

No. 10-218

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**In the  
Supreme Court of the United States**

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PPL MONTANA, LLC,

*Petitioner,*

v.

STATE OF MONTANA,

*Respondent.*

\_\_\_\_\_  
**On Writ of Certiorari to the  
Supreme Court of the State of Montana**

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**BRIEF OF PROFESSORS JOHN L. ALLEN, DAVID M.  
EMMONS, GARY E. MOULTON, THOMAS J. NOEL,  
CHARLES E. RANKIN, CARLOS A. SCHWANTES, AND  
DAVID M. WROBEL AS *AMICI CURIAE* IN  
SUPPORT OF PETITIONER**

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**QUESTION PRESENTED**

Were the upper Missouri, Clark Fork, and Madison Rivers commercially navigable at the time of Montana's statehood?

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* — Professors John L. Allen, David M. Emmons, Gary E. Moulton, Thomas J. Noel, Charles E. Rankin, Carlos A. Schwantes, and David M. Wrobel — are professors of history with particular emphasis on the history, and historiography, of the American West. All have published extensively on the West. All are concerned with the public's familiarity with and regard for history as an intellectual discipline. And all have an interest in advocating in this case on behalf of history as a profession and method, as well as on behalf of the historical record itself.

Ensuring that courts are proficient in historical reasoning and in evaluating historical sources is a matter of public concern. Much as familiarity with law is often critically important for historians, so too lawyers and judges should be able to employ historical analysis in their professional work. For these reasons, *amici* take a professional interest in the judicial use of historical methodology, particularly in cases pertaining to the American West. That unique interest, combined with the

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<sup>1</sup> No counsel for a party authored any part of this brief, and no counsel or any other party or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor David M. Emmons served as petitioner PPL Montana, LLC's retained and compensated expert on the history of the upper Missouri, Clark Fork, and Madison Rivers in the litigation below. In this Court, he is donating his time. The remaining *amici* have no prior involvement with this case and also are receiving no compensation for the preparation of this brief. The parties have consented to the filing of this brief.

decades' worth of professional knowledge, experience, and expertise accrued by these professors, allows them to bring now a significantly different perspective to the issues before the Court.

David M. Emmons is professor emeritus on the history faculty of the University of Montana in Missoula, Montana, where he has taught since 1967. Professor Emmons has developed and taught an historical methods course entitled "The Historians' Craft." Professor Emmons was retained and compensated as an expert witness by petitioner PPL Montana, LLC in the trial court proceedings below. He has been informed by counsel for PPL that, in the event the Court reverses the decision below and remands for trial, he may well be asked by PPL to participate in those remand proceedings (with appropriate compensation). However, Professor Emmons has *not* been compensated for the time he has spent discussing this case with other concerned historians, analyzing the historical flaws in the Montana Supreme Court's decision, and helping to prepare this brief. His motivation for joining this brief, and promoting it to fellow historians, is his concern about the consequences of the Montana courts' historically inaccurate conclusions and unprofessional historical methods.

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

John L. Allen is professor emeritus at the University of Wyoming and at the University of Connecticut. He has taught geography since 1967. As an historical geographer, he has published extensively on the American West, and particularly on the Lewis and Clark expedition. Professor Allen is the author of *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest*, which concerns the effect of the expedition on expectations about the geography of the North American continent. Professor Allen was a consultant for the widely-viewed PBS documentary, *Lewis and Clark: The Journey of the Corps of Discovery*, produced by Ken Burns.

Gary E. Moulton, professor emeritus at the University of Nebraska, Lincoln, taught for many years as the Thomas C. Sorenson Professor of American History. He spent much of his professional career as editor of the definitive edition of the journals of the Lewis and Clark expedition, published in thirteen volumes over nearly 20 years. Professor Moulton, too, was a historical consultant for PBS's documentary on the expedition.

Thomas J. Noel is professor of history and Director of Public History, Preservation and Colorado Studies at the University of Colorado, Denver, where he has taught since 1991. His research has included study of frontier newspapers, in Denver and elsewhere, during the booster period of expansion of the Western United States.

Charles E. Rankin teaches history at the University of Oklahoma. Since 2000 he also has served as Editor-in-Chief of the University of Oklahoma Press, a pre-eminent publisher of books

on the West. He has also served as Editor of *Montana: The Magazine of Western History* and Director of the Montana Historical Society Press.

Carlos A. Schwantes is the St. Louis Mercantile Library Professor of Transportation and the West at the University of Missouri, St. Louis, and has taught there and elsewhere for over twenty years. Professor Schwantes is a recognized expert on transportation in the American West, including steamboating on the Missouri River. Professor Schwantes has also published widely on the expansion period of the American Northwest, including Montana, in such books as *The Pacific Northwest: An Interpretive History*.

