or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor David M. Emmons served as petitioner PPL Montana, LLC's retained and compensated expert on the history of the Missouri, Madison, and Clark Fork Rivers in the litigation below. In this Court, he is donating his time. The remaining *amici* have no prior involvement with this case and also are receiving no compensation for the preparation of this brief.

entitled "The Historians' Craft." Professor Emmons has not been compensated for the time he has spent discussing this case with other concerned historians, analyzing the historical flaws in the Montana Supreme Court's decision, and helping to prepare this brief.

Nonetheless, Professor Emmons wants to be clear that he was retained and compensated as an expert witness by PPL in the trial court proceedings below. Professor Emmons wants to further disclose that he has been informed by counsel for PPL that, in the event the Court grants its petition, reverses the decision below, and remands for trial, he may well be asked by PPL to participate in those remand proceedings (with appropriate compensation). But Professor Emmons wants to be equally clear that his motivation for joining this brief, and promoting it to fellow historians, is his deep concern about the consequences of the Montana courts' historically inaccurate conclusions and unprofessional historical methods.

If PPL were able to find another expert on Montana history that would, to PPL's satisfaction, address relevant historical issues in any remand proceedings, Professor Emmons would readily forgo any future expert participation in this case. But in light of PPL's clearly articulated preference in favor of Professor Emmons's potential participation in future stages of the case, if any, Professor Emmons carefully weighed whether it would be appropriate for him to support PPL's petition for certiorari as *amicus curiae.* Professor Emmons ultimately decided it would be appropriate, in light of his career-long commitment to sound historical analysis, so long as his past involvement in earlier

proceedings and potential involvement in future proceedings were fully disclosed.

The other professional historians who join this brief have not had any prior involvement with this case. Nor do they expect to become involved for compensation in any future case proceedings. They are all preeminent experts in Western history and are deeply concerned about the Montana courts' approach to the important issues of historical method the case presents.

Thomas Noel is professor of history and Director of Public History, Preservation and Colorado Studies at the University of Colorado, Denver, where he has taught since 1991. Charles E. Rankin teaches history at the University of Oklahoma, where he also has served as Editor-in-Chief of the University of Oklahoma Press since 2000. Carlos A. Schwantes is professor of history at the University of Missouri–St. Louis, and has taught there and elsewhere for over twenty years. Professor Schwantes is a recognized expert on transportation in the American West, including steamboating on the Missouri River. David M. Wrobel is Chair of the History Department at the University of Nevada, Las Vegas. He, too, has taught courses in historiography.

The interest of the historians in this case is on behalf of history as a profession and a method, as well as on behalf of the historical record itself. Ensuring that courts are proficient in historical reasoning and in evaluating historical sources is a matter of great public concern. Much as familiarity with law is often critically important for historians, so too lawyers and judges should be able to employ historical analysis in their professional work. For

these reasons, *amici* take a professional interest in the judicial use of historical methodology, particularly in cases pertaining to the American West. That unique interest, combined with the decades of professional knowledge and expertise underlying it, brings an important perspective to the issues before the Court that cannot be appreciated or conveyed adequately by any other party.

In this case involving the history of the West, the State courts misapplied historical methodology. As explained in this submission, the Montana Supreme Court failed to evaluate its sources with an historian's critical eye, and failed to read those sources as they were meant to be read. The result was an unwarranted historical conclusion that threatens serious consequences for the law and future litigation. For these reasons, *amici* seek leave to file the attached *amicus curiae* brief in support of petitioner.

Respectfully submitted,

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QUESTION PRESENTED

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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Supreme Court confronted a quintessentially historical question: Were the upper Missouri, Madison, and Clark Fork Rivers "navigable" for title purposes in 1889 when Montana became a State? As the Montana Court recognized, that historical question could be answered only by an historical analysis. Unfortunately, in affirming the trial court's summary judgment decision that the rivers had in fact been navigated at the time of statehood, the Montana Supreme Court failed strikingly in the historian's task.

