

No. _____

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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

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

Counsel for Petitioner

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

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QUESTION PRESENTED

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

The questions presented are:

1. Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of

present-day recreational use, with the question “very liberally construed” in the State’s favor?

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

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. No publicly held company owns 10% or more of PPL Corporation's stock.

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PETITION FOR CERTIORARI

This case offers the Court an opportunity to rectify an enormous uncompensated land grab by state court judges subject to review only by this Court. The method for effectuating this massive land transfer was straightforward: declare that significant stretches of riverbed lands, long thought to belong to private parties and the federal government, in fact have belonged to the State all along. To reach this conclusion, the Montana Supreme Court had to overcome two federal-law obstacles: this Court's precedents on the test for determining when a river is navigable and thus belongs to a state at statehood, and principles of federal preemption. The lower court's erroneous rulings on these two federal questions merit review.

In 1889, at the time of Montana's statehood, it was clear that Fort Benton, Montana, was the head of navigation on the Missouri River. All roads from the west led there because all boats from the east stopped there, for after Fort Benton came the impassable Great Falls. But what is bad for navigation is good for hydropower generation. Hence, in 1891, a predecessor-in-title to petitioner PPL Montana, LLC ("PPL") chose this non-navigable stretch to build a hydroelectric dam. It did so knowing, as owner of the riparian land on both sides, that it owned the riverbeds. This ownership was based on the core federal-law principle that only commercially navigable stretches of a river transfer to a State at the time of statehood—and no one would have suggested that the Great Falls were navigable. Over the years, predecessors to PPL built another six dams on the

Missouri river upstream from Fort Benton, as well as dams and reservoirs on non-navigable sections of the Madison and Clark Fork rivers. With respect to all the river stretches on which PPL's predecessors constructed the dams, letters from the War Department, reports by the U.S. Army Corps of Engineers, and (in one case) even a federal court decree confirmed that the lands were non-navigable and belonged to PPL's predecessors, other private landowners, or the federal government. At no point before the start of this case did Montana ever notify the dams' owners that the State held title to the riverbeds under the dams and reservoirs and was thus entitled to rent.

The Montana Supreme Court ignored these salient facts, and held that all this expert testimony and extensive primary source evidence did not even raise a material dispute. It thus affirmed the trial court's summary judgment ruling that Montana holds title, imposing on PPL \$41 million in retroactive liability for back rent and many millions more in expected future rent for use of the riverbeds.

The Takings Clause and basic principles of federal due process would ordinarily provide a backstop against this sort of state-court overreaching. In this case, however, there were two preliminary federal-law obstacles that the Montana Supreme Court had to overcome. *First*, it misapplied this Court's test for determining navigability for title purposes. That error allowed it to ignore historically non-navigable sections of the rivers based on its assertion that the rivers as a whole are now more or less navigable. *Second*, it

failed to recognize that the Federal Power Act preempts the State's attempt to impose retroactive leasing obligations on federally-licensed hydropower projects. Beyond those errors, the lower court's decision reflects the larger drift, confusion, and divisions among the lower courts over these important, recurring federal issues. The Court can and should grant review.

OPINIONS BELOW

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

The Montana district court's June 13, 2008 final judgment is reproduced at App. 118. The district court's August 28, 2007 partial summary judgment on navigability issues is reproduced at App. 130. The district court's April 14, 2006 partial summary judgment on preemption issues is reproduced at App. 145.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution is reproduced at App. 161.

The relevant provisions of the Federal Power Act are reproduced at App. 162.

The relevant provisions of the Montana Hydroelectric Resources Act are reproduced at App. 185.

STATEMENT OF THE CASE

This case raises the question of who owns the riverbeds under more than 500 miles of rivers, including approximately 5,600 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 more than a century, it was undisputed that the riverbeds were 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 land. All but one of the relevant dams were constructed between 1891 and 1930. In 1949 and 1956, the Federal Power Commission approved the two projects under the Federal Power Act. The projects have since been re-licensed by the Federal Energy Regulatory Commission (“FERC”) and, for the last ten years, they have been owned and operated by PPL.

In the proceedings below, the Montana courts held, contrary to settled understandings, that the State of Montana has held title to the riverbeds since statehood and, as a consequence, PPL owes the State tens of millions of dollars in retroactive lease payments and millions more in expected future payments. The lower courts imposed this massive land transfer and resulting liability based on a determination—at the summary judgment stage of proceedings no less—that the 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 stretches of the rivers were not navigable for title purposes at statehood. The court thus deemed all that evidence of ownership to raise no material dispute of fact, and awarded title to Montana to some 500 miles of riverbeds, including federal lands inside Yellowstone National Park. It could do so only by ignoring the clear teachings of this Court's precedents.

A. PPL's Hydropower Projects

1. The two hydropower projects at issue—the Thompson Falls project (FERC No. P-1869) and the Missouri-Madison project (FERC No. P-2188)—consist of one storage dam and nine dams with facilities that have a combined generating capacity of approximately 350 megawatts. The generated energy is sold to wholesale customers, large industrial users, local utilities, and electricity cooperatives in Montana and beyond.

The Thompson Falls project, which began operations in 1915, is located on the Clark Fork River at Thompson Falls, Montana. The project consists of a seven-unit hydroelectric plant with a total generating capacity of 94 megawatts. The project, which was constructed on a naturally occurring waterfall, was first licensed by the

federal government in 1949, and re-licensed in 1979. The license expires in 2025.

