

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 PETITIONER**

---

ASHLEY C. PARRISH  
PAUL A. MEZZINA  
KING & SPALDING LLP  
1700 Pennsylvania Ave. NW  
Washington, DC 20006  
(202) 737-0500

ROBERT L. STERUP  
KYLE A. GRAY  
HOLLAND & HART LLP  
401 N. 31st St., Ste. 1500  
Billings, MT 59101  
(406) 252-2166

PAUL D. CLEMENT  
*Counsel of Record*  
ERIN E. MURPHY  
BANCROFT PLLC  
1919 M St. NW, Ste. 470  
Washington, DC 20036  
pclement@bancroftpllc.com  
(202) 234-0090

ELIZABETH THOMAS  
K&L GATES LLP  
925 Fourth Ave., Ste. 2900  
Seattle, WA 98104  
(206) 623-7580

*Counsel for Petitioner*

August 31, 2011

---

---

## QUESTION PRESENTED

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

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?

**RULE 29.6 STATEMENT**

The sole member of petitioner PPL Montana, LLC is PPL Montana Holdings, LLC, a privately held Delaware limited liability company. The sole member of PPL Montana Holdings, LLC is PPL Generation, LLC; the sole member of PPL Generation, LLC is PPL Energy Supply, LLC; and the sole member of PPL Energy Supply, LLC is PPL Energy Funding Corporation.

PPL Energy Funding Corporation is a wholly owned subsidiary of PPL Corporation, a publicly traded Pennsylvania corporation.

## TABLE OF CONTENTS

QUESTION PRESENTED .....	i
RULE 29.6 STATEMENT.....	ii
TABLE OF AUTHORITIES .....	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	1
STATEMENT OF THE CASE.....	1
A. PPL’s Hydropower Projects .....	3
B. The Trial Court Proceedings .....	4
1. The State’s Evidence.....	6
2. PPL’s Evidence.....	13
3. The Trial Court’s Ruling.....	20
C. The Montana Supreme Court.....	21
SUMMARY OF ARGUMENT.....	25
ARGUMENT .....	27
I. Navigability For Title Purposes Is A Constitutionally Grounded Test That Requires Uniform And Consistent Application .....	27
II. This Court Should Confirm The Controlling Federal Test For Determining Navigability For Title Purposes .....	33
A. Navigability for Title Purposes Is Assessed with Respect to the Particular River Stretches at Issue.....	34

1. The Segment-by-Segment Approach Is Dictated by Practical Considerations .....	34
2. This Court’s Cases Have Consistently Applied the Segment-by-Segment Approach. ....	36
3. The Decision Below Exemplifies the Dangers of Substituting a “Whole River” Approach for this Court’s Segment-by-Segment Approach .....	40
B. Navigability for Title Purposes Is Determined Based on Evidence of Commercial Navigation at Statehood. ....	43
1. The Proper Test Focuses on Reliable Historical Evidence and Considers Susceptibility to Use Only in Narrow Circumstances.....	44
2. Modern-Day Evidence Is Inherently Suspect and Rarely Relevant .....	46
3. Recreational Use Cannot Establish that a River Supplied a Highway for Commerce .....	49
4. Isolated and Unsuccessful Log Floats Cannot Establish that a River Supported Trade and Travel. ....	53

C. The Burden of Proof Rests on the Party Seeking to Establish Navigability; Navigability for Title Purposes Is Not “Very Liberally Construed.” .....	54
III. Under A Correct Application Of This Court’s Precedents, The State’s Evidence Was Manifestly Insufficient To Sustain Its Title Claims.....	58
CONCLUSION .....	61
APPENDIX	
U.S. Const., art. VI, cl. 2 .....	1a
U.S. Const., art. IV, § 3, cl. 2.....	2a
43 U.S.C. § 931 .....	3a
43 U.S.C. § 1311(a).....	4a

## TABLE OF AUTHORITIES\*

### Cases

<i>Alabama v. Texas</i> , 347 U.S. 272 (1954).....	30
<i>Alaska v. Ahtna, Inc.</i> , 891 F.2d 1401 (9th Cir. 1989).....	40, 48, 52, 53
<i>Arizona Free Enter. Club’s Freedom Club PAC v. Bennett</i> , 131 S. Ct. 2806 (2011).....	55
<i>Arizona Ctr. for Law in the Pub. Interest v. Hassell</i> , 837 P.2d 158 (Ariz. Ct. App. 1991).....	55
<i>Boerner v. McCallister</i> , 89 S.E.2d 23 (Va. 1955) .....	55
<i>Boutwell v. Champlain Realty Co.</i> , 94 A. 108 (Vt. 1915) .....	55
<i>Brewer-Elliot Oil &amp; Gas Co. v. United States</i> , 260 U.S. 77 (1922).....	passim
<i>Burner v. Nutter</i> , 87 S.E. 359 (W. Va. 1915).....	55
<i>Colorado v. New Mexico</i> , 467 U.S. 310 (1984).....	57
<i>Elkins v. United States</i> , 364 U.S. 206 (1960).....	55

---

\* “Pet.App.” refers to the petition’s appendix. “S.App.” refers to the reply brief’s appendix. “2d.S.App.” refers to the appendix to the supplemental brief filed at the certiorari stage. JA refers to the joint appendix.

<i>George v. Beavark, Inc.</i> , 402 F.2d 977 (8th Cir. 1968).....	52
<i>Hamling v. United States</i> , 418 U.S. 87 (1974).....	55
<i>Harrison v. Fite</i> , 148 F. 781 (8th Cir. 1906).....	50, 55
<i>In re Montana Power Co.</i> , 7 F.P.C. 163 (1948) .....	9
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	31, 33, 44
<i>Leo Sheep Co. v. United States</i> , 440 U.S. 668 (1979).....	33, 36, 56
<i>Martin v. Waddell</i> , 41 U.S. 367 (1842).....	28
<i>Montana Power Co. v. FPC</i> , 185 F.2d 491 (D.C. Cir. 1950).....	9, 18
<i>Mundy v. United States</i> , 22 Cl. Ct. 33 (1990) .....	40
<i>N. Am. Dredging Co. of Nev. v. Mintzer</i> , 245 F. 297 (9th Cir. 1917).....	50
<i>North Dakota ex rel. Bd. of Univ. &amp; Sch. Lands v. United States</i> , 972 F.2d 235 (8th Cir. 1992).....	48, 54, 55
<i>Nw. Steelheaders Ass'n v. Simantel</i> , 112 P.3d 383 (Or. Ct. App. 2005) .....	40
<i>Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.</i> , 313 U.S. 508 (1941).....	32

<i>Oklahoma v. Texas</i> , 258 U.S. 574 (1922).....	passim
<i>Oregon ex rel. State Land Bd. v. Corvallis Sand &amp; Gravel Co.</i> , 429 U.S. 363 (1977).....	28
<i>Oregon v. Riverfront Prot. Ass'n</i> , 672 F.2d 792 (9th Cir. 1982).....	40
<i>Pollard v. Hagan</i> , 44 U.S. 212 (1845).....	28
<i>Republic of Austria v. Altmann</i> , 541 U.S. 677 (2004).....	57
<i>State v. Aucoin</i> , 20 So. 2d 136 (La. 1944) .....	55
<i>Steele v. Donlan</i> , In Equity No. 950 (D. Mont. July 14, 1910).....	11
<i>Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.</i> , 130 S. Ct. 2592 (2010).....	31
<i>Taylor Fishing Club v. Hammett</i> , 88 S.W.2d 127 (Tex. Civ. App. 1935).....	50
<i>The Daniel Ball</i> , 77 U.S. 557 (1870).....	27, 31, 49
<i>The Montana Power Co.</i> , 8 F.P.C. 751 (1949) .....	13
<i>The Montello</i> , 87 U.S. 430 (1874).....	42
<i>United States v. Appalachian Elec. Power Co.</i> , 311 U.S. 377 (1940).....	32, 44

<i>United States v. Davis</i> , 339 F.3d 1223 (10th Cir. 2003).....	55
<i>United States v. Holt State Bank</i> , 270 U.S. 49 (1926).....	28, 29, 30
<i>United States v. Oregon</i> , 295 U.S. 1 (1935).....	passim
<i>United States v. Rio Grande Dam &amp; Irrigation Co.</i> , 174 U.S. 690 (1899).....	37, 49, 54
<i>United States v. Texas</i> , 339 U.S. 707 (1950).....	28, 29
<i>United States v. Utah</i> , 283 U.S. 64 (1931).....	passim
<i>United States v. Utah</i> , 283 U.S. 801 (1931).....	38
<i>Utah v. United States</i> , 304 F.2d 23 (10th Cir. 1962).....	39
<i>Utah v. United States</i> , 403 U.S. 9 (1971).....	44, 51
<i>Webb’s Fabulous Pharms., Inc. v. Beckwith</i> , 449 U.S. 155 (1980).....	31
<b>Constitutional Provisions</b>	
U.S. Const., art. I, § 8.....	31
U.S. Const., art. III, § 2.....	31
U.S. Const., art. IV, § 3, cl. 2 .....	30
<b>Statutes</b>	
16 U.S.C. § 791 .....	9
16 U.S.C. § 796(8).....	9, 13, 32

16 U.S.C. § 803(e).....	4
28 U.S.C. § 1254(1).....	1
33 U.S.C. § 407.....	32
43 U.S.C. § 931.....	30
<b>Other Authorities</b>	
78 AM. JUR. 2D <i>Waters</i> (2002).....	55
MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008).....	50, 53

## **OPINIONS BELOW**

The opinion of the Montana Supreme Court is reported at 229 P.3d 421 and reproduced at Pet.App.1.

The Montana district court's June 13, 2008 final judgment is reproduced at Pet.App.118. The district court's August 28, 2007 partial summary judgment on navigability is reproduced at Pet.App.130.

## **JURISDICTION**

The Montana Supreme Court rendered its decision on March 30, 2010. On June 8, 2010, Justice Kennedy extended the time for filing a petition to and including August 12, 2010. The petition was timely filed, and granted limited to Question 1 on June 20, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Supremacy Clause and the Property Clause of the United States Constitution and the relevant statutory provisions are reprinted in the appendix to this brief. App. 1a–4a.

## **STATEMENT OF THE CASE**

This case concerns the State's belated effort to assert ownership—more than 100 years after statehood—of the riverbeds under more than 500 miles of rivers, including approximately 5,900 acres of riverbeds under dams and reservoirs that are part of two federally licensed hydropower projects on the upper Missouri, Madison, and Clark Fork rivers in Montana. For over a century, the riverbeds were

understood to be owned by either private parties or the federal government. On that basis, appropriate easements were granted, deeds transferred, and extensive payments made for use of the riverbeds. These arrangements occurred in the early years of Montana's statehood. The first of the relevant dams was constructed in 1891, just two years after Montana's admission to the Union, and all but one were constructed between 1891 and 1930.

