No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC, PETITIONER

v.

STATE OF MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

WILLIAM M. JAY
Assistant to the Solicitor General

KATHRYN E. KOVACS
KATHERINE J. BARTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MICHAEL A. BARDEE
General Counsel

ROBERT H. SOLOMON
Solicitor

HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTIONS PRESENTED

Petitioner owns federally licensed hydroelectric facilities on three rivers in Montana. The Montana Supreme Court held that the State owns the submerged lands underlying the facilities and that petitioner owes rent for the use of these lands. The questions presented by the petition are:

1. Whether the Montana Supreme Court erred in concluding that riverbeds occupied by petitioner's hydroelectric facilities are the property of the State of Montana because they were navigable for title purposes at the time Montana became a State.

2. Whether the Montana law requiring rent for past and ongoing use of State-owned riverbeds is preempted in relevant part by the Federal Power Act, 16 U.S.C. 791a *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations:

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This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This case involves the question whether petitioner, a utility registered to do business in Montana, must pay rent to the State of Montana for the use of the riverbeds on which its hydropower facilities are located. The Montana district court held that petitioner must pay rent pursuant to the Montana Hydroelectric Resources Act (HRA), Mont. Code Ann. § 77-4-201 *et seq.* (2009), because the State of Montana owns the beds of the rivers on which petitioner's facilities are located, and the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, does not preempt the requirement to pay compensation. The Montana Supreme Court affirmed.

1. This Court has long held that when a State is admitted to the Union, it takes title to the lands beneath waters that are navigable at that time. That is because the Crown held those lands in a public trust at the time of American independence, and the original 13 States assumed that trust responsibility. *Shively* v. *Bowlby*, 152 U.S. 1 (1894). Under the "equal footing" doctrine, subsequently admitted States enter the Union on an equal footing with the original States, so they, too, take title at statehood to the lands under waters that are navigable at that time. See *Utah* v. *United States*, 403 U.S. 9, 10 (1971). Title to lands beneath waters that are *not* navigable at the time of statehood, however, is not affected by a State's entry into the Union. *United States* v. *Utah*, 283 U.S. 64, 75 (1931). Thus, to determine whether the State or the adjacent landowner owns the submerged lands underlying certain waters, a court must determine whether those waters were navigable at statehood. *Ibid*.

In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), this Court set forth the general standard for determining whether waters are navigable as a matter of federal law. The Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563. Navigability "does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels, or flatboats—nor on an

absence of occasional difficulties in navigation." *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926). Navigability is not destroyed because a watercourse is interrupted by occasional natural obstructions, or short interruptions such as rapids and sandbars, nor need navigation be open at all seasons of the year, or at all stages of the water. *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921); *United States* v. *Utah*, 283 U.S. at 77. It is not sufficient, however, that a river be navigable only under exceptional conditions or during short periods of temporary high water. *Id.* at 87. The condition of the watercourse should be such as to ordinarily assure regularity and predictability of usage. *Ibid.*

The precise legal standard and its application vary depending on the purpose for which a specific determination is being made. Navigability determinations are made not only to identify whether a State gained title to submerged lands at statehood, but also to delineate admiralty jurisdiction, see, *e.g.*, *The Montello*, 87 U.S. (20 Wall.) 430 (1874), and to aid in determining the extent of federal regulatory jurisdiction under the Commerce Clause and legislation enacted pursuant to that Clause, see, *e.g.*, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (construing navigability under the FPA). The differing standards reflect these different purposes. For example, while navigability for title must be determined as of the time a State entered the Union, admiralty jurisdiction may exist over waters currently navigable even if they were non-navigable in the past. See *id.* at 409. And the standard for identifying navigable waters for purposes of federal regulatory jurisdiction even more broadly recognizes waters to be navigable if they were once navigable but are no longer, see,

e.g., Economy Light & Power, 256 U.S. at 123-124, or only recently have become passable, see, *e.g., Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 634-635 (1912), or are not now and never have been navigable but may become so, by improvements, in the future, see, *e.g.*, *Appalachian Elec. Power*, 311 U.S. at 409. Thus, "any reliance upon judicial precedent" on the subject of navigability "must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979) (citation omitted).

