Supreme Court, U.S.
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No. 10-218

In The
Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF FOR THE MONTANA WATER RESOURCES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river was navigable for State ownership purposes under the equal footing doctrine require a trial court to determine, after an evidentiary trial, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on observed present-day recreational use, with the question "very liberally construed" in the State's favor?

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INTEREST OF *AMICUS*[1]

The Montana Water Resources Association ("MWRA") is an association of holders of appropriated water rights, which are property rights specifically protected by Montana's Constitution, and other individuals and entities interested in issues related to water rights. Its members include irrigation districts, cooperative ditch companies, public water supply companies, utilities, power cooperatives and individual farmers, ranchers and others who put the waters of Montana to beneficial use. Some of their water rights are well over a century old, and all have been exercised under the equally venerable and vital beneficial use doctrine which recognizes that appropriating water for beneficial use requires a diversion and is a public good, and, therefore, one owning a water right is entitled to make free use of any state-owned riverbed to divert water.

When made aware of the State's claims against power companies seeking past and future rent for

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[1] In accordance with Rule 37.6 *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief. In the interest of full disclosure, *amicus* states the Petitioner is a member of MWRA, and Petitioner abstained from any involvement with the decision to file this *amicus* brief and did not make any contribution to its preparation or submission. In accordance with Rule 37.3(a), *amicus* states that all parties consented to the filing of this brief and were notified ten days prior to the due date of this brief of the intention to file.

their use of allegedly navigable riverbeds, pending in Montana's district court, the MWRA issued (at its Annual Membership Meeting on October 26, 2006) the following Resolution:

> 06. DIVERSION AND IMPOUNDMENT FACILITIES ON PUBLIC BEDS AND BANKS OF STATE WATERS
>
> BE IT RESOLVED that MWRA recognizes that Montana water users have the right to place diversion and impoundment facilities on the public beds and banks of state waters as part of their water right appropriation and have not been required to pay a lease or other fee to the state;
>
> BE IT FURTHER RESOLVED that MWRA opposes any efforts to require water users, including hydropower users, to make payments to the state for diversion and impoundment facilities, including dams and reservoirs, located on the public beds and banks of state waters.

The Montana Supreme Court decision is directly contrary to this Resolution. Many of MWRA's members hold water rights to water from rivers Montana now claims are navigable, the beds and banks of which it now claims it has owned since statehood in 1889, and, most importantly, for the use of which it now claims it must charge rentals. MWRA members own and operate diversion and impoundment structures located in the beds of such rivers. Many have owned these structures for over a century and

none have paid rentals or faced the prospect of having to do so until the Montana Supreme Court's decision. These members have direct, pecuniary interest in seeking this Court's review of the Montana Supreme Court's decision because, if it is left standing, it will lead to the taking of property rights and the imposition of rent (past and future) or other user fees for their past and continued use and operation of their diversion and impoundment structures, whether as owners in fee or owners with rights by prescription or adverse possession.

The Montana Supreme Court's navigability decision is deeply troubling to MWRA's members. Those members have two equally important types of ownership interests affected by that decision. Some members own real property directly abutting the rivers and so long as the rivers have not been legally designated "navigable" at Statehood, they own the property to the middle of the stream. The Montana Court's decision presumptively decided that against them. Thus, if this Court reviews and overturns the Montana Supreme Court, they would have their fee ownership of sections of the riverbeds returned to them.

Other members own water rights, the use of which requires them to own and operate diversion and impoundment structures built on or into the riverbeds, and by deed, prescriptive easement, or rights otherwise long-settled under law hold the property right to continue to operate, for free, those

structures to divert or impound water for beneficial use.

The Montana Court's decision upsets both types of cherished rights. Whether by fee ownership or as part of their water rights under the beneficial use doctrine, MWRA's members believed their right to continue to operate their diversion and impoundment structures on the riverbeds with no payment to anyone was long settled. The Montana Supreme Court has now taken these long held, critical riverbed ownership and access rights and granted them to the State. (Pet. App. 64-66, 90-91).

Also deeply troubling for the future, the Montana Supreme Court held that no statutes of limitation apply to the ownership rights the court now declared for the state in the riverbeds. This means prescriptive and adverse possession rights to continue to operate long-established diversions on the riverbeds that would apply against anyone else who "discovered or invented" a long lost ownership interest do not exist against the state, completely devaluing water rights dependent on these diversions. (Pet. App. 66-69).

Also, retroactive "back rent" damages against ranches, farms, irrigation districts, ditch companies, and others – many of which have operated for decades or even a century – are apparently now allowed, perhaps required, under the Montana Supreme Court ruling in this matter, all arising from its first erroneous decision that Montana has owned the entirety of

the riverbeds in trust since statehood. (Pet. App. 73, 90-91).

Some MWRA members also own real property along other rivers Montana claims are navigable. They have a direct pecuniary interest in the value of that real property not being diminished by attacks on the historic and continuing right to divert, appropriate, and store water pursuant to appurtenant water rights. The value of these water rights literally depends on the right to own and operate the related diversion and impoundment structures located in and near navigable riverbeds. Without the right to divert and impound, which necessarily means the right to place these structures in a location that is effective, water rights are useless.

These members also have direct, pecuniary interests related to the extent of their title to real property (whether to the ordinary low water mark of a navigable river's banks, or to the middle of the bed of a non-navigable river), that riverbeds not be declared navigable to the benefit of the State by a court on summary judgment, without a trial being held on all the relevant evidence related to whether or not a river was navigable at statehood.