In the proceedings below, the Montana courts held, contrary to long-settled understandings, that the State of Montana has owned the riverbeds all along and that, as a consequence, PPL Montana, LLC ("PPL") owes the State tens of millions of dollars in retroactive rent payments and millions more in expected future payments. The lower courts effected this massive land transfer and imposed the resulting multi-million-dollar liability based on a determination—at the summary judgment stage of proceedings no less—that the upper Missouri, Madison, and Clark Fork rivers were navigable for title purposes in 1889 when Montana joined the Union. The courts reached that conclusion notwithstanding more than 500 pages of exhibits and expert witness affidavits provided by PPL disputing the State's claim to title and demonstrating that the relevant river stretches where PPL's hydropower projects are located were non-navigable at statehood. The court deemed all that evidence to raise no material dispute of fact and retroactively awarded Montana title to some 500 miles of riverbeds.

### A. PPL's Hydropower Projects

PPL owns and operates two hydropower projects on the upper Missouri, Madison, and Clark Fork rivers: the Missouri-Madison project and the Thompson Falls project. *See* <http://www.pplmontana.com/PPL-Montana-LLC-v-Montana> (maps and pictures of rivers and dams).

The Missouri-Madison project consists of nine dams on the upper Missouri and Madison rivers. Those dams, with one exception, were constructed in the early years of Montana's statehood, on the sections of the river with the fastest flowing rapids and most precipitous vertical drops. Five dams—Black Eagle (1891), Rainbow (1910), Ryan (1916), Morony (1930), and Cochrane (1958)—are on the Missouri River near the city of Great Falls, where over a 17-mile stretch with five historic waterfalls the river drops more than 600 feet. Two dams—Hauser (1911) and Holter (1918)—are situated on the Stubbs Ferry stretch of the Missouri River, which was a treacherous, boulder-strewn section before the dams were built. And two dams—Madison (1906) and Hebgen (1915)—are on the Madison River in steep, rocky canyons with falls of 20 and 16 feet per mile. The Hebgen dam, near the northwestern border of Yellowstone National Park, stores and releases water to regulate flow to the other downstream dams. That dam was regulating water flow by 1912 and was fully operational by 1915. The Missouri-Madison project has been federally licensed twice: in 1956 and in 2000.

The Thompson Falls project, which was completed by 1915, was constructed on a naturally

occurring waterfall with a 22-foot drop on the Clark Fork River at Thompson Falls, Montana. It consists of a seven-unit hydroelectric plant with a total generating capacity of 94 megawatts. That project has also been federally licensed twice: in 1949 and in 1979.

Although both projects date back nearly a century, until this litigation, “the State had never previously sought compensation for use of the” underlying riverbeds. Pet.App.4. Those lands were instead understood to be either private lands owned by PPL’s predecessors-in-title or others who had granted flood easements, or federal lands for which the hydropower producer paid substantial annual use, occupancy, and enjoyment charges. 16 U.S.C. § 803(e). Although the State actively participated in the federal licensing and re-licensing proceedings for both projects, it never claimed title to any of the riverbeds in those proceedings.

In 1999, PPL purchased the two hydropower projects from The Montana Power Company (“MPC”) and, with the federal government’s approval, continued to operate them. As part of that transaction, PPL received numerous deeds conveying fee title, easements, and other interests to lands underlying the projects, including deeds and patents from the State granting MPC (or its predecessors) fee title to certain lands and rights-of-way to flood lands owned by the State.

### **B. The Trial Court Proceedings**

In 2003, two Montana citizens sued PPL and two other hydroelectric companies, Avista Corporation and PacifiCorp, in the United States

District Court for the District of Montana. The citizen suit relied on the novel theory that the riverbeds under hydroelectric facilities in Montana had always been state-owned lands that were part of Montana's school trust, and that the companies owed hundreds of millions in unpaid rent to the State. In 2004, the State intervened as plaintiff. In 2005, the district court dismissed the case for lack of diversity jurisdiction.

PPL, Avista, and PacifiCorp then filed this case in the Montana First Judicial District Court seeking a declaration that federal law precludes or preempts any claim for compensation. In response, the State filed a counterclaim, contending it was entitled to compensation for use of the lands.

The trial court rejected arguments by PPL and the other companies that equitable doctrines like laches and equitable estoppel, which would prevent a private party from belatedly asserting title in comparable circumstances, constrained the State. Pet.App.157–60. Although the trial court conceded the premise of these equitable arguments—that the State had never before sought compensation for use of the riverbeds, even though both the federal government and private parties had openly asserted title to those lands for decades—the trial court deemed those equitable defenses inapplicable against the sovereign. Pet.App.157–60. Faced with hundreds of millions in potential rent for use of lands reaching back to the early 1900s, Avista and PacifiCorp settled; as state-regulated utilities (unlike PPL), they could pass their additional costs through to ratepayers.

The State then moved for partial summary judgment against PPL. It contended that Montana held title to the riverbeds because the upper Missouri, Madison, and Clark Fork rivers were purportedly navigable in 1889 when Montana entered the Union.

### **1. The State's Evidence**

There is no historically reliable evidence that any of the relevant river stretches were navigable in 1889, and considerable historical evidence to the contrary, not to mention a century's worth of evidence that title did not lie with the State. Nonetheless, the State attempted to prove navigability at statehood by submitting two non-expert affidavits of state employees that relied entirely on hearsay evidence. The State contended that these affidavits entitled it to summary judgment because no material facts were in dispute under its view of the governing legal test. The first affidavit attached copies of various newspaper articles, books, and journal entries from the Montana Historical Society's collection. The State Archivist vouched for the authenticity of the documents, but not for their accuracy or reliability. The second affidavit, provided by the Mineral Management Bureau Chief for the Montana Department of Natural Resources, summarized the results of a discredited 20-year-old study commissioned by the State. That 1986 study relied primarily on river studies prepared in 1974, which the State (mistakenly) attributed to the U.S. Army Corps of Engineers.

The State's evidence was facially unreliable and lacking in probative value in multiple respects. First, the 1974 studies had plainly *not* been *prepared by* the Army Corps, but were instead only *presented to* the Corps by individuals whose background and affiliations (and, in one instance, identities) were not given. JA 226, 246, 294. Moreover, those studies addressed the very different question of navigability for purposes of establishing the Corps' regulatory authority, not for determining title, and therefore were not limited to evidence of commercial use of the unimproved rivers at statehood. Second, the 1986 study explained that its "approach to documenting navigable waterways for title purposes ha[d] been constrained by lack of funding" and that, "[d]ue to [those] limitations, several exclusions were made from the research." JA 205–06. Finally, although the studies claimed that the three rivers were navigable in their entirety, the evidence set forth in each study confirms the significant—even insurmountable—difficulties experienced by the few adventurers who attempted to traverse the relevant stretches at or near statehood.

*Upper Missouri River.* Although the State argued that the whole Missouri River was navigable, its evidence revealed that navigation was *not* attempted on the "Great Falls Reach," where PPL's Missouri-Madison project is principally located. The Great Falls Reach is a dangerous 17-mile stretch in which the river drops more than 600 feet over a series of impassable rapids and waterfalls, culminating in the 87-foot Great Falls. It lies almost 50 miles above Fort Benton, the historical head of navigation on the upper Missouri River. JA 317.

The State produced no evidence even suggesting the Great Falls Reach had ever been navigated, much less used as a highway of commerce. For example, the State relied on the journals of Captains Meriwether Lewis and William Clark documenting their travels on and along the Missouri River. JA 305–06. But those journals confirm that their expedition did not attempt to traverse the Great Falls Reach; the expedition instead undertook a grueling, 33-day, overland journey that was barely conducive to exploration, but certainly not to waterborne commerce. JA 397–435. Along the way, Clark documented fifteen different rapids and nine waterfalls. JA 437. The State also contended that shallow-draft, flat-bottomed boats, known as “mackinaws,” were paddled or poled on parts of the Missouri above Fort Benton in 1867. The State offered no credible support for that contention, but in any event acknowledged that mackinaws could not have navigated the Great Falls Reach. JA 313.

As to the Missouri River above the Great Falls, the State acknowledged that a federally commissioned 1885 study concluded that attempts to render that stretch navigable had proved futile. JA 317. The State’s studies also documented the substantial difficulties experienced by the few who had attempted commercial navigation, including the travails of the only two steamboats to attempt the trip between Canyon Ferry and Great Falls. The first “barely ascended” the treacherous Half-Breed Rapids (near the present-day Holter dam), leading its operator to “conclude[] that regular service between Three Forks and Great Falls would be impossible.” JA 322. “[A] difficult trip down” the

same stretch convinced the operator of the second boat “that he should withdraw from the steamboat business.” JA 322. He made a wise decision: Both steamboats “were lost” on the river. JA 323.

Finally, the State emphasized a 1948 regulatory determination that the upper Missouri River is “navigable” under section 3(8) of the Federal Power Act, 16 U.S.C. § 791 *et seq.* Pet.App.137 (citing *In re Montana Power Co.*, 7 F.P.C. 163 (1948); *Montana Power Co. v. FPC*, 185 F.2d 491 (D.C. Cir. 1950)). But the test for the Federal Power Commission’s regulatory jurisdiction is very different from the test applied to determine title. Section 3(8) considers navigability in a river’s “natural *or improved* condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids.” 16 U.S.C. § 796(8) (emphasis added). Moreover, “all such interrupting falls, shallows, or rapids” are subject to regulation under the Act, even if they are not navigable themselves. *Id.* Accordingly, the Commission did not deem the Great Falls Reach navigable, but instead deemed the reach “specifically encompassed by that definition.” *In re Montana Power*, 7 F.P.C at 174; *see also Montana Power*, 185 F.2d at 494–95.

***Madison River.*** The Madison River has never been navigable for commercial purposes. Not surprisingly, the State’s studies acknowledged with considerable understatement that “recorded entrances of commercial navigation [on the Madison River] are few.” JA 218. The State nonetheless claimed that the river historically served as a useful highway of commerce because it purportedly supported log floats.

The State's evidence in fact revealed that exactly one log float was attempted on the Madison River. It was an abject failure. In the summer of 1913—nearly a quarter-century *after* statehood and a year *after* the Hebgen Dam began regulating water flow on the river—a timber company attempted a single log float down the middle portion of the river (where neither of PPL's dams is located). JA 258. It took two months to drive the logs a mere 55 miles down the river, and many never reached their final destination. JA 258. Indeed, "for years after this summer of 1913, numerous logs were found along side the banks of the Madison River." JA 258. The company never attempted a second log drive, and it "was forced into indebtness" within two years. JA 259–60. No log floats have been attempted since, and the consensus is that conditions on the Madison "make the cost of river-driving timber prohibitive." JA 263.

The State's other principal historical evidence regarding the Madison was the Lewis and Clark journals, which, according to the State, document that Clark considered the Madison navigable. The relevant journal excerpt reveals, however, that Clark neither characterized the river as navigable nor attempted to navigate it. JA 146. Upon observing the mouths of the Madison, Jefferson, and Gallatin rivers at Three Forks, Clark noted only that all three appeared somewhat similar in size. JA 146. Clark then concluded that the Jefferson was likely the best river to ascend because the other two appeared "very rapid & Contain Some timber in their bottoms which is verry extincive." JA 146. Clark never saw more

than the mouth of the Madison, for the expedition followed his advice and ascended the Jefferson.