2. This case concerns whether particular stretches of three rivers—the Clark Fork, the Madison, and the Missouri—were navigable at the time Montana became a State in 1889. The Clark Fork originates east of Missoula, Montana, and flows generally northwest to its terminus in Lake Pend Oreille in Idaho. The Madison River originates in Yellowstone National Park in Wyoming and flows north after it enters Montana until it joins two other rivers to form the Missouri River at the town of Three Forks. The Missouri continues flowing north through Helena and northeast through Great Falls to Fort Benton, and it ultimately joins the Mississippi River on the Missouri-Illinois border.

Petitioner operates two hydropower projects on those three rivers. Petitioner acquired the projects from the Montana Power Company in 1999. Pet. App. 3. Pursuant to the FPA, which imposes "a complete scheme of national regulation" to promote hydropower development, *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152, 180 (1946), the Federal Energy Regulatory Commission (FERC), formerly the Federal Power Commission (FPC), licenses hydroelectric power projects on waterways within federal jurisdic-

tion. 16 U.S.C. 797(e). Both of petitioner's projects are licensed by FERC.

The Thompson Falls Project consists of a single dam constructed at Thompson Falls, Montana, on the Clark Fork River. The project was relicensed by FERC in 1979. Pet. App. 2.

The Missouri-Madison Project consists of nine dams on the Madison and Missouri Rivers. Pet. App. 2-3. Two of the project's dams are located on the Montana portion of the Madison: the Hebgen dam near the Wyoming-Montana border and the Madison dam north of Ennis, Montana. The other seven dams are located on the Missouri: five dams (Black Eagle, Rainbow, Ryan, Morony, and Cochrane) are located on a 17-mile stretch of rapids that is part of the so-called Great Falls Reach, just downstream from the city of Great Falls, and the other two dams (Holter and Hauser) are on the Stubbs Ferry stretch north of Helena.[1] The Missouri-Madison dams were constructed between 1891 and 1958, and were relicensed by FERC in 2000. *Ibid*.

3. In 1931, the Montana Legislature enacted the HRA. That statute contains both regulatory provisions, which include a competitive bidding process for the award of power site leases, a 50-year lease-term limitation, and a preference for lease bids submitted by municipalities, Mont. Code Ann. §§ 77-4-205, 77-4-207, 77-4-209 (2009), and compensatory provisions, which require the State to charge rent for the use of state-owned lands for hydropower projects. *Id.* §§ 77-4-201, 77-4-208 (2009).

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[1] The dams on the Missouri are all upstream from Fort Benton, where the parties agree the river was navigable in 1889.

4. In November 2004, petitioner filed this action in Montana state court against the State of Montana. Petitioner sought a declaration that it owed the State no compensation for the use of the riverbeds underlying its hydroelectric facilities.[2] Petitioner contended, as relevant here, that the Montana HRA is preempted by the FPA. Pet. App. 5.

The State counterclaimed. It sought a declaration that it owned submerged lands beneath petitioner's projects and that petitioner owes it compensation for use of those lands. The State also sought damages for petitioner's past uncompensated use. Pet. App. 147; Br. in Opp. App. 1-13.

5. a. The state district court rejected petitioner's claim that the FPA preempts the Montana HRA on its face. The court held that the FPA does not occupy the field and that the compensatory provisions of the state HRA do not conflict with federal law. Pet. App. 152-156. The court acknowledged that at least one regulatory provision of the HRA is conflict-preempted, but held that the compensatory provisions are independent and do not seek to regulate petitioner's hydropower operation—only to seek payment for use of state lands. *Id.* at 155-156. The court deferred action on petitioner's as-applied preemption claim as presenting a question of fact. *Id.* at 156-157.

b. The state district court then granted the State partial summary judgment on the question whether the

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[2] Petitioner's suit was prompted by another lawsuit, brought in federal court by parents of Montana schoolchildren, that contended that the Montana school trust owned the riverbeds where petitioner's facilities are located and that petitioner owed rent to the trust. After petitioner filed this action in state court, the federal action was dismissed for lack of standing. Pet. App. 3-5.

three rivers were navigable at statehood, allowing the State to claim compensation for their use. Pet. App. 130-143. The court relied principally on admissions by petitioner and on decisions of the FPC applying the different test for navigability under the federal commerce power. See *id.* at 137-143. The court also cited one historical study of navigation on the Madison River. *Id.* at 143.

c. After trial, the state district court rejected petitioner's as-applied preemption claim. Pet. App. 119-124. The court then entered judgment for the State and held that petitioner owed back rent in the amount of $40,956,180. *Id.* at 45.