This brief offers a professional historian's assessment of the Montana Supreme Court's handling of the question of navigability of the Missouri River in 1889. Because the Missouri River's historical record is more extensive than that of the Madison or Clark Fork Rivers, the Montana Supreme Court's errors are most evident in its analysis of that river, although similar errors may be found in its treatment of the other rivers.

It is undisputed that the Missouri River is navigable as far upstream as Fort Benton, Montana, which is situated at the lower end of the tailing off of the large series of waterfalls known as the Great Falls. Farther upstream from Fort Benton, on the upstream side of the Great Falls, lies the city of Great Falls, Montana. Between the city of Fort Benton and the upper Missouri River's headwaters at Three Forks, Montana, lie many miles of rapids and other obstacles to navigation, including the Great Falls themselves. The critical historical question this case presents is whether those

obstacles prevented navigation at the time of Montana's 1889 statehood. That historical question was both outcome-determinative and hotly disputed in the trial and appellate courts below.

The trial court's summary judgment determination of what the historical evidence *meant* necessarily demanded historical reasoning. All historical documents come accompanied by their own limitations. As one historian reminds us, properly using any form of historical documentation means that "one has to be aware of the limitations and problems that are involved in using it." Bernard Bailyn, *On the Teaching & Writing of History* 47 (Edward Connery Lathem ed., 1994); *see also* David Bebbington, *Patterns in History: A Christian Perspective on Historical Thought* 4 (1990) ("The 'textbook mentality', that an assertion is true because it is written down, is utterly alien to any historical outlook.").

As Justice Rice noted in dissenting from the Montana Supreme Court's decision and historical analysis, PPL submitted a "mountain" of evidence that the Missouri River was not navigable upstream of Fort Benton. This evidentiary showing included Professor Emmons's affidavit, his expert report, and the report's accompanying exhibits. Pet. App. 100. The majority, however, deemed that evidentiary mountain a molehill, denying that it even raised a question of fact as to the issue of historical navigability. In reaching this erroneous conclusion, the Montana Supreme Court majority overlooked much of the evidence adduced by PPL, erroneously concluding that it rested on three, and only three, sources. Pet. App. 56-57. In fact, however, PPL

relied on other sources in addition to those cited below, including the Lewis and Clark journals, Pet. App. 230-39; records compiled by the Federal Power Commission licensing proceedings in the 1940s, Pet. App. 219-222, 273; and the circumstantial inferences to be gleaned from the historical pattern of roadways linking the Missouri River to other Montana sites and waterways. Pet. App. 239-44.

Compounding its error of underestimating PPL's evidentiary showing, the Montana Court overestimated the strength of the State's showing, and in so doing it failed to adhere to fundamental tenets of historical analysis. At the core of historical analysis is the critical evaluation of historical documents and other sources of information. And at the core of the Montana Supreme Court's error was its failure to critically evaluate the principal historical sources relied on by the State of Montana. *First*, the Montana Supreme Court failed to apply an historian's scrutiny to the State's proffer of secondhand accounts that in turn relied on primary and other secondary sources that no historian would rely on without corroboration. If the Montana Supreme Court had evaluated the State's sources as professional historians do, it would have found them insufficiently reliable to form an historical judgment in favor of navigability. *Second*, the Montana Supreme Court failed to follow the cardinal rule that language in primary sources must be evaluated in context, and in light of its author's intentions. As one critical example, the court seized on isolated words in the journals of the Lewis and Clark expedition without the necessary historical awareness of how those words were being used. As a

result, the Montana Supreme Court drew lessons from the journals opposite to their actual meaning.

By affirming the trial court's judgment, the Montana Supreme Court treated disputed historical evidence as proven fact, rather than submitting it to the test of trial.

ARGUMENT

Academic historians live by professional standards. These standards, while perhaps incapable of once-for-all-times delineation, nonetheless provide signposts for proper conduct that are fiercely defended by the best of the profession. Like the canons for any profession, the standards dividing competent from incompetent historical research may be (and often are) disputed in particular settings and applications. But what is not disputable is that there are such principles. To the competent historian, these include reading primary sources in their proper authorial and temporal context; judging secondary sources according to their skill in handling primary sources; and maintaining a proper critical distance and healthy skepticism when confronting characterizations of historical fact, regardless of whether found in primary or secondary source materials.