Finally, the State contended that in modern times parts of the Madison River have supported a “lively recreation industry.” JA 262. But it did not even attempt to show that the river did or could support that non-commercial use in its unimproved condition at statehood. Instead, the 1974 report references modern-day recreational use on a 50-mile stretch of the river far from where PPL’s dams are located and where the river’s flow has been heavily regulated since construction of the Hebgen dam decades after statehood. JA 261.

***Clark Fork River.*** The State’s burden as to the Clark Fork River should have been particularly heavy, for, as the State acknowledged, a federal district court determined in 1910 that the relevant stretch of the river was non-navigable and granted title to the riverbeds under the Thompson Falls project to PPL’s predecessor-in-title. JA 217 (citing *Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910)). The 1910 federal court decree held that “Clark’s Fork of the Columbia River at all points in Sanders County, Montana, always was and is a non-navigable, torrential, mountain stream, full of rapids and falls.” S.App.3. The State nonetheless asserted not just that a federal court a century closer to statehood was wrong, but that there was not even a material dispute of fact as to the Clark Fork’s navigability.

The State based its claim primarily on what it described as “extensive steamboat traffic” on the river in the 1860s. Br. Supp. State’s R. 56(c) Mot.

Summ. J. 9 (Doc. 84). But the only traffic the State's studies discuss in any detail is a single steamboat line reported to have run from Lake Pend Oreille to somewhere *below* the Thompson Falls area. JA 236–37. Even assuming the reports are accurate, the boats of course could not pass the falls area itself, which later became the site of the Thompson Falls project. And to get even that far, passengers were reported to have unloaded and reloaded onto additional steamboats along the way to bypass hazardous stretches of rapids. JA 236–67. Accordingly, the company could not actually provide a continuous line of service, but instead operated three separate steamboats, each of which traversed only a short segment of a 60-mile stretch of the Clark Fork that ended somewhere before Thompson Falls. The studies do not reveal how “extensive” travel on that three-boat line was, but they do note that the line ceased operations in 1870, five years after its inception. JA 237. The only other steamboat the State's studies reference was reported to have crashed and been stolen some 100 miles from the site of the Thompson Falls project. JA 135.

Beyond that, the State claimed the Clark Fork supported miner traffic and log drives. The 1986 and 1974 studies, however, principally discuss sporadic transportation on separate stretches of the river, either well below or more than 100 miles above the Thompson Falls area, including small vessels whose occupants drowned after they crashed or capsized. JA 132–33, 214–15, 237–41. Although both studies refer to log drives in the late nineteenth and early twentieth centuries, the State documented only a single lumber raft that attempted to navigate

the river anywhere near the Thompson Falls area. Its two passengers lost control of the raft in perilous rapids, and only one escaped with his life when the raft crashed over the falls. JA 139. Beyond that, neither study revealed where or for how long on any stretch of the river any log floats occurred; the 1986 study noted that funding limitations prevented any attempt to uncover such critical details. JA 205.

Finally, the State noted that PPL's predecessor-in-title did not contest that parts of the Clark Fork were navigable during the 1949 federal licensing proceeding for the Thompson Falls project. *The Montana Power Co.*, 8 F.P.C. 751 (1949). That proceeding, however, determined only that the river was navigable "within the meaning of section 3(8) of the Federal Power Act." *Id.* at 752. As with the Federal Power Commission's determination concerning the Missouri River, any effort to equate section 3(8)'s test for regulatory jurisdiction with the navigability-for-title test is a profound mistake. A concession of regulatory jurisdiction under section 3(8) in 1949 is hardly a concession of navigability for title purposes in 1889. Indeed, the State participated in that same 1949 regulatory proceeding and did not assert title to the riverbeds.

## 2. PPL's Evidence

The facial shortcomings of Montana's evidence should have been enough to preclude summary judgment. Before taking the extraordinary step of upending more than a century of settled expectations and retroactively vesting title in the State, the state court should have required Montana to come forward with much more evidence of

navigability. Nonetheless, PPL submitted more than 500 pages of exhibits and affidavits from two renowned experts: Dr. David M. Emmons, a Professor of History Emeritus at the University of Montana, and Dr. Stanley A. Schumm, a specialist in fluvial geomorphology, which is the study of the physical characteristics of rivers and how rivers change over time. JA 367, 570. Both experts concluded that the relevant stretches of the three rivers were non-navigable in 1889. Before the trial court entered final judgment, PPL also submitted additional evidence supporting those conclusions in the form of an offer of proof, which the court accepted. JA 656, 729, 922.

Dr. Emmons identified glaring flaws in the State's evidence. As to the 1986 study, he reiterated that "[t]he Study itself highlights its limitations" by cautioning that it was "constrained by lack of funding." JA 371. Dr. Emmons noted that the only other firm invited to bid on preparing the study declined to do so because it did not believe it could provide "a solidly researched and defensible product ... given the stated project ceiling." JA 371–72, 394. Dr. Emmons also opined that the study "is overly dependent on two of the least trustworthy historical sources known to Western historians—frontier-era newspapers and personal memoirs or reminiscences." JA 372. Frontier newspapers, he explained, were notorious for "act[ing] more as unabashed promoters of economic development than unbiased news reporters." JA 372; *see also* Amicus Br. of Professors Supporting Certiorari 10 (describing fabricated accounts of 28-pound radishes

and steamboat traffic between Denver and the Gulf of Mexico).

As to the three 1974 reports, Dr. Emmons emphasized that those reports had only been *presented to* the Army Corps, by individuals whose background and affiliations were not provided, and “thus do not carry any imprimatur of credibility that might be associated with an actual Corps Report.” JA 373. He further noted that the reports were written with the goal of proving the rivers navigable for *regulatory* purposes and “rely on the same types of untrustworthy historical sources as” the 1986 study. JA 373. For example, Dr. Emmons noted that the Missouri River study placed undue emphasis on accounts from Hubert Howe Bancroft, a source described by one eminent historian as “often ludicrous and sometimes dishonest.” JA 374. Dr. Emmons attested that he “know[s] of no professional historian who would use Bancroft as a credible historical source.” JA 374. Yet Bancroft is the sole source the reports provide to support the notion that mackinaw boats traveled on the upper Missouri. JA 313.

In addition to undermining the credibility of the State’s sketchy evidence, PPL’s experts identified a “mountain” of historical evidence documenting that the relevant stretches of all three rivers were non-navigable in 1889. Pet.App.100.

***Upper Missouri River.*** Dr. Emmons attested that, “to [his] knowledge as a professional historian, there has *never* been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it.” JA 375. He

reiterated that the Lewis and Clark expedition “did *not* navigate the Great Falls Reach of the Missouri because it was *impossible* for them to do so.” JA 375. Indeed, upon observing the 17-mile reach, Lewis concluded that getting around it likely would be “the most perilous and difficult part of” the expedition. JA 423–24. Their journals reveal that they “engaged in an arduous month-long portage” and met with significant difficulties when they returned to the river’s upper stretch. JA 375. Dr. Emmons explained that one of the expedition’s most lasting influences upon westward expansion was its discovery that the Missouri River was *not* navigable above the Great Falls, leading Congress to spend the better part of the next century trying to locate “the easiest way to get around both them and the sections of the river above them.” JA 752.

PPL also pointed to two findings that the Army Corps *actually* made nearly contemporaneously with Montana’s entry into the Union, each of which concluded that the Great Falls Reach was non-navigable. First, in 1896, PPL’s predecessor-in-title asked the Army Corps whether it needed a permit to maintain the dam constructed just above the Black Eagle Falls. The Corps responded that a permit was not necessary, as the dam was “situated in a portion of this stream that is not now navigable and which in all probability never will be.” JA 472. Although the Corps acknowledged that “the greater portion of [the Missouri] is a ‘navigable stream,’” it concluded that the Great Falls Reach could “never be made navigable at a cost that the demands of commerce will ever justify.” JA 472. Second, an 1898 Corps report concluded that the portion of the river from

Fort Benton through the Great Falls Reach was “an unnavigable section occupied by cataracts and dangerous rapids,” on which no improvement work had ever been contemplated. JA 475.

PPL’s evidence also proved that stretches of the Missouri River above and immediately below the Great Falls Reach were not navigable as useful highways of commerce. First, the same 1898 Army Corps report detailed a long history of failed attempts to render the Stubbs Ferry stretch—a reach with “[n]umerous rapids and rock obstructions”—navigable, leading to abandonment of all such efforts by 1899. JA 299, 495. In 1915, the Corps concluded that “[a]s far as navigation is concerned the headwaters of the Missouri are completely and permanently separated from the river below.” JA 919. Dr. Schumm’s review of historical maps confirmed the Corps’ conclusion: They revealed “about 30 impediments to navigation in the form of waterfalls, rapids, and riffles ... from Fort Benton to Canyon Ferry,” which occurred, “on average, every 6 miles.” JA 688. That and other evidence led Dr. Schumm to conclude that navigation “would be impractical.” JA 688. A 1916 engineering report prepared for MPC before it constructed the Holter dam similarly concluded that “the navigability of the Missouri River from Hauser Lake to Cascade is not practicable and almost impossible.” JA 857.

***Madison River.*** PPL identified a 1931 report actually prepared *by* the Army Corps to inform Congress whether the Madison River was navigable. After conducting a thorough search of federal, state, and county records; holding local meetings; and

carrying out field studies, the Corps informed Congress that “[a]s far as is known there has never been any navigation on th[is] stream[], and commercial navigation on the[] [stream] is entirely out of the question.” JA 535. That conclusion was corroborated by numerous nineteenth century land surveyor reports. *See* JA 677 (“Madison River passing through the Township is not navigable; it is a bold rapid mountain stream”); JA 678 (“Madison River, which is a wide rocky shallow stream with swift current, not navigable”); JA 678 (“Madison River is a rapid shallow mountain stream, not being navigable”). The Federal Power Commission later took the same position; even under its permissive definition of regulatory jurisdiction, it conceded in the 1949 licensing proceeding that the Madison River was non-navigable. *See Montana Power*, 185 F.3d at 496 (finding jurisdiction because Madison River facilities are located on federal property).

PPL also submitted evidence establishing the irrelevance of the State’s evidence of modern-day recreational usage. Based on an extensive review of historical maps and water flow records, Dr. Schumm opined that “the current physical conditions of the Madison River, with respect to navigability, are not the same as the conditions of the river in 1889.” JA 574.

Dr. Schumm explained that the Madison and Hebgen dams, constructed around 1906 and 1912, respectively, “have made the river more susceptible now to commercial navigation than it would have been without them,” because they “mak[e] the flow lower during periods of high flow and higher during periods of low flow.” JA 574. The 1931 Army Corps

report made the same observation. JA 535 (the dams “result[] in a regulated flow during low-water periods that is generally greater than the natural low water discharge”). PPL’s expert also pointed out that the single 1913 log drive on the Madison River did not occur until after the dams were constructed, making it questionable whether it even absent those improvements would have been attempted. JA 804.