David Wrobel, formerly Chair of the History Department at the University of Nevada, Las Vegas, is currently the Merrick Chair in Western American History at the University of Oklahoma. He, too, has taught courses in historiography. As the author of *Promised Lands: Promotion, Memory, and the Creation of the American West*, Professor Wrobel is a leading authority on newspapers and other primary sources of the Western frontier.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Supreme Court confronted a quintessentially historical question: Were the upper Missouri, Clark Fork, and Madison Rivers “navigable” for title purposes in 1889 when Montana became a State? As the Montana court recognized, that historical question was outcome-determinative, and it could be answered only by historical analysis. Ultimately the court failed to engage in a proper historical analysis, reached an unhistorical conclusion, and decided the case on that basis. Specifically, the court affirmed the trial court’s prior summary judgment decision that the three rivers were in fact navigable at the time of Montana’s statehood, and that the State therefore held the disputed title.

The professional historians joining this brief disagree with that conclusion. A better historical analysis, they believe, indicates not only that there is a question of fact regarding whether the relevant portions of the three rivers were suited for commercial navigation at the time of Montana’s statehood, but even further that professional historians — evaluating historical sources in accordance with historical methods — must agree that such navigation was not possible and that none occurred. In short, the Montana Supreme Court failed in the historian’s task.

The Montana Supreme Court’s error was essentially twofold. *First*, the majority overlooked or ignored much of the historical evidence adduced by Petitioner PPL Montana, LLC. As Justice Rice noted in dissenting from the Montana Supreme

Court's decision and historical analysis, PPL submitted a "mountain" of evidence that the three rivers in fact were not navigable. This evidentiary mountain included *amicus* Professor Emmons's affidavit, his expert report, and accompanying exhibits. Pet. App. 100. For example, as to the upper Missouri River, Emmons and PPL relied on an array of sources including the Lewis and Clark journals, JA 743-51; records of the Army Corps of Engineers, JA 734-35; records compiled in connection with Federal Power Commission licensing proceedings in the 1940s, JA 732-33, 784; and the circumstantial inferences to be gleaned from the historical pattern of roadways linking the Missouri River to other Montana sites and waterways, JA 751-52. The court ignored that evidence altogether, as it inexplicably concluded that PPL's argument rested on three, and only three, sources. Pet. App. 56-57. No professional historian would have so cavalierly disregarded contrary evidence as persuasive as these historical materials.

*Second*, compounding its error of underestimating PPL's evidentiary showing, the Montana court overestimated the strength of the State's showing. At the core of any historical analysis is the critical evaluation of historical documents and other sources of information. As one historian reminds us, properly using any form of historical documentation means that "one has to be aware of the limitations and problems that are involved in using it." Bernard Bailyn, *On the Teaching & Writing of History* 47 (Edward Connery Lathem ed., 1994); *see also* David Bebbington, *Patterns in History: A Christian Perspective on*

*Historical Thought* 4 (1990) (“The ‘textbook mentality’, that an assertion is true because it is written down, is utterly alien to any historical outlook.”). But the Montana Supreme Court failed to critically evaluate the principal historical sources relied on by the State by weighing their credibility and reading their words in context. In so doing, that court failed to adhere to fundamental tenets of historical analysis. The result was that the court credited sources that no professional historian would rely on, and it accorded other sources an interpretation *opposite* to one a professional historian would draw.

#### ARGUMENT

#### **THE RELEVANT REACHES OF THE UPPER MISSOURI, MADISON, AND CLARK FORK RIVERS WERE NOT NAVIGABLE AT THE TIME OF MONTANA’S STATEHOOD.**

The depth of the Montana Supreme Court’s historical errors in finding the three rivers at issue navigable as a matter of law is most evident from reading Professor Emmons’s affidavit and report, reproduced in full in the Joint Appendix. Nonetheless, even a summary description of the Montana Supreme Court’s treatment of the evidence before it suffices to establish that there was, at the very least, a question of fact as to the three rivers’ navigability.

**A. The Journals of the Lewis & Clark Expedition, Among Other Sources, Show That the Missouri River Was Not Navigable Upstream of the Great Falls.**

It is undisputed that the upper Missouri River is navigable as far upstream as Fort Benton, Montana, which is situated at the lower end of the tailing off of the large series of waterfalls known as the Great Falls. Farther upstream from Fort Benton, on the upstream side of the Great Falls, lies the city of Great Falls, Montana. Between the city of Fort Benton and the upper Missouri River's headwaters at Three Forks, Montana, lie many miles of rapids and other obstacles to navigation, including the Great Falls themselves. *See* JA 726 (map of the upper Missouri River). It is the navigability of *those* reaches of the Missouri River — the portions between Fort Benton and Three Forks — that this case concerns.

The Montana Supreme Court concluded that the State had shown that the Missouri River is navigable along its entire length — including upstream of the Great Falls and not just downstream of Fort Benton. The court based that conclusion on a purported reading of the journals of the Lewis and Clark expedition, buttressed by questionable secondary sources prepared long after the fact. Pet. App. 16-17, 57. (Significantly, the State presented barely any evidence supporting navigability of the upper Missouri River beyond what the Montana Supreme Court cited. *See, e.g.*, JA 381 (noting that the State “relies exclusively on secondary sources that by their own admission are

limited in scope and which rely on untrustworthy primary sources”).)

In conducting its assessment of historical evidence, however, the Montana Supreme Court failed to analyze evidence according to historical methods and ignored or underestimated the weight of contrary evidence. The historical record, read according to the standards of the historical profession, leads in exactly the opposite direction — to a conclusion that the upper Missouri River was *not* navigable.

