

No. 10-218

In The
Supreme Court of the United States

—◆—
PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

—◆—
**On Writ Of Certiorari To The
Supreme Court Of The State Of Montana**

—◆—
**BRIEF OF AMICA CURIAE
STEPHENIE AMBROSE TUBBS IN SUPPORT
OF RESPONDENT STATE OF MONTANA**

—◆—
BRENDA LINDLIEF-HALL
Counsel of Record
MORRISON, MOTL &
SHERWOOD, P.L.L.P.
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261
brenda@mmslawgroup.com

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**INTEREST OF AMICA CURIAE
STEPHENIE AMBROSE TUBBS**

Amica Curiae Stephenie Ambrose Tubbs¹ is a well-known historian, researcher, author, and speaker. She most recently authored *Why Sacagawea Deserves the Day Off and Other Lessons From the Lewis and Clark Trail*.² She also co-authored *The Lewis and Clark Companion: An Encyclopedic Guide to the Voyage of Discovery*.³ Stephenie is the daughter of late historian and author, Stephen E. Ambrose, who penned the best-seller *Undaunted Courage*, which chronicles Lewis and Clark's expedition up the Missouri River. Stephenie has extensive, first-hand knowledge of the Missouri River and the travels and travails of Lewis and Clark as they navigated up the Missouri River into what is now the State of Montana. Stephenie met her husband, John Tubbs, whose family operated the famous Gates of The Mountains boat tours on the Upper Missouri River near Helena, Montana, while on a voyage with her family retracing Lewis and Clark's trail in the mid-1970s. Stephenie continues to explore and paddle the Missouri River, hosting tours of the White Cliffs section of the River and sharing

¹ Pursuant to Supreme Court Rule 37.6, amica states that no counsel for a party authored this brief in whole or in part; and no person or entity, other than the amica and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. Letters of consent from the appropriate counsel have been submitted to the Clerk.

² University of Nebraska Press (2008).

³ Henry Holt and Company, LLC (2003).

her knowledge of the River and Lewis and Clark's historic journey.

Having followed the Lewis and Clark trail with her family, led by her father, Stephen E. Ambrose, and having spent her adult life in Montana and on its Rivers and steeped in its history, Stephenie Ambrose Tubbs is well qualified to provide the Court with a unique perspective on the Rivers at issue in this case, and, in particular, on Lewis and Clark's historic navigation on the Upper Missouri, including the Expedition's portage around the Great Falls.



INTRODUCTION AND SUMMARY OF ARGUMENT

Water is the quintessential elixir of life and legend, the stuff of miracles and mystery, power and wealth, and the preeminent means of empire building. Throughout history, water has played a pivotal role in connecting continents and cultures and the commerce that links them. Without water for navigational purposes – the expanse of the seas and ribbons of inland waters – one can scarcely imagine how the world would look today, or how history might have played out.

Nowhere does the preeminent role that navigable waters played in the development of nations and commerce manifest itself more than in the legacy of the American West. President Thomas Jefferson's Louisiana Purchase, and Lewis and Clark's subsequent journey up the Missouri River with the Corps

of Discovery, exposed the Eastern United States and Europe to the cultures of the American Indians, opening corridors for commerce with them.

Navigating the Missouri to the interior West and across the Continental Divide also invigorated the battle between the United States and the British Empire for control of the land and its bountiful natural resources. But in addition to fostering the hunger for national expansion and security, Lewis and Clark's discovery of the Upper Missouri route into what is now the State of Montana, and beyond to the Pacific Ocean, sparked the imagination of not only Jefferson, but private commercial entrepreneurs, leading to the formation of the American Fur Company and the Rocky Mountain Fur Company, both of which competed with the Hudson's Bay Company for resources and trade with American Indian Tribes inhabiting the region.

Trade with the American Indians rapidly expanded into an international trade in furs, buffalo hides, textiles, spirits, munitions, and more. By the early 1830s, less than two decades after Lewis and Clark's expedition, the Eastern U.S. and Europe had developed voracious appetites for beaver pelts and buffalo robes. U.S. merchants based in St. Louis were soon ferrying unimaginable numbers of pelts, buffalo robes, meats, tallow, and other precious goods from the as-yet unsettled West to St. Louis via the Missouri River. In turn, the fur traders were importing goods from Europe and the Eastern U.S. and transporting them westward up the Missouri via keelboats

and pirogues, and eventually steamboats, for trade with the Indians and to provision the forts that sprang up along the Missouri to support such trade. Thus, the Missouri River served not only as an immensely important route for trade with the American Indians, but created a far broader international market.

On the heels of Lewis and Clark's expedition, use of the Missouri for commercial navigation surged. Fort Benton was built and became a bustling and raucous frontier town, with regular steamboat traffic coming up the Missouri bringing commercial goods from St. Louis and other towns along the lower Missouri. Those same steamboats navigated back down the Missouri laden with treasures from the West: pelts, buffalo robes, gold, silver, and more.