Dr. Schumm also explained “that relevant portions of the river appear to have been either anastomosing or braided at the time of statehood,” meaning that the stretches were split into “multiple distinct channels.” JA 574, 578. One map documents so many anastomosing channels now submerged by the present-day Madison reservoir (Ennis Lake) as to have made pre-dam navigation impossible. JA 628. Accordingly, Dr. Schumm concluded that “[t]he Madison River is not the same river now that it was in 1889” and “was not susceptible to navigation at that time.” JA 581.

***Clark Fork River.*** In contrast to the State’s reliance on the 1949 determination of *regulatory* navigability, PPL relied on the more contemporaneous 1910 federal district court decree that analyzed navigability of the Clark Fork River for *title* purposes and declared the relevant stretch of the river non-navigable. *See* 2d.S.App.3. PPL also produced a study of the Clark Fork prepared *by* the Army Corps in 1891, only two years after statehood. That report described the river as “a mountain torrential stream, full of rocks, rapids, and falls”; pronounced the Thompson Falls “a complete obstruction to navigation”; and declared the river “utterly unnavigable, and incapable of being made

navigable except at enormous cost.” JA 564–66. The report noted that, at the time of Montana’s statehood, the mayor and other prominent citizens of Missoula—a city situated on and apt to profit from improvements to the river—dismissed the notion of rendering the river navigable as “an absurdity.” JA 565.

PPL also relied on other historical governmental reports, each documenting that the Clark Fork is navigable, at most, only on the first four miles above Lake Pend Oreille. *See* JA 655 (“Clark Fork is a meandered non navigable stream”); JA 357 (Clark Fork “above the lake is exceedingly rough, and ... it is utterly impossible to make it a navigable river”). That four-mile stretch is over the Idaho border and more than 60 miles downstream from the Thompson Falls project. In 1940, responding to an inquiry as to whether the river was navigable between the lake and Missoula, an Army Corps major confirmed that the Corps considered the Clark Fork navigable only “from its mouth in Pend O’Reille [sic] Lake to the Northern Pacific Railroad Bridge, a distance of only about four miles.” JA 568–69.

### **3. The Trial Court’s Ruling**

Notwithstanding the weakness of the State’s evidence, and despite PPL’s considerable evidence that the relevant stretches of all three rivers were non-navigable in 1889, the trial court granted summary judgment to the State. Pet.App.143.

As to the Missouri and Clark Fork rivers, the trial court refused to examine the rivers on a section-by-section basis and instead, without discussing any of PPL’s evidence, concluded that PPL could “not

defeat a finding of navigability” as to each river as a whole. Pet.App.138, 142. As to the Madison River, the court acknowledged that “[t]here apparently is little historical documentation regarding the [river’s] navigability” but nonetheless found it navigable based on the single, unsuccessful 1913 log float and modern-day recreational usage. Pet.App.143.

After an 8-day bench trial on the remaining issues in the case, the trial court entered final judgment in the State’s favor. The trial court awarded the State \$34.7 million in retroactive back rent for PPL’s use of the riverbeds from 2000 through 2006; an additional \$6.2 million for its use of the riverbeds in 2007; and whatever future amounts the State Land Board determined in 2008 and going forward. Pet.App.81. With statutory interest at a rate of 10% per annum, the amount has grown to approximately \$53 million.

### **C. The Montana Supreme Court**

The Montana Supreme Court affirmed the trial court’s grant of summary judgment to the State. It observed that the trial court “perceived the navigability for title test as somewhat ‘fluid,’” and concluded that two points in particular were “crucial” to the trial court’s decision. Pet.App.53. First, it noted that the trial court concluded that “portages do not defeat navigability,” and that the relevant inquiry was whether the river as a whole “was used, or susceptible of being used,” for navigation. Pet.App.53. It concluded that the trial court could not have ignored “the presence of rapids, falls, and obstructions on the Clark Fork and Missouri Rivers” without considering the

navigability only of the rivers as a whole, rather than of the segments at issue. Pet.App.53. Second, acknowledging that “the early usage of the Madison River was admittedly not well-documented,” the Montana Supreme Court emphasized the importance of the trial court’s view that “present-day usage [is] probative as to navigability of a river at the time of statehood.” Pet.App.53–54.

The Montana Supreme Court concluded “unequivocally” that the trial court’s “understanding of the navigability for title test was correct.” Pet.App.54. Deriving a rule of construction from this Court’s cases that “the concept of navigability for title purposes” must be “very liberally construed” in the State’s favor, the Montana court rejected the notion that obstructions or portages can “defeat a finding of navigability.” Pet.App.54. Although it acknowledged that this Court employed a section-by-section analysis in *United States v. Utah*, 283 U.S. 64 (1931), to determine whether a 4.35-mile river stretch was navigable for title purposes, it concluded that “the ‘section-by-section’ approach does not apply to ‘short interruption[s] of navigability in a stream otherwise navigable.’” Pet.App.60 (quoting *Utah*, 283 U.S. at 77). It then summarily declared each of the relevant river stretches, including the 17-mile Great Falls Reach and the “interruptions to unimpeded navigation in the vicinity of PPL’s Thompson Falls project,” to be “relatively short interruptions” that are “insufficient as a matter of law” to prevent a finding of navigability for the river as a whole. Pet.App.61.

The Montana Supreme Court also characterized this Court’s precedent as “embrac[ing] the notion

that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability.” Pet.App.55. It emphasized that the relevant test looked not just to actual use at statehood, but to whether the river was “susceptible” to use for commerce. Pet.App.54. It therefore agreed with the trial court that “present-day usage of a river may be probative of its status as a navigable river at the time of statehood.” Pet.App.55–56. As to the Madison, the failed 1913 log float and the modern-day recreational use were deemed sufficient evidence “that this river was susceptible of providing a channel for commerce at the time of statehood.” Pet.App.56. Indeed, the Montana Supreme Court considered this sparse evidence effectively irrefutable. It dismissed Dr. Schumm’s expert testimony that the Madison’s characteristics had changed since statehood, in large part because of improvements by PPL’s predecessors. In the Montana Supreme Court’s view, that evidence did not “raise a genuine issue of material fact regarding [the Madison’s] susceptibility for commerce” because “[t]he present-day recreational use is sufficient for purposes of ‘commerce.’” Pet.App.58.

The Montana Supreme Court dismissed the remainder of PPL’s more contemporaneous evidence as “conclusory statements ... made by a federal district court in 1910, and the Corps of Engineers in the 1930s.” Pet.App.57. Although both the federal court and the Army Corps thoroughly documented the evidence that led them to find the relevant river stretches non-navigable, the Montana Supreme

Court declared their conclusions “without any specific factual support.” Pet.App.57.

Justice Rice authored a dissent joined by Judge Salvagni (sitting for Justice Morris who was recused). Pet.App.93–117. The dissent asserted that the majority veered “off track” in two respects: by “assum[ing] an *entire river* is navigable merely because certain reaches of the river are navigable,” and “by disregarding genuine material factual conflicts” created by PPL’s “mountain” of evidence. Pet.App.93, 96, 100.

The dissent concluded that *Utah* mandates a section-by-section analysis, in which courts must “look to relevant portions of a river and, based upon the facts, determine whether particular reaches at issue are navigable or non-navigable.” Pet.App.96. The dissent found it “[d]isturbing” that the majority circumvented *Utah* by “declaring, as a matter of law, that the reaches claimed by PPL to be non-navigable are simply too ‘short’ to matter.” Pet.App.99. The dissent also criticized the majority for ignoring that, “unlike navigability as analyzed under the Commerce Clause, navigability for title is determined by a specific time period,” namely, the State’s admission to the Union. Pet.App.95.

The dissent also pointed out that “PPL submitted a ‘mountain’—over 500 pages—of affidavits and exhibits demonstrating that the portions of the Missouri, Madison, and Clark Fork Rivers at issue were non-navigable at the time of statehood.” Pet.App.100. The dissent concluded that “[t]his evidence, if accepted after a trial, would lead inevitably to the conclusion that the State did

not hold title to the streambeds at issue.” Pet.App.100. “[T]he validity and credibility of the State’s evidence,” the dissent explained, “should have been[] determined at trial.” Pet.App.101. Instead, “the District Court, and now this Court, has taken upon itself the role of factfinder, weighing PPL’s evidence and concluding that it lacks credibility, rendering it mere ‘conclusory statements.’” Pet.App.112. Finding PPL’s considerable evidence “relevant and material,” the dissent “wonder[ed] just what evidence the Court would have considered sufficient for PPL to defeat summary judgment.” Pet.App.117.

### SUMMARY OF ARGUMENT

There is always a strong temptation for state courts to combine revisionist history and modern evidence with doctrines that strongly favor the State to “enlarge what actually passed to the state, at the time of her admission” to the Union. *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 88–89 (1922). That is precisely what happened here: Disregarding both long-settled understandings and the overwhelming weight of historical evidence, the Montana courts allowed the State to exploit supposed ambiguities in the doctrine of title navigability to effectuate a massive land grab. If Montana’s action is allowed to stand, other States will surely follow suit with their own judicial takings, with the demand for “just compensation” coming *from*, not against, the State.

This Court can provide a meaningful check on that powerful temptation for abuse by reiterating the uniform federal standard and fixed set of rules

that govern navigability for title purposes. Although more than a century's worth of precedent has already established the key components of title navigability analysis, the decision below confirms the need to reaffirm them with clarity.

*First*, title navigability should be assessed with respect to the particular river stretches at issue; a single river may contain both navigable and non-navigable segments. Courts may not shift focus to the navigability of the river "as a whole" and deem significant stretches simply too short to matter.

*Second*, title navigability must be determined at statehood, based on the unimproved condition of the river. A river's "susceptibility" to commercial use should be considered only in the rare instance when the absence of historical commercial use is explained by limited or non-existent settlement in the region, and even then only if river conditions are the same today as at statehood. Moreover, a river must have been capable of serving as a highway for useful trade and travel. Activities on the river that fall short of that standard, such as recreational fishing and unsuccessful log floats, cannot establish navigability.

*Third*, the burden of proof rests on the party asserting navigability and, contrary to the decision below, the test should not be construed "very liberally" in favor of the State. That burden is particularly vital where, as here, the State, free of equitable limitations like laches, asks its own courts to award it title to riverbed lands long thought to belong to others.

Proper application of these settled rules to the facts of this case confirms not only that the State did

not carry its burden of proving beyond material factual dispute that the relevant river stretches are navigable, but also that at least some of the State's assertions of title cannot succeed. There is no question that the 17-mile Great Falls Reach is and always has been a non-navigable stretch of the Missouri River. Similarly, the combination of a single, failed log drive—attempted *after* one of the dams at issue began regulating water flow—and modern-day recreational use does not come close to upsetting the long-settled understanding that the Madison River is and always has been non-navigable. Finally, the State's evidence of navigation on *other* portions of the Clark Fork is manifestly insufficient to overcome contemporaneous findings that the relevant portion of the river is non-navigable, most prominently a 1910 federal district court awarding title of the riverbeds in question to PPL's predecessor.