**1. The Lewis & Clark expedition found the Missouri River impossible to navigate upstream of the Great Falls.**

The Montana Supreme Court’s main basis for finding that the State had proved navigability before Montana’s statehood is what can only be described as a tendentious reading of the journals of the Lewis and Clark expedition. According to the Montana court, the expedition “portaged” the Great Falls, “allowing the Missouri to provide a useful channel of commerce.” Pet. App. 57. In reality, the records of the Lewis and Clark expedition — edited by *amicus* Professor Moulton — show precisely the opposite.

The Lewis and Clark expedition was motivated, in part, by the dream of finding rivers “whose courses took them in the proper direction for a water communication” and whose heads could be connected by “short portages.” John Logan Allen, *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest* xxvi (1975); see generally *The Lewis and Clark Journals: An American Epic of Discovery, the Abridgement of the Definitive*

*Nebraska Edition* (Gary E. Moulton ed., 2d ed. 2004). In hopes of fulfilling that dream, Lewis and Clark travelled the Missouri River upstream by boat, mainly pirogues and canoes. Once the expedition reached the Great Falls, it found that continued travel in large boats had become impossible. The expedition then portaged around the Great Falls, a process that took *thirty-three days*. JA 746-47. The party was then forced to resort to dugout canoes for the remainder of its trip up the Missouri to its headwaters. They could no longer “navigate” the river, at least not in any way relevant for commercial use.

The dugout canoes that the expedition used after the Great Falls portage were hollowed-out tree trunks built in a matter of hours; they certainly were not boats suited for commercial operations. JA 748-49. More fundamentally, as *amicus* Professor Allen has written, easy water travel (even in such rudimentary boats) became impossible for good only a few miles upstream of the Great Falls. *See* Allen, *supra* p. 9, at 282. Although the expedition put its dugout canoes in the water after the long portage, travel on the water became increasingly difficult and dangerous, *id.* at 285, and soon afterward expedition members could only walk alongside the water, towing their little dugouts as they went. *Id.* at 286; JA 747, 748-50. Doing so required such extreme physical exertion that “the men complain[ed] of being much fortieged [*sic*]” by labor that was “excessively great.” JA 828; *see also* JA 748-50.

Accordingly, when Lewis’s and Clark’s journals refer to the river as navigable, they mean only that the expedition could follow its course as they

explored the then-uncharted territory toward the Pacific. JA 748. A cardinal rule of interpreting primary historical sources is that words must be read in context, in light of contemporary facts and circumstances, and according to the meanings their author had in view. Historians must read Lewis's and Clark's words as *they* meant them. JA 750. The mere fact that the exploratory expedition's canoes could be floated in parts of the Missouri River on both sides of the Great Falls does not remotely establish that the river was commercially useful upstream of the Great Falls. To the contrary, the expedition appears to have found the Missouri River useful as a waterway only *downstream* of the Falls.

The unanimous opinion of Lewis and Clark's contemporaries upon their return was that the expedition had failed to find a navigable passage past the Falls. Those highly-interested contemporaries did not consider Lewis and Clark's reported portage promising for navigation. Contemporary opinion thus disagreed with the Montana Supreme Court's conclusion that "portages" of the Great Falls "allow[ed] the Missouri to provide a useful channel of commerce" beyond the Falls. Pet. App. 57. Historians are now in agreement, furthermore, that the Lewis and Clark reports were in fact the final undoing of perennial, centuries-old, hopes for easy passage by navigable water to the Pacific Ocean. Allen, *supra* p. 9, at 328; JA 750-51.

From an historian's perspective, it is thus not only incorrect but extremely ironic to say — 200 years after the fact — that Lewis's and Clark's journals prove as a matter of law that the upper Missouri River could "provide a useful channel of

commerce.” Pet. App. 57. The Montana Supreme Court’s conclusion in this regard is diametrically opposed to the one trained historians have drawn.

**2. Other sources confirm that the Missouri River was not navigable upstream of the Great Falls.**

From the century after the Lewis and Clark expedition returned with the news that water passage to the headwaters of the Missouri River was not commercially viable, a wealth of historical evidence addresses the River’s navigability. *Amicus* Professor Emmons, in his capacity as PPL’s expert in the Montana trial court, reviewed all of it that could be located, ranging from accounts of exploration after Lewis and Clark, to Army Corps of Engineers studies of the late 19th and early 20th centuries, to thousands of pages of historical records from Federal Power Commission hearings during the 1940s. JA 732-36. These are the types of sources that professional historians must consider and weigh in cases such as this one, but the Montana Supreme Court ignored practically all of it. Had it been considered, this evidence would have pointed to the same conclusion as the Lewis and Clark expedition records.