The Missouri-Madison project includes nine dams built between 1891 and 1958 on the Missouri and Madison rivers. Because they are designed to generate hydropower, the dams were constructed on 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 Great Falls, Montana where, over a 17-mile stretch with five historic waterfalls, the river drops more than 600 feet. Two dams—Holter (1918) and Hauser (1911)—are on the Stubbs Ferry stretch of the Missouri River, close to Helena, Montana. And two dams—Madison (1906) and Hebgen (1915)—are on the Madison River. The Hebgen dam, which is near the northwestern border of Yellowstone National Park, stores and releases water to regulate flow to the other downstream dams. The project was first licensed in 1956 and, in September 2000, the federal government issued a new license that expires in 2040.

2. The State of Montana participated in the federal licensing proceedings for both the Thompson Falls and the Missouri-Madison projects. As part of those proceedings, the federal government carefully evaluated the relevant public interest factors and undertook a detailed economic analysis to determine whether the projects were economically feasible. *See Mead Corp.*, 72 FERC ¶ 61,027, at 61,068 (1995) (describing economic analysis). PPL and its predecessors demonstrated

that they had obtained all necessary property rights to operate the facilities. And the State offered detailed comments on various aspects of the projects.

The State did not contest the federal agency's finding that PPL's predecessor-in-title, The Montana Power Company ("MPC"), had "submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes" of the license. *Montana Power Co.*, 8 F.P.C. 751, 752 (1949). More to the point, the State never claimed ownership of the riverbeds under the projects or entitlement to significant lease payments that would fundamentally affect the projects' economic feasibility. The riverbeds under the dams and reservoirs were generally understood to be either private lands owned by MPC or other private parties from whom flood easements were granted, or federal lands for which the hydropower producer paid substantial annual use, occupancy, and enjoyment charges to the federal government. 16 U.S.C. § 803(e).

3. In 1999, PPL purchased the two hydropower projects from MPC and, with the federal government's approval, continued to operate them. As part of that transaction, MPC delivered to PPL numerous deeds conveying its acquired 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. PPL also acquired permits from the U.S. Secretary of the

Interior and the U.S. Department of Agriculture authorizing the use of federal lands. When PPL purchased the hydropower projects, the State never suggested that it held title to the riverbeds or that PPL owed rent for their use.

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, seeking retroactive compensation to the State for the use of riverbeds under hydroelectric facilities in Montana. The lawsuit relied on the novel theory that the riverbeds were state-owned lands that were part of Montana's school trust and that PPL and the other companies owed hundreds of millions in unpaid rent to the State. In 2004, the State intervened as plaintiff. In September 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 that it was entitled to compensation under the Montana Hydroelectric Resources Act. Faced with hundreds of millions in potential back rent for use of lands reaching back to the early 1900s, Avista and PacifiCorp settled; as regulated utilities (unlike PPL) their additional costs could be passed through to ratepayers. The litigation then proceeded against PPL with the trial court issuing three key rulings.

1. The Preemption Ruling

The trial court first addressed whether federal law preempts the State's claims. In response to the State's motion for partial summary judgment, PPL contended that the Federal Power Act preempts the Montana Hydroelectric Resources Act, and that any attempt to obtain retroactive compensation would conflict with federal law. In particular, PPL noted that state law lease requirements would interfere with FERC's exclusive jurisdiction over the issuance and transfer of licenses for federal hydropower projects.

On April 14, 2006, the trial court held that at least one provision of the Montana statute impermissibly conflicted with the Federal Power Act. App. 155. Nonetheless, although the Montana statute has no severability provision, the trial court held that nothing in federal law prevented the State from seeking retroactive and future compensation under the statute for the use of the riverbeds. App. 156. The trial court also ruled that PPL's as-applied preemption challenges could not be decided without a factual record and reserved ruling on the issue until after trial. App. 157.

2. The Navigability Ruling

The State then moved for partial summary judgment that the Missouri, Madison, and Clark Fork rivers were navigable in 1889 and, therefore, that Montana held title to the riverbeds under the "equal footing doctrine." *Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845). To carry its burden to prove navigability, the State submitted two non-expert affidavits that relied entirely on hearsay.

The first affidavit, provided by a State Archivist of the Montana Historical Society, attached copies of newspaper articles, books, and journal accounts contained in the Historical Society's collection. The second affidavit, provided by the Minerals Management Bureau Chief for the Montana Department of Natural Resources, summarized a discredited 20-year-old study, commissioned by the State (the "River Study").

In response, PPL argued that, under this Court's precedents, the navigability of a river for title purposes is determined on a section-by-section basis in light of navigability at the time of statehood, not on a river-as-a-whole basis in light of present-day usage. PPL submitted more than 500 pages of exhibits and affidavits from two experts: Dr. David M. Emmons, a Professor of History Emeritus at the University of Montana, and Dr. Stanley A. Schumm, a specialist in the field of fluvial geomorphology. Both experts concluded that the relevant stretches of the three rivers were not navigable in 1889 when Montana joined the Union.

The information cited by PPL's experts included a 1910 federal court decree of non-navigability granting title to the riverbeds where the Thompson Falls project operates to PPL's predecessor and declaring that the relevant stretch of the Clark Fork river "was and is a non-navigable stream." *Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910). Other primary sources relied on by PPL's experts included, for example: (1) an 1891 Army Corps of Engineers Report to Congress noting that the relevant stretch of the Clark Fork

River “is a mountain torrential stream, full of rocks, rapids, and falls” that is “utterly unnavigable, and incapable of being made navigable except at enormous cost,” App. 109, 202, 307; (2) a federal War Department declaration stating that PPL’s predecessor did not need a permit to build the Black Eagle dam because the Great Falls reach of the Missouri river “was not now navigable and ... in all probability never will be,” App. 200, 263; (3) an 1898 Report to Congress by the Army Corps stating that the Great Falls reach was an “unnavigable section, occupied by cataracts and dangerous rapids,” App. 114, 200, 218; and (4) with respect to the Madison River, a 1931 Report to Congress by the Army Corps concluding that “commercial navigation ... is entirely out of the question.” App. 102, 201, 295.