## ARGUMENT

### **I. Navigability For Title Purposes Is A Constitutionally Grounded Test That Requires Uniform And Consistent Application.**

Under long-settled law, waters are “navigable in fact” if 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.” *The Daniel Ball*, 77 U.S. 557, 563 (1870). To establish title to a river within its borders, a State must demonstrate that the river was navigable in fact at the time it entered the

Union. *Pollard v. Hagan*, 44 U.S. 212, 228–29 (1845).

Whether a river is navigable for title purposes “is necessarily a question of federal law.” *United States v. Holt State Bank*, 270 U.S. 49, 55–56 (1926); see also *United States v. Oregon*, 295 U.S. 1, 14 (1935). That is because “the State’s title to lands underlying navigable waters within its boundaries is ... conferred ... by the Constitution itself.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

“[W]hen the revolution took place,” the original 13 States “became themselves sovereign; and in that character hold the absolute right to their navigable waters, and the soils under them for their own common use.” *Martin v. Waddell*, 41 U.S. 367, 410 (1842). Under the “equal footing” doctrine, the same is true for States that subsequently entered the Union: Because “the original States ... reserved [their navigable waters] to themselves,” “to deny the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States.” *United States v. Texas*, 339 U.S. 707, 716 (1950); see also *Pollard*, 44 U.S. at 229. Accordingly, when a State claims title to waters by virtue of their navigability, it is asserting navigability “as the basis of a right arising under the Constitution.” *Holt*, 270 U.S. at 55–56.

The constitutional parity compelled by the equal footing doctrine is a two-way street. Just as the doctrine ensures that no State enters the Union with *lesser* sovereign rights than its predecessors, it

equally ensures that no State has *greater* sovereign rights. *Texas*, 339 U.S. at 717. Accordingly, “[i]t is not for a state by courts or legislature ... to adopt a retroactive rule for determining navigability which would ... enlarge what actually passed to the state, at the time of her admission.” *Brewer-Elliott*, 260 U.S. at 88. To do so would arrogate greater sovereign rights than those of other States, and “give the Constitution a diversified operation where uniformity was intended.” *Holt*, 270 U.S. at 56.

The temptation for States to take lands by contriving unfounded navigability claims, however, is profound. This Court recognized nearly a century ago States’ troubling tendency to seek “to retain title to the beds of streams by recognizing them as navigable when they are not actually so.” *Brewer-Elliott*, 260 U.S. at 89. The temptation is particularly strong in times of fiscal constraint, especially when outside groups who stand to benefit from the State’s retroactive assertion of title egg the State on. *See, e.g.*, JA 959. Whereas an exercise of eminent domain requires a State to pay just compensation, a retroactive claim to title allows a State not only to expand its holdings but to charge back rent, as this case dramatically illustrates.

What is more, States can employ this “convenient method of preserving ... control” over riverbeds within their boundaries, *id.*, secure in the knowledge that their claims will, in many instances, be settled by their own rules in their own courts. Doctrines like laches and equitable estoppel that would prevent private parties from usurping titles unquestioned for a century can be waved aside as inconsistent with a State’s conception of sovereign

immunity. *See* Pet.App.157–60. These structural incentives for self-dealing demand not only a watchful eye toward retroactive expansions of the concept of navigability, but also a particular skepticism toward navigability determinations made by a State’s own courts in the State’s favor. *See Holt*, 270 U.S. at 55–56 (declining to follow state court’s determination that river was navigable for title purposes); *Oklahoma v. Texas*, 258 U.S. 574, 591 (1922) (same).

The need to guard against relaxing the title navigability standard is also compelled by substantial Fifth Amendment concerns. Riverbed lands under waters that are non-navigable at statehood remain the property of the United States, subject to Congress’s plenary power to dispose of as it sees fit. U.S. Const., art. IV, § 3, cl. 2; *see also Alabama v. Texas*, 347 U.S. 272, 273 (1954) (*per curiam*). Congress can, and often does, convey title in non-navigable waters and their riverbeds to private landowners. That is nowhere more true than in the vast western lands that the United States acquired through treaties, such as the Louisiana Purchase and the Oregon Treaty. To encourage settlement in the resulting territories, the United States routinely granted land to private parties. When the United States patented out riparian lands alongside non-navigable rivers, the patent generally included title to the riverbed by virtue of the common law or applicable statutes. *See* 43 U.S.C. § 931 (first codified as R.S. § 2476). Patentees accordingly received the often-valuable mineral rights underlying riverbeds, as well as the right to construct dams where feasible.

To allow a State unilaterally and retroactively to deem such lands state property “would destroy a title already accrued under federal law.” *Brewer-Elliot*, 260 U.S. at 88. Neither a State nor its courts may “by *ipse dixit* ... transform private property into public property without compensation.” *Webb’s Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality opinion) (“It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.”).

The constitutional concerns attendant to the navigability-for-title test require particular attention to this Court’s admonishment that “any reliance upon judicial precedent must be predicated upon careful appraisal 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). The navigability test set forth in *The Daniel Ball* has been adapted as relevant to other distinct inquiries, such as whether waters fall within Congress’s regulatory authority under the Commerce Clause, U.S. Const., art. I, § 8, or within the federal admiralty jurisdiction, U.S. Const., art. III, § 2. Like the navigability-for-title test, each of those inquiries brings with it certain underlying principles that affect how navigability is determined. But those underlying principles are quite different and properly produce distinct legal tests to govern distinct contexts.

While the Property Clause underscores that the navigability-for-title test must have a stable focus on navigability at statehood, the Commerce Clause

readily admits of a dynamic focus that allows regulatory jurisdiction to expand when improvements create newly navigable rivers. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409 (1940) (the “plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence”). Moreover, in the regulatory context, navigability is only part of the analysis, as Congress has by statute extended authority and jurisdiction beyond waters that are navigable in fact. *See, e.g.*, 33 U.S.C. § 407 (extending Army Corps regulatory jurisdiction to tributaries and banks of navigable waters).

The provision of the Federal Power Act that gave rise to “navigability” determinations or concessions on which the Montana Supreme Court mistakenly relied is a case in point. Section 3(8) expressly allows consideration of rivers in their “improved” condition and subjects non-navigable falls and rapids to federal regulation in addition to its regulatory jurisdiction over navigable waters. 16 U.S.C. § 796(8); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (holding portion of Red River already found non-navigable for title purposes subject to regulatory jurisdiction).

In stark contrast to the fluid and flexible approach to determining regulatory navigability, this Court has recognized “the special need for certainty and predictability where land titles are concerned.” *Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979). That special need demands rejection of any title test that would render the same river non-navigable one day but navigable the next.

Indeed, to conflate the dynamic regulatory navigability test with the static title navigability test (as the courts below did) would produce perverse incentives: No rational landowner would risk making reasonable improvements to his property if he might strip himself of title in the process. *Cf. Kaiser Aetna*, 444 U.S. at 176. The constitutional concerns that have undergirded the Court’s title navigability jurisprudence only underscore the need for “certainty and predictability” and require the navigability-for-title test to remain—at all times and in all courts—a fixed legal standard applied to a set of historical facts fixed at statehood.

## **II. This Court Should Confirm The Controlling Federal Test For Determining Navigability For Title Purposes.**

This Court can provide a meaningful check on States and state courts by reaffirming certain core principles of the navigability-for-title test. As described below, these principles include: (1) title navigability depends on the navigability not of the river as a whole but of the particular river segment at issue; (2) title navigability should be based on reliable historical evidence of actual commercial use at statehood, not modern-day recreational usage and improved conditions examined through the guise of “susceptibility to use”; and (3) the burden of proof rests on the party asserting navigability, and the relevant rule of construction is not one of “very liberal” construction in the State’s favor.

**A. Navigability for Title Purposes Is Assessed with Respect to the Particular River Stretches at Issue.**

This Court's cases establish as a matter of controlling federal law that title depends on the navigability in fact of the particular river segments at issue. A river can contain both navigable and non-navigable segments, and a State may not claim title to the non-navigable stretches merely because other parts of the river may be navigable.

**1. The Segment-by-Segment Approach Is Dictated by Practical Considerations.**

This Court has traditionally considered the navigability of rivers on a segment-by-segment basis. *See Utah*, 283 U.S. at 77. That approach is dictated by the practical realities of our Nation's rivers. Between its headwaters and its mouth, a river may flow for hundreds of miles through different States with diverse and widely varying terrain. A river's characteristics as it flows are shaped by a variety of regional factors, such as precipitation and gradient levels. A river may also be joined by tributaries that alter its volume, flow rate, and other characteristics. As a result, most long rivers, and many shorter ones, are (or were) navigable in some places and non-navigable in others.

For that reason, rivers have almost always been analyzed in terms of different segments with distinct characteristics. Indeed, both the federal government and Montana itself have previously employed a segment-by-segment approach to evaluate the rivers in this case. In 1986, Montana's Department of State Lands published a list of rivers it claimed were

navigable for title purposes. That list included only one stretch of the Madison River, “from the confluence of its west fork to Varney, Montana” (which is not where PPL’s facilities are located). Pet.App.104–05. In response, the Bureau of Land Management disputed the accuracy of Montana’s list, but allowed that “portions” of three other rivers were navigable for title purposes. 2d.S.App.2. Likewise, in 1891 the Army Corps determined the Clark Fork River to be non-navigable except for a short stretch “from its mouth ... to the Northern Pacific Railroad Bridge, a distance of only about four miles.” JA 568–69. And in 1898, the Corps declared the stretch of the Missouri River from Fort Benton to Great Falls “an unnavigable section occupied by cataracts and dangerous rapids.” JA 475.

The segment-by-segment approach is also dictated by the practical realities of our system of litigation and the importance of property rights. Courts are not well-designed to make broad, definitive pronouncements that a river either is or is not navigable along its entire expanse. Rather, courts adjudicate concrete disputes between adverse parties that generally concern discrete segments of a river. Forcing a dispute concerning a discrete segment to turn on whether the entire river is partially or predominantly navigable would have grave consequences. Every disagreement between private parties over title to specific riverbed lands would require the parties to dispute and the court to assess the navigability-in-fact of the entire river. Rather than focus on the dispute at hand, the parties and court would need to consider far-ranging issues impacting the rights and interests of numerous third

parties. Every decree in a case involving riverbed titles would have serious implications for the land rights of all others who claimed an interest in riverbeds down and upstream. The inconsistent outcomes that would inevitably arise would dramatically undermine “the special need for certainty and predictability where land titles are concerned.” *Leo Sheep*, 440 U.S. at 687–88.

**2. This Court’s Cases Have Consistently Applied the Segment-by-Segment Approach.**

Reflecting these practicalities, this Court’s cases establish that a single river may contain both navigable and non-navigable segments. As the Court has repeatedly reiterated, “navigability *in fact* is the test of navigability in law,” *Oklahoma*, 258 U.S. at 586 (emphasis added), and is to be determined based on evidence. *Utah*, 283 U.S. at 87. That fact-based test necessarily focuses on distinct segments, because many rivers do not have uniform characteristics along their lengths, and are thus navigable in some places and non-navigable in others. Indeed, the very concept of looking at the “whole river” is an artificial construct, as it is often not even certain where a particular river began or ended at statehood. *See id.* at 73 (noting the Grand River was “designated on all government maps and reports as separate from the Colorado river” until 1921, when Congress re-labeled it an upstream segment of the Colorado River).

