No. 10-218 OCT 1 - 2010

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

BRIEF IN OPPOSITION OF THE STATE OF MONTANA

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QUESTIONS PRESENTED

1. The Clark Fork, Madison, and Missouri Rivers in Montana have a recorded history of navigation that dates as far back as the Lewis and Clark Expedition. Based on this history, and decades before this action and PPL's purchase of the projects at issue, the Montana Supreme Court, the Federal Courts of Appeals, the Federal Power Commission, the United States Army Corps of Engineers, and the Montana Department of State Lands found these rivers to be navigable in fact in their original condition. PPL's pleadings and deeds confirmed the rivers' navigability, and it failed to set forth specific facts sufficient under state rules to dispute this. The district court granted summary judgment confirming the State's title. The Montana Supreme Court affirmed. Does this state-specific factual and procedural record merit review in this Court?

2. The Federal Power Act contemplates that a hydropower project licensee will obtain all property rights necessary under state law for operation of the project. Does the same Act preempt state property rights that require compensation for the use of state sovereign trust lands?

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In addition to the unofficial report cited in the Petition for Certiorari, the Montana Supreme Court decision is reported at *PPL Mont. v. State*, 229 P.3d 421 (Mont. 2010).

STATEMENT OF THE CASE

1. On December 17, 1999, PPL purchased from Montana Power Company its hydroelectric projects located on the Clark Fork, Madison, and Missouri Rivers. At trial, PPL's General Counsel and lead witness conceded that PPL had never reviewed its deeds to determine whether or not Montana Power purported to own or convey to PPL the lands underlying the Clark Fork, Madison, and Missouri Rivers:

> Q. Did you make a review of whether the streambeds were included in the real property when you acquired it?
>
> A. I did not.

Tr. 619-20. The deeds conveyed by Montana Power to PPL confirm that PPL did not acquire ownership of the lands underlying the rivers. Instead, the legal descriptions of PPL's property run to a river bank or water level as a boundary. Resp't App. 37-38, 59.

Since statehood, Montana law has held that "[t]he state is the owner of all land below the water of

a navigable lake or stream." Mont. Code Ann. § 70-1-202, *enacted as* § 1091, Mont. Civ. Code (1895). The State currently manages thousands of acres within navigable rivers, in addition to the leases approved for PPL's co-plaintiffs during this litigation. Pet'r App. 73 n.10. Even though PPL lacked title to the lands underlying its projects within the navigable rivers, it did not apply for a lease or otherwise compensate the State for the use of these lands.

2. In a line of cases dating back a century, the Montana Supreme Court has held that the State's management of some trust lands had not met the historic constitutional requirements to obtain full market value for trust lands. *See Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Comm'rs*, 989 P.2d 800 (Mont. 1999); *see also id.* at ¶ 14. Before PPL acquired its projects in Montana, that court had held that landowners take ownership of sovereign state lands "subject to the constitutional trust status of these lands." Pet'r App. 73, *citing Montanans for the Responsible Use of the School Trust*, ¶ 19.

Parents of Montana public school children, as beneficiaries of the state land trust, contended that the State had failed to obtain full market value for the navigable riverbeds occupied by the hydroelectric projects of Avista, PacifiCorp, and PPL. They originally sued in a diversity action in United States District Court on October 17, 2003, where PPL conceded the navigability of the rivers. Resp't App. 26-31. The State intervened. The Court denied PPL's motion to

dismiss, holding that the State's trust land claims were not preempted by the Federal Power Act. The court also dismissed the trust beneficiaries for lack of standing. In the resulting absence of diversity, the court dismissed the action for lack of jurisdiction and vacated its order on preemption. Pet'r App. 145-46.

PPL and its two co-plaintiffs sued in state district court in November 2004. They sought a declaratory judgment that they did not need to pay for their use of what they conceded were the "navigable riverbeds" of the Clark Fork, Madison, Missouri, and Swan Rivers. Resp't App. 5-8, 17-20. In response, the State counterclaimed for a declaration that PPL and its co-plaintiffs unlawfully occupied state lands and must compensate the State land trust on behalf of its public beneficiaries for the use of those lands. The State also immediately moved for summary judgment on PPL's federal preemption claim and state-law equitable and other defenses to the State's claims.

a. The district court held in accord with the federal district court that "the Utilities cannot invoke the federal navigational servitude to preempt the State's claims for compensation" and the Federal Power Act "does not preempt the State from obtaining rental compensation" or "bringing any common-law claims for damages." Pet'r App. 152, 156. The district court further held, relying on long-established state law, that "the Utilities cannot assert any of their legal or equitable defenses against the State in its role as trustee of state lands," including the defenses of

prescriptive easement, estoppel, laches, statutes of limitations, and waiver. Pet'r App. 157-60.

b. Exhaustive discovery between the parties commenced. More than two years into the litigation, the district court heard the State's motions on summary judgment as to the navigability of the Clark Fork, Madison, Missouri, and Swan Rivers, and the trust status of the state lands underlying those rivers. Based on a lengthy historical record established through primary sources, state and federal government reports, extensive current use, prior judicial and administrative determinations of navigability in proceedings against PPL's predecessor, prior navigability holdings by this Court, PPL's title documents, and unequivocal assertions of navigability-in-fact by PPL and its co-plaintiffs in their pleadings, the district court granted summary judgment to the State on the issue of navigability. Pet'r App. 130-44. Many of these historical facts were hearsay, Pet. 9, but they fell within established exceptions. *See* Mont. R. Evid. 803(8), (16), (20), and (24).