Moreover, as PPL’s experts explained, the rivers have changed significantly since 1889. In the 1800s, the relevant river sections were fraught with torrential rapids and waterfalls, as well as boulder-strewn sections, and were braided or anastomosing. App. 103, 208–215. PPL’s hydropower dams have made the post-statehood rivers more susceptible to navigation by significantly altering the rivers’ hydrology, including reducing the peak flows, increasing the low flows, and submerging boulders and historic rapids. App. 214–215.

PPL’s experts also disputed the accuracy of the materials on which Montana relied. For instance, the conclusions reached in the River Study were unreliable because severe funding constraints prevented the study’s authors from preparing a

credible historic account. *See* App. 105–106, 193. Dr. Emmons noted that many of the documents that the State mistakenly attributed to the Army Corps represented the views of undisclosed authors and were in fact not prepared or approved by the Army Corps. App. 111, 195, 269–272. Similarly, although the State had asserted that “[a]s anyone with even a passing knowledge of the Lewis and Clark Expedition must concede, the Missouri River is navigable in fact throughout Montana,” Dr. Emmons explained that the Expedition did not navigate the Great Falls reach of the Missouri River “because it was impossible for them to do so”; indeed, the Expedition “engaged in an arduous month-long portage around that reach.” App. 197.

Notwithstanding the substantial evidence submitted by PPL, the trial court concluded that there were no disputed issues of material fact and awarded summary judgment in the State’s favor. App. 143. The trial court further concluded that navigability need not be determined on a section-by-section basis and that, in light of present-day recreational usage on some parts of the rivers, the entire rivers were navigable nearly 120 years earlier. App. 138, 143.

3. The Final Judgment

The trial court held an 8-day bench trial in October 2007 on the remaining issues and, on June 13, 2008, entered final judgment in the State’s favor. The trial court awarded the State \$34 million in retroactive back-rent for PPL’s use of the riverbeds from 2000 through 2006; an additional \$6 million for its use of the riverbeds in 2007; and

whatever future amounts the State Land Board determined in 2008 and going forward. (With statutory interest at a rate of 10% per annum, the amount has grown to approximately \$49 million.) App. 81.

The trial court also rejected PPL's claim that the Montana Hydroelectric Resources Act is preempted as applied to PPL's hydropower projects. In the trial court's somewhat cryptic judgment, although the Montana statute may well conflict with PPL's federal licenses and Federal Power Act regulations, that "does not mean that there can be no lease." App. 123.

C. The Montana Supreme Court's Decision

PPL appealed to the Montana Supreme Court and, on March 30, 2010, a divided (5–2) court, over a powerful dissent by Justice Rice, largely affirmed the trial court's rulings.

1. With respect to navigability, the Montana Supreme Court concluded that the State was entitled to summary judgment and that the trial court had properly concluded that the Missouri, Madison, and Clark Fork rivers were navigable for title purposes.

Addressing PPL's assertion that the trial court misapplied precedent, the Montana Supreme Court recognized that "two ... crucial aspects" of the trial court's decision were that (1) non-navigable interruptions in a river do not defeat navigability, so long as the river *as a whole* was "used, or susceptible to being used, as a channel of commerce at the time of statehood"; and (2) present-day usage

is “probative as to navigability of a river at the time of statehood.” App. 53. The Montana Supreme Court then explained that its “independent review of the case law” established “unequivocally” that the trial court’s “understanding of the navigability for title test was correct.” App. 54. The Montana Supreme Court agreed with the trial court’s staggering conclusion that PPL’s expert testimony based on primary materials (including a federal court decree of non-navigability) was “insufficient to raise a genuine issue of material fact regarding navigability.” App. 57.

According to the Montana Supreme Court, the “concept of navigability for title purposes is very liberally construed.” App. 54. It therefore made no difference that miles-long stretches of the rivers were impassable when Montana entered the Union. For example, even though the Great Falls reach on the Missouri River was non-navigable, this “17-mile stretch ... is merely a short interruption in the use of the Missouri as a channel for useful commerce, as evidenced by the Lewis and Clark expedition’s portage of this area, and the well-documented actual use of the Missouri subsequent thereto.” App. 61. Although the Montana Supreme Court recognized that there are “interruptions to unimpeded navigation in the vicinity of PPL’s Thompson Fall project,” it concluded that the Clark Fork River as a whole is generally navigable. *Id.* Similarly, “PPL’s dams on the Madison River are also merely short interruptions in the navigation of this river as well.” *Id.*

The Montana Supreme Court further concluded that it was appropriate to consider

present-day circumstances to determine whether a river is navigable for title purposes. According to the court, “it is equally clear that the present-day usage of the Madison, Clark Fork, and Missouri rivers demonstrates that these rivers were susceptible of providing a useful channel of commerce throughout the state of Montana at the time of statehood.” *Id.*

2. With respect to federal preemption, the Montana Supreme Court concluded that the “core” purpose of the Montana Hydroelectric Resources Act is “compensatory,” not “regulatory,” and that the statute’s compensatory provisions are not preempted. App. 72. The court further suggested that the non-compensatory provisions could be severed and would not prevent the State from recovering both retroactive and future lease payments under the statute for the use of the riverbeds under PPL’s hydropower facilities.