The Court’s decision in *Utah* exemplifies the segment-by-segment approach. There, the United States brought suit to quiet its title to “certain

portions of the beds of the Green, Colorado, and San Juan Rivers within the state of Utah.” *Id.* at 71. Referring the case to a special master to make findings regarding the navigability of those portions, *id.* at 72, the Court stated that it was proper for the master to “limit[] his findings and conclusions as to navigability” to “the sections of the rivers which are described in the complaint.” *Id.* at 77. As the Court explained, “[e]ven where the navigability of a river, speaking generally, is a matter of common knowledge ... it may yet be a question, to be determined upon evidence, how far navigability extends.” *Id.*; *see also Oklahoma*, 258 U.S. at 584 (certain rivers were “known to be navigable in their lower reaches and not navigable in their upper reaches, but how far up the streams navigability extended was not known”); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (even when it is “general knowledge” that a river is navigable, “it is not so clear ... at what particular place between its mouth and its source navigability ceases”).

In *Utah*, not only was the master’s—and hence the Court’s—analysis limited to the specific river sections at issue, but it also dealt separately with stretches within those sections that had distinct topographical characteristics. The master determined, for example, that (1) the disputed segments of the Green and Grand rivers, which joined to form the Colorado River, were navigable; (2) the Colorado was non-navigable for 40.5 miles south from the confluence of the Green and Grand rivers to the bottom of Cataract Canyon; and (3) the Colorado was navigable for 150 miles south from the

bottom of Cataract Canyon to the Utah-Arizona border. And when Utah raised exceptions to the master's finding of non-navigability as to "the first 4.35 miles of the stretch of the Colorado river," the Court considered that 4.35-mile stretch separately and ultimately sustained Utah's exception. 283 U.S. at 89–90. As a result, the Court recognized no fewer than three distinct segments within the relevant portion of the Colorado River—a non-navigable segment of 36 miles sandwiched between navigable segments of 4.35 miles and 150 miles. *See United States v. Utah*, 283 U.S. 801 (1931) (decree).

*Utah* distinguished between the stretches under consideration and the kind of *de minimis* "short interruption" or "negligible part" that would not merit independent analysis or change the nature of a stream or segment otherwise uniformly navigable or non-navigable. 283 U.S. at 77. The Court did not elaborate on when a stretch is "negligible," but the Court's detailed analysis made clear that it did not consider a 4.35-mile segment *de minimis*.

Other decisions from this Court have likewise followed a segment-by-segment approach to determining title navigability. For example, in *Oklahoma v. Texas*, Oklahoma claimed title to the bed of the Red River along the Texas-Oklahoma border. The Court recognized that Oklahoma's claim turned on the navigability not of the entire, 1,360-mile Red River, but rather of the much shorter segment at issue: "If *that section* of the river be navigable, its bed undoubtedly became the property of the state." 258 U.S. at 583 (emphases added). And the Court did not stop there; it further subdivided the disputed section into two distinct

segments: the western half, which the Court regarded as “obvious[ly]” non-navigable, and the eastern half, for which the evidence was less conclusive. *Id.* at 588, 591. Although the Court ultimately concluded that both segments were non-navigable, it treated them separately, not as though their navigability would stand or fall together.

Likewise, in *Brewer-Elliott*, the Court made clear that the title-navigability inquiry is specific to the river segment at issue, holding that Oklahoma had no claim of title to contested “portions of the bed of the Arkansas River, opposite the Osage Reservation in that state.” 260 U.S. at 79. The Court first observed that the district court had “found that *at the place in question* the Arkansas River was, and always had been, a nonnavigable stream,” and that the court of appeals had “concurred in the finding ... that the Arkansas *at this place* was, and always had been, nonnavigable.” *Id.* at 79–80 (emphasis added). Although the Court acknowledged that other portions of the Arkansas River were navigable, it found no need to consider Oklahoma’s claim of title “in view of the finding as a fact that the Arkansas is and was not navigable *at the place where the river bed lots, here in controversy, are.*” *Id.* at 85–86 (emphasis added).

Following this Court’s consistent adherence to a segment-by-segment approach, numerous federal and state courts have likewise recognized that title navigability is based on the characteristics of the particular river segments at issue. *See Utah v. United States*, 304 F.2d 23, 26 (10th Cir. 1962) (“the part of the river in question was in fact and in law non-navigable”); *Alaska v. Ahtna, Inc.*, 891 F.2d

1401, 1402 (9th Cir. 1989) (“[t]he part of the River at issue ... is its lower 30 miles”); *Oregon v. Riverfront Prot. Ass’n*, 672 F.2d 792, 793 (9th Cir. 1982) (considering “whether the McKenzie River between river mile 37 and its confluence with the Willamette River was navigable”); *Mundy v. United States*, 22 Cl. Ct. 33, 36 (1990) (a “river can be navigable in some parts and non-navigable in others”); *Nw. Steelheaders Ass’n v. Simantel*, 112 P.3d 383, 388 (Or. Ct. App. 2005) (title inquiry depends on “whether a given river segment is navigable”).

**3. The Decision Below Exemplifies the Dangers of Substituting a “Whole River” Approach for this Court’s Segment-by-Segment Approach.**

Rather than follow the segment-by-segment approach mandated by this Court’s precedent, the Montana Supreme Court rejected “a piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable”—and dismissed the bulk of PPL’s evidence as irrelevant. Pet.App.58. Among other things, the court determined—on summary judgment, as a matter of law—that the 17-mile Great Falls Reach of the Missouri River, which no one contended was susceptible to commercial navigation, was a mere “short interruption” that could be disregarded because it was portaged by Lewis and Clark. The court reached that conclusion even though the Great Falls Reach is nearly four times as long as the stretch of the Colorado River that this Court considered separately in *Utah*, and even though the month-long Lewis and Clark

portage was wholly incompatible with commercial navigation.

The Montana Supreme Court's mistaken "whole river" approach was on full display when it came to the Clark Fork, for the State's minimal evidence of navigability did not even pertain to the stretch where the disputed riverbeds are located. Instead, the State presented limited evidence of sporadic and hazardous transportation on stretches of the river below or more than 100 miles above the Thompson Falls project. *See supra*, p. 12. Under a segment-by-segment approach, that evidence could not possibly have carried the State's burden of proving navigability at the "locus in quo." But the Montana Supreme Court's rejection of that approach allowed it to grant summary judgment to the State based on inapposite evidence concerning irrelevant portions of the Clark Fork, while acknowledging that "there are interruptions to unimpeded navigation on this river in the vicinity of PPL's Thompson Falls project." Pet.App.61. That "vicinity" should have been the focus, but was instead dismissed as legally irrelevant.

The Montana Supreme Court even dismissed a federal court decree addressing, *inter alia*, the relevant stretch only 21 years after statehood as merely a "conclusory statement[]." Pet.App.57. But the conclusion of a federal court reached when memories of statehood conditions were still fresh cannot be dismissed as "conclusory." That near-contemporaneous conclusion is far more probative than the State's thin evidence of sporadic activities elsewhere on the river.

The Montana Supreme Court reached its contrary conclusion by placing undue emphasis on this Court's decision in *The Montello*, 87 U.S. 430 (1874). That decision addressed *regulatory* navigability, not title navigability, for purposes of a federal statute regulating vessels upon "navigable waters." *Id.* at 442–43. Although the Court concluded that vessels could not escape federal regulation on a river they routinely navigated by pointing to brief portages and "carrying-places" along the way, the Court did not suggest that those non-navigable stretches should be considered themselves navigable for the quite different purpose of establishing title. Nor has the Court treated portageable interruptions as navigable in subsequent title cases. Quite the contrary, the special master in *Utah* held that the Cataract Canyon section of the Colorado River and the disputed portion of the San Juan River were non-navigable for title purposes even though portions of both rivers had been portaged on the river itself. 2d.S.App.10–17.

In any event, 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*. The 17-mile Great Falls Reach, which could only be bypassed with an arduous, month-long journey, does not fit that description. Nor could such an approach explain the Montana Supreme Court's refusal to consider PPL's compelling evidence that much longer stretches of the upper Missouri and Clark Fork rivers were non-navigable. The court could only do

that by focusing on irrelevant stretches of the river and deeming those stretches sufficient to classify the entire river navigable as a matter of law. Nothing in any of this Court's cases remotely supports that river-as-a-whole approach.

**B. Navigability for Title Purposes Is Determined Based on Evidence of Commercial Navigation at Statehood.**

The navigability-for-title inquiry is fundamentally a factual one, determined based on the river's use and condition at statehood, without regard to subsequent improvements or changes. *Utah*, 283 U.S. at 87–89. The decision below flouted these principles by using this Court's reference in *Utah* to a river's "susceptibility to use" to deem evidence of modern-day, purely recreational usage dispositive of title navigability. That analysis is flawed at every turn.

The "susceptibility to use" language is not an invitation to consider rivers in their improved modern condition, but rather a recognition of narrow circumstances in which rivers in remote areas where commerce was not attempted at statehood might still be found navigable. That language should have no relevance in a case like this, where there were ample opportunities and incentives to navigate the rivers at statehood. Moreover, evidence of modern-day recreational use is doubly problematic. Not only is it irrelevant, outside the context of remote and undeveloped rivers and absent a predicate showing that the river's condition has not changed materially since statehood, but recreational use cannot substitute for the commercial use that the test

requires. The decision below illustrates the dangers of elevating such evidence above reliable historical evidence of a river's use and condition at statehood.

**1. The Proper Test Focuses on Reliable Historical Evidence and Considers Susceptibility to Use Only in Narrow Circumstances.**

This Court's decisions make clear that title navigability is based on whether the river segment in question was navigable when the State entered the Union. *Utah v. United States*, 403 U.S. 9, 10 (1971); *Oregon*, 295 U.S. at 6; *Utah*, 283 U.S. at 75. The focus on historical usage and conditions is one of the key distinctions between title navigability and regulatory navigability—whereas title navigability “is determined ... as of ... admission to statehood ... , navigability, for the purpose of the regulation of commerce, may later arise,” based on post-statehood changes or improvements to a river. *Appalachian*, 311 U.S. at 408; *see also Kaiser Aetna*, 444 U.S. at 172. That dichotomy makes perfect sense: While regulatory jurisdiction can expand as new commerce is made possible, title must be fixed once and for all. Title cannot morph over time, with a property owner subject to dispossession based on changes in the river or, worse yet, the consequences of his own improvements.

The historical nature of the title inquiry ordinarily requires navigability to be proven by reliable historical evidence of actual, contemporaneous uses of the river, at or near the time of statehood. *See Oregon*, 295 U.S. at 16–24; *Utah*, 283 U.S. at 83; *Oklahoma*, 258 U.S. at 586.