6. The Montana Supreme Court affirmed by a vote of 5 to 2. Pet. App. 1-117.

a. The state supreme court concluded that petitioner had failed to create a material factual dispute on the question whether the three rivers were navigable in 1889. Pet. App. 57. The State's evidence, the court held, "was clearly sufficient to demonstrate navigability in fact," or that the rivers "were susceptible of such use," at the time of statehood. *Id.* at 56. Although some of the State's evidence was of post-statehood use, including present-day use, the state court agreed with the trial court that such evidence may "be probative as to navigability of a river at the time of statehood." *Id.* at 53; see *id.* at 54, 58. Petitioner had submitted expert evidence that conditions on the Madison had changed so much since 1889 that evidence of present-day usage could not show navigability at the time of statehood. *Id.* at 20-21. The state court held that petitioner's expert evidence "fails to demonstrate that the Madison was not susceptible for use as a channel of commerce at the time of statehood." *Id.* at 58.

The state supreme court dismissed much of petitioner's evidence of non-navigability, such as a 1910 federal district court decree, as "conclusory." Pet. App. 57-58. As for petitioner's contention that the Great Falls Reach and other segments of the three rivers were not navigable at statehood, the court concluded that "'carrying places,' portages, or other obstructions which require a resort to 'artificial means' of navigation, are not sufficient to defeat a finding of navigability." *Id.* at 54. The court observed that the Great Falls Reach had been portaged by the Lewis and Clark expedition. *Id.* at 56, 57. In any event, the court held, the segments that petitioner addressed were "insufficient as a matter of law" to establish non-navigability, because they were only "relatively short interruptions" in navigation that "do not affect the actual use or susceptibility of use of these rivers as channels for commerce in Montana at the time of statehood." *Id.* at 61.

b. The court also rejected petitioner's preemption challenge to the Montana HRA. The court acknowledged that the regulatory provisions of the state law may conflict with the FPA, but held that the compensatory provisions are severable. See Pet. App. 70-72.[3] The latter provisions are not preempted, the court concluded, because "[t]he FPA permits private landowners, including states, to seek and receive compensation for the use of their land." *Id.* at 71.

c. Justice Rice dissented, joined by Judge Salvagni. Pet. App. 93-117. The dissent concluded that the majority "erred in its analysis of the law governing title navigability and also failed to properly apply the tenets of

[3] The court noted that the regulatory provisions had not been applied to petitioner, so "no [preemptive] conflict exists at the present" even as to those provisions. Pet. App. 72.

summary judgment by disregarding genuine material factual conflicts." *Id.* at 93. Addressing the court's legal analysis, the dissent reasoned that "in applying the navigability for title test, courts are not to assume an *entire river* is navigable merely because certain reaches of the river are navigable," and that the majority erred in concluding "that all of the challenged reaches of all the rivers are 'relatively short' and thus unable, as a matter of law, to be declared non-navigable for title purposes." *Id.* at 96, 100.

Turning to the question whether summary judgment was appropriate, the dissent undertook a river-by-river analysis of the record evidence, and concluded that, "with respect to all the relevant reaches of the Madison, Clark Fork, and Missouri Rivers, the State met its initial burden to prove navigability under the title test." Pet. App. 116. But the dissent further concluded that petitioner's evidence, if accepted, "would lead inevitably to the conclusion that the State did not hold title to the streambeds at issue." *Id.* at 100-101. The dissent thus concluded that petitioner "ha[d] satisfied its burden to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable," and that the case should have gone to trial. *Id.* at 117.