3. Justice Rice, joined by Judge Salvagni (sitting for Justice Morris who was recused), penned a 22-page dissenting opinion. The dissent noted that the majority veered “off track” by failing to undertake the “section-by-section” navigability analysis mandated by *United States v. Utah*, 283 U.S. 64 (1931). App. 96. Justice Rice expressed concern that the majority, in focusing on the navigability of the river as a whole, had “misstat[ed]” PPL’s objections to that approach. App. 99. PPL had not claimed that “virtually every stretch of a river must be ‘navigable in fact’ and that particular stretches of a river which are non-navigable ... can defeat a finding of navigability with respect to the *whole river*.” *Id.* (quoting App.

58). Instead, PPL had argued “for certain reaches to be declared non-navigable” consistent with *Utah*’s section-by-section approach. *Id.* Justice Rice criticized the majority for “attempting to avoid the consequences of *Utah*’s application—and of PPL’s considerable evidence”—by treating the section-by-section approach “essentially as an anomaly” rather than a general “framework of analysis.” App. 97. That interpretation, Justice Rice explained, was an “illogical rendering” that “ignores both” this Court’s “approach and the actual result of [*Utah*],” which had found two different titleholders to different sections of the riverbeds. App. 98.

Justice Rice found it “disturbing” that the majority dismissed the disputed sections of the Missouri, Madison, and Clark Fork rivers as “simply too ‘short’ to matter.” App. 99. The majority had failed to explain what made the disputed sections too “short.” App. 99, 116. Nor had the majority explained how it could reach any conclusions “without the benefit of the extensive fact-finding done in *Utah*” as to the specific waters’ topography, history, impediments, and use and susceptibility to use for commerce purposes. App. 100.

Finally, Justice Rice summarized PPL’s “mountain” of evidence, determining on each count, that “genuine material factual conflicts” precluded the “extreme remedy” of summary judgment. App. 100–101. Justice Rice concluded that PPL’s evidence, “if accepted after a trial, would lead inevitably to the conclusion that the State did not hold title to the streambeds at issue.” App. 100.

And, in any event, the credibility of the State's evidence should have been tested at trial, especially given the questions PPL raised as to whether the State had followed "fundamental tenets of historical analysis." App. 101.

REASONS FOR GRANTING THE PETITION

The decision below effectuates a massive land transfer by ignoring clear federal-law obstacles to its conclusion that riverbeds long thought to be private and federal lands belonged to the State all along. *Certiorari* is warranted for three reasons. *First*, the Montana Supreme Court's decision cannot be squared with this Court's navigability precedents, and it deepens existing divisions and confusion among the lower courts over the proper test for determining who holds title to submerged lands. *Second*, contrary to basic principles of federalism, the court below failed to recognize that the Federal Power Act preempts the State's attempt to assert retroactive title to riverbeds and collect millions in retroactive lease payments. *Third*, the questions presented address important, recurring issues that should be resolved by this Court.

This petition presents an ideal opportunity for the Court to reaffirm the bedrock principles set forth in *United States v. Utah*, 283 U.S. 64 (1931), and to address the disturbing trend of states asserting sovereign ownership of lands long thought to be owned by either private parties or the federal government. The petition thus warrants the Court's exercise of its exclusive authority to review final state court decisions raising important

federal issues. It is hard to imagine a more brazen effort to flout the federal law on navigability than the grant of summary judgment for the State in the face of a federal court decree and a “mountain” of contrary evidence. If left uncorrected, the decision below not only provides a roadmap for other states to circumvent federal law on navigability, but it also threatens to upend the federal regulatory scheme for hydropower facilities and decades of expectations concerning who owns the riverbeds under the Nation’s rivers and streams.

I. The Court Should Grant Review To Clarify That *Utah* Remains The Proper Test For Determining Navigability For Title Purposes.

Under the “equal footing” doctrine, title to the beds of rivers within Montana vested in the State when it was admitted to the Union if the rivers were “then navigable.” *Utah*, 283 U.S. at 77. If the rivers were not “then navigable,” “title to the river beds remained in the United States.” *Id.*; see also *Shively v. Bowlby*, 152 U.S. 1, 27 (1894); *Pollard’s*, 44 U.S. at 229. This Court’s precedents establish that the proper test for navigability is whether the relevant stretches of the rivers were “navigable in fact” when Montana joined the Union in 1889—that is, whether the river stretches were used, or susceptible to use, “as highways for commerce, over which trade and travel” could “be conducted in the customary modes of trade and travel on water.” *Utah*, 283 U.S. at 76 (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

The Montana Supreme Court misapplied this test. In particular, the court failed to consider evidence demonstrating navigability on a section-by-section basis. It instead concluded that the Missouri, Madison, and Clark Fork rivers are generally navigable rivers and, therefore, title to the riverbeds passed to the State—even though significant river stretches where PPL’s hydropower projects are located were not navigable when Montana joined the Union. The court below also improperly considered evidence of present-day usage as independently sufficient evidence of whether the rivers were navigable in 1889. The extent of the departure from this Court’s decisions is dramatically illustrated by the lower court’s grant of summary judgment for the State in the face of a 1910 federal court decree finding the relevant stretches of the Clark Fork river non-navigable. The federal court decree could be deemed not to raise an issue of material fact only if non-navigable stretches were irrelevant and modern-day usage trumped evidence of usage at statehood. Both underlying premises of the Montana Supreme Court’s decision are inconsistent with this Court’s precedent.

A. The Montana Supreme Court’s Navigability Analysis Contravenes This Court’s Precedents.

Over a century ago in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), the Court indicated that the navigability of a waterway for title purposes must be determined on a section-by-section basis. *Id.* at 698. The Court explained that, 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.” *Id.* The Court thus held that, although the Rio Grande was commonly viewed as navigable, a section of the river “within the limits of the territory of New Mexico” was not a waterway “over which, in its ordinary condition, ... trade and travel [could] be conducted in the customary modes of trade and travel on water.” *Id.* at 699. That middle section of an otherwise-navigable river was therefore non-navigable.