Evidence of “susceptibility to use,” by contrast, is rarely relevant to whether a river was navigable at statehood. If there were ample incentives for navigation and commerce before statehood, reliable evidence of commercial use should be readily available, and the absence of such evidence is highly probative of *non*-navigability. Only in the rare instance when a river and its surrounding lands were so inaccessible or unpopulated at statehood that “conditions of exploration and settlement explain the infrequency or limited nature of [actual] use” is evidence of a river’s “susceptibility to use” as a highway of commerce, rather than its actual use, appropriate. *Utah*, 283 U.S. at 82.

That of course is not the case here. While parts of Montana were sparsely populated, the river segments at issue were not in some remote wild where commerce was never attempted before statehood, such that the focus must necessarily shift from actual use to the inherently more speculative inquiry into susceptibility to use. The absence of successful efforts to navigate the Great Falls Reach, for example, was not for lack of trying, or at least incentives to try. By the 1860s, Fort Benton was known as the “Chicago of the Plains” for its role as a busy trading post that served as the main supply point for Montana. JA 310–12. Although Fort Benton received extensive steamboat traffic from the East during April, May, and June, *id.*, most travel beyond that point was by horse or wagon; travel on the river above Fort Benton was “hazard[ous]” and required portaging around the Great Falls. JA 313; *see also* JA 317 (Fort Benton remained the “practical head of navigation”); JA 752 (noting “tens of

thousands of ox-, mule-, and horse-drawn wagons” heading west from Fort Benton, where further commercial river travel became impossible, to Helena). The 17-mile Great Falls Reach was bypassed by Lewis and Clark not out of convenience, but out of necessity—the stretch was impassable. Indeed, the State’s own evidence confirms that commercial navigation *was* attempted on the relevant river stretches and was repeatedly proven impossible or wholly impractical.

The Montana Supreme Court nonetheless repeatedly invoked the susceptibility test, which it viewed as a “very liberal[]” and “expansive” standard, to speculate that river segments *could* have supported commercial use even though they in fact did not. Pet.App.54, 61. Nowhere was this tendency more pronounced than in its treatment of the Madison River. The Montana Supreme Court acknowledged that there is “little historical documentation” and only “sparse” evidence of navigation on the Madison at statehood. Pet.App.26. Undeterred, it relied almost exclusively on modern-day evidence of post-improvement uses to fuel speculation that the river was “susceptible to use” in 1889. Pet.App.56. That was plainly erroneous.

## **2. Modern-Day Evidence Is Inherently Suspect and Rarely Relevant.**

Even in the rare case when resort to “susceptibility to use” is appropriate, courts should still view evidence of modern-day usage with a skeptical eye. Both natural forces and human ingenuity can dramatically alter a river’s characteristics over time. Accordingly, modern-day

usage is relevant only when supported by reliable evidence that the river's condition and characteristics are materially unchanged since statehood.

Moreover, any value such evidence might have will almost always be outweighed by the dangers that attend its use. Allowing courts to consider usage that came into existence long after statehood undermines stability of title and invites continuing litigation even centuries after statehood. Moreover, reliance on modern-day usage creates a perverse incentive for riverbed owners not to improve their property in ways that facilitate navigation, lest they invite challenges to their titles based on the very uses they have made possible. By contrast, a clear rule that modern-day evidence is strongly disfavored promotes stable property rights and diminishes the potential for constant reevaluation of the navigability of rivers, streams, and lakes whose ownership has long been thought settled.

The Montana Supreme Court's heavy reliance on modern-day usage was erroneous twice over, particularly as to the Madison River. First, there was no need to resort to such "susceptibility" evidence at all, as reliable historical evidence of non-navigability, not a lack of incentive, explained the lack of commercial navigation. Second, the Montana Supreme Court compounded its error by refusing to consider PPL's expert evidence that the Madison had changed materially since statehood, and by instead deeming evidence of modern-day usage "sufficient" to establish "susceptibility for commerce at the time Montana became a state." Pet.App.58.

That conclusion flies in the face of this Court's insistence that the equal footing doctrine is concerned with navigability only at statehood. It also finds no support in the Montana Supreme Court's invocation of *Ahtna*, in which the Ninth Circuit considered modern-day usage only *after* the parties stipulated "that the physical characteristics of the River" were "the same as they were when Alaska became a State in 1959." *Ahtna*, 891 F.2d at 1402. Here, by contrast, PPL presented highly credible and unchallenged expert testimony that the characteristics of the Madison had changed and that the river was not susceptible to navigation at statehood. Those facts alone should have rendered modern-day usage irrelevant and certainly insufficient to support a grant of summary judgment. *See North Dakota ex rel. Bd. of Univ. & Sch. Lands v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) ("modern day canoe use and modern day 'boatability' data [were] not reliable indicators of ... navigability at statehood" where evidence showed "that the River today is not the same ... as it was at statehood").

To add insult to injury, the modern-day uses on which the Montana courts relied were made possible by post-statehood construction of *PPL's own dams*, Pet.App.20–21, which significantly increased water flow and submerged anastomosing channels. The Montana Supreme Court's heavy reliance on present-day evidence of dubious probative value is in stark contrast to its dismissal of far more probative contemporaneous evidence, such as early Army Corps reports and the 1910 federal court decree, as "conclusory" and of no evidentiary weight. *See*

Pet.App.57–58 (“The fact that these statements were made in the early 1900’s does not somehow cure them of their conclusory nature.”). The court below thus got exactly backwards the order of priority that should be afforded to historical and present-day evidence.

### **3. Recreational Use Cannot Establish that a River Supplied a Highway for Commerce.**

The proper navigability-for-title test recognizes that even historical evidence is relevant only if it reflects the kind of commerce that counts. *See Oklahoma*, 258 U.S. at 586–87 (unreliable and inaccurate historical anecdotes “must yield to the actual situation”). It is not “every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable.” *Rio Grande*, 174 U.S. at 698–99. A river must instead be capable of serving as a “highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *Oklahoma*, 258 U.S. at 586; *see Daniel Ball*, 77 U.S. at 563. Modern-day recreational use thus not only suffers all the failings of modern-day evidence, but also improperly equates recreational and commercial use.

To support commercial use, a river must have been capable of serving for most of the year as a “*highway* for commerce” at statehood. *Oklahoma*, 258 U.S. at 586 (emphasis added). In other words, the river must have been conducive to “commercial utilization on a large scale,” even if the demands of the time produced only smaller-scale utilization.

*Utah*, 283 U.S. at 83; *cf.* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 249 (11th ed. 2008) (commerce refers to "the exchange or buying and selling of commodities on a large scale involving transportation from place to place"). If the only commercial uses a river could support were "irregular" and "exceptional," *Oklahoma*, 258 U.S. at 591, or "sporadic and ineffective," *Oregon*, 295 U.S. at 23, or for only a few months out of the year, *id.*, then the river was not a "highway for commerce."

In keeping with these principles, courts have routinely found evidence of recreational use insufficient to establish title navigability. *See Harrison v. Fite*, 148 F. 781, 784, 787 (8th Cir. 1906) (lake "sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes" non-navigable); *N. Am. Dredging Co. of Nev. v. Mintzer*, 245 F. 297, 299–300 (9th Cir. 1917) (channel usable only by "duck boats or punts for hunting and fishing" non-navigable); *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130 (Tex. Civ. App. 1935) ("lake that is chiefly valuable for fishing or pleasure boats of small size is not navigable"); *Aucoin*, 20 So. 2d at 160 (lake used only for "pirogues and canoes [for] hunting, fishing, and trapping" non-navigable). As this Court aptly put it, that a water body is "large enough to float a boat" does not mean it is a useful highway for commerce. *Oregon*, 295 U.S. at 23.

Contrary to the Montana Supreme Court's suggestion, nothing in *Utah* supports a "broad definition of commerce" that includes recreational use. Pet.App.55, 58. The passage from *Utah* on which the lower court relied said nothing about

recreational use. It instead merely explained that navigability is not necessarily defeated where “commercial utilization [of the river] on a large scale awaits future demands ... as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources.” Pet.App.55 (quoting *Utah*, 283 U.S. at 83). That language in no fashion relaxes or broadens the definition of “commercial use.” It instead reflects the Court’s recognition that there are rare instances—not present here—in which the limited extent of *actual* commercial use at statehood does not necessarily reflect the river’s capacity for commercial use at that time. *See* Part II.B.1, *supra*.

*Utah v. United States* also does not support resort to recreational use to establish navigability. The Court there went out of its way to avoid placing any weight on recreational use. *Compare* Report of Special Master J. Cullen Ganey at 22–23, 35–36, *Utah*, 403 U.S. 9 (No. 31, Orig.) (documenting extensive recreational use), *with Utah*, 403 U.S. at 11 (finding evidence of navigability “not extensive” and relying exclusively on small-scale *commercial* navigation). Beyond that, the case is only a straightforward application of the principle articulated in *United States v. Utah*: the Court found the Great Salt Lake one of those atypical bodies of water for which evidence of only small-scale commercial navigation was explained by something other than the lake’s inability to sustain larger-scale use. *See* Report of Special Master J. Cullen Ganey at 48–49, *Utah*, 403 U.S. 9 (No. 31, Orig.) (“[w]hile commerce and trade ... has not flourished on the Lake, this is so not because ... the drawbacks and

obstacles are too formidable, but rather ... the need, strong enough to overcome them, has not arisen”). The State’s own evidence precludes application of that principle here, where the significant demand for commercial navigation was frustrated at every turn by repeated determinations that the relevant river stretches were not navigable and could not be made so.

Nor can the logic of a single outlier case from the Ninth Circuit justify the Montana Supreme Court’s untenable conflation of recreational and commercial use. Pet.App.58 (citing *Ahtna*, 891 F.2d at 1405 (finding “guided fishing and sightseeing trips” sufficient “commercial activity” to constitute “conclusive evidence” of title navigability)). On this point, *Ahtna* should be expressly rejected. Any body of water that can support recreational fishing and boating activities can also support “commercialization” of those same activities through the use of paid guides, rented watercraft, and the like. To consider such uses sufficient to render those waters “highways for commerce” would read the *commercial* component out of the navigability test, and cast a large shadow over titles to waterways throughout the country. See *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) (noting “literally hundreds of overflow lands, drainage ditches, etc. where fishing is prevalent” that are “useful for no other purpose”).

#### 4. Isolated and Unsuccessful Log Floats Cannot Establish that a River Supported Trade and Travel.

In conjunction with the “highway of commerce” requirement, the navigability-for-title test also requires a showing that a river could support both “trade *and* travel.” *Oklahoma*, 258 U.S. at 586 (emphasis added). The river must thus be capable of transporting both commercial goods and people. *Cf. Ahtna*, 891 F.2d at 1404 n.3. Moreover, that transportation must not demand extraordinary effort or ingenuity; rather, it must be possible utilizing the “customary modes of trade and travel on water” at statehood. *Oklahoma*, 258 U.S. at 586; *see also Oregon*, 295 U.S. at 23 (navigability requires “general and common usefulness for purposes of trade and commerce”).