The record in the courts below for each river at issue is summarized by government reports and supported by historical sources produced on summary judgment. The State filed in the district court on summary judgment, and the Montana Supreme Court in its appendix, a summary of the evidence appended here at Resp't App. 26-57. The record in the courts below established the following.

The Clark Fork River. In 1810, David Thompson navigated the Clark Fork River between fur trading posts he established near the mouth of the Clark Fork at Pend Oreille Lake (below PPL's dam) and the mouth of the Thompson River above Thompson Falls (above PPL's dam). Resp't App. 80, 103. In 1853, Washington Territorial Governor Isaac Stevens sent a railroad survey party down the Bitterroot River to the Clark Fork (above PPL's dam) and down it to Pend Oreille Lake (below PPL's dam). Resp't App. 80-81, 103-04. Other forms of navigation continued above Thompson Falls in pre-statehood years, to the Blackfoot River and beyond, including miner traffic followed by log drives that supported a robust timber industry. Resp't App. 80-85, 104-09.

Three decades into statehood, the Montana Supreme Court held it was "a matter of common knowledge that Clark's fork of the Columbia river is a navigable stream" in the area of PPL's dam, and that property "lying along its course are bounded on that side by the line of the stream at low water." *Interstate Power v. Anaconda Copper Mining*, 159 P. 408, 410 (Mont. 1916). In licensing the Thompson Falls Dam to PPL's predecessor, the Montana Power Company, the Federal Power Commission determined that the river "was used for the transportation of persons and property between areas now constituting the states of Oregon, Idaho, and Montana from 1810 to 1870."

The Montana Power Co., Project No. 1869, 8 FPC 751 at Finding 13 (1949) (Thompson Falls Original License).

PPL did not dispute these prior findings. Instead, PPL primarily relied on a "1910 federal decree," dicta from a minor water rights case between private parties enjoining one party from "claiming the waters" of the Clark Fork; the case does not analyze navigability. *Steele v. Donlan*, No. 950 (D. Mont. 1910). Unlike the Federal Power Commission's binding navigability finding against PPL's predecessor in *Montana Power*, neither the State nor any privy was a party to *Donlan*.

PPL also relied on reports commissioned to assess the Clark Fork's potential for future navigational improvements for modern powered watercraft, although it presented them as if they were addressed to historical navigability. Pet. 10-11. For example, the 1891 Corps Report deemed the river non-navigable at points for large powered craft like steamboats, even though an 1882 report (offered by PPL on summary judgment) described navigation by light boat of nearly the entire river, and a 1932 report (also offered by PPL on summary judgment) described log drives down the relevant length of the river. Resp't App. 38-40. These more traditional forms of navigation on the Clark Fork were undisputed and dispositive of navigability in fact.

The Madison River. "The Madison River has experienced considerable use historically by explorers, trappers, miners, farmers and loggers, and is generally considered to have high potential for navigation." Resp't App. 88. When William Clark reached the Three Forks on July 25, 1805, he observed that the Madison and its navigable counterparts the Gallatin and Jefferson were "nearly of a Size." Resp't App. 51-52. The Madison's early navigation has not been as extensively documented as that of its sister rivers, as the surrounding region was reputed to be forbidding to pioneers during the early nineteenth century. Resp't App. 121-22. In the early 20th century, the Madison River Lumber Company floated logs down most of its middle portion (between PPL's dams), though by then the river's navigability was diminished by the Madison Dam and its Hebgen storage facility. Resp't App. 88, 124-28.

A decade later, the Montana Power Company conceded the Madison's navigability in a nuisance suit arising under a statute applicable to "any navigable lake, or river, bay, stream, canal, or basin . . . " *Jeffers v. Montana Power*, 217 P. 652, 658 (Mont. 1923). A U.S. Army Corps of Engineers study concluded in 1974 that, notwithstanding the post-statehood "obstructions of the Madison Dam, Earthquake fill and Hebgen Dam . . . [t]his situation warrants a recommendation of navigability for the entire Madison River from its boundary with Yellowstone Park to its confluence with the Missouri River."

Resp't App. 135. Today, the Madison River, prized by anglers, is one of the most heavily navigated waters in Montana despite reduced post-statehood flows. Only the Missouri is more heavily used over its length. Resp't App. 62-63. PPL did not dispute this.

Instead, PPL again selectively quoted from a 1931 report considering future navigability improvements for modern navigation. Pet. 11. PPL also presented an affidavit, from an expert who has never set foot near any of the rivers at issue, speculating through maps and charts that the river's flow had changed since statehood. Pet. 11. While its expert concluded that increased water depths "make the Madison River more susceptible to use for navigation now than it was at the line [sic] of statehood" in the months of October and November, he also found that the converse was true: the river was at least as deep as it is today, and therefore more susceptible to use for navigation, in every other month of the year. Pet'r App. 210. He also deemed shallows and sandbars at certain locations on the Madison to bar navigation, despite heavy actual use at those locations, Pet'r App. 211-13; Resp't App. 62-63, and the rule that shallows and sandbars "do[ ] not make a river non-navigable." *United States v. Utah*, 283 U.S. 64, 86 (1931).