By the 1860s, Montana’s population had grown sufficiently that navigation of the upper Missouri, especially between Fort Benton and Helena, were it possible, would have been highly lucrative, and passengers and cargo would have taken advantage of the river as a useful highway of commerce. Fort Benton, just below the Great Falls, in fact became a significant commercial center. But not one of the roads leaving Fort Benton led upstream around the

Falls back to the river. JA 752-53. In 1858, when the Army undertook to connect the Missouri and Columbia Rivers, it built a 600-mile road from Fort Benton to Fort Walla Walla, Washington, rather than (say) an 18-mile portage road around the Great Falls and a 60-mile road from Helena to the Clark Fork of the Columbia — a far simpler project that would have accomplished almost precisely the same function *if only those rivers had been navigable*. JA 754-56. Fifteen years ago, *amicus* Professor Schwantes described the construction of the “Mullan Road” (after the engineer who headed its construction) and stated that it terminated at Fort Benton because that town was “the upper limit of steamboat navigation on the Missouri River[.]” See Carlos A. Schwantes, *The Pacific Northwest: An Interpretive History* 180 (rev’d ed. 1996).

In 1872, a railroad engineer proposed a portage road around the Great Falls. But even in making this proposal, the engineer conceded that the upper Missouri would only be useful for commercial navigation after “numerous improvements,” and that even then it would be usable only by some sort of vessel “of small size and navigated with great caution,” making the proposal all but pointless, commercially speaking. JA 760-62. As a result, although the Army Corps of Engineers reported in 1878 that three quarters of the goods shipped to Montana were destined for Helena by way of Fort Benton, they reached Helena by a direct road, not by water. JA 875; *see also* JA 753. If it were possible to continue commercial navigation upstream of the Falls after a portage, a road would surely have been built to make possible further westward progress via

water transport, but no such road was built. The natural inference is that the Great Falls were not merely an interruption in the Missouri River, but a fundamental point of demarcation — beyond which commercial navigation was impractical.

Although some logs are reported to have floated upstream of the Great Falls, it appears that they were mostly held in the water, not regularly transported over significant distances. JA 797-98. One of the more ambitious efforts reported, undertaken during high water, ended with disaster at the Great Falls. JA 798-99. And even to the extent that evidence for the occurrence of log floats rests on personal recollection, care is required as well. See David M. Wrobel, *Promised Lands: Promotion, Memory, and the Creation of the American West* (2002) (noting the unreliability of frontier “reminiscers”).

Even if log floats could be enough to prove legal title navigability, the isolated, often futile instances contained in the historical record certainly cannot suffice to establish what might be termed “log float” navigability. See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (“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.”); see also *Oklahoma v. Texas*, 258 U.S. 574, 587 (1922) (rejecting analysis of evidence that “emphasize[d] the exceptional conditions in times of temporary high water and . . . disregard[ed] the ordinary conditions prevailing throughout the greater part of the year”).

In the late 1870s, commercial enterprises tried to *remake* the Missouri River into a navigable waterway upstream of the Great Falls by spending several thousand dollars dynamiting boulders. Ultimately, however, this effort was abandoned as impossible. JA 764. The Army Corps of Engineers resumed the effort in 1880, destroying boulders, building wing dams, and digging channels. JA 768-69. These efforts, too, were gradually abandoned, and the Army engineer in charge concluded, dejectedly, that the Missouri River upstream of the Great Falls had not been rendered fit for commercial navigation and likely never could be. JA 889 (“I do not believe the river above the falls will ever be navigated by steamboats, except perhaps at some future day one or two small pleasure boats may be placed on the river for the benefit of tourists.”); *see also* JA 771.

Post-statehood evidence confirms that these private and government efforts to improve the Missouri’s navigability made little real difference. The Army Corps of Engineers’ improvement efforts ended in 1894, five years after Montana’s statehood. JA 774. In 1916 a mining engineer traveled on the Missouri from Hauser Lake, near Helena, to Cascade in a small steel boat. On his return, he reported not only that commercial navigation of that stretch was impossible, but concurred that it could not even be made possible by further improvements. JA 857-58 (“[F]rom every standpoint, navigation would be attended by so many difficulties that such is not feasible or practicable.”); *see also* JA 765-67. The Army appears to have reached the same conclusion not just once, but four times: in 1896, in 1915, in

1935, and finally in 1940, when one engineer referred to a scheme for making the upper Missouri navigable as “preposterous,” “unrealistic,” and “harebrained.” JA 780; *see generally* JA 774-80.

At most, the historical record contains two instances of steamboat travel upstream of the Great Falls. In 1887 the *Fern* made the trip from Townsend to Great Falls at an average rate of four miles per day, carrying no freight or passengers, and never did so again. JA at 791-92. In the same year, the *Rose of Helena* did the same with difficulty, and also never attempted it again. JA 792-95. Such “occasional use of boats, sporadic and ineffective,” is certainly not enough, standing alone, to establish navigability. *United States v. Oregon*, 295 U.S. 1, 23 (1935). These exceptions therefore only prove the rule that viable commercial cargo and passenger navigation of the Missouri River, upstream of the Great Falls, never occurred. *See United States v. Utah*, 283 U.S. 64, 76 (1931) (title navigability requires showing that river may be used 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”) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

**3. The Montana Supreme Court’s secondary sources evidencing navigability are not historically reliable.**

Aside from its (mis)use of the journals of the Lewis and Clark expedition, the Montana Supreme Court reached its navigability conclusion largely on the strength of modern secondary sources: two unpublished reports prepared in 1974 and 1986,

respectively (the “1974 Report” and “1986 Report” — collectively, the “Reports”). Pet. App. 16-17; JA 220-23 (1986 Report); JA 294-346 (1974 Report). A professional historian would have considered these two secondary sources in accordance with the professional standards that apply to an historian’s interpretation of such sources. An historian would have considered, for example, the purpose for which the Reports were produced; the time at which they were produced; the circumstances surrounding their production; and the identity, qualifications, and predispositions of their authors. An historian also would have judged these secondary sources according to their choice of, and proper use of, primary sources. The Montana Supreme Court did none of the above, and its conclusion that the Reports are credible was mistaken.