The “trade and travel” requirement casts serious doubt on whether even a series of successful log floats, without more, could render a river navigable for title purposes. The requirement makes clear that a single, unsuccessful attempt is insufficient and, in fact, demonstrates non-navigability. To support both “trade and travel,” a river must be capable of carrying human travelers, not just logs or other inanimate objects. Indeed, that requirement is implicit in the term “navigable,” for “navigation” generally involves some element of human-directed “steer[ing],” “manag[ing],” or “operat[ing]” of a vessel. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 827 (11th ed. 2008). Accordingly, the “mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river.” *Rio*

*Grande*, 174 U.S. at 698; *see also Oregon*, 295 U.S. at 23 (“sporadic and ineffective” log floats do not establish navigability); *North Dakota*, 972 F.2d at 238–39 (same).

The Montana Supreme Court violated these principles when it deemed a single, unsuccessful log float—attempted *after* significant improvements to the river were made—sufficient to demonstrate that the Madison River was navigable at statehood. Even assuming *arguendo* that log floats might demonstrate navigability (*i.e.*, both trade *and* travel), only an established practice of commercially profitable log floats could even conceivably do so. *See Rio Grande*, 174 U.S. at 698. The State did not come close to making such a showing. Indeed, the State’s evidence confirmed that the Madison was *not* capable of supporting commercially profitable log floats, as a log float was never again attempted after the first one ended in bankruptcy. JA 259–60. Even if the Montana Supreme Court were correct that “commerce” is “broadly construed,” it would be ludicrous to construe commerce so broadly as to include a single, disastrous log float.

**C. The Burden of Proof Rests on the Party Seeking to Establish Navigability; Navigability for Title Purposes Is not “Very Liberally Construed.”**

Because a finding that a body of water is navigable results in the imposition of public servitudes and affects the property rights of adjacent landowners, the burden of proof rests on the party seeking to establish title navigability. That is the rule stated by the special master in *Utah v. United*

*States*, and the Court expressed no disapproval thereof. See Report of Special Master J. Cullen Ganey at 50, *Utah*, 403 U.S. 9. And it is the rule that has been consistently applied by lower courts. See *North Dakota*, 972 F.2d at 238; *United States v. Davis*, 339 F.3d 1223, 1227 (10th Cir. 2003); *Harrison*, 148 F. at 785; *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 165 n.10 (Ariz. Ct. App. 1991); *Boerner v. McCallister*, 89 S.E.2d 23, 27 (Va. 1955); *State v. Aucoin*, 20 So. 2d 136, 159 (La. 1944); *Boutwell v. Champlain Realty Co.*, 94 A. 108, 112 (Vt. 1915); *Burner v. Nutter*, 87 S.E. 359, 361 (W. Va. 1915); see also 78 AM. JUR. 2D *Waters* § 133, at 480 (2002) (“the burden of proof rests upon the party asserting such navigability”).

Placing the burden on the proponent of navigability is consistent both with a proper respect for property rights and with fundamental fairness given the inherent difficulty of proving a negative. See *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2823 (2011); *Hamling v. United States*, 418 U.S. 87, 116 (1974); *Elkins v. United States*, 364 U.S. 206, 218 (1960). Discrete historical events and similar evidence are typically readily available when a body of water was navigable at statehood—even more so because the obvious incentives for navigation and commerce mean that most rivers that could be navigated were, in fact, navigated. The absence of evidence of successful navigation in the presence of ample incentives for commercial exploitation strongly supports a finding of non-navigability. Placing the burden on the proponent of navigability corresponds to that reality and is far preferable to making the

other party prove a negative a century or more after the fact. *See* JA 784.

Moreover, because a State will often be the party asserting navigability, the traditional allocation of the burden of proof serves as an appropriate counterweight to the strong incentives to claim rivers “as navigable when they are not actually so,” so as to “enlarge what actually passed to the state, at the time of her admission.” *Brewer-Elliott*, 260 U.S. at 88–89. The burden also offsets the sizeable advantages a State enjoys when it challenges privately held titles in its own courts. If a private party sought to reclaim property rights a century after statehood and after participating in numerous regulatory proceedings premised on others’ ownership, numerous state law doctrines like laches and equitable estoppel would reinforce settled expectations in stable property rights. But when a State belatedly asserts its property interests in its own courts, those same doctrines are often deemed inconsistent with the State’s sovereign immunity. *See, e.g.*, Pet.App.13. Only federal law can vindicate property rights in that situation, and placing the burden of proof on the party seeking to establish navigability is an important safeguard.

Placing the burden on the State or other party asserting navigability is especially important where, as here, that assertion would upset long-settled ownership expectations. “This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned” and has been reluctant to “upset settled expectations.” *Leo Sheep*, 440 U.S. at 687–88; *see also Republic of Austria v. Altmann*, 541 U.S. 677,

693 (2004). That reluctance is reflected, for example, in the requirement that a State seeking to divert previously appropriated water for future uses must prove by clear and convincing evidence that the diversion should be permitted, a standard that reflects society's interest in "the stability of property rights." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). By the same logic, the burden of proof appropriately rests on a State that, like Montana here, lays claim to riverbed lands that for decades, if not centuries, have been understood to be owned by the federal government or private parties.

For all the same reasons that the burden of proof has traditionally been placed on the proponent of navigability, the navigability-for-title test should be construed to disfavor belated claims of navigability. At a minimum, there is no place for a rule of construction that construes "the concept of navigability for title purposes ... very liberally" in favor of navigability. Pet.App.54. To do so would defeat the purposes for which courts have consistently placed the burden on the party asserting navigability. It would unsettle property rights, fuel the States' temptation to "enlarge what actually passed" at statehood, *Brewer-Elliott*, 260 U.S. at 88–89, and exacerbate the substantial advantages the State enjoys in its own courts.

Yet that is precisely what the Montana Supreme Court did here. Not only did it ignore the well-settled burden of proof; it affirmatively rejected it in favor of a rule that the navigability-for-title test must be "very liberally construed" *in the State's favor*. Pet.App.54. Remarkably, the lower court derived its erroneous "liberal constru[ction]" rule not

from some mistaken view that state law controls the question, but from *this* Court's opinion in *Utah*, which says nothing of the sort. *See* Pet.App.54. That erroneous reading of this Court's precedent is the only plausible explanation for the Montana Supreme Court's mystifying conclusion that summary judgment was appropriate, notwithstanding PPL's "mountain" of evidence demonstrating non-navigability, and "without the benefit of the extensive factfinding" that this Court's cases require. Pet.App.100 (Rice, J., dissenting). This Court should correct that error and make clear that the burden of proof rests with the proponent of navigability and that the appropriate rule of construction does not liberally favor belated assertions of title.

### **III. Under A Correct Application Of This Court's Precedents, The State's Evidence Was Manifestly Insufficient To Sustain Its Title Claims.**

That the Montana Supreme Court construed this Court's precedent to support invalidation of long-held titles and consummation of the State's massive land grab illustrates the need for this Court to reaffirm the core principles of the federal navigability-for-title test. When those principles are properly applied, it is crystal clear that the grant of summary judgment in the State's favor cannot stand. Moreover, under a proper application of the test, certain of the State's assertions of title fail as a matter of law.

*First*, Montana's claim of title to the 17-mile Great Falls Reach of the Missouri River, where the

bulk of PPL's Missouri-Madison project is located, cannot succeed. The distinct characteristics of that stretch mean that it must be considered separately under this Court's longstanding segment-by-segment approach. No party seriously contends that the Great Falls Reach was navigable—commercially or otherwise—when Montana entered the Union or at any other time, and the State presented no evidence to that effect. And, contrary to the decision below, the Great Falls Reach cannot be classified as a negligible, “short interruption” given that it is nearly four times as long as the segment this Court treated separately in *Utah*. Nor can the Montana courts grant summary judgment in the face of PPL's considerable historical evidence that other, even longer, disputed segments of the Missouri are non-navigable as well.

*Second*, the State's evidence cannot possibly prove the Madison River navigable at statehood. The State relied on three pieces of evidence: a single, disastrous log float attempted in 1913; present-day recreational use made possible by post-statehood improvements; and the observations of Captain Clark. Under a proper application of this Court's “highway for commerce” test, the unsuccessful and never-repeated log float actually confirms *non*-navigability. And the evidence of present-day recreational use is irrelevant, especially in light of the unrefuted expert testimony that present-day conditions did not match conditions at statehood. That leaves only Clark's observations, which do not even tend to show the navigability of a river that he never saw beyond its mouth. Accordingly, the State's evidence is insufficient as a matter of law to

establish that the Madison River was navigable at the time of statehood.

*Third*, as to the Clark Fork River, the State offered insufficient evidence to overcome nearly contemporaneous findings that the relevant stretch is non-navigable, including the 1910 federal court decree awarding title to PPL's predecessor. The State's evidence primarily pertained to limited log floats and passenger transportation on river stretches not at issue here. The admitted "interruptions to unimpeded navigation on this river in the vicinity of PPL's Thompson Falls project," Pet.App.61, were disregarded along with this Court's segment-by-segment approach. When this Court's approach is correctly applied, it is clear that the interruptions "in the vicinity" are what matters, and that the State's evidence of sporadic activities elsewhere on the river did not carry its summary judgment burden.

**CONCLUSION**

The Court should reverse the decision below, and remand with instructions for the Montana courts to apply the correct federal test for determining title navigability.

Respectfully submitted,

PAUL D. CLEMENT  
*Counsel of Record*  
ERIN E. MURPHY  
BANCROFT PLLC  
1919 M St. NW, Suite 470  
Washington, DC 20036  
(202) 234-0090

ASHLEY C. PARRISH  
PAUL A. MEZZINA  
KING & SPALDING LLP  
1700 Pennsylvania Ave., NW  
Washington, DC 20006  
(202) 737-0500

ROBERT L. STERUP  
KYLE A. GRAY  
HOLLAND & HART LLP  
401 N. 31st St, Ste. 1500  
Billings, MT 59101  
(406) 252-2166

ELIZABETH THOMAS  
K&L GATES LLP  
925 Fourth Ave., Ste. 2900  
Seattle, WA 98104  
(206) 623-7580

August 31, 2011 *Counsel for Petitioner*

**APPENDIX  
OF RELEVANT CONSTITUTIONAL  
AND STATUTORY PROVISIONS**

**TABLE OF CONTENTS**

U.S. Const., art. VI, cl. 2 ..... 1a  
U.S. Const., art. IV, § 3, cl. 2 ..... 2a  
43 U.S.C. § 931 ..... 3a  
43 U.S.C. § 1311(a)..... 4a

**U.S. Const., art. VI, cl. 2,  
the Supremacy Clause of the  
United States Constitution**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2a

**U.S. Const., art. IV, § 3, cl. 2,  
the Property Clause of the  
United States Constitution**

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or Property belonging to the United States[.]

3a

**43 U.S.C. § 931**

**Navigable rivers as public highways**

All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

**43 U.S.C. § 1311(a)**

**Rights of States**

**(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use**

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]