The Missouri River. More than two centuries ago, Captain Meriwether Lewis led an expedition up the length of the Missouri River in Montana and observed he could not find a better example than the Missouri and Jefferson of rivers that run "through

such a mountainous country and at the same time [are] so navigable as they are." Resp't App. 147-48. After the discovery of gold, miners and settlers floated the river to Great Falls and Ft. Benton from the Helena area mining districts upstream. Resp't App. 91-92, 153-65. Thus, a U.S. Army Corps of Engineers study concluded, and the Corps itself determined, that "[h]istorical evidence supports the contention that the Missouri River is a navigable waterway from Loma, Montana, [below PPL's dams] to Three Forks, Montana [above them]." Resp't App. 167-69.

In the 1940s, PPL's predecessor Montana Power Company contested the Federal Power Commission's effort to license its hydropower projects on the Missouri. It argued then, as PPL does now, that the Great Falls of the Missouri was not navigable in its original condition. The Commission rejected the argument and found, based on historical evidence of the river in its original condition, that "the Missouri River, throughout its entire length, is a navigable water of the United States." *In re Montana Power*, 7 FPC 163 (1948), *aff'd, Montana Power v. Federal Power Comm'n*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951).

Specifically, the Commission found the Missouri to be navigable from Fort Benton to Three Forks before statehood, and also cited two Montana Supreme Court decisions that considered the Upper Missouri to be navigable for title purposes. The first,

Gibson v. Kelly, 39 P. 517, 519 (Mont. 1895), a boundary dispute concerning property between Great Falls and Fort Benton (below PPL's dams), relied on the Missouri's navigability in establishing that the state owns all land below the low-water mark. The second, *Herrin v. Sutherland*, 241 P. 328, 330 (Mont. 1925), involved a similar dispute on the Missouri in Lewis and Clark County (between PPL's dams), and again relied on the Missouri's navigability for title.

PPL did not, and could not, dispute the official determination by the Corps that the Upper Missouri was navigable in fact through its entire length. Instead, PPL again took out of context an 1896 War Department declaration and an 1898 Corps report, which considered only the Great Falls themselves, and then only for modern navigational improvements. Pet. 11. Neither of those documents considered log floating, canoeing, or small boats that suffice for navigability in fact, or contained any discussion of history. Except for the falls themselves, both documents deemed the Upper Missouri River navigable throughout its length. Resp't App. 41-44.

What PPL calls a 500-page "mountain of contrary evidence," Pet. 18, is a pile of largely immaterial government reports on vast interstate river basins. They contain only a molehill's worth of specific historical navigability analysis beyond the fifty words PPL quotes in its petition. Pet. 10-11. Unlike the more recent navigation reports cited by the State, these early reports considered only the prospects of improvements

for future commercial navigation by large powered craft. They do not concern navigability for title, which turns on the susceptibility of navigation by "[v]essels of any kind that can float upon the water," including "rafts of lumber." *The Montello*, 87 U.S. 430, 441-42 (1874). Moreover, the Corps lacks jurisdiction to find rivers non-navigable. *See* 33 C.F.R. § 329.16.

PPL introduced these cherry-picked reports through the short, conclusory, and often contradictory expert affidavit of historian (and proposed *amicus curiae*) David Emmons, who researched only the State's affidavits and the "historical documentation produced in this case" by PPL.[1] He disputed just one of the dozens of specific recorded instances of navigation on the rivers at issue. Pet'r App. 196 (contesting a single log float on the Clark Fork in 1882).

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[1] PPL's petition improperly appends and relies upon material that was not before the courts below on summary judgment, the *Navigation Report* by David M. Emmons (June 2007); *cf.* Emmons Prop. *Amicus* Br. at 2 (incorrectly asserting that PPL's "evidentiary showing included . . . his expert report, and the report's accompanying exhibits"). Although the report showcases the kind of factless conclusory analysis identified by the lower courts, PPL did not file it in the summary judgment proceedings, which were submitted six months earlier. Pet'r App. 131; *cf.* Mont. R. Civ. P. 56(c) (adverse party's opposing affidavits to be served "prior to the day of the hearing"). Instead, it was one of several pretrial expert reports on the history and geology of the rivers, proferred by both PPL and the State, in the event the district court did not grant summary judgment and the case proceeded to trial. It is irrelevant to whether the courts below properly granted summary judgment on the record PPL actually submitted.

Similarly, far from "discrediting" the State's detailed historical reports, Pet. 10, he attacked only one of the several hundred sources supporting those reports, a nineteenth century historian whose name Emmons misspelled as Hubert "Hugh" Bancroft. Pet'r App. 196. Unlike Emmons, this Court has relied on Hubert *Howe* Bancroft for nearly as long as it has considered navigability cases. *See The Montello*, 87 U.S. at 440, *citing Bancroft's History of the United States*. Emmons's opinions did not so much satisfy Montana's rules of evidence and civil procedure as they sought to displace them with his own "professional historian's assessment." Emmons Prop. *Amicus* Br. at 1.

c. As a consequence of the rivers' navigability, the district court held that the underlying lands passed to the State under the Equal Footing Doctrine at statehood and therefore the lands then became part of the public land trust established by Mont. Const. Art. X, § 11. Pet'r App. 27-31.