To begin with, the Montana Supreme Court misunderstood the nature of the Reports in ways that exaggerated their credibility. The 1986 Report, prepared by the Heritage Research Center in Missoula on commission for the Montana Department of State Lands, contains some discussion of the navigability of all three rivers at issue in this case (and so will be addressed throughout this brief). But the 1986 Report did not even purport to be a complete record of those rivers’ navigability. Because of funding constraints, the 1986 Report’s authors “focused upon generating the most information for the least possible cost,” not on producing the most accurate or authoritative account of Montana’s navigable waterways. JA 370-71, 205-06. Indeed, those constraints dissuaded at least one other firm from bidding for the work of preparing the

report. As the would-be bidders explained, “we do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be reimbursed.” JA 371-72, 394-95.

Little primary source research is evident in the 1986 Report. Indeed, the 1986 Report drew nearly all of its citations from the earlier work, dutifully recording this dependence by describing its sources as “as cited in” or “as quoted in” the 1974 Report. JA 220-23. The 1986 Report was thus produced by cribbing almost all of its research from the earlier 1974 Report.

Insofar as the 1986 Report’s authors did perform primary source research, they committed errors of their own. For example, when they turned their attention to the Clark Fork River, they cited the February 24, 1882 article from the frontier newspaper, the *Missoulian*, for the proposition that logs *were* floated down the river in that year. JA 216. Whatever the dubious merits of the newspaper itself (discussed further below), in fact the article only said that logs “*can be*” floated. JA 143 (emphasis added); *see also* Pet. App. 111; JA 374. Because the underfunded 1986 Report relied almost exclusively on the 1974 Report for its treatment of the Missouri River, JA 220-23, the State’s historical case for the navigability of the Missouri River in 1889 rested, in effect, on the sole authority of the 1974 Report.

As for the 1974 Report, the Montana Supreme Court operated under a mistaken impression that the 1974 Report was prepared by the United States Army Corps of Engineers, Pet. App. 17, when in fact

it was prepared *for* the Corps, through the work of Alan Newell and Gary Williams. Any special authority that historians might attach to the Corps's official reports, which are researched in the field and prepared by the Corps's own experts, therefore does *not* attach to the 1974 Report.

More importantly, the Montana Supreme Court failed to perform the all-important evaluation of the 1974 Report's use of primary sources. Secondary sources like the Reports are "helpful but pernicious," because the facts they bring to light "have already been pre-selected." Barbara W. Tuchman, *Practicing History* 19 (1981). Because a secondary source based on unreliable primary sources cannot itself be credible, care in selection and evaluation of primary sources should have been the guidepost not only for the Reports' authors, but for the Montana Supreme Court's decision as to whether or not to rely on the Reports.

The 1974 Report, judged against the canons of professional historians, cannot bear the weight the Montana court placed on it below. Most of the 1974 Report describes the undisputed fact of historical navigation on the Missouri River downstream of Fort Benton. Although it also purports to describe actual use of the Missouri River upstream of Fort Benton for trade and passenger travel at the time of Montana's statehood, it overwhelmingly relies on two sources of information for that showing. *First*, the 1974 Report relies extensively on frontier-era newspapers such as the *Helena Weekly Herald* and the *Great Falls Tribune* for its conclusion that companies used the upper Missouri River for commercial boats and to float logs downstream to

Great Falls. JA 313-16. *Second*, the report relies on footnotes in Hubert Howe Bancroft's 19th century history of Montana for the proposition that miners and settlers travelled the upper Missouri River with only a short portage around the Great Falls upstream of Fort Benton. JA 313. No professional historian would treat those sources standing alone as adequate proof of an occurrence.

The place of frontier-era newspapers in historical scholarship has been much discussed, and it is a particular scholarly interest of *amici* Professors Emmons, Rankin, Schwantes, and Wrobel. *See, e.g.*, David M. Emmons, *Garden in the Grasslands: Boomer Literature of the Central Great Plains* (1971); Charles E. Rankin, *Type and Stereotype: Frederic E. Lockley, Pioneer Journalist*, in *Frontier and Region: Essays in Honor of Martin Ridge* (Robert C. Ritchie & Paul Andrew Hutton eds., 1997); Schwantes, *supra* p. 13, at 289-91; Wrobel, *supra* p. 14. It is fair to say that professional historians almost universally concur that frontier newspapers were frequently written to promote travel and settlement, and, as a result, they often subordinated considerations of factual accuracy to the seemingly more important goal of presenting glowing pictures of life on the frontier. The result was hyperbole and often outright fabrication. As explained by Professor Wrobel, these boosters "could be regarded as the used-car dealers of an earlier age . . . [and] it is important to treat these sources as reflections of the purpose of their creators rather than as accurate descriptions of places and events." Wrobel, *supra* p. 14, at 4. Accordingly, "[i]f you think of [these newspapers] as small versions of today's *New York*

*Times*, you're in trouble — because they weren't." Bailyn, *supra* p. 6, at 46; *see also* Wrobel, *supra* p. 14, at 5-6 ("Some boosters were great anticipators, trying to convince themselves as much as others of the promise of western places; others were bold-faced liars selling promises for financial profit and nothing more.").