In 1832, George Catlin, the renowned artist, took passage up the Missouri on the steamboat Yellow Stone. In his book, *The North American Indians*, Catlin describes the immense quantities of gold, silver, and other splendors coming down the Missouri River from Fort Benton. During the mid-1800s, rich veins of gold and silver were struck in Helena, Montana and surrounding areas, most notably the Last Chance Gulch strike of 1864, increasing the use of steamboats and navigation on the Missouri.⁴

⁴ Helena, Montana's main street is still named Last Chance Gulch.

But centuries before Jefferson entered into the Louisiana Purchase, before Lewis and Clark navigated up the Missouri into Montana and over to the Pacific Ocean, the Missouri, the Columbia, and the Clark's Fork Rivers had historically served as highways for navigation and commerce amongst the American Indian Tribes of the region. Likewise, the fur traders who found their way to the northwest via the Pacific, and the Columbia, and those who came down from Canada, were ferrying furs on these waters.

And of course, Lewis and Clark's much heralded expedition and findings harkened a new day for the West and what became the Territory of Montana. By about 1819, steamboats were navigating the Missouri, and became a common means of transportation to Fort Benton in the Montana Territory not far below the Great Falls of the Missouri. Steamboats, log floats and other means of navigation were also prevalent on the Missouri above Great Falls up to Three Forks, where the Madison, Jefferson, and Gallatin flowed together to form the headwaters of the Missouri.

Navigation by water was then, and remains, paramount to the economy of Montana and the American West in general. And while the role of Montana's Rivers for navigational and commercial purposes has evolved dramatically, from being the preeminent means of commercial navigation, to now serving primarily recreational pursuits, Montana's Rivers continue to contribute extensively to Montana's economy,

and that of the West in general. The Missouri, the Madison, and the Clark Fork Rivers are world-class fly-fishing destinations. Walk into the Helena, Bozeman, and Missoula airports on any given day throughout the summer and fall, and you will see men and women arriving with fly rods in hand, striking out to fish Montana's revered waters.

Those who come to float and fish Montana's Rivers contribute significantly to commerce in Montana, from the airlines they fly, to the hotels they stay in, the restaurants they eat in, and the fishing guides they hire. In turn, the airlines, hotels, restaurants, and guides continue the flow of commerce – in state, inter-state, and international – in innumerable ways. They are employers, they purchase goods in Montana, goods that are both made or grown in Montana, and those that are imported from other states and countries. And so it goes – the cycle of commerce on the great waters of Montana continues.



ARGUMENT

I. EARLY NAVIGATION AND COMMERCE ON MONTANA'S RIVERS

In the expanse of time before Lewis and Clark made their way to the Upper Missouri River, the inland northwest, and the territory that is now Montana, American Indians had a well-established trade route from west to east between the Pacific coast via the Columbia River, and what eventually came to be

known as the Clark's Fork (now the Clark Fork), and the Missouri:

The intertribal trade of the Indians was amazingly complex. Long before the Flat-head or Nez Perces met any white men in person they were occasionally getting manufactured goods, beads or pieces of cloth or bits of iron – brought up the Columbia from tribe to tribe before 1800. . . .⁵

And although the nomadic plains Indians, such as the Blackfeet and Sioux, were horsemen, they traded extensively with the tribes on the Missouri.

West of the Mississippi where the hunting nomadic horsemen of the plains captured historical interest and popular imagination, strategically placed agricultural tribes controlled and directed the development of the western fur trade. Near the great bend of the Missouri River, the Mandan, Arikara, and Hidatsa Indians maintained a flourishing agricultural economy that sustained themselves and the nomadic tribes. . . .⁶

Sacagawea, the legendary Shoshone woman from the Lemhi River in what is now Idaho, experienced the darker side of such trade, having been kidnapped

⁵ Bernard DeVoto, *Across the Wide Missouri*, p. 11, Houghton Mifflin Company (1947).

⁶ Thomas Wessel, *Agriculture, Indians, and American History*, *Ag. History*, Vol. 50, No. 1, pp. 9-20 (Jan. 1976), available at <http://www.cals.ncsu.edu/agexed/aee501/indians.html>.

by Hidatsas and taken to the Hidatsa-Mandan villages on the Missouri when she was about 12 years old and traded at a young age, probably between 12 and 14, to Toussaint Charbonneau, a French-Canadian fur-trader.⁷ Charbonneau eventually married Sacagawea, who gave birth to their infant son at Fort Mandan, just before leaving with Charbonneau to accompany Lewis and Clark up the Missouri in 1805.⁸

There was unquestionably an established route of trade on the Missouri by this time. Indeed, the use of bullboats, made from bull buffalo hides, is well documented. Fur trader Nat Wyeth's adventures in Montana are documented in Bernard DeVoto's *Across the Wide Missouri*, and includes a description of his bullboat:

His boat was made of three skins, tough ones, from elderly bulls. He says it was eighteen feet long, five and a half wide, sharp (he means narrowing) at both ends, with a round bottom and a draft of about

⁷ See PBS, *Lewis and Clark, Inside the Corps, Sacagawea*, available at <http://www.pbs.org/lewisandclark/inside/saca.html> (last visited Nov. 2, 2011); see also Donna J. Kessler, *The Making of Sacagawea: An Euro-American Legend*, University of Alabama Press (1996).