The professionalism these principles embody and enforce can perhaps be most easily discerned by judges through their inevitable familiarity with Judge Leventhal's own canonical description of its antithesis—the practice of tendentiously reviewing historical materials as part of "an exercise in looking over a crowd and picking out your friends." *See, e.g.*,

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (quotation marks omitted). This brief is respectfully offered because we believe the Montana Supreme Court incorrectly employed a pick-out-your-friends approach, as opposed to the professional historian's approach, to adducing historical evidence and adjudicating historical fact. Its misguided approach, we believe, caused the Montana Court to lapse into the serious error of incorrectly resolving the historical and constitutional question of the navigability of Montana's rivers in 1889.

I. The Montana Supreme Court Disregarded Historical Evidence And Misapplied Basic Methods Of Historical Analysis.

The historical questions presented here required the Montana Supreme Court to adjudicate historical facts by evaluating the relevant primary and secondary sources as competent historians would. Close historical analysis of the court's opinion demonstrates that it failed in this task and reached false historical conclusions as a result.

A. The Montana Supreme Court Failed To Critically Evaluate The Origins Of, And Basis For, The State's Secondary Historical Sources.

The Montana Supreme Court concluded that the State showed that the Missouri River is navigable along its entire length—including upstream of the Great Falls and not just downstream of Fort Benton. The Court further concluded that "Lewis and Clark . . . and many others" had actually navigated the upper river after portaging the Great Falls. Pet.

App. 56-57. Aside from the journals of the Lewis and Clark expedition (discussed below), it reached this historical navigability conclusion largely on the strength of questionable secondary sources prepared long after the fact: two unpublished reports prepared in 1974 and 1986, respectively (the "1974 Report" and "1986 Report"—collectively, the "Reports"). Pet. App. 16-17; Amicus App. 3a-19a.

Nor was the reason for this scanty evidentiary showing difficult to discern. The State presented hardly any evidence in support of navigability on the upper Missouri River, beyond what the Montana Supreme Court cited. Pet. App. 203. A competent historian would have treated the 1974 Report and the 1986 Report according to the professional standards that apply to an historian's interpretation of secondary sources. A competent historian would have considered, for example, the purpose for which the Reports were produced, at what time, under what circumstances, and by whom. A competent historian also would have judged those secondary sources according to their choice of, and proper use of, primary sources. The Montana Supreme Court did none of the above.

To begin with, the Montana Supreme Court misunderstood the nature of the Reports in ways that exaggerated their credibility. The 1986 Report, prepared by the Heritage Research Center in Missoula on commission for the Montana Department of State Lands, did not even purport to be a complete record of the Missouri River's navigability. Because of funding constraints, the 1986 Report's authors "focused upon generating the most information for the least possible cost," not on

producing the most accurate or authoritative account of Montana's navigable waterways. Pet. App. 193; Amicus App. 5a-6a. Indeed, those constraints had prevented at least one other firm from bidding for the work of preparing the report. As the would-be bidders explained, "we do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be reimbursed." Pet. App. 194; Amicus App. 1a.

Ultimately, little primary source research is evident in the 1986 Report. The Report instead cribbed its research almost entirely from the earlier 1974 Report. Indeed, the 1986 Report drew nearly all its citations from the earlier work, dutifully recording its dependence by describing its sources as "as cited in" or "as quoted in" the 1974 Report. Amicus App. 9a-12a. Insofar as the 1986 Report's authors did perform primary source research, they committed errors of their own. For example, when they turned their attention to the Clark Fork River, they cited the February 24, 1882 article from the frontier newspaper, the MISSOULIAN, for the proposition that logs *were* floated down the river in that year. Amicus App. 8a. Whatever the dubious merits of the newspaper itself (discussed further below), in fact the article only said that logs "*can be*" floated. Pet. App. 111, 197 (emphasis added). Because the underfunded 1986 Report relied almost exclusively on the 1974 Report for its treatment of the Missouri River, Amicus App. 4a-12a, the State's historical case for the navigability of the Missouri River in 1889 rested, in effect, on the sole authority of the 1974 Report.