Meanwhile, PPL's co-plaintiffs agreed to enter into leases for state-owned riverbeds under the Hydroelectric Resources Act. Pet'r App. 73 n.10. In June 2007, the Land Board approved an agreement by PacifiCorp to enter a lease "for 47.84 acres of common school trust lands forming the bed of the Swan River" at a rental rate of approximately $50,000 per year. In November 2007, the Land Board approved an agreement by Avista to enter a lease for "approximately 3,100 acres of Clark Fork riverbed in the amount of $4 million annually." The district court approved the

agreements by stipulated dismissal and consent judgment.

d. PPL and the State tried their remaining preemption, property, and damages claims in a seven-day bench trial. Based upon expert analysis by a leading natural resources economist familiar with the valuation method used by the Federal Energy Regulatory Commission for similar bedlands, the State and the district court valued the riverbeds used by all three projects at approximately the same annual amount per acre: $1,267 for Avista's projects on the Clark Fork River, $1,045 for PacifiCorp's project on the Swan River, and $1,086 for PPL's projects. These values are typical for hydroelectric uses of riverbeds elsewhere. Tr. 291-309. The district court calculated the full market value of state lands used by PPL to be $6,207,919 annually in 2007, plus damages for past wrongful occupation beginning when PPL purchased the Montana Power Company dams, with the terms of a future lease to be approved by the Land Board. Resp't App. 181.

3. The Montana Supreme Court affirmed in an 84-page opinion, over the dissent of one justice and a district court judge sitting by designation.

a. As to the State's proof, the Montana Supreme Court rejected PPL's challenges to the district court's reliance on the historical record. Pet'r App. 47-53. It held "unequivocally that the District Court's understanding of the navigability for title test was correct." Pet'r App. 54. It further held, "[t]he evidence

presented by the State was clearly sufficient to demonstrate navigability in fact under this test, and entitlement to judgment as a matter of law." Pet'r App. 56.

The Montana Supreme Court paid particular attention to this Court's opinion in *United States v. Utah*, 283 U.S. 64 (1931) ("*Utah I*"). It rejected PPL's claim that interruptions in navigability render "any portions of these rivers non-navigable," when the rivers still "were susceptible of providing a useful channel of commerce" at statehood. Pet'r App. 61-62. Thus, it found "PPL's reliance on *Utah* misplaced" because, as this Court explained, "[t]he question here is not with respect to a short interruption of navigability," but "*with long reaches.*" Pet'r App. 59-60 (emphasis in original), *quoting Utah I*, 283 U.S. at 77. So by the logic of *Utah I*, a portage around the Great Falls was "merely a short interruption in the use of the Missouri as a channel for useful commerce" by navigators whose origins and destinations lay further downstream or upstream within the "long reach" of the river at issue. Pet'r App. 61.

b. The Montana Supreme Court held that PPL's evidence failed under Mont. R. Civ. P. 56(c) to "set forth specific facts" showing a genuine issue of material fact as to navigability. PPL did not dispute that the Great Falls were "portaged by the Lewis and Clark expedition, and many others, early in the 19th century, allowing the Missouri to provide a useful channel of commerce." Pet'r App. 57. PPL's expert witness's recital of "conclusory statements, without any specific factual support, are insufficient as a

matter of [state] law to raise genuine issues of material fact." Pet'r App. 57-58; *see Tin Cup Co. Water and/or Sewer Dist. v. Garden City Plumbing & Heating*, 200 P.3d 60, ¶ 54 (Mont. 2008) ("[C]onclusory statements and assertions do not constitute facts that are 'material and of a substantial nature' that would prevent summary judgment."). Similarly, PPL's contention that post-statehood flows raised and lowered the Madison River a few inches on a temporary seasonal basis did not raise a genuine issue because regardless of that slight variation, "the Madison was susceptible for use during portions of the year . . . at the time of statehood." Pet'r App. 58.

c. On the preemption issue, the Montana Supreme Court construed the leasing provisions in the State's Hydroelectric Resources Act consistently with PPL's federal licenses. It held the Act "survives the federal preemption" claim as a matter of federal law, and its compensation provisions would survive a severability analysis even if other parts of the Act were preempted by federal law. It therefore held that preemption "would not alter the fact that the core of the HRA is compensatory, not regulatory, in nature." Pet'r App. 71-72. Moreover, this compensatory obligation is not dependent on the Act alone; as the opinion made clear, the State's monetary claim is ultimately "based on failure to provide the State compensation as required under the Montana Constitution." Pet'r App. 85.

REASONS FOR DENYING THE PETITION

PPL repeatedly misstates the record, and that record presents no important federal question. PPL does not, and did not ever, have title to the riverbed lands at issue. To the contrary, its deeds end at the riverbanks, reflecting a documented history of navigability in fact at statehood, confirmed repeatedly by state and federal courts and administrative agencies, and conceded by PPL in its pleadings. PPL's conclusory assertions could not, and did not, controvert these multiple factual and legal grounds on summary judgment as a matter of state law. As a consequence, PPL must compensate the State for the use of its lands, just as it and other federal licensees compensate other landowners in Montana and elsewhere. This result is compelled by long-established state law and contemplated by applicable federal law.

I. MONTANA'S TITLE TO THE RIVERBEDS AT ISSUE IS FACTBOUND AND SETTLED.

Under the federal "equal footing" doctrine, "the State receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union. . . ." *State Land Bd. v. Corvallis Sand & Gravel*, 429 U.S. 363, 372 (1977). Navigable rivers are those that "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." *The Daniel Ball*, 77 U.S. 557, 563 (1870).