DISCUSSION

The decision of the Montana Supreme Court does not warrant this Court's review. The court's rulings are largely fact-specific and do not conflict with any decision of this Court, another state court of last resort, or a federal court of appeals. Therefore, although the court erred in certain respects in applying the principles for determining navigability for title purposes, those errors

in this case do not warrant plenary review by this Court. The state supreme court's decision on the preemption question largely rests on a state-law severability analysis; to the extent that the court rejected the preemption challenge to the HRA's compensation provisions, that decision is correct and does not warrant further review.

I. THE QUESTION WHETHER THE STATE HOLDS TITLE TO THE RIVERBEDS ON WHICH PETITIONER'S HYDROPOWER FACILITIES ARE LOCATED DOES NOT WARRANT THIS COURT'S REVIEW

The Montana Supreme Court's navigability-for-title holding is not squarely at odds with any holding of this Court. Although the state supreme court appears to have incorrectly applied some aspects of this Court's principles to the summary-judgment record here, that case-specific decision does not warrant further review.

1. Petitioner contends (Pet. 21-22) that the Montana Supreme Court erred in its analysis of the effect of the rapids and obstructions on the Missouri and Clark Fork rivers by assessing the status of the rivers "as a whole," without undertaking the "section-by-section analysis" that, petitioner submits, is required by this Court's decision in *United States* v. *Utah*, 283 U.S. 64 (1931). That overstates the Montana Supreme Court's rationale. The state court did address the river segments that interrupted navigation, but held that they should be regarded as navigable on the theory that they are "relatively short" sections that before statehood were portaged by travelers on the river. Pet. App. 60-61. And contrary to petitioner's contentions, characterizing those segments as "relatively short" does not directly conflict with *United States* v. *Utah* or any other decision of this Court.

a. As petitioner emphasizes, one of the issues in *United States* v. *Utah* was the proper characterization of a stretch of river approximately 4.35 miles in length. Petitioner argues (Pet. 22-23; Cert. Reply 9-10) that *United States* v. *Utah* and other decisions of this Court require a "section-by-section analysis" that looks at segments as small as 4.35 miles.

United States v. *Utah* does not stand for the legal proposition that any 4.35-mile interruption in navigability must be treated as a distinct segment over which a State did not acquire title at statehood. Indeed, the Court and parties did not focus on the 4.35-mile segment because of distinct features that required it to be analyzed separately from both the upstream and the downstream stretches. Rather, the dispute over the 4.35-mile stretch was over whether it properly belonged with the segment upstream (which was navigable) or the segment downstream (which was not navigable).

The Special Master found that the relevant portions of the Green River and the Grand River (as it was then known) had been navigable in 1896, and that title to the lands beneath those portions therefore had passed to Utah at statehood.[4] The Green and the Grand join to form the Colorado River; the Master further found that the first 40 miles of the Colorado (most of which flow through Cataract Canyon) had been entirely non-navigable at the time of statehood, and that the United States therefore retained title to that stretch. 283 U.S. at 73-74. Utah made no objection to most of that finding, except for a 4.35-mile stretch of the Colorado from the confluence of the Green and Grand Rivers down to the

[4] The United States excepted unsuccessfully to that conclusion. *United States* v. *Utah*, 283 U.S. at 74-75, 89.

beginning of Cataract Canyon. *Id.* at 75. The Court sustained that exception, because it found that the 4.35-mile segment "d[id] not differ in its characteristics, with respect to navigability, from [the Green and Grand] as they reach the point of confluence" immediately above that segment. *Id.* at 89. Thus, although the Court differed with the Special Master as to the treatment of the 4.35-mile segment, it did so not because the segment was so long as to require separate treatment, but because the Court could not "substantially differentiate" that segment "from those parts of [the adjacent Green and Grand Rivers] found by the Master to be navigable." *Ibid.* Navigability ended where the river entered Cataract Canyon; the Court left it to the parties to work out the exact endpoint and to submit their agreement in a proposed decree. See *id.* at 90; see also *United States* v. *Utah*, 283 U.S. 801 (1931) (decree).