The Court has since reaffirmed that, when determining navigability for title purposes, a fact-intensive, section-by-section analysis is required. In *United States v. Utah*, 283 U.S. 64 (1931), the Court focused on the navigability of a 4.35-mile reach of the Colorado River. *Id.* at 89. Citing *Rio Grande*, the Court reiterated that, “[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.” *Utah*, 283 U.S. at 77 & n.9. The Court ultimately concluded that a 4.35-mile section of a larger, 40-mile stretch of the Colorado River—title to which had otherwise vested in the United States—was navigable at statehood and, therefore, title for the 4.35-mile stretch had passed to Utah when it joined the Union. *See id.* at 90–91; *see also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922) (considering stretch of Arkansas River along Osage Reservation).

The Court has also applied a section-by-section approach when employing the more lenient test for determining navigability for purposes of

determining the scope of the federal government's Commerce Clause power. In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Court considered the navigability of a 111-mile stretch of the New River to determine whether the United States could prevent the Appalachian Power Company from constructing a hydroelectric dam. Finding that the river was non-navigable between Allisonia, Virginia and Hinton, West Virginia, the trial court held that the United States lacked that authority. *Id.* at 410-11. This Court reversed. Dividing the river into “three sections”—a 28-mile section, 59-mile section, and 24-mile section—the Court focused on the “middle section” because the evidence of navigability was “much stronger” for the other two sections. *Id.* at 411. After carefully reviewing the evidence, the Court concluded that the relevant portions of the river were navigable for purposes of commerce and, therefore, the United States could require the Appalachian Power Company to comply with federal licensing requirements. *Id.* at 424.

The message from *Rio Grande, Utah*, and *Appalachian Electric* is clear: Courts should not assume that certain sections of a river are navigable or non-navigable merely because the river taken as a whole may be characterized as generally navigable or non-navigable.

The Montana Supreme Court's decision did not merely overlook the teachings of this Court's precedents; it rejected them “unequivocally.” App. 54. Dismissing PPL's argument that a court should consider navigability “with regard to certain sections of the river, as opposed to the rivers

themselves as a whole,” the Montana Supreme Court deemed *Utah*’s section-by-section approach to be both anomalous and inapplicable. App. 59. It was anomalous, in the lower court’s view, because the parties in *Utah* elected not to dispute the overall non-navigability of a larger 40-mile stretch, focusing on only 4.35 miles. App. 60. It was inapplicable because *Utah* had not concerned “short interruption[s] of navigability”—and the disputed sections of the Missouri, Madison, and Clark Fork rivers were, in the majority’s judgment, “relatively short interruptions.” App. 60–61. The Montana Supreme Court thus concluded that “so long as *the river itself* was used, or susceptible of being used, as a channel of commerce at the time of statehood,” no further inquiry was required. App. 53 (emphasis added).

The Montana Supreme Court’s river-as-a-whole approach to navigability cannot be reconciled with this Court’s decisions. As the dissent below recognized, the rejection of a section-by-section analysis “ignores both” this Court’s “approach and the actual result of” *Utah*. App. 98 (Rice, J., dissenting). To be sure, in *Utah* the Court noted that it was not concerned with “short interruption[s] of navigability in a stream otherwise navigable”; rather, it was only concerned about “long reaches with particular characteristics of navigability or non-navigability.” *Utah*, 283 U.S. at 77. But the Court plainly viewed the 4.35-mile stretch in *Utah* to be sufficiently “long” and emphasized that the “exact point at which navigability may be deemed to end ... should be determined precisely.” *Id.* at 90. Determining the

“exact point” is, quite obviously, particularly important when navigability determines title to land.

Against this backdrop, the lower court’s characterization of the 17-mile non-navigable stretch of the Missouri River as unduly “short” without any fact-finding is indeed “disturbing.” App. 99 (Rice, J., dissenting). As the dissent recognized, *see* App. 101, PPL was not only disputing the navigability of a 17-mile stretch (itself nearly four times the disputed stretch in *Utah*); instead, it challenged the navigability of more than 125 miles of the Missouri River; the entire Madison River (approximately 133 miles); and approximately 235 miles of the Clark Fork River. App. 101, 104, 109–110, 114.

The lower court’s decision reflects a particularly egregious example of how *Utah*’s “short interruptions” language, if misapplied, becomes an exception that swallows the rule. Only by eviscerating *Utah* and relying on broad pronouncements about the general navigability of the Missouri, Madison, and Clark Fork rivers was the Montana court able to cast aside expert evidence of non-navigability, including a federal court decree concerning the Clark Fork River and multiple federal reports as to all three rivers. That brazen disregard of this Court’s precedents is reason enough for this Court’s intervention. But here the consequence of disregarding federal law was to upend the long-settled expectations of private property owners and the federal government.

B. The Montana Supreme Court's Navigability Analysis Conflicts With Decisions From Other Courts.

In addition to contravening this Court's controlling authorities, the Montana Supreme Court's decision exacerbates a long-simmering conflict among the lower courts. While this Court's teachings are clear, the temptation for state courts to err on the side of the states is equally clear.