⁸ In his journal entry for February 11, 1805, Lewis wrote: "About five O'clock this evening, one of the wives of Charbono was delivered of a fine boy." Original Journals of the Lewis and Clark Expedition, Ruben Gold Thwaites, Ed., Vol. I, p. 257 (1904); see *id.* fn. 1 "this was Sacajawea, the Shoshone captive purchased by Charboneau . . . Sacajewea was the only woman taken on the expedition."

eighteen inches. . . . Its flexibility made it stauncher than any other craft in the rapid, shallow, snag-filled rivers of the high plains. The small half-oranges of the Mandans and other river tribes were longer-lived, being used for short hauls only.⁹

George Catlin, the renowned artist and student of American Indians, their villages, and lifestyles, traveled up the Missouri River on the steamboat Yellow Stone in 1832. Catlin gave this highly amusing account of his ride on a bullboat across the Knife River, a tributary to the Missouri in the Dakotas:

The old chief, having learned that we were to cross the river, gave instruction to one of the women of his numerous household, who took upon her head a skin canoe (more familiarly called in this country, a bull-boat) made in the form of a large tub, of buffalo's skin, stretched on a frame of willow boughs, which she carried to the water's edge; placing it in the water, made signs for us three to get into it . . . she stepped before the boat, and pulling it along, waded towards the deeper water, with her back towards, carefully with the other hand attending to her dress, which seemed to be but a light slip, and floating upon the surface until the water was above her waist, when it was instantly turned off, over her head, and thrown ashore; and she boldly plunged forward, swimming and

⁹ Bernard DeVoto, *Across the Wide Missouri*, pp. 116-17, Houghton Mifflin Company (1947).

drawing the boat with one hand, which she did with apparent ease. In this manner we were conveyed to the middle of the stream, where we were soon surrounded by a dozen or more beautiful girls, from twelve to fifteen and eighteen years of age, who were at that time bathing on the opposite shore.

They all swam in a bold and graceful manner, and as confidently as so many otters or beavers; and gathering around us, with their long black hair floating about on the water, whilst their faces were glowing with jokes and fun, which they were cracking about us, and which we could not understand. . . .

In the midst of this bewildering amusement, we found ourselves suddenly in the delightful dilemma of floating down the current in the middle of the river; and of being turned round and round to the excessive amusement of the villagers, who were laughing at us from the shore. . . .¹⁰

Like Mandan and other tribes living along the Rivers of the West, the Flathead Indians (Salish), who

¹⁰ George Catlin, *The North American Indians*, John Grant (1903), *reprinted* Digital Scanning, Inc. (2000). To view an exceptional George Catlin rendition of a Mandan bullboat see http://s132.photobucket.com/albums/q18/bigskytrapper/?action=view¤t=1861gustavsohonmodeofcrossingriversbyflatheadandotherindians.jpg#!oZZ83QQcurrentZZhttp%3A%2F%2Fs132.photobucket.com%2Falbums%2Fq18%2Fbigskytrapper%2F%3Faction%3Dview%26current%3DMandan_Bull_Boats_and_Lodges-_George_Catlin1832.jpg.

now primarily reside in Western Montana, but whose ancestral lands extended from the Cascade Mountains east to the continental divide and the headwaters of the Clark Fork River, “navigated streams in the mountain valleys using both dugout canoes and bull-boats.”¹¹ Undoubtedly, the American Indians along the Missouri, the Clark Fork, the Madison and other Rivers of Montana used the Rivers for transportation long before Lewis and Clark navigated the upper Missouri area in pirogues and keelboats.

II. THE LOUISIANA PURCHASE AND LEWIS AND CLARK’S EXPEDITION UP THE MISSOURI

A. President Jefferson’s Quest for a Navigable Route Through the Northwest

In a display of remarkable foresight, President Thomas Jefferson entered into a treaty with France and thereby executed the Louisiana Purchase in 1803. Jefferson added approximately 828,000 square miles of land west of the Mississippi River to the political geography of the United States.¹² Political

¹¹ Junius P. Rodriguez, *The Louisiana Purchase: A Historical and Geographical Encyclopedia*, p. 109, ABC-CLIO (2002); see also Gustav Sohon pictorial of a Flathead Indian River crossing, <http://s132.photobucket.com/albums/q18/bigskytrapper/?action=view¤t=1861gustavsohonmodeofcrossingriversbyflatheadandotherindians.jpg>, Archives and Special Collections, Mansfield Library, The University of Montana.

¹² See National Archives and Records Administration, *Exhibit: The Louisiana Purchase*, available at http://www.archives.gov/exhibits/american_originals/loupurch.html.

expansion and protection of the United States' interests from French, Spanish, and British interests, together with Jefferson's insatiable inquisitiveness regarding the natural world and the American Indian Tribes of the interior West, were central to Jefferson's signing of the Louisiana Purchase.¹³ But a third and equally compelling prospect – commercial expansion and the search for a navigable route to the interior northwest and beyond to the Pacific – was as great a motivating factor, if not greater.¹⁴

Just as this trinity of purposes inspired the Louisiana Purchase, these same goals – national expansion and protection, the pursuit of knowledge of the natural world and civilizations beyond the Mississippi, and the quest for a navigable commercial waterway to the interior northwest and the Pacific ocean – spurred Jefferson to commission Captain Meriwether Lewis to undertake one of the most notable and exploratory missions in the history of the United States.