Separately, the Special Master concluded that the portion actually flowing through Cataract Canyon was non-navigable, although it was situated in between navigable segments. The Master emphasized that the Cataract Canyon stretch could not be portaged. See Report of the Special Master at 126-127, *United States* v. *Utah*, *supra* (No. 14, Original). This Court did not consider that issue, because neither party excepted to the Master's ruling. See 283 U.S. at 74, 80. Here, by contrast, the state supreme court concluded that the relevant segments *had* been portaged to allow commerce to continue uninterrupted. Pet. App. 60-61 (distinguishing *United States* v. *Utah*); see *id.* at 54, 56.

b. The other decisions of this Court that petitioner cites (Pet. 19-20) did not address how to treat non-navigable "middle section[s] of an otherwise-navigable river," Pet. 20. In *Brewer-Elliott Oil & Gas Co.* v.

United States, 260 U.S. 77 (1922), the Court held that Oklahoma did not acquire title at statehood to a segment of the bed of the Arkansas River that was "a number of miles" above the "head of navigation," *id.* at 86, and there is no indication that the Arkansas was navigable anywhere above that point. Accord *United States* v. *Utah*, 283 U.S. at 88 n.12 (discussing the lower courts' findings in *Brewer-Elliott*). And in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), the Court considered whether the Rio Grande was navigable "within the limits of the Territory of New Mexico," *id.* at 698, 699, because the case had come from the territorial supreme court and did not present the question of navigability outside the Territory; this Court did not suggest that the Rio Grande was navigable *upstream* of the point where it enters New Mexico. In both *Brewer-Elliott* and *Rio Grande*, the reason the relevant stretch was not navigable was because so little water flowed through it during most of the year, see *id.* at 698; *United States* v. *Utah*, 283 U.S. at 88 n.12, and the Court never suggested that conditions were different upstream. Moreover, *Rio Grande* concerned the distinct question (see Cert. Reply 4) of navigability for commerce, not for title. See 174 U.S. at 701, 707.

Finally, in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Court dealt with a stretch of the New River that the United States argued was navigable for commerce; navigability for title purposes was not at issue. To "conserve discussion," the Court divided the stretch into three sections and focused its analysis on the "crucial" middle one, because that section had the least evidence of navigability. *Id.* at 411-412. Once the Court concluded that the middle section was (through improvement) navigable for commerce,

"[i]t follow[ed]" that the other two sections were navigable as well, and thus that the whole stretch at issue was navigable. *Id.* at 418-419.

c. Nor is there a conflict in the lower courts on this question. Each of the three cases that petitioner describes as requiring a section-by-section analysis addressed only a single segment because that was the extent of the dispute between the parties, and two of those cases were not applying this Court's standards de novo but deferentially reviewing FERC's application of the FPA's statutory definition of navigability. See *Muckleshoot Indian Tribe* v. *FERC*, 993 F.2d 1428, 1430, 1432-1433 (9th Cir. 1993); *City of Centralia* v. *FERC*, 851 F.2d 278, 279-280 (9th Cir. 1988); *Loving* v. *Alexander*, 745 F.2d 861, 867 & n.7 (4th Cir. 1984).

Similarly, the few cases that petitioner cites (Pet. 25) as joining the court below in applying an improper "river as a whole" analysis are either misconstrued, irrelevant, or both. *Northwest Louisiana Fish & Game Preserve Comm'n* v. *United States*, 574 F.3d 1386 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 1072 (2010), addressed the federal navigational servitude, not navigability for title; because all that mattered was whether the Red River was navigable, and the Saline Bayou was not part of the Red River but a tributary to it, the Saline Bayou's status was irrelevant. *Id.* at 1388, 1391-1392. In the two state cases, which applied state public-trust doctrine, the courts naturally focused on particular segments (surrounding an artificial lake, or flowing through a particular county), and not on the river as a whole. See *Bauman* v. *Woodlake Partners, LLC*, 681 S.E.2d 819, 827 (N.C. Ct. App. 2009); *Ryals* v. *Pigott*, 580 So. 2d 1140, 1152 (Miss.), cert. denied, 502 U.S. 940 (1991).

d. The Montana Supreme Court concluded that petitioner's evidence of non-navigability at statehood could establish only "relatively short interruptions of navigability" in otherwise navigable rivers. Pet. App. 61. As petitioner and the dissent both note, summary judgment for the State on that basis was incorrect, particularly given the length of the segments as to which petitioner submitted evidence of non-navigability. See Pet. 23 (citing the dissent).[5] But the state supreme court's application of the summary-judgment standard to particular evidence does not warrant review by this Court absent some more significant consequence, such as an attempt to apply the decision below more broadly to claim not only back rent from a private utility, but title from others, including the federal government. See, *e.g.*, Br. in Opp. 31 (affirming that no one except petitioner is bound by the judgment below).