The "crucial question" of navigability is "susceptibility [of use] in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use" at the time Montana was admitted to the Union in 1889. *Utah I*, 283 U.S. at 82. Use "limited in the sense of serving only a few people" sufficiently distinguishes "between navigability and non-navigability." *Utah v. United States*, 403 U.S. 9, 11 (1971) ("*Utah II*"). Courts may rely on post-statehood use probative of a river's "susceptibility in the ordinary condition," especially "where conditions of exploration and settlement explain the infrequency or limited nature of such use" pre-statehood. *Utah I*, 283 U.S. at 82.

The district court granted summary judgment, and the Montana Supreme Court affirmed that judgment, based on PPL's failure to dispute the State's title under state law and not because of any misapplication of federal law.

A. Each Navigability Determination Below Stands on Its Own Facts.

The Montana Supreme Court correctly applied the federal navigability for title test to the particular facts concerning the parts of the Clark Fork, Madison, and Missouri Rivers at issue, all entirely within Montana. Pet'r App. 58-62. There is no lower court conflict here because the history and geography of Montana's rivers is, like those of all American rivers,

unique. "Each determination as to navigability must stand on its own facts." *Utah I*, 283 U.S. at 87.

1. In its attempt to manufacture a conflict worthy of this Court's review, PPL attacks a "river-as-a-whole" navigability test that does not appear in the opinions below. The Montana Supreme Court nowhere concluded "that the Missouri, Madison, and Clark Fork river are generally navigable rivers," based on distant navigation far downstream or upstream. Pet. 19. Instead, that court had before it a lengthy historical record of actual navigation on these rivers at or near PPL's projects. Resp't App. 26-57. In response to that record, PPL did "not put forth any evidence whatsoever of 'long reaches of non-navigability' but instead merely points to relatively short interruptions in the Clark Fork, Missouri, and Madison Rivers." Pet'r App. 60-61. The Montana Supreme Court acknowledged that these falls, rapids, and shallows "impede uninterrupted navigation," but correctly concluded that they "do not affect the actual use or susceptibility of use of these rivers as channels for commerce in Montana at the time of statehood," given undisputed evidence of portages that made the interruptions passable. Pet'r App. 61.

This follows from the archetypal navigability case that involved the Fox River in Wisconsin, which in its natural condition contained "several rapids and falls" and "through its entire length, could not be navigated by steamboats or sail vessels," while short draft boats required "the aid of a few portages." *The Montello*, 87 U.S. at 439-41. Although the case

addressed navigability under the Commerce Clause, this Court considered the river's pre-statehood navigability in fact, "before the improvements resulting in unbroken navigation were taken." *Id.* at 440-41; *see also Utah I*, 283 U.S. at 76 (relying on *The Montello* to determine title). The Fox River was navigable in fact despite the obstructions, because any other rule "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." *The Montello*, 87 U.S. at 442-43. This Court made clear that even where "serious obstructions to an uninterrupted navigation" exist, "the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." *Id.*, at 443. Such a channel may bypass navigational obstructions by portage. "If this be so the river is navigable in fact." *Id.*

Even as to the Great Falls of the Missouri, the Montana Supreme Court's application of this principle is consistent with prior federal decisions that "the Missouri River was [held] navigable in the area of Fort Benton, Montana, despite the presence of the Great Falls of Missouri . . . because 'gold miners in considerable number [had] travelled downstream with the aid of a portage or 'land carriage' around the falls.'" *Consolidated Hydro v. FERC*, 968 F.2d 1258, 1262 (D.C. Cir. 1992), *quoting Montana Power v.*

Federal Power Comm'n, 185 F.2d 491, 494 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951).

The undisputed fact that the Great Falls "were portaged by the Lewis and Clark expedition, and many others, early in the 19th century," Pet'r App. 57, distinguishes it from the 36-mile long Cataract Canyon (the navigability of which was not at issue) in *Utah I*, the 59-mile section considered in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), and the hundreds of miles of the Rio Grande in New Mexico in *United States v. Rio Grande Dam and Irrigation*, 174 U.S. 690 (1899). PPL has cited no case in which a court has held that such a short interruption with a history of portages rendered the longer reach of river non-navigable. *See Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1433 (9th Cir. 1993) (holding non-navigable 21 miles of a 55-mile river that had never been "portaged around"); *City of Centralia v. FERC*, 851 F.2d 278 (9th Cir. 1988) (holding navigable a 26.2 mile stretch); *Loving v. Alexander*, 745 F.2d 861, 866 (4th Cir. 1984) (holding navigable a 19.1 mile segment, and rejecting argument that navigation at certain points "should be divorced from the navigability of the balance of the [segment]"); *Utah v. United States*, 304 F.2d 23, 24 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962) (holding non-navigable a 55 mile distance); *Northwest Steelheaders Ass'n v. Simantel*, 112 P.3d 383, 394-95 (Or. App. 2005), *cert. denied*, 547 U.S. 1003 (2006) (distinguishing navigable 100-mile lower river basin from non-navigable 140-mile upper river basin).