As for the 1974 Report, the Montana Supreme Court operated under a mistaken impression that the 1974 Report was prepared *by* the United States Army Corps of Engineers (the "Corps"), Pet. App. 17, when in fact it was prepared *for* the Corps, through the work of Alan Newell and Gary Williams. Any special authority that historians might attach to the Corps's own reports which are researched in the field and prepared by the Corps's own experts therefore does *not* attach to the 1974 Report.

More importantly, the Montana Supreme Court failed to perform the all-important evaluation of the Reports' use of primary sources. Secondary sources like the Reports are "helpful but pernicious," because the facts they bring to light "have already been pre-selected." Barbara W. Tuchman, *Practicing History* 19 (1981). Because a secondary source based on unreliable primary sources cannot itself be credible, care in selection and evaluation of primary sources should have been the guidepost not only for the Reports' authors, but for the Montana Supreme Court's decision as to whether or not to rely on the Reports.

The 1974 Report, however, simply cannot bear the weight the Montana Court has now placed on it. Most of the 1974 Report describes the undisputed fact of historical navigation on the Missouri River downstream of Fort Benton. Although it also purports to describe actual use of the Missouri River upstream of Fort Benton for trade and passenger travel at the time of Montana's statehood, it overwhelmingly relies on two sources of information for that showing. *First*, the 1974 Report relies extensively on frontier-era newspapers such as the

HELENA WEEKLY HERALD and the GREAT FALLS TRIBUNE for its conclusion that companies used the Missouri River for commercial boats and to float logs downstream to Great Falls. Amicus App. 15a-18a. *Second*, it relies on footnotes in Hubert Howe Bancroft's 19th century history of Montana for the proposition that miners and settlers travelled the upper Missouri River with only a short portage around the Great Falls upstream of Fort Benton. Amicus App. 14a. No professional historian would treat those sources standing alone as adequate proof of an occurrence.

The place of frontier-era newspapers in historical scholarship has been much discussed, and is a particular scholarly interest of *amici* Professor Emmons and Professor Wrobel. *See, e.g.*, David M. Emmons, *Garden in the Grasslands: Boomer Literature of the Central Great Plains* (1971). It is fair to say that professional historians almost universally concur that frontier newspapers were frequently written to promote travel and settlement, and, as a result, subordinated considerations of factual accuracy to the seemingly more important goal of presenting glowing pictures of life on the frontier. The result was persuasive hyperbole and often outright fabrication. Accordingly, "[i]f you think of [these newspapers] as small versions of today's NEW YORK TIMES, you're in trouble—because they weren't." Bailyn, *supra* p.2, at 46; *see also* David M. Wrobel, *Promised Lands: Promotion, Memory, and the Creation of the American West* 5-6 (2002) ("Some boosters were great anticipators, trying to convince themselves as much as others of the promise of western places; others were bold-faced

liars selling promises for financial profit and nothing more."). Because frontier newspapers should always be read with a grain of salt and in light of their important role as promotional brochures, they should seldom be relied on as sole sources on questions of historical fact. Pet. App. 194-95, 222.

Examples from representative non-Montana frontier newspapers illustrate this point. Some newspapers claimed that rainfall on the Great Plains would increase if the ground were plowed, or if "'American' culture" were "substitute[ed] . . . for Indian[.]" *See* Emmons, *supra* p.9, at 153; *see generally id.* at 153-60 (discussing newspapers in Kansas and Colorado). One reported that its State's soil produced 28-pound radishes. *See id.* at 65. Another concluded "that Eastern moneyed investors would want Denver to have good steamboat access," and then on this basis "simply invented" news of steamboat traffic between Denver and the Gulf of Mexico. *See* Kirk Johnson, *Part of Denver's Past, The Rocky Says Goodbye*, N.Y. TIMES, Feb. 27, 2009, at A11. The trustworthiness concerns applicable to those newspapers apply equally to Montana's frontier newspapers. The authors of the 1974 Report undoubtedly would have hesitated to count on Montana's or any other frontier newspapers for descriptions of monster radishes. For similar reasons, the 1974 Report's authors and the Montana Supreme Court should have hesitated before crediting questionable accounts of ready commercial uses of Montana's rivers.