Numerous federal and state courts have engaged in a proper section-by-section analysis to determine navigability, both for regulatory and title purposes, for specific mileages and geographical segments of rivers. *See Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1432–33 (9th Cir. 1993) (“navigability for the middle segment may not be based on inferences of actual use elsewhere on the river”); *City of Centralia, Wash. v. FERC*, 851 F.2d 278, 279–80 (9th Cir. 1988); *Loving v. Alexander*, 745 F.2d 861, 867 & n.7 (4th Cir. 1984) (affirming that “the Jackson River, from RM 43 to 23.9, meets the federal test of navigability,” but expressing “no opinion on the portions of the river above RM 43”); *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”); *see also Northwest Steelheaders Ass'n, Inc. v. Simantel*, 112 P.3d 383, 395 (Or. App. 2005).

In contrast, other courts (predominantly state courts) have adopted a different approach that emphasizes the navigability of a river as a whole. These courts have rejected suggestions that navigability “should be tested using short

segments” or that one river could contain “short, intermittent, intermingled navigable and non-navigable sections, contending that such an approach “would introduce considerable confusion and difficulty into the application of the public trust doctrine.” *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 827 (N.C. Ct. App. 2009). Under this approach, navigability disputes concerning “short interruptions” of the navigable waterway have no effect on title. *See Northwestern La. Fish & Game Preserve Comm’n v. United States*, 574 F.3d 1386, 1391 (Fed. Cir. 2009) (“regardless of the navigability of the Saline Bayou, the Red River is a navigable waterway”); *Ryals v. Pigott*, 580 So. 2d 1140, 1152 (Miss. 1991) (finding navigability based on generalized uses of river); *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 166 (Mont. 1984) (rejecting claim to title because the entire river was navigable).

In “unequivocally” rejecting *Utah’s* section-by-section approach as an outlier rather than a general rule, the decision below has gone further than any other court. Its brazen disregard of *Utah*, and dismissal of a 1910 federal court decree as not even raising a material fact, make this case a candidate for summary reversal. Nonetheless, because other courts have committed less egregious variants of the same error, there is a conflict with both *Utah* and other lower court decisions and, hence, plenary review would be appropriate.

**C. The Montana Supreme Court's
Reliance On Present-Day Navigability
Conflicts With Decisions From Other
Courts.**

The decision below also deepens a split in authority over the relevance of present-day evidence to determining navigability for title purposes, particularly evidence of modern-day recreational usage. Although it is well-settled that navigability for title purposes is determined as of the date a State is admitted to the Union, *see Utah v. United States*, 403 U.S. 9, 9–10 (1971) (“*Utah II*”), the extent to which post-statehood usage may be probative of a waterway’s use or susceptibility to use at statehood has generated uncertainty. The decision below is a powerful example of the dangers of giving post-statehood usage undue weight, as the court elevated modern usage over evidence from federal sources at or shortly after statehood.

The Court’s decisions have applied a rigorous approach to navigability that has endeavored to tie evidence of navigability to the State’s precise date of admission to the Union. For example, in holding that the Great Salt Lake was navigable in 1896—the time of Utah’s admission—the Court took pains to explain that facts on which it relied from the 1870s and 1880s had not changed by 1896. *See Utah II*, 403 U.S. at 11–12. The Court’s decisions have not, however, categorically shut the door to post-statehood evidence—at least of certain kinds, and under certain conditions. In *Utah*, the Court noted that some post-1896 evidence of actual navigation was “relevant” to the rivers’

“susceptibility” to use as a highway of commerce in 1896. *Utah*, 283 U.S. at 82.

Applying this Court’s decisions, several lower courts have concluded that post-statehood evidence of navigability is generally an unreliable indicator of a waterway’s condition at statehood. For example, the Eighth Circuit rejected the relevance of modern-day recreational canoe use in considering the navigability of portions of the riverbed of the Little Missouri River. *See North Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992). Although North Dakota argued that “if canoes can travel on the River today, commercial watercraft could have done so in the late 1880s,” the Eighth Circuit discounted that evidence, concluding that “modern day canoe use and modern day ‘boat-ability’ data are not reliable indicators of the River’s navigability at statehood.” *Id.*; *see also North Dakota ex rel. Bd. of Univ. & Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982) (“the issue is one of ... navigability at the time of statehood, not in the present day”), *rev’d on other grounds*, 461 U.S. 273 (1983). Other courts have likewise deemed present-day usage irrelevant in distinguishing navigability for *title* purposes—which is determined as of the date of statehood—from navigability for *Commerce Clause* purposes—which “may arise later.” *Arkansas River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003) (“present-day navigability” may be relevant to navigability for Commerce Clause purposes but not for title purposes).

In contrast, other courts have been more receptive to post-statehood evidence of navigability, albeit to varying degrees. The Oregon Court of Appeals, for example, cited a “variety of post-statehood events” from the 1880s to 1920s to “further corroborate” a stream’s susceptibility to navigation in 1859. *Simantel*, 112 P.3d at 487 (quoting *Utah*, 283 U.S. at 82); *see also Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373 (Ohio 1959) (modern-day usage resulting from artificial improvements); *Ryals*, 580 So.2d at 1152 (Bogue Chitto River is navigable because it is “capable in its ordinary condition today of supporting commercial fishing”). Similarly, in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), the Ninth Circuit considered present-day recreational and commercial usage of the lower Gulkana River to conclude that it was susceptible to commercial use when Alaska became a state in 1959. *Id.* at 1405. The Ninth Circuit noted, however, that this conclusion followed from the parties’ factual stipulation that “the River’s physical characteristics have remained *unchanged since statehood.*” *Id.* (emphasis added).