Unlike PPL, these cases recognize a distinction between "long reaches" of river at issue in Utah and "a short interruption of navigability in a stream otherwise navigable," such as a series of falls on the Mississippi similar to the Great Falls. *Utah I*, 283 U.S. at 77, *citing St. Anthony Falls Water Power v. St. Paul Water Comm'rs*, 168 U.S. 349, 359 (1897). In *St. Anthony Falls*, this Court determined Minnesota's Equal Footing rights to the Mississippi at the falls themselves, "based upon the really unquestionable fact that it is a navigable river at all points referred to in these records," even though "boats could not go up and down [the falls] in its natural condition," logs could be floated only "with chutes that are artificially prepared," and navigation directly above and below the falls was possible only because "the dam made it so." *Id.* (emphasis added), *cf. Niagara Falls Power Co. v. Water Power & Control Comm'n*, 267 N.Y. 265, 270, *cert. denied*, 296 U.S. 609 (1935) (finding navigability because "[w]hether the Niagara river is navigable at the particular point of the defendant's intake for water used to create power [at Niagara Falls] is immaterial.").

"[N]avigability does not depend . . . on an absence of occasional difficulties in navigation. . . ." *Utah I*, 283 U.S. at 76, *quoting United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). Any other rule would negate both state title and federal jurisdiction over most hydroelectric projects on falls within otherwise navigable rivers, since as PPL explains "what is bad for navigation is good for hydropower generation." Pet. 1.

So PPL's non-navigability and preemption arguments are self-contradictory. The sole basis for federal jurisdiction over PPL's projects on the Great Falls is the pre-statehood use, between 1864 and 1870, "of the entire length of the upper river for through traffic from above the falls to Fort Benton below. . . ." *Montana Power*, 185 F.2d at 494. If that case was incorrectly decided, and as PPL argues the Great Falls "in all probability never will be" navigable, Pet'r App. 200, then there would be no federal preemption because the Federal Power Act could not extend to its projects. Instead, the Great Falls of the Missouri are held to be navigable for interstate commerce because they were found to be navigable in fact before statehood, which proves navigability for title. Pet'r App. 61.

2. PPL attempts to portray a similar split with respect to the Montana Supreme Court's limited consideration of post-statehood navigation. Sparing no superlative, it warns of "an extraordinarily expansive and erroneous reading of *Utah [I]*" and the "dangers of giving modern evidence undue weight." Pet. 28-29. Yet PPL fails to cite a single instance of such misuse of post-statehood evidence.

To the contrary, as PPL admits, "post-statehood usage may be probative of a waterway's use or susceptibility to use at statehood." Pet. 26. The only question is how, and that depends on the facts of the case. The court below applied to the facts below this Court's rule that "where conditions of exploration and

settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved" by means other than actual pre-statehood use, including "the consideration of future commerce" that might occur under more intensive settlement. *Utah I*, 283 U.S. at 82-83. This Court reiterated in *Utah I* "that navigability does not depend on the particular mode in which such use is or may be had. . . ." *Id.* at 76, *quoting Holt State Bank*, 270 U.S. at 56. In other words, if the Madison River was more susceptible to navigation at statehood than it is today, and if fishing boats navigate the Madison River today, then the Madison River was at least as susceptible to navigation in similar boats at statehood as it is today. "[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *Appalachian Electric Power Co.*, 311 U.S. at 416.

In the proceedings below, PPL questioned the propriety of post-statehood evidence only for the Madison River, given the thorough pre-statehood historical record of navigation on the other larger rivers. Pet'r App. 57. Today, the Madison River where PPL's projects are located is the most navigated section of river in Montana, by anglers in driftboats. Resp't App. 62-63. Unfortunately for PPL, it chose to challenge that post-statehood evidence by presenting an expert opinion that found the Madison at statehood to be at least as navigable as it is today for ten months of the year. Pet'r App. 11.

B. PPL Never Had Title to the Riverbeds.

PPL's intemperate claim of "an enormous uncompensated land grab," Pet. 1, would be untrue even in the absence of summary judgment on navigability. The record provides ample factual and state law grounds to render this Court's review unnecessary to the final disposition of the case.

1. PPL owns no riverbed land to "grab." As the district court explained, "[s]ignificantly, excepted from the warranty deeds are the beds of the Missouri, Madison and Clark Fork Rivers." Resp't App. 59. PPL's general counsel, and its lead witness at trial, confirmed that PPL had no basis to claim ownership of the riverbeds when it purchased the projects. Tr. 619-20. Its deeds end at the riverbanks. Resp't App. 37-38. Under state property law, "[m]ention of the stream as the extent of a boundary which terminates in that direction is sufficient to show a connection between such boundary and the line of low water." *Interstate Power v. Anaconda Copper Mining*, 159 P. 408, 410 (Mont. 1916). Therefore title to those lands has remained with the State since statehood. *See* Mont. Code Ann. §§ 70-1-201, -202. This undisputed evidence is dispositive and presents no federal question.

2. Several federal tribunals preceded the Montana Supreme Court in finding the rivers at issue to be navigable in fact. *See, e.g., In re Montana Power*, 7 FPC 163 ("Actual [historical] use alone, therefore, shows the [Missouri] River to be a 'navigable water' of

the United States"), *aff'd*, *Montana Power v. Federal Power Comm'n*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951); *The Montana Power Company*, 8 FPC 751-53 ("The section of the Clark Fork River between Pend Oreille Lake in Idaho and the mouth of the Jocko River in Montana was used for the transportation of persons and property . . . from 1810 to 1870"). Although these facts arose in a determination under the Federal Power Act, these findings are based on pre-statehood use of the river in its original condition. Under state law of preclusion, these findings preclude PPL, which is privity with Montana Power as its successor, from challenging these "determinative facts which were actually or necessarily decided in a prior action." *Haines Pipeline Constr. v. Montana Power*, 876 P.2d 632, 636 (Mont. 1994).