During his two-year tenure as Jefferson's secretary prior to his expedition up the Missouri, Meriwether

¹³ Stephen E. Ambrose, *Undaunted Courage*, pp. 71-79, Simon and Schuster (1996).

¹⁴ *Id.*, at 78; see also *The Journals of the Expedition Under the Command of Capts. Lewis and Clark to the sources of the Missouri, thence across the Rocky Mountains and down the river Columbia to the Pacific Ocean, performed during the years 1804-5-6 by Order of the Government of the United States*, 1 Nicholas Biddle ed., The Heritage Press (1962).

Lewis became Jefferson's confidante.¹⁵ Jefferson's confidence in Lewis, and the purposes for the undertaking, are clearly illuminated in Jefferson's letter instructing Lewis to lead the expedition and describing the objectives of the mission:

To Meriwether Lewis, esquire, captain of the first regiment of infantry of the United States of America:

Your situation as secretary of the president of the United States, has made you acquainted with the objects of my confidential message of January 18, 1803, to the legislature; you have seen the act they passed, which, though expressed in general terms, was meant to sanction those objects, and you are appointed to carry them into execution. . . .

Instruments for ascertaining, be celestial observations, the geography of the country through which you will pass, have already been provided. Light articles for barter and presents among the Indians, arms for your attendants, say from ten to twelve men, boats, tents, and other travelling apparatus . . . and provisions, you will have prepared,

¹⁵ Stephen E. Ambrose, *Undaunted Courage*, p. 79, Touchstone Simon and Schuster (1996) (citing Donald Jackson, *Letters of the Lewis and Clark Expedition, With Related Documents 1783-1854*, Vol. II, pp. 18-19, 2d Ed., Urbana: University of Illinois Press (1978)).

with such aids as the secretary at war can yield in his department. . . .

The object of your mission is to explore the Missouri River, and such principal streams of it, as, by its course and communication with the waters of the pacific ocean, whether the Columbia, Oregon [*sic*], Colorado, or any other river, may offer the most direct and practicable water-communication across the continent, **for the purposes of commerce.**

Beginning at the mouth of the Missouri, you will take observations of latitude and longitude, at all remarkable points on the river, and especially at rapids, at islands, and other places and objects distinguished by such natural marks and characters, of a durable kind, as that they may with certainty be recognized hereafter. . . .

The interesting points of the portage between the heads of the Missouri, and of the water offering the best communication with the Pacific ocean, should also be fixed by observation; and the course of that water to the ocean, in the same manner as the Missouri. . . .

The commerce which may be carried on with the people inhabiting the line you will pursue, renders a knowledge of those people important. You will therefore endeavour to make yourself acquainted, as far as a diligent pursuit of your journey shall

admit, with the names of the nations and their numbers . . . ;

Other objects worthy of notice will be –

The soil and face of the country, its growth and vegetable productions . . .

The mineral productions of every kind, but more particularly metals, lime-stone, pit-coal, and saltpeter; salines and mineral waters. . . .

Should you reach the Pacific ocean, inform yourself of the circumstances which may decide **whether the furs in those parts may not be collected as advantageously at the head of the Missouri . . .** as at Nootka Sound, or any other point of that coast; and **that trade be consequently conducted through the Missouri and United States more beneficially** than by the circumnavigation now practiced.¹⁶

It is evident from Jefferson's letter to Lewis that commercial navigation on the Missouri River was foremost on his mind.

¹⁶ *The Journals of the Expedition Under the Command of Capts. Lewis and Clark to the sources of the Missouri, thence across the Rocky Mountains and down the river Columbia to the Pacific Ocean, performed during the years 1804-5-6 by Order of the Government of the United States*, 1 Nicholas Biddle ed., The Heritage Press (1962) (*quoting* Thomas Jefferson, June 20, 1803 letter to Meriwether Lewis) (emphasis added).

B. Lewis and Clark and the Corps of Discovery: The Beginning of the Expedition

On May 14, 1804, Clark led the party from their encampment at the mouth of the Wood River, near where the Missouri entered the Mississippi.¹⁷ Lewis, who was at that time attending to business matters in St. Louis, joined the party on May 20. Together, they departed on the afternoon of May 21, and made their way up the Missouri. For transportation, they had three boats, a fifty-five foot long keelboat with a sail, twenty-two oars, and “forecastle and cabin” in the stern.¹⁸ The other two boats were open “periogues” (pirogues), one with six and one with seven oars.¹⁹ Two horses for carrying game back from hunting excursions were to be led along the shore.²⁰

The entire length of the journey up the Missouri was arduous, including in those stretches of the River that have always been recognized as “navigable” for purposes of the Equal Footing Doctrine. Sandbars, rapids, and riffles were common obstacles throughout the course of the River. About nine days after setting out on the expedition, the party encountered difficulties navigating the River:

[W]e ascended a very difficult rapid, called the Devil’s Race Ground, where the current sets for half a mile against some

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 1.