2. Petitioner also contends (Pet. 26-29) that the state supreme court erred in its use of post-statehood evidence of navigability on the Madison River. But as petitioner recognizes (Pet. 26-27), evidence of current-day boating may be probative of navigability at statehood, *United States* v. *Utah*, 283 U.S. at 82, *if* the evidence also shows that the river was in a condition at statehood that would support comparable boating. The cases that petitioner cites do not establish a conflict on

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[5] Even if those segments are not navigable for title, however, they have been determined to be subject to federal regulation under the Commerce Clause. See, *e.g.*, U.S. Army Corps of Engineers, Omaha Dist., *Navigable Waters of the United States*, http://www.nwo.usace.army.mil/html/od-r/navwat.pdf (last visited May 19, 2011) (listing the Missouri River "[f]rom its Headwaters near Three Forks, Montana downstream" as navigable within the meaning of Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403).

this point; they merely reach different outcomes after applying the relevant principles to different facts. Compare, *e.g.*, *North Dakota* v. *United States*, 972 F.2d 235, 240 (8th Cir. 1992) (modern-day canoe use not probative because district court found that river's physical condition had materially changed since statehood), with *Alaska* v. *Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (modern commercial use probative because parties stipulated that river's "physical characteristics have remained unchanged since statehood"), cert. denied, 495 U.S. 919 (1990), and *Northwest Steelheaders Ass'n, Inc.* v. *Simantel*, 112 P.3d 383, 391-393 (Or. Ct. App.) (post-statehood use, by comparable vessels, probative because post-statehood conditions were *less* favorable to navigation than conditions at statehood), review denied, 122 P.3d 65 (Or. 2005), cert. denied, 547 U.S. 1003 (2006).[6]

The Montana Supreme Court correctly recognized that navigability for title purposes is determined by navigability in 1889, not today. See, *e.g.*, Pet. App. 15, 54, 55-56, 58, 62. The court recognized that petitioner could establish the irrelevance of inquiry into present-day use by showing that the river had changed, *id.* at 20-21, but it rejected petitioner's expert evidence as insufficient to survive summary judgment on that question, *id.* at 58. Although the state supreme court did not adequately explain *why* it was rejecting that evidence, see *ibid.*, and it ignored petitioner's evidence that the river was too braided and interrupted by sandbars at statehood to support navigation, see Pet. 11,[7] the court's deficient

[6] Petitioner's other cases (Pet. 27, 28) do not concern navigability for title and thus do not examine the question of navigability *at statehood*.

[7] The state supreme court also failed to consider whether the modern-day craft using the Madison River were comparable to vessels used in the customary modes of trade and travel at statehood. See, *e.g.*,

application of the relevant legal principles to the facts of this case does not warrant further review.

II. THE QUESTION WHETHER THE COMPENSATION PROVISIONS OF MONTANA'S HYDROPOWER RESOURCES ACT ARE PREEMPTED BY THE FEDERAL POWER ACT DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner also contends that the FPA preempts the state law under which the State recovered compensation. Petitioner does not allege that the Montana Supreme Court's rejection of that contention creates any conflict; indeed, the state court only briefly discussed the points petitioner presses. Rather, petitioner contends that the state court's decision is so erroneous as to warrant review. That contention lacks merit. Further review on this question is not warranted.[8]

1. Petitioner first contends (Pet. 32-33) that Montana's HRA conflicts "on its face" with federal law, because its regulatory provisions are "irreconcilabl[e]" with the FPA. But as petitioner acknowledges (Cert. Reply 11), the state supreme court held that those provisions—which have never been applied to petitioner—are severable from the compensatory provisions at issue in this case. Pet. App. 71. Severability is a question of state law, and the state supreme court's answer is authoritative. *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996).