3. Given the lack of title on its deeds, and multiple factual findings of navigability in fact against its predecessor in interest, PPL repeatedly admitted in pleadings that the rivers at issue are navigable. Resp't App. 26-31. PPL's meaning was perfectly clear in these admissions: it admitted in its Answer "that title to the beds and banks of the navigable riverbeds within [] Montana vested in the State." Resp't App. 20. As the plaintiff who originally framed the issues on declaratory judgment, PPL's admissions pose a separate bar to its claims as a matter of state law. Its proposed amendments to those admissions, not raised and therefore waived in the pretrial order, *see* Mont. Uniform D. Ct. R. 5,

amounted to an impermissible shift in the theory of liability "simply to suit [its] legal maneuverings at the time." *Rowland v. Klies*, 726 P.2d 310, 316 (Mont. 1986); *see also Audit Services v. Frontier West*, 827 P.2d 1242 (Mont. 1992) (affirming judgment against the defendant based upon the admissions contained within the answer).

II. THE FEDERAL POWER ACT CONTEMPLATES, AND DOES NOT CONFLICT WITH, STATE PROPERTY LAW.

No federal question can arise from the Montana Supreme Court's construction of the State's Hydroelectric Resources Act. The preemptive scope of the Federal Power Act is limited to a state's exercise of its regulatory powers to modify the development or operation of a licensed project, or otherwise exercise "veto power over the federal project." *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 164, *rehr'g denied*, 328 U.S. 879 (1946). The decision below demands nothing of the sort. Proof of this can be found in the fact that two other licensees under the Federal Power Act, PPL's former co-plaintiffs Avista and PacifiCorp, have agreed to leases and complied with both their federal licenses and their state rental requirements for several years now. Pet'r App. 73 n.10.

PPL's preemption argument assumes that the Montana Supreme Court held that its federally licensed projects are subject to state regulation. The court below held just the opposite. Like all licensees,

PPL must pay compensation to the State for the land it occupies, but it is *not* subject to state regulation. Pet'r App. 72. PPL requested and received a trial on whether the State's specific claims, as applied to PPL's specific projects at issue, were preempted by the Federal Power Act. Pet'r App. 119. The district court found that "[t]he FPA does not preempt the State's property rights in the riverbeds." Pet'r App. 122. The Montana Supreme Court affirmed, holding that any State interference under the Hydroelectric Resources Act with PPL's licensed operations was "not before the Court in the present appeal, nor is it even remotely probable." Pet'r App. 73.

1. The Montana Supreme Court held that the Hydroelectric Resource Act's rental provisions are severable from the more explicitly regulatory provisions. Pet'r App. 71-72. "Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Whether or not other state laws "worked hand-in-glove" with the State's property rights are questions already answered by the courts below as a matter of that state law of severability. Pet. 33. The Montana Supreme Court's opinion therefore is definitive in its holding that the State's leasing of its riverbed lands does not and cannot invoke any regulatory provisions that conflict with the Federal Power Act.

2. PPL concedes that "the Federal Power Act contemplates that states and other landowners will receive compensation for use of their lands." Pet. 31. With respect to such matters, "[t]he Act leaves to the

States their traditional jurisdiction." *First Iowa*, 328 U.S. at 171. A licensee's "private property rights are rooted in state law, subject to the paramount rights of the State and Nation," which a state may assert "through its rental charges and the Nation through its license." *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954). The Commission "will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights." *First Iowa*, 328 U.S. at 178; *see also id.* at 174 ("The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the lands, if it desires to, and that has been done in some States.").

It makes no difference that "[t]he State actively participated in the federal licensing process and raised no objection that it held title to the riverbeds." Pet. 33. To the contrary, with respect to state property rights, the Federal Power Act "require[s] *Licensees* to obtain all rights necessary or appropriate for the construction, maintenance, and operation of the project," and "the burden remains with [the Licensee] to acquire all rights necessary to comply with project needs." *Cooper Valley Elec. Ass'n*, 4 FERC ¶ 61,336, at 61,796 (1978) (emphasis added). It is, therefore, PPL's duty as licensee to ensure that its property rentals "be factored into the economic analysis when the project is federally licensed." Pet. 31. This is not a

property owner's "bait-and-switch," Pet. 34, but a new licensee's failure of diligence.