¹⁹ *Id.*

²⁰ *Id.*

projecting rocks on the south side. We were less fortunate in attempting a second place of equal difficulty. Passing near the southern shore, the bank fell in so fast as to oblige us to cross the river instantly, between the northern side and a sandbar which is constantly moving and banking with the violence of the current. The boat struck on it, and would have upset immediately, if the men had not jumped into the water and held her, till the sand washed from under her.²¹

Over the course of about five months, the expedition encountered many such difficulties. They made their way to what they named Fort Mandan, where they would spend the winter. For a number of reasons, not the least of which was ice in the River, they would not leave until nearly a year later, in April 1805.

On October 27, 1804, the party reached the five villages of the Mandan Indians near what is now Bismarck, North Dakota.²² The following day, Lewis determined they were “obliged to pass the winter at this place, [and] we went up the river about one and a half miles . . . with a view of finding a convenient spot for a fort, but timber was too scarce and small for our purposes.”²³ Clark continued up the River another three miles and found a suitable site for a fort, with plenty of timber.²⁴ While at Fort Mandan, Lewis and

²¹ *Id.* at 3.

²² *Id.* at 74.

²³ *Id.*

²⁴ *Id.* at 77.

Clark met Charbonneau, whom they enlisted as an interpreter, and his Shoshone wife, Sacagawea, who would also serve as an interpreter as they ventured upriver, and whose services would prove essential as the expedition crossed the continental divide through the Bitterroot Mountains.

While at Fort Mandan, the expedition's boats became frozen in the River. Lewis was unable to wrest them from the clutches of the ice until late February, despite numerous attempts.²⁵ The temperatures were often well below 0 degrees Fahrenheit throughout the winter, dipping as low as 44° below.²⁶ Being frozen, the Missouri was rendered impassable until spring.

C. Lewis and Clark's Travels From Fort Mandan to the Great Falls

On April 7, 1805, Lewis and Clark were finally able to set out from Fort Mandan, this time with dugout canoes and pirogues.²⁷ They were sending the keelboat back to St. Louis laden with artifacts for President Jefferson.²⁸ As the expedition progressed up the Missouri, they passed the Yellow Stone River, the "Muscleshell" (Musselshell) in what is now central Montana, and on June 7, 1805 came upon the Marias River, dubbed Maria's River by Lewis who

²⁵ *Id.* at 98, 102-03.

²⁶ *Id.* at 89.

²⁷ *Id.* at 108-10.

²⁸ *Id.* at 108-10.

wrote: “The whole of my party to a man except myself were fully peswaided that this river was the Missouri, but being fully of opinion that it was neither the main stream or that which it would be advisable for us to take, I determined to give it a name and in honour of Miss Maria W___d[] called it Maria’s River.”²⁹

On June 9, Lewis made the decision to take a small group of men and go further upriver to reconnoiter the area.³⁰ Clark would stay with the main party by the River, as Lewis thought him the better boatman.³¹ Lewis remained firmly convinced that they were on the mainstem of the Missouri, but others in the party were unsure.³² Lewis fell ill that same day, and noted in his journal that “Sâh-câh-gâh, we â, our Indian woman is very sick this evening.”³³ Despite being ill, Lewis set out with his small party on the morning of June 11.³⁴ By the morning of

²⁹ *The Lewis and Clark Journals, An American Epic of Discovery*, p. 125, Gary E. Moulton, Ed., University of Nebraska Press (2003).

³⁰ *Id.* at 125-26; see also Stephenie Ambrose Tubbs with Clay Straus Jenkinson, *The Lewis and Clark Companion: An Encyclopedic Guide To The Voyage of Discovery*, Henry Holt and Company, LLC (2003).

³¹ *The Lewis and Clark Journals, An American Epic of Discovery, supra*, at 126-27.

³² *Id.* at 126.

³³ *Id.* at 127.

³⁴ *Id.*

June 12, Lewis was “quite revived,” and continued upriver.³⁵

On June 13, 1805, Lewis reached the Great Falls of Missouri, filled with obvious wonder at the sight:

Immediately at the cascade the river is about 300 yds. wide . . . [there] is a smoth even sheet of water falling over a precipice of at least eight feet, the remaining part of about 200 yards formes the grandest sight I ever beheld. . . . [T]he water in it's passage down . . . brakes it into a perfect white foam which assumes a thousand forms in a moment sometimes flying up in jets of sparkling foam to the hight of fifteen or twenty feet.³⁶

Lewis and his smaller party camped by the Great Falls, the first of five, while the rest of the party camped near Bird Coulee.³⁷ The following day, June 14, 1805, Lewis sent Joseph Fields with a letter to Clark ordering Fields “to keep sufficiently near the river to observe it's [sic as in original] situation in order that he might be enabled to give Capt. Clark an idea of the point at which it would be best to halt to make our portage.”³⁸ That same day, Lewis continued upriver, and found the other falls, describing them in

³⁵ *Id.* at 128.

³⁶ *Id.* at 129.

³⁷ *Id.* at 131.

³⁸ *Id.*

his journal as “pleasingly beautifull” and “sublimely grand.”³⁹ He was clearly captivated.