It was not even difficult to become the editor of a frontier newspaper. As Professor Schwantes has shown, "[a]nyone with a modest amount of cash or a patron, a modicum of education and technical know-how, and a passion to say something could start a newspaper." Schwantes, *supra* p. 13, at 279. "A pioneer newspaper was an intensely partisan and personal operation . . . [and] [r]eaders expected a newspaper editor above all else to function as a community booster who promoted local attractions and damned all rivals." *Id.* It is no wonder that "[t]he mortality rate among" such early papers "was extremely high. Operating on high hopes and a shoestring budget, few survived longer than a year or two." *Id.* at 280.

Because frontier newspapers should always be read with a grain of salt and in light of their authorship and of their important role as promotional brochures, they should seldom be relied on as sole sources on questions of historical fact. JA 372, 735-36.

Examples from representative non-Montana frontier newspapers illustrate this point. Some newspapers claimed that rainfall on the Great Plains would increase if the ground were plowed, or if "American' culture" were "substitut[ed] . . . for Indian[.]" *See* Emmons, *supra* p. 20, at 153; *see*

*generally id.* at 153-60 (discussing newspapers in Kansas and Colorado). Another reported that its State's soil produced 28-pound radishes. *See id.* at 65. Still another concluded "that Eastern moneyed investors would want Denver to have good steamboat access," and then on this basis "simply invented" news of steamboat traffic between Denver and the Gulf of Mexico. *See* Kirk Johnson, *Part of Denver's Past, The Rocky Says Goodbye*, N.Y. TIMES, Feb. 27, 2009, at A11 (article interviewing *amicus* Professor Noel); *see also* Stephen J. Leonard & Thomas J. Noel, *Denver: Mining Camp to Metropolis* 9, 11 (1990) (discussing the founder of the *Rocky Mountain News*).

The trustworthiness concerns applicable to these newspapers apply equally to Montana's frontier newspapers. The authors of the 1974 Report undoubtedly would have hesitated to count on Montana's or any other frontier newspapers for descriptions of monster radishes. For similar reasons, the 1974 Report's authors should have hesitated before crediting questionable accounts of ready commercial uses of Montana's rivers. The 1974 Report's reliance on the frontier newspapers, and the Montana Supreme Court's cheerful acceptance of that evidence, *see* Pet. App. 52 (contending that "reliance upon . . . newspaper accounts" is "well-accepted and proper"), is not historically justified.

As for the 1974 Report's other source, Bancroft, professional historians do not consider his interpretations of historical facts as reliable, absent corroboration. Rather, Bancroft's principal value is as a pointer to more credible sources.

Hubert Howe Bancroft was a wealthy businessman and avid collector and compiler of historical documents, and for that historians no doubt owe him a great debt. Bancroft's documents concerning California are especially useful, and the Bancroft Library at the University of California, Berkeley was founded on his collection. But even as to California, as the preeminent California historian Kevin Starr has observed, Bancroft was "often ludicrous and sometimes dishonest." Kevin Starr, *Americans and the California Dream, 1850-1915* 119 (1973). For other States such as Montana, Bancroft merely had his assistants review unreliable newspapers and gazettes for source material. JA 788-89. Today, no reputable historian would use Bancroft as a sole source on an important factual point of Montana history. JA 373-74, 788-89.

Bancroft was also the main source for the State's administrative authority treating the Missouri River as navigable upstream of Fort Benton for regulatory purposes. See *In re Montana Power Co.*, 7 F.P.C. 163, 172-73 (1948), *aff'd sub nom. Montana Power Co. v. FPC*, 185 F.2d 491, 493-94 (D.C. Cir. 1950). Those administrative agency proceedings, it should be noted, addressed regulatory navigability, not title navigability. Hence, because the test for regulatory navigability does not entail the same historic focus as the test for title navigability, the conclusions reached in those proceedings are not relevant to this case, even if their sources were reliable. Compare *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (title navigability determined "as of the formation of the Union in the original states or the admission to statehood of those formed

later,” while “navigability, for the purpose of the regulation of commerce, may later arise”), *with id.* at 410 (navigability determined with reference to the river as a whole), *and Utah*, 283 U.S. at 77 & n.9, 89 (title navigability determined as to particular river segments, not the river as a whole).

Against this backdrop, the 1974 Report’s crucial reliance on Bancroft cannot be defended. Instead of mining Bancroft’s work for primary sources, and then mining those primary sources for what *they* had to offer, the 1974 Report’s authors dubiously cited Bancroft alone to show that miners and settlers travelled the Missouri River above Fort Benton by boat and that a company operated a line of boats for commercial transport with a portage around the Great Falls. JA 313.