As for Bancroft, the 1974 Report's other source, his interpretations of historical fact, standing alone, are not considered reliable by professional

historians. Rather, their principal usefulness is as leads to more credible sources. Bancroft, a wealthy businessman, was primarily a collector and compiler of documents and for that historians no doubt owe him a great debt. The Bancroft Library at the University of California, Berkeley, for example, was founded on his collection. Bancroft's documents concerning California are often useful. But even as to California, as the preeminent California historian Kevin Starr has observed, Bancroft was "often ludicrous and sometimes dishonest." Kevin Starr, *Americans and the California Dream, 1850-1915* 119 (1973). For other States such as Montana, Bancroft merely had his assistants review unreliable newspapers and gazettes for source material. Pet. App. 277. Today, no reputable historian would use Bancroft as a sole source on an important factual point of Montana history. Pet. App. 196, 277.

Bancroft was also the main source for the State's federal authority treating the Missouri River as navigable upstream of Fort Benton for regulatory purposes. *See In re Montana Power Co.*, 7 F.P.C. 163, 172-73 (1948), *aff'd Montana Power Co. v. FPC*, 185 F.2d 491, 493-94 (D.C. Cir. 1950). Those administrative agency proceedings, it should be noted, addressed regulatory navigability, not title navigability. Hence, the proceedings would be no more than persuasive authority in this case, even if their sources were reliable. *Compare United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (title navigability determined "as of the formation of the Union in the original states or the admission to statehood of those formed later," while "navigability, for the purpose of the regulation of

commerce, may later arise"), *with id.* at 410 (navigability determined with reference to the river as a whole), *and United States v. Utah*, 283 U.S. 64, 77 & n.9, 89 (1931) (title navigability determined as to particular river segments, not the river as a whole).

Against this backdrop, the 1974 Report's crucial reliance on Bancroft cannot be defended. Instead of mining Bancroft's work for primary sources, the 1974 Report's authors cited Bancroft alone to show that miners and settlers travelled the Missouri River above Fort Benton by boat, and that a company operated a line of boats for commercial transport with a portage around the Great Falls. Amicus App. 14a. But Bancroft's likely source for this dubious proposition was an 1866 issue of the city of Helena's ROCKY MOUNTAIN GAZETTE, yet another frontier newspaper riddled with factual errors rendering suspect the accuracy of its accounts. For example, this 1866 account dramatically understated the length of the portage required to avoid the Great Falls: The portage it described would have left the passengers stranded in the middle of the Falls, or drowned. Pet. App. 278. Nor were the remarkable facts the article describes—"thousands" of passengers travelling on commercial mackinaw boats—directly corroborated by any other source brought to light in the present litigation, including the voluminous reports of the Corps cataloguing the uses of the Missouri River. Here again, an historian would not have used the GAZETTE'S dubious reports as historical fact without demanding further corroboration.

In summary, in finding that "many" besides Lewis and Clark had portaged the Great Falls and navigated the upper Missouri, the Montana Supreme Court relied on the 1986 and 1974 Reports. But the 1986 Report relied on the 1974 Report, and the 1974 Report relied on primary and secondary sources that no competent historian would treat with anything other than deep skepticism. The 1974 Report did credibly confirm actual navigation of the Missouri River upstream *to* Fort Benton, but not *beyond* Fort Benton. From the perspective of a professional historian, the Montana Supreme Court found historical "proof" where no such proof was evident.