On June 16, Lewis returned to join the main party. He and Clark spent the next few days further scouting the area for the best portage route.⁴⁰ Preparations for the portage continued, including making “carrage wheels” from an immense cottonwood tree, while Lewis and Clark both administered extensively to Sâh-câh-gâh, we â, fearing she may be near death.⁴¹

D. The Great Falls Portage

Wagon wheels made, and wagons ready, Lewis and Clark made final preparations for the portage. Clark moved the main party across the River and set up camp at the lowest end of the portage route, where “*one of the small canoes was left below this rappid in order to pass and repass the river for the purpose of hunting as well as to procure the water of the Sulpher Spring, the virtues of which I now resolved to try on the Indian woman.*”⁴² They decided to leave the white pirogue at the lowest point of the portage for the return trip, and instead determined to use the Iron Boat beyond the portage.⁴³ Preparations for the portage

³⁹ *Id.*

⁴⁰ *Id.* at 135-39.

⁴¹ *Id.* at 134-38.

⁴² *Id.* at 135 (emphasis added).

⁴³ *Id.*

continued through June 21, and on June 22, the portage was underway.⁴⁴ The portage was fraught with difficulties. Beginning the first day, they experienced problems with their improvised wagons:

[W]e were obliged here to renew both axeltrees and the tongues and howns of one set of wheels which took us no more than 2 hours. these parts of our carriage had been made of cottonwood and on axetree of an old mast, all of which proved deficient and *had broken down several times before we reached this place. . . .* after dark we had reached within half a mile of our intended camp when *the tongues gave way and we were obliged to leave the canoe*, each man took as much of the baggage as he could carry on his back and proceeded to the river where we formed our encampment much fortieged.⁴⁵

Lewis stayed at the upper portage camp, while Clark and the majority of the party worked from the lower portage camp, hauling canoes and equipment overland.⁴⁶

During the portage, between June 22 and July 14, the party experienced extreme weather, and were caught in a torrential downpour and rockslide, with Clark, Sâh-câh-gâh, we â, her baby Jean Baptiste, and others in the party nearly drowning in a gully

⁴⁴ *Id.* at 139.

⁴⁵ *Id.* (Emphasis added.)

⁴⁶ *Id.* at 139-49.

during a rainstorm.⁴⁷ Others in the party had to abandon their loads on the plains due to a severe hail storm – a problem encountered more than once.⁴⁸

During the portage, Lewis and Clark and their party suffered illness, encounters with bears, they required time to hunt buffalo and gather food, and they had to make moccasins, as on the plains a pair would only last about two days.⁴⁹ They were also building canoes, and reassembling the Iron Boat, which they had transported upriver, and which failed when Lewis discovered that “a greater part of the composition had separated from the skins and left the seams of the boat exposed to the water and she leaked in such a manner that she would not answer.”⁵⁰ Plainly, the “portage” was much more than a simple portage, given their limited supplies and knowledge of the lay of the land.

It is *crucial* to bear in mind that Lewis and Clark created their portage route based on minimal information. As noted above, they were not even certain they were on the mainstem of the Missouri until Lewis sighted the Great Falls, and they had the difficulties with their improvised wagons breaking,

⁴⁷ *Id.* at 142.

⁴⁸ *Id.* at 144-46.

⁴⁹ *Id.* at 140-48.

⁵⁰ *Id.* at 146-47; see also Stephenie Ambrose Tubbs with Clay Straus Jenkinson, *The Lewis and Clark Companion: An Encyclopedic Guide To The Voyage of Discovery*, p. 157, *supra*, fn. 30.

illness, hunting for food, making moccasins, axe handles and canoes, and reconstructing the Iron Boat, among other things.

While the Lewis and Clark Expedition took many days to portage the Great Falls, overcoming many unique hardships and even constructing new boats along the way, subsequent portage routes were much shorted. Indeed, there are historical accounts on the eve of Montana's statehood describing the portage around the Great Falls as a one-day event:

We portaged the boats around the Great Falls the next day . . . and [when we] launched the boats, it was 2 o'clock, and we were still 24 miles from Fort Benton. . . . Night fell long before we reached the town. There was no moon, and it was impossible to see. . . . Then came the welcome sight of lights ahead. Soon we were safely ashore and sitting down to supper in a comfortable hotel, very tired, and very happy.⁵¹

⁵¹ See *The Upper Missouri and the Great Falls (recounting a trip down the Missouri from Helena, Montana to Fort Benton on the Missouri River)*, *The Century Illustrated Monthly Magazine*, (Jan. 1888) (Montana Historical Society Archives, Collection MC 13, box 7-6, United States Federal Power Commission Records, Docket #IT-5840, consisting "of hearing materials in a case involving the failure of Montana Power Company to apply for a license to operate its hydroelectric dams on the Missouri River and tributaries. Exhibits in the case (including steamboat logs, diaries, articles, clippings, etc.) sought to document whether the Missouri River was navigable above Fort Benton.") For a complete description and list of materials contained in the

(Continued on following page)

As with other Rivers throughout the country, portaging the Great Falls of the Missouri was common and not viewed as an obstacle to navigation. Indeed, portaging the Great Falls simply presented another commercial opportunity. By 1867, commercial entrepreneurs were vying for rights to a portage route around the falls.⁵²

III. NAVIGATION AND COMMERCE FOLLOWING LEWIS AND CLARK'S EXPEDITION

A. Steamboats and Navigation on the Missouri up to Fort Benton and Beyond to the Headwaters of the Missouri at Three Forks

There are numerous accountings of steamboat use on the upper Missouri. The American Fur Company employed traditional water routes on the Missouri, using keelboats, pirogues, and other then-traditional water craft, for transporting “furs – and even feathers, meat, grease and tallow . . . and by 1833 buffalo robes had already become a bigger

collection see <http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv40361>).