The Montana Supreme Court’s decision exacerbates this split in authority and goes one step further: The court concluded that evidence of present-day recreational use “is *sufficient* for purposes of ‘commerce’” to establish navigability, even though the State’s admission to the Union occurred more than 130 years ago, and the rivers’ geology and hydrology have changed significantly in the ensuing years. App. 58 (emphasis added). In an extraordinarily expansive and erroneous

reading of *Utah*, the lower court declared that this Court has “embraced the notion that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability.” App. 55. The court acknowledged that historical usage of the waters was “admittedly not well-documented” nor “well-established.” App. 54, 56. But the paucity of historical evidence only confirmed the importance of present-day evidence because the concept of navigability is to be “very liberally construed.” App. 54.

The dangers of giving modern evidence undue weight could hardly be more starkly illustrated. Among the historical evidence deemed not to raise even a triable issue of fact was a 1910 federal court decree and 1891 and 1898 reports from the Army Corps to Congress. *See* App. 109–110, 114. To make matters worse, the Montana Supreme Court’s decision failed to recognize that the post-statehood construction of PPL’s dams significantly modified the rivers, making them much more susceptible to navigation and recreational use.

II. The Montana Supreme Court’s Decision Misconstrues The Preemptive Reach Of The Federal Power Act.

This Court’s review is also warranted because the decision below erred in overcoming the second federal obstacle to this massive land grab: preemption. The court below improperly concluded that federal law does not preempt Montana from imposing massive rental obligations on hydropower producers for use of riverbeds that, as part of federal licensing proceedings, were understood to

be owned by private parties and the federal government.

A. The Montana Statute Under Which The Rental Obligation Purportedly Arises Is Preempted.

The Federal Power Act imposes extensive requirements on companies, like PPL, that seek approval to construct and operate hydropower facilities on the Nation’s waterways. *See* 16 U.S.C. § 797(e). The Act imposes a “complete scheme of national regulations.” *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). Congress’s intent was “not merely to prevent obstructions to navigation” but rather to “secure enactment of a comprehensive development of national resources” through control over the “engineering, economic and financial soundness” of hydropower projects. *Id.* at 180–81; *see also California v. FERC*, 495 U.S. 490, 499 (1990).

The statute vests FERC with sole discretion to select the operator of any hydropower site, *see* 16 U.S.C. §§ 797(e), 800(a); *see also id.* § 801 (sole discretion over license transfers); 18 C.F.R. §§ 9.1–9.3, and requires all lands to be held by the licensee “in perpetuity.” 18 C.F.R. § 2.9. It also provides that hydropower licenses will be awarded based on an expert analysis of project economics. *See* 16 U.S.C. § 797(b) (FERC shall determine “actual legitimate original cost of and the net investment in a licensed project”); 18 C.F.R. § 5.18(b)(5)(ii)(E). That analysis considers “whether the project will be profitable” and “whether the benefits of project

power outweigh its costs.” *Mead Corp.*, 72 FERC ¶ 61,027 (1995).

Although the Federal Power Act contemplates that states and other landowners will receive compensation for use of their lands, the statutory scheme is structured on the premise that these costs will be factored into the economic analysis when the project is federally licensed and that all land rights will be acquired within five years of the first license. The statute likewise provides a mechanism for state participation. In particular, the statute requires an applicant for a hydropower license to provide “notice ... in writing to any State or municipality likely to be interested in or affected by such application” and to “publish notice ... in a daily or weekly newspaper published in the county or counties in which the project ... or the lands affected thereby are situated.” 16 U.S.C. § 797(f); *see also id.* § 802 (requiring notice to “[a]ny ... State, municipal or other local governmental agency likely to be interested in or affected by such application”). It requires the applicant to provide “a statement in duplicate showing the actual legitimate original cost of construction of such project, ... and of the price paid for water rights, rights-of-way, lands, or interest in lands”. *Id.* § 797(b). And it mandates that the applicant shall provide “satisfactory evidence” demonstrating compliance “with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks.” *Id.* § 802.

Against this backdrop of comprehensive federal regulation that invites state participation, the

Montana Hydroelectric Resources Act—the statute that provides the sole asserted basis for the State’s compensation claim for the use of the riverbeds—directly and irreconcilably conflicts with federal law. *See Albany Eng’g. Corp. v. FERC*, 548 F.3d 1071, 1075 (D.C. Cir. 2008) (Federal Power Act precludes “dual licensing authority”). Notwithstanding the federal government’s exclusive authority over hydropower projects, the statute sets out a comprehensive scheme of state regulation attuned to the economic value and viability of proposed hydropower projects. For example, the Montana statute requires the Montana Land Board to make a “preliminary examination as to the value of the power site, as to the plans of development submitted by the applicant, and of *all other matters* relating to the proposed development as it deems necessary for the proper disposition of the business.” Mont. Code Ann. § 77-4-204 (emphasis added). Proposed leases may be debated at public meetings, and the Montana Land Board is granted authority to accept bids from potential operators and to select the bid “most advantageous to the state.” *Id.* § 77-4-206(3). The statute includes durational limits, stipulating that the “term of” any “lease shall not exceed 50 years.” *Id.* § 77-4-209. Moreover, the statute requires rent to be paid to Montana for no less than the “full market value of the estate or interest disposed of through the granting of the lease or license.” *Id.* § 77-4-208. This provision was interpreted here to permit Montana to recover a share of the profits generated by the federally licensed facilities. App. 42, 84.

The Montana Supreme Court recognized what is undeniable: that sizeable parts of the Montana statute irreconcilably conflict with the requirements of the Federal Power Act. *See* App. 71–72. It nonetheless deemed these conflicts to be alleviated by the State’s non-binding assurances that it will not seek to apply the statute’s regulatory, non-rental provisions to PPL. *Id.* But even though the State may deem the rental provisions severable from the more explicitly regulatory provisions, that does not save the rental provisions from preemption. As originally enacted, these provisions worked hand-in-glove with the concededly preempted regulatory provisions. And to the extent they are shorn of those regulatory provisions, they are just a naked revenue grab that continues to conflict with the federal regulatory regime.