Even if Bancroft were not of questionable veracity in general, however, he still would lack credibility on the specific point for which he was cited by the 1974 Report. Bancroft’s likely source for reporting the upper Missouri steamboat line was an 1866 issue of the city of Helena’s *Rocky Mountain Gazette*, yet another frontier newspaper riddled with factual errors. For example, this 1866 account dramatically understated the length of the portage required to avoid the Great Falls: The portage it described would have left the passengers stranded in the middle of the Falls, or drowned. JA 789-90. Nor were the remarkable facts the article describes — “thousands” of passengers travelling on commercial mackinaw boats — directly corroborated by any other source brought to light in the present litigation, including the voluminous reports of the Corps cataloguing the uses of the Missouri River.

Here again, an historian would not have used the Gazette's dubious reports as historical fact without demanding further corroboration.

In summary, the bulk of historical evidence shows that the Missouri River was not navigable upstream of the Great Falls at the time of Montana's statehood. The Montana Supreme Court's finding that Lewis and Clark proved otherwise rested on a misreading of the evidence of the expedition. Its finding that "many" besides Lewis and Clark had portaged the Great Falls and navigated the upper Missouri rested on the 1986 and 1974 Reports. But the 1986 Report relied on the 1974 Report, and the 1974 Report relied on primary and secondary sources that no professional historian would treat with anything other than deep skepticism. From the perspective of an historian, the Montana Supreme Court found historical "proof" where no such proof was evident.

**B. The Clark Fork and Madison Rivers Were Not Navigable.**

The bulk of the historical evidence in this case pertains to the upper Missouri River, but the scantier evidence related to the Clark Fork and Madison Rivers leads to the same conclusion — that no commercial navigation of those rivers was possible. In reaching the conclusion that the rivers were navigable, the Montana Supreme Court made the same errors of historical analysis as in finding commercial navigation on the upper Missouri. For the sake of completeness, *amici* succinctly discuss these two rivers below.

### 1. The Clark Fork River.

The Clark Fork River is a tributary of the Columbia River, flowing west through Montana into Idaho. The portions of the river at issue here are those in the area of the Thompson Falls, which are upstream of the Idaho border and downstream of Missoula. *See* JA 728 (map of the Clark Fork River). In places below Thompson Falls, there is some evidence that the Clark Fork was navigated by commercial passenger boats. JA 812. But in the area of Thompson Falls, the evidence shows the river was not navigable.

The first historical account of the Clark Fork River is that of David Thompson, an explorer and fur trader who kept a journal of canoe trips on the river starting in 1808. The Thompson journals do not indicate anything resembling a potential for commercial navigation of the river; instead they indicate that even Clark Fork canoe trips were difficult and dangerous. JA 633 (describing efforts to pass rapids); *see also* JA 809-10. When eastward-bound goods and passengers travelled upstream to Thompson Falls on the Clark Fork River, they continued their travels by road, rather than portaging the Falls. JA 57 (referring to Thompson Falls as the “upper limit of navigation”); *see also* JA 812. One frontier newspaper report refers to a single steamboat in operation upstream of Thompson Falls, but another article from the same paper describes that very ship’s wreck. JA 131, 135, *see also* JA 813.

Later, just as with the Missouri River, repeated reports of the Army Corps of Engineers show that the Clark Fork River was not navigable. The 600-mile Mullan Road linking the Missouri to the

Columbia bypassed not only the upper Missouri but the Clark Fork as well, giving rise to an inference that the Clark Fork, too, was not navigable. JA 813. In 1891, the Corps engineer charged with surveying the entire Clark Fork for navigability described the river as a “torrential stream” that was “utterly unnavigable, and incapable of being made navigable except at an enormous cost.” JA 564-65, *see also* JA 379-80, 818. In fact, even Montanans who lived right on the Clark Fork agreed that “the idea of making the river navigable was . . . an absurdity,” despite the obvious benefits that could accrue to them if the river *were* navigable (or made so). JA 565, *see also* JA 818-19. The Corps reiterated that opinion in a 1932 report, JA 357, as well as a 1940 official letter, JA 568-69. *See also* JA 819-20.

The last, and one of the most important, pieces of evidence concerning the Clark Fork is a century-old 1910 judicial decision from the federal District Court of Montana. That decision, made only two decades after Montana’s statehood, applied to the Clark Fork River the test of navigability used for title purposes. Although most of the trial record has been impossible to locate, it is certain that the court concluded after a hearing that the Clark Fork “was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation” and that it allocated title accordingly. S. App. 11-12.

The Montana Supreme Court, once again, did not regard this evidence as raising a question of fact, dismissing the Corps studies and the 1910 judicial decision as “conclusory.” Pet. App. 57-58. But that dismissal ignores yet another critical rule of

historical analysis — the principle that primary sources must be evaluated as a whole, with consideration of how all parts relate to one another. Had the court below applied this rule, it would have noted that the Corps study of the Clark Fork River explains that it was written after an “examination” of the river, including a personal visit by the author to Missoula where he conducted interviews of “the mayor and prominent citizens engaged in various commercial and mining pursuits.” JA 564-65. The 1910 decision, for its part, recites that the court reached its conclusion after an evidentiary hearing. S. App. 11. Calling the considered findings of the Corps and the court “conclusory” without reference to evidence of the methods used is as misguided as dismissing a legal brief as “conclusory” after reading only its last sentence. The Montana Supreme Court’s stated basis for holding that PPL had failed to raise a question of fact as to the Clark Fork’s navigability, in short, does not hold water.