⁵² See *General Laws and Memorials and Resolutions Of the Territory of Montana, Passed At The Fourth Session Of The Legislative Assembly, An Act to re-enact an act entitled, “An Act to authorize Robert Tingley and John Kennedy and their associates to construct a wagon road around the Falls of the Missouri River.”* (Montana Historical Society Archives, *supra* fn. 51, Collection MC 13, box 8-2.)

annual value for its Upper Missouri River Outfit, than beaver was.”⁵³ In addition transporting such items from the Upper Missouri to points along the lower Missouri and on to St. Louis, by 1833, the American Fur Companies steamboat, the Yellowstone, was making its third voyage up the Missouri to Fort Benton.⁵⁴ On its trip up the Missouri in 1833 along with numerous dignitaries, “the *Yellowstone* carried the government goods and the bulk of the Company’s annual supplies for its upriver posts.”⁵⁵ As mentioned above, the renowned painter of American Indians, George Catlin, traveled to Fort Benton on the Yellow Stone,⁵⁶ as did the other another acclaimed artist of the day, Carl Bodmer.⁵⁷ By the middle 1800s, steamboat traffic on the Upper Missouri was common.⁵⁸ In 1867, at least 39 steamers plied the waters of the Missouri up to Fort Benton.⁵⁹

⁵³ Bernard DeVoto, *Across the Wide Missouri*, pp. 22-23, (1947).

⁵⁴ *Id.* at 23.

⁵⁵ *Id.* at 24 (italics in original).

⁵⁶ George Catlin, *The North American Indians*, *supra*, fn. 13.

⁵⁷ Bernard DeVoto, *Across the Wide Missouri*, pp. 17 and 26.

⁵⁸ Greg Gordon, *Steamboats, Woodhawks, and War On the Upper Missouri River*, *Montana The Magazine of Western History*, pp. 30-46 (Summer 2011, Vol. 61, No. 2).

⁵⁹ Hubert Howe Bancroft, *History of Washington, Idaho, and Montana*, p. 732, San Francisco The History Company (1890) (Montana Historical Society Archives, Collection MC 13, 7-8).

Portaging was by then seen as a commercial opportunity, and in that same year, 1867, the Legislative Assembly of the Territory of Montana enacted special legislation authorizing Robert Tingley and John Kennedy to incorporate the Missouri River Falls Wagon Company, giving them exclusive rights to a **one-mile wide, eight-mile long stretch** along the Missouri River to operate a portaging company around the falls – a much shorter distance than the 17-mile route traveled by the Lewis and Clark Expedition.⁶⁰

By 1868, Montana was touted as a commercial and geographical center, with its rich exports of gold, silver exports and other goods, with discussion of navigation on the Missouri above the Great Falls.⁶¹ In 1872, about \$1.5 million in gold was taken from Montana via “overland routes *and down the Missouri*.”⁶² In that same year silver, “[s]ixty tons of base boullion

⁶⁰ See *General Laws and Memorials and Resolutions Of the Territory of Montana, Passed At The Fourth Session Of The Legislative Assembly, An Act to re-enact an act entitled, “An Act to authorize Robert Tingley and John Kennedy and their associates to construct a wagon road around the Falls of the Missouri River.”* (Montana Historical Society Archives, *supra* fn. 5, Collection MC 13, box 8-2.)

⁶¹ *Historical Sketch and Essay on the Resources of Montana: Including a Business Directory of the Metropolis Helena Herald and Job Printing Office* (1868) (Montana Historical Society Archives, *supra*, Collection MC 13, box 9-19).

⁶² *Statistics of Mines And Mining In The States And Territories West Of the Rocky Mountains: being the annual report of Rossiter W. Raymond, U.S. commissioner of mining statistics*, Vol. 5, pp. 214-25, Government Printing Office (1873).

[was][] shipped east, via Fort Benton, at \$500 per ton,” and “silver-ore[] shipped East – 75 tons via Fort Benton . . . value \$200 per ton.”⁶³

B. The Clark’s Fork River

In addition to the Missouri River having become a regular route of commerce, the Clark’s Fork was also widely used as a means of transporting furs and other goods for trade and commerce. “In 1818 [fur traders] built a permanent post at the mouth of the Walla Walla River, naming it Fort Nez Percé for the principal tribe it served. Even earlier, but as part of the same effort to get at the interior West from the Pacific coast, they had built ‘Saleesh House’ on the Clark’s Fork, among the Flatheads,” just below what is now Thompson Falls, Montana.⁶⁴

Saleesh House was located near what is now present-day Thompson Falls, Montana on the Clark Fork River near PPL’s Thompson Falls Dam. According to the Montana Sanders County Historical Society, by 1809 David Thompson, a fur trader and cartographer had traveled up the Clark’s Fork, and in 1810 established Saleesh House, which became a widely-known fur trading post.⁶⁵ “In 1821 the North West Company and the Hudson’s Bay Company

⁶³ *Id.* at 215.