B. The Montana Supreme Court Failed To Interpret Primary Source Language In Context.

The Montana Supreme Court's other basis for finding that the State had proved navigability is what can only be described as a tendentious reading of the journals of the Lewis and Clark expedition. According to the Montana Court, the expedition "portaged" the Great Falls, "allowing the Missouri to provide a useful channel of commerce." Pet. App. 57. In so concluding, the court read the Lewis and Clark journals in an ahistorical fashion.

To be sure, Lewis and Clark travelled the Missouri River upstream by boat (keelboats, pirogues, and canoes), took their canoes around the Great Falls by land, and ultimately put canoes back into the water. And, to be sure, the expedition's journals did refer to this land transport as a portage. And the journals further referred to the expedition's continued progress as navigation. Pet. App. 232-37. Nonetheless, a cardinal rule of interpreting primary

historical sources is that words must be read in context, in light of contemporary facts and circumstances, and according to the meanings their author had in view. Historians must read Lewis's and Clark's words as *they* meant them. Pet. App. 237. Unless the historian does that, the bare words of a journal become meaningless hieroglyphics or, worse, signposts on the road to historical error.

The evidence below established in the Montana courts without contradiction that the Lewis and Clark portage took *thirty-three* days. Pet. App. 233-34. And though Lewis and Clark returned their canoes to the Missouri River after that arduous land passage, they could no longer "navigate" the river in any way relevant here. As an initial matter, the vessels that the expedition "portaged" were mere dugout canoes, built in a matter of hours by hollowing out tree trunks; they were certainly not boats suited for commercial operations. Pet App. 235. More fundamentally, although those rude canoes were put back in the water after the 33-day portage, the expedition members often could only walk alongside the water, towing the canoes as they went. Pet. App. 234, 236-37. Doing so required extreme physical exertion from the men on land. Pet. App. 235-37. Accordingly, when the journals referred to the river as navigable, they meant only that they could follow its course as they explored the then-uncharted territory in this manner. Pet. App. 235. The mere fact that the exploratory expedition's canoes could be floated in parts of the Missouri River on both sides of the Great Falls does not remotely establish that the river was commercially useful upstream of the Great Falls.

Significantly, once the expedition had returned, Lewis and Clark's contemporaries did not consider their reported portage promising for navigation. Those highly-interested contemporaries thus disagreed with the Montana Supreme Court's conclusion that "portages" of the Great Falls "allow[ed] the Missouri to provide a useful channel of commerce" beyond the Falls. Historians are now in agreement, in fact, that the Lewis and Clark reports were the final undoing of the perennial, centuries-old, hopes for easy passage by navigable water to the Pacific Ocean. Pet. App. 57, 238-39. From an historian's perspective, it is thus not only incorrect but extremely ironic to say that Lewis's and Clark's journals prove as a matter of law that the upper Missouri River could "provide a useful channel of commerce." Pet. App. 57. The Montana Supreme Court's conclusion in this regard is diametrically *opposite* to the one drawn by Lewis and Clark's own contemporaries, as well as historians down to the present day.

II. This Case Presents A Recurring Issue Of Property Law Rooted In The Constitution And Dependent On History.

This Court has long held that when new States enter the Union, they enjoy title in the waterways on their territory that are navigable at the time of statehood. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845). That rule, commonly called the "equal footing doctrine," is a constitutional rule regulating valuable property rights and the relationship between States and the federal government. If the historical errors committed below are not corrected, this venerable rule risks becoming little more than a

cash cow for State governments wishing to reshuffle settled property rights to their own benefit by twisting the historical record.