The paucity of the State’s affirmative case for summary judgment on the Clark Fork’s navigability underscores this point. The State relied once again on the limited, underfunded 1986 Study. But the 1986 Study itself refers to Thompson Falls as the head of steamboat navigation. JA 227. Though it referred to isolated instances of boat trips on the Clark Fork, those references were drawn, once again, from unreliable frontier newspapers, and they gave no indication that the trips had serious commercial value. JA 237-38. It is all but undisputed, in short, that commercial navigation on the Clark Fork did not occur — either before or long after Montana’s statehood.

The 1986 Study does report that log floats took place upstream of Thompson Falls. But the 1986 Study cribbed this conclusion, once more, from an earlier study; namely, an undated, unsigned report of unknown purpose that as a consequence should be given little weight. The log drives it suggests are improbably long, would have to have gone through many rapids, JA 815, and would appear to have been largely pointless. Idaho had no shortage of lumber at the time, and the actual lumber company records evaluated by Professor Emmons show that the dominant shipment route for western Montana lumber was not westward toward the forests of Idaho but *eastward* for use in mines. JA 816. The lumber company records Professor Emmons evaluated, showing no evidence of successful lumber drives on the Clark Fork River, are by far the more credible source. JA 816-17.

In light of the above, plus the fact that the State gave the Montana Supreme Court little or no affirmative evidence of navigability of the relevant portions of the Clark Fork River, the Montana Supreme Court's finding that the State had carried its burden to prove navigability and that PPL had not even raised a question of fact is all but inexplicable.

## **2. The Madison River.**

The Madison River, a tributary of the Missouri, *see* JA 725 (map of the Madison River), is the smallest and least thoroughly documented of the three rivers at issue in this case. That in itself is an indication that the Madison was not used for commercial navigation, for if it had been used, historians would expect it to have received more

attention. JA 736. The historical evidence identified by *amici* confirms this common-sense implication.

For much of the Madison River's length, there is no historical evidence of navigability at all — not even the newspaper boosters who touted the imaginary navigability of the Missouri River could bring themselves to tell the same stories about the Madison. JA 801-02. The only evident historical use of the Madison River is a single log float that took place in 1913. JA 803. That drive, although touted in a contemporary newspaper report, JA 154-55 (noting that the log drive “for many years ha[d] been ridiculed and deemed by many impossible”), appears to have been a notable failure. It seems to have taken two months to move the logs only 55 miles, and many of the logs had to be abandoned at the side of the river for up to two *years*. JA 803. This Court's precedent suggests, as mentioned above, that such efforts do not show navigability. *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 698. The company that attempted this 1913 log drive folded soon after (in 1916) and no company appears to have repeated the effort. JA 803. Moreover, and quite significantly, even this failed log drive occurred after Hebgen Dam — constructed in 1912, long after Montana's statehood, and located downstream of the reach of the Madison where the drive occurred — began impounding water and raising the Madison's water levels. JA 803.

The Corps, in a 1932 study, reached exactly the same conclusion. After running through a physical description of the river (noting its steep fall through a series of narrow gorges), the Corps's final word on the river was that “[t]here never has been any

navigation on” the Madison River; that commercial navigation was “entirely out of the question;” and that “improvement” for purposes of navigation “is impracticable[.]” JA 482, 495, 535; *see also* JA 806-07. The Montana Supreme Court dismissed that Corps study as “conclusory” as well, but for no better reason than its dismissal of similar evidence concerning the Clark Fork.

The State’s affirmative evidence of the Madison River’s navigability was based on much the same sources outlined above, the same 1986 Study, which again relied almost exclusively on a 1974 study by Newell and Williams. But as to the Madison River, those Reports have the additional weakness that they do not describe any navigation or commercial use of the Madison River. Indeed, aside from mentioning the 1913 log drive, they say little more than that trapping and settlement occurred in the *area* of the river, as well as that the river has been used for recreation and power. JA 218-20, 251-62. *See Oregon*, 295 U.S. at 20-21 (noting that trappers walking, wading, or using small boats in a river does not prove navigability). They do not even purport to show other commercial use, even by citing unreliable frontier newspapers.

\* \* \*

In sum, judicial determinations of title navigability require historical analysis of a river’s past condition and use at the moment of a territory’s accession to statehood. And such analysis requires, in turn, that judges employ the methods of professional historians, including those that apply to choosing, evaluating, and drawing inferences from sources. Here, the Montana Supreme Court failed

notably in addressing the navigability of the upper Missouri, Clark Fork, and Madison Rivers, giving unwarranted credence to certain pieces of evidence, inappropriately discounting more historically robust evidence, misinterpreting the valid evidence it did credit, and finally overlooking certain key evidence altogether. The result was indefensible historical analysis, and an erroneous historical conclusion.

### CONCLUSION

For these reasons, the Court should reverse the decision of the Montana Supreme Court.

Respectfully submitted,

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