⁶⁴ Bernard DeVoto, *Across the Wide Missouri*, pp. 11-12, (1947).

⁶⁵ *Id.*; see also <http://saleeshhouse.org/>.

merged and all of the NWC fur trade and posts were then operated under the name of the Hudson's Bay Company.⁶⁶

C. The Madison River

While there is very little written about the historical use of the Madison for commercial navigation, it is beyond dispute that the Madison River is currently navigable. When William Clark reached the Three Forks on July 25, 1805, he observed that the Jefferson, Madison, and Gallatin Rivers were “nearly of a Size” (shared the same characteristics).⁶⁷ This comparison is very significant, because Lewis had previously described the Jefferson as a shining example of a navigable River in “a mountainous country.”⁶⁸ Lewis and Clark actually navigated up the Jefferson River. They chose the Jefferson route for a number of reasons, but chiefly among them was that the Jefferson would take them westward (towards the Pacific Ocean), whereas the Madison flowed along a north-south axis.⁶⁹

⁶⁶ *Id.*

⁶⁷ Bernard DeVoto, *The Journals of Lewis and Clark* 165 (1953).

⁶⁸ *Id.* at 162.

⁶⁹ *See* Resp. Br. 1a (map).

Today, people flock from around the world to float in the Madison – the “Last Best Place”⁷⁰ where trout thrive in its deep, cold, shadowy pools. Simply type the words “Madison River” into any internet search engine, and innumerable websites for fly-fishing outfitters, guides, and stores appear. And while the Madison has developed significantly as a commercially navigable River since Montana joined the Union, it nonetheless survives the time-honored test for navigability, as it is, and has been, “susceptible” of navigation.⁷¹

IV. A DECISION FINDING THE RIVERS AT ISSUE NON-NAVIGABLE WOULD HAVE A NEGATIVE IMPACT ON PUBLIC ENJOYMENT OF THE RIVERS

There are many potential legal ramifications of a decision holding that the Rivers at issue are non-navigable. But any decision that caused the Rivers to be broken up into navigable and non-navigable pieces would almost certainly limit public access to the Rivers and affect resource management of the Rivers. Having traveled along the entire Lewis and Clark trail and spent time on the Madison and Clark Fork Rivers, I can attest that such a result would be an immense tragedy. These Rivers, and especially the Missouri, given its important role in the

⁷⁰ William Kittredge, one of Montana’s renowned writers, coined the term “Last Best Place” for Montana in the title of his 1988 anthology of works by Montana writers.

⁷¹ *United States v. Utah*, 283 U.S. 64 (1931).

nation's history, are public treasures. Moreover, having spent a great deal of time on these Rivers, it is clear that fish and wildlife do not distinguish between non-navigable and navigable pieces based on the kind of segmentation rule proposed by PPL. Any decision that impacted resource management along the Rivers by breaking them up into navigable and non-navigable pieces would jeopardize critical habitats, and deprive the public of the opportunity to see these beautiful Rivers in a natural state as close as possible to the one that Lewis and Clark encountered on their fateful journey.



CONCLUSION

Lewis and Clark's journey up the Missouri still resonates loud and large. The Expedition's adventures, discoveries, and journals sparked some of the most profound developments in the history of the American West. Their mark irrevocably remains, as witnessed by the thriving commerce and public enjoyment of Montana's waters today. Montana's Rivers are significant resources, contributing substantially to commerce in Montana. For instance, in 2005, about 120,000 people hired guides or outfitters to raft and float her Rivers, and about 64,000 people hired fishing guides.⁷² For those of us who have spent our lives

⁷² See Institute for Tourism and Recreation Research, p. 7, figure 2 (2007), available at <http://www.itrr.umt.edu/research07/outfitterguidereport.pdf>.

on these Rivers, retracing Lewis and Clark's historic footsteps, the prospect of adopting PPL's ahistoric test for navigability is particularly frightening, as any test that would ignore the historic geography of this Nation's great Rivers in favor of a piecemeal ownership scheme threatens to destroy our continued enjoyment of these Rivers.

In light of Lewis and Clark's status as agents of President Jefferson, it is difficult to imagine more weighty evidence of the traditional concept of navigability as applied to these Rivers. The Court should affirm the judgment of the Montana Supreme Court, which recognized that these Rivers were navigable, as that term was understood by President Jefferson and the Founders before him.

Respectfully submitted,
BRENDA LINDLIEF-HALL
Counsel of Record
MORRISON, MOTL &
SHERWOOD, P.L.L.P.
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261
brenda@mmslawgroup.com
Counsel for *Amica Curiae*

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