3. PPL did not raise its preemption claims concerning "extreme economic burdens" on appeal below. Pet. 34. Therefore, it has waived the argument. *See Mountain West Farm Bureau Ins. v. Brewer*, 69 P.3d 652, 654 (Mont. 2003); *Beck v. Washington*, 369 U.S. 541, 553, *rehr'g denied*, 370 U.S. 965 (1962). Nonetheless, the ability of other federal licensees to pay a small fraction of their revenues in rent for thousands of acres of land necessary for their projects, as well as PPL's own ability to pay millions in rent annually at its Kerr Dam project, disproves this unpreserved argument. *See Montana Power Co.*, 32 FERC ¶ 61,070, at 61,178 (1985) (assessing annual charge for use of tribal lands in the Kerr Dam project of "$9 million adjusted annually for inflation"); Tr. 291-92 (PPL pays an annual rental of $16.9 million for the use of bedlands at Kerr Dam on the Flathead River). PPL ignores a long line of federal authority that has required licensees to compensate sovereign landholders for the value of the lands occupied, even when they have failed to do so in the past. *See, e.g., Portland General Electric Co.*, 12 FERC ¶ 63,055 (1980) (charging licensee for use of sovereign land in project licensed 30 years earlier, including back rents); *cf.* Pet. 34; Edison Elec. Inst. *Amicus* Br. 14-15.

These rental duties are not "retroactive" in any legal sense. As the Montana Supreme Court held under state law, "the HRA codifies an aspect of a

constitutional provision which was extant in 1889," 110 years before PPL arrived in Montana. Pet'r App. 73. In any event, PPL's primary statute of limitations defense in the court below ran back ten years, more than twice as long as it had occupied the lands at issue when the state sued. *See* Mont. Code Ann. § 70-19-302.

III. PPL'S PETITION PRESENTS NO ADDITIONAL FEDERAL ISSUES, IMPORTANT OR OTHERWISE.

The Petition ends with a final volley of claims that have no basis in the record, were waived below, or both. They offer no grounds to grant the petition.

1. There is no support in or out of the record for the assertion that the decision below "require[s] PPL to pay the State rent for lands that the federal government considers to be federal lands." Pet. 34. In fact, both parties presented extensive expert trial testimony by surveyors concerning the precise boundaries of the state lands claimed, excluding federal and other deeded uplands on PPL's motion. Resp't App. 60. The district court made detailed findings of fact as to the amount of state-owned land at issue based on that testimony. Resp't App. 174-75. The only discussion of federal lands arose when PPL testified to the annual charges it paid for flooded federal uplands – not original state bedlands – as part of its damages case. Resp't App. 180. PPL's own deeds demonstrated that all riparian title, whether federal or private, ended at

the riverbanks. Resp't App. 37-38. The prospect of "competing, overlapping obligations," Pet. 34 is a fiction.

2. Likewise, the decision below in no way "purports to determine the property rights along hundreds of miles of three rivers," other than as between PPL and the State. Pet. 35. The navigability of these rivers has been confirmed and reconfirmed by precedent that spans more than a century. This is why the deeds to PPL from Montana Power Company, the projects' owner since shortly after statehood, exclude the riverbeds. Still, the parties devoted a day at trial to specifying exactly how many riverbed acres were at issue, none of which were shown to be held by anyone other than the State. As a matter of state law, no landowner other than PPL is bound by the judgment below. *See* Mont. Code Ann. § 70-28-109. Still, no landowner other than PPL or its co-plaintiffs has disputed the navigability of these rivers for most of a century.

3. PPL tries to have it both ways with its incipient takings and due process claims. Pet. 36-37. PPL raised affirmative defenses under the Contracts Clause, the Ex Post Facto Clause, the Fifth Amendment, and the Fourteenth Amendment in a motion to amend its answer. However, after the district court had determined the State's title, PPL waived these defenses in the pre-trial order, in which it agreed that "this pre-trial order shall supersede the pleadings" and "that all pleadings herein shall be amended to conform to this pretrial order." Mont. Uniform D. Ct.

R. 5(c); *see also* Pet'r App. 62 ("PPL did not raise this omission until the trial was well underway, long after the final pretrial order had been issued.").

Still, nothing in the Montana Supreme Court's opinion "contravened established property law." *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010). The State has claimed and received compensation for uses of navigable riverbeds for decades, and state and federal courts and agencies have reiterated the navigability of the rivers at issue repeatedly over the past century. PPL does not present a question of its water rights, which arise solely under state law. Contrary to the assertions made by *amicus* Montana Water Resources Association, however, more than a century of Montana water law has never established a "right to make *free* appropriation of waters on and within state-owned lands without paying any compensation to the State." Pet'r App. 65-66. Trial established that water users already can, and do, pay nominal amounts for their use of state trust lands under navigable rivers.

The *amici*, hoping to turn this case into the sequel to *Stop the Beach Renourishment* as a matter of "a thinly-disguised judicial taking," Cato *Amicus* Br. at 15, will be disappointed by the fact that PPL's deeds and pleadings show it has no riverbed property to take. Resp't App. 37-38, 59. The dramatic consequences that are alleged to follow from the long recognized navigability of the Clark Fork, Madison, and Missouri Rivers were not so dramatic, it seems, to merit PPL's attention to "whether the streambeds

were included in the real property when [PPL] acquired it." Tr. 619-20. Given this, the only way "thousands . . . will lose their property rights," Cato *Amicus* Br. at 17, is if PPL takes Montana's great rivers from the People who have navigated, enjoyed, and owned them since statehood.

CONCLUSION

This case is fact-bound to a unique historical record wholly within the State of Montana. The Petition often misstates that record and repeatedly departs from it altogether. Many of PPL's claims are procedurally troubled. Those that are not cannot change the disposition of this case because they are controlled by multiple alternative state-law grounds. Given this, and the absence of any conflicted or otherwise important federal question, the proper way in this case "to enforce basic principles of federalism," Pet. 37, is to deny review of the Montana Supreme Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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