Ahtna, 891 F.2d at 1405; see also *United States* v. *Utah*, 283 U.S. at 82 (approving admission of evidence of post-statehood use of the rivers, but noting that such use included boats of particular types in use when Utah became a State). Petitioner does not separately contend that the state supreme court erred in this respect, however.

[8] Even if this Court were to grant review on the first question presented, this question would not warrant review; indeed, the preemption issue would be mooted if this Court were to reverse on the title issue.

Whether those regulatory provisions are preempted[9] therefore has no bearing on whether the compensatory provisions are preempted.

2. Petitioner also contends (Pet. 33-35) that the compensatory provisions are preempted in their own right because petitioner obtained its licenses from FERC "on the unquestioned assumption that the riverbeds were not State lands." A FERC license, however, does not turn every "assumption" underlying the license application into preemptive federal law. "A state measure is pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *California* v. *FERC*, 495 U.S. 490, 506 (1990) (citations omitted); accord *Albany Eng'g Corp.* v. *FERC*, 548 F.3d 1071, 1076 (D.C. Cir. 2008) ("this does not mean that the FPA precludes every state exercise of power marginally related to federal hydropower licensees"). The state supreme court did not err in finding no conflict.

PPL is correct that the FPA imposes a "complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152, 180 (1946). Under that scheme, FERC's authority to license jurisdictional hydroelectric projects is exclusive. *Id.* at 167-168. But questions of title and compensation for property rights

[9] The state supreme court acknowledged that if Montana applied the regulatory provisions in a way that conflicted with FERC requirements, that application "would arguably be preempted." Pet. App. 72. The court did not decide that question, however, as this case does not present it.

fall outside the scope of the FPA and within the realm of state law. See *id.* at 178; *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1954); see also, *e.g., Georgia Power Co.* v. *138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980) (state law governs measure of compensation for land condemned under FPA), cert. denied, 450 U.S. 936 (1981). Although FERC conducts an economic analysis of a proposed project at the time of licensing, see 16 U.S.C. 797(b), FERC's economic analysis does not incorporate the *actual* costs of land acquisition. See 18 C.F.R. 4.41(e) (license application must include *estimated* cost of necessary land rights); 18 C.F.R. 2.9 (adopting Form L-1, which allows licensees five years to obtain necessary property rights).

Moreover, although an application for a FERC license must identify (*inter alia*) the lands within the project boundary that the applicant owns, 18 C.F.R. 4.41(h)(4); see 18 C.F.R. 4.51(h), that does not mean that FERC's approval of the license adjudicates the licensee's ownership of the lands, or preempts state property law giving someone else title to those lands. See *Jordan* v. *Randolph Mills, Inc.*, 716 F.2d 1053, 1055 (4th Cir. 1983) (holding that a FERC license "neither transfers nor diminishes any right of possession or enjoyment possessed by" any landowner). A licensee, like any commercial venturer, assumes on a prospective basis the risk of increased costs (whether for land acquisition, dam safety remediation, or environmental abatement) over the 30-to-50-year term of the FERC license. See *Wisconsin Pub. Serv. Corp.* v. *FERC*, 32 F.3d 1165, 1170 (7th Cir. 1994) ("The FPA cannot be read to require the Commission to protect the economic viability of all hydroelectric projects."). The licensee can condemn necessary lands that it does not own. 16 U.S.C. 814. But it is

not protected against having to pay more for those lands than it initially projected. Petitioner points to no contrary authority from any court.

The FPA's "policy favoring the protection of licensees' expectations" precludes FERC itself from imposing certain retroactive charges, see *City of Seattle* v. *FERC*, 883 F.2d 1084, 1088-1089 (D.C. Cir. 1989), but it does not follow that the FPA impliedly ousts state property law allowing a landowner to charge rent simply because a FERC licensee's bill for past rent is both substantial and unforeseen. Accordingly, compliance with the HRA neither precludes petitioner from complying with its FERC licenses nor upsets licensees' expectations in a manner preempted by the FPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

WILLIAM M. JAY
Assistant to the Solicitor General

KATHRYN E. KOVACS
KATHERINE J. BARTON
Attorneys

MICHAEL A. BARDEE
General Counsel

ROBERT H. SOLOMON
Solicitor

HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission

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