B. The State’s Attempts To Impose Rental Obligations On PPL Are Preempted.

Even assuming that the Montana statute is not preempted on its face, the State’s attempts to recover lease payments are still preempted as applied here. PPL’s hydropower projects were licensed and re-licensed on the unquestioned assumption that the riverbeds were not State lands. The State actively participated in the federal licensing process and raised no objection that it held title to the riverbeds. Moreover, PPL pays annual charges of approximately \$500,000 to the federal government for the “use, occupancy, and enjoyment” of federal lands, including lands to which the State now claims title. 16 U.S.C.

§ 803(e). The State’s efforts to pull a bait-and-switch at this juncture would defy the whole purpose of the federal regulatory regime.

The State’s attempt to impose a retroactive assessment for tens of millions in rent for use of the riverbeds upends baseline assumptions behind PPL’s federal licenses and saddles the licensed projects with extreme economic burdens. The suggestion that states can impose such assessments undercuts the federal government’s capacity to make informed decisions with respect to proposed hydropower licenses. It also upends the “highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process.” *California*, 495 U.S. at 500. Whatever the precise bounds of permissible state regulation, the Federal Power Act surely preempts a State from retroactively imposing leasing obligations for extended periods of time during which neither the licensee nor FERC had any notice of any claim for compensation—and no reason to believe compensation was owed. As this Court has noted, retroactivity only accentuates serious preemption problems and heightens the threat to the federal regulatory scheme. *See Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) (retroactivity “only accentuates the danger of conflict”).

Moreover, requiring PPL to pay the State rent for lands that the federal government considers to be federal lands puts PPL in an untenable position. In particular, it subjects PPL to precisely the type of competing, overlapping obligations that this Court has rejected when interpreting other parts of

the Federal Power Act. *Cf. Nantahala Power & Light Co. v. FERC*, 476 U.S. 953, 970 (1986) (preempting state regulation resulting in “trapping” of costs that would occur under dual regulatory scheme).

III. The Montana Supreme Court’s Decision Raises Important Federal Issues That Implicate Private Property Rights And Can Only Be Effectively Resolved By This Court.

The decision below clearly conflicts with this Court’s decision in *Utah* and would merit this Court’s review for that reason alone. But the decision also strips away the private property rights of PPL and thousands of other private property owners. This Court’s review is necessary to provide PPL and other private property owners with meaningful relief.

The extent of the State’s land grab and its effect on private property rights are hard to overstate. The Montana court’s decision purports to determine the property rights along hundreds of miles of three rivers, on stretches where private or federal ownership had long been a given. As noted, the decision directly affects river stretches that have already been determined by a federal court to be non-navigable. *See Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910).

But even that vastly understates the impact of the decision below. The State’s key evidence, which the court below believed entitled the State to summary judgment, was the inclusion of the three rivers on the State’s 1986 “navigable rivers list,”

which was based on the same flawed River Study discussed above. *See supra* at 10–12. That list goes well beyond the three rivers at issue here. It includes “some 8 million acres of federally-owned surface” and “hundreds of [federal] mineral leases.” U.S. Dep’t of Interior, Letter to Montana Dep’t of State Lands (dated Aug. 26, 1988) (outlining federal government’s objections to list). It also includes stretches of rivers on which major federal hydropower and irrigation projects are located, including the Hungry Horse Reservoir, Yellowtail Dam, and Libby Dam—facilities that have been generating power since 1953, 1967, and 1973, respectively. That list now appears to constitute irrebuttable evidence of navigability in the Montana state courts.

The effect on private property owners will be dramatic. As the federal government has recognized, the State’s aggressive claims will have a “disquieting effect on the title to thousands of parcels of *private land* through which these streams pass.” U.S. Dep’t of Interior, Letter to Montana Dep’t of State Lands (Aug. 26, 1988) (emphasis added). Because the courts were the operative force behind this land transfer, it remains to be seen whether property owners in general have a Takings Claim or due process objection to the lower courts’ land grab. *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Env’tl Prot.*, No. 08-1151 (U.S. June 17, 2010) But, even if private landowners can bring an action, any Takings Claim would be dead on arrival in state court given the Montana Supreme Court’s decision that the land has always belonged to the State.

And the Eleventh Amendment stands between those private landowners and any federal court action. Accordingly, even if the Takings Clause and due process principles provide some backstop, for riparian owners the federal issue of navigability and the settled rules of this Court for determining navigability for title provide the primary check on state action. This Court's review is necessary to maintain that check.

The temptation for other states to follow Montana's lead is obvious and real. *Cf.* Attorney General News Release, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010) (touting the \$41 million dollar award to other States as "a victory for generations of Montanans" against "out-of-state corporations"). This Court recognized the dangers long ago, noting that "[s]ome states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so" as "a convenient method of ... control." *Brewer-Elliott*, 260 U.S. at 89, *see also Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring); *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of certiorari).

Finally, this Court's review is needed to enforce basic principles of federalism. It is not for "a state by courts or legislature ... to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law." *Brewer-Elliott*, 260 U.S. at 88. Unless the Court grants *certiorari*, there will be effectively no check to prevent state court judges from claiming for the

citizens who elect their ownership of state riverbeds and the economic benefits therefrom—no matter how belated the claim and no matter how otherwise settled the fact that the land belongs to private parties or the federal government.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(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 J. LAWRENCE
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

August 12, 2010 *Counsel for Petitioner*