The equal footing doctrine is rooted in the Nation's early history. Because the original thirteen States were independent sovereigns when they formed the United States, they held title in the beds and banks of their own navigable waterways that the federal Constitution did not disturb. *Massachusetts v. New York*, 271 U.S. 65, 86-89 (1926); *Martin v. Waddell's Lessee*, (1842), 41 U.S. (16 Pet.) 367, 410-11 (1842). When other States later came into the Union, it was readily acknowledged that they should do so on terms of equality with the original States. Hence, a settled constitutional rule holds that, although the federal government holds title to a new State's navigable waterways pre-statehood, title to the beds of those navigable waterways "passes" to the State when it joins the Union, just as if it too had formerly been an independent sovereign. By contrast, title to the beds and banks of non-navigable waters remains with the federal government upon a territory's accession to statehood. *See Utah*, 283 U.S. at 75; *Pollard's Lessee*, 44 U.S. at 228-29. This equal footing doctrine is grounded in "the equality of states." This Court has emphasized that it ultimately rests on "constitutional principle." *Utah*, 283 U.S. at 75.

By its nature, however, the equal footing doctrine is a constitutional principle that is uniquely dependent in application upon accurate historical analysis. The critical question is always whether a given section of a waterway was navigable *at the time of statehood*. *Id.* The doctrine therefore

requires a point-in-time historical analysis by its very terms. Moreover, the difficulty and professional skill required for this analysis only increases as time passes. When a State is newly admitted, many questions of title navigability will be comparatively uncontroversial, because the contemporary usefulness of waterways for navigation will be a matter of public knowledge. Today, however, no State has been admitted to the Union for more than fifty years. In today's circumstances, the historian's craft is indispensable for accurately determining whether given rivers were navigable in historical times that range from a half-century ago in the case of Alaska and Hawaii, to ninety-eight years ago for New Mexico and Arizona, and to well over a century ago in all other cases. For that same reason, the equal footing doctrine leads in turn to important reliance interests.

Consequently, disturbances to longstanding conclusions reached on equal-footing grounds will inevitably lead to serious disruptions of settled expectations, especially where, as here, those conclusions are rooted in flawed historical analysis. To date, the equal footing doctrine has been likeliest to be contested in cases brought soon after States enter the union, or when development of waterways is underway. For that reason, and because of the reliance interests involved, title to waterways under the equal footing doctrine has been litigated only infrequently in recent decades. Indeed, the Court's most recent major pronouncement on the issue remains *Utah*, a 1931 decision prompted by a quiet title action commenced against Utah by the federal government.

The Montana Supreme Court's decision, however, carries a potential to unleash a new wave of litigation between States, private parties, and the federal government. By persuading the court below to declare—more than 120 years after Montana's statehood—that the upper Missouri, Madison, and Clark Fork Rivers had in fact been navigable in 1889, the State of Montana reaped both lease revenue and property-rights windfalls. Precisely because Montana's reward was so high in this case, the temptation for sister States to engage in similar historical revisionism will be great.

The consequences for property rights, dramatic here, could be equally or even more dramatic in other cases. All but one of the dams at issue in this litigation were built between 1891 and 1930, and the newest was built in 1958. Title to each of these dams had been treated as settled by all parties, including the State, for at least fifty years, and in some cases for more than a century. It just so happens that PPL has only held title to the dams since 1999 and relicensed them in 2000, meaning that the assessed judgment from PPL was for "only" about a decade's worth of back compensation. But PPL's predecessor in title had owned and operated the dams since the 1940's, and in general licenses for hydroelectric dams can last for up to fifty years. 16 U.S.C. § 799. As great as the $41 million award in this case was, it could have been even greater if the relevant defendant had happened to own the relevant dams for even longer before the outbreak of historical revisionism. Even when a State's case for title navigability is poor, the *in terrorem* threat posed by the prospect of many decades' worth of back

compensation may be sufficient to extract large settlements from companies like PPL in other cases.

In addition, and of particular interest to the *amici*, the consequences for the historical record and historical profession also could be great. All determinations of title navigability at a precise moment of accession to statehood require a quintessentially historical analysis. But the decision below illustrates, if nothing else, that these quintessentially academic inquiries into historical fact can entail enormous, present-day, financial consequences. The result is a legal situation that, if left unremedied, will require intensive, detached, evenhanded historical analysis in precisely those cases where the temptations for States and State courts to run roughshod over the historical record will be most difficult to resist—a situation almost equally distressing for legal practice, settled rights, and historical professionalism.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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