MWRA members use of their constitutionally protected water rights in Montana are crucial to the success of the long-established ranching and farming businesses of some of its members. A central component of their use of the river's water is the operation of diversion structures located within the

banks of the river. The historically unfettered access to the riverbed for purposes of operating these diversion structures will be severely jeopardized if this Court were to let stand the Montana Supreme Court's holdings that the State owns the entirety of the riverbeds at issue in trust and that no statutes of limitations apply to claims by the State seeking back rent for purported wrongful occupation of riverbeds by those structures.

Many MWRA members use diversion and impoundment structures to appropriate water from the rivers, including ditches, headgates, intake pipes, diversion dams, and pumps. Use of these structures is absolutely necessary to access, use and store water. Without such structures – which by their nature must be cut into, drilled under, or built on top of, the riverbed – it is impossible for MWRA's members to put their constitutionally protected water rights to beneficial use as required by law to maintain ownership of these rights and avoid abandonment. MWRA's members cannot access water from a river without some use of the riverbed.

To MWRA's collective knowledge, no member has ever (before this case) been asked by a representative of the State to pay a fee, rent or any other type of payment for these diversion and impoundment structures. Likewise, to MWRA's collective knowledge its members have always made unrestricted use of the riverbeds to operate their diversion and impoundment structures.

In sum, MWRA's members have strong interests in many of the issues raised by PPL Montana in its Petition, and could suffer direct, pecuniary losses if this Court declines to assume jurisdiction of this matter and lets stand the rulings of the Montana Supreme Court. Despite the Montana Supreme Court's assertions to the contrary (Pet. App. 90-91), the State as a trustee required to fulfill its fiduciary duty to collect fair market value for all use of state land will eventually have no choice but to continue, river by river, to take property rights away and assess fees and past damages against owners and users of diversion and impoundment structures in the riverbed.

MWRA's members will be forced under the constraints of the Eleventh Amendment and this Court's takings jurisprudence to file lawsuit after lawsuit against these takings in state court (which this decision preordains they will lose), with the hope that this Court will someday accept certiorari to contain the confiscatory conduct of the State of Montana, or of the other states that will surely follow suit.

At this point, only this Court can avert the slow-motion property-rights train wreck the Montana Supreme Court's decision has set in motion. The interests at stake are not just those of "out-of-state corporations" as argued by the Montana Attorney General. MWRA's members, the irrigators, ranchers, small cooperatives, ditch companies, and others will suffer the most if this Court does not act.

SUMMARY OF ARGUMENT

MWRA agrees with Petitioner and with *amicus curiae,* Montana Farm Bureau Federation ("Farm Bureau"), that the Montana Supreme Court's ruling regarding navigability is erroneous and should be reversed. The Montana Supreme Court cannot be allowed to rewrite, indeed eviscerate, this Court's navigability jurisprudence, which rests on fundamental federal questions concerning the creation of the Union. Those protective federal rules underlie an ancient doctrine that provides critical protection to owners of private property along rivers, including owners of water rights.

The rights in private property – its ownership and enjoyment – are among the most important rights protected by our constitutions, both federal and state. Stability of title is a necessity in our constitutional system. The Montana Supreme Court's overturning of a century of precedent recognizing and allowing free use of state-owned riverbeds to appropriate water for beneficial use brings into sharp focus why this Court's review and authority over state courts regarding federal navigability title rights is a necessary and required backstop against state takings of property rights that can otherwise not be effectively challenged in any other court.

ARGUMENT

The question of ownership of riverbeds in Montana, and who has the right to use them, has wide-ranging real-world impacts to thousands of Montana citizens. The Montana Supreme Court's ruling adversely affects the long-standing right to freely divert appropriated water through ditches, headgates, or pipelines located in the riverbeds and to use diversion dams, wing dams or dikes also located in the riverbeds, along the length and breadth of the 36 rivers that the Montana Department of Natural Resources and Conservation ("DNRC") claims to be navigable. The ruling also impedes the ability to freely sell or transfer real property, along with appurtenant water rights and their indispensable diversion structures which are generally located in the riverbeds. As shown below, the protection of these rights now depends on the actions of this Court.

I. The Montana Supreme Court Wrongly Rewrote Federal Navigability Law.

For this argument, MWRA relies upon and joins in with the brief of *amicus curiae,* Farm Bureau. MWRA agrees with and emphasizes Farm Bureau's argument that unless the Court accepts PPL's petition an enormous and unlawful land grab will go unchecked and will be unchallengeable.

II. Unique Federalism Concerns Cry Out For This Court's Exercise Of Jurisdiction To Reign In Montana's Confiscatory Conduct.

In order to strip away long-established rights of MWRA's members, the first step was for the Montana Supreme Court to summarily declare the rivers navigable at statehood and thus owned by the State. It did this without the benefit of an evidentiary hearing as to each section of the rivers. This preemptive navigability conclusion is the foundation of the Montana Supreme Court's erroneous decision, and if it is reversed the other concerns discussed below will go away. If it is not, that flawed foundation will remain in place and a flood of judicial takings litigation will surely follow.

Once the Montana Supreme Court declared the State the indisputable owner of the river beds, the State demanded monetary compensation for past and future uses. But to reach that point, the Montana Supreme Court wrote out of state law a doctrine that had existed since the State first came into being – that beneficial uses of water are public uses, and Montanans may freely use state lands to effectuate those public uses, as an incident to owning water rights, without payment to the State. So, in addition to dismissing the mountain of evidence on navigability and rewriting this Court's navigability precedent, the Montana Supreme Court also ignored the right to unencumbered access to state lands to appropriate water that has existed since 1889.

A. Montana Law Before This Decision.

As a territory, like most arid, western areas, Montana followed the customs of miners and ranchers that all water is subject to appropriation for such beneficial uses as mining, irrigation and stock watering, and that "first in time is first in right." *Mettler v. Ames Realty Co.*, 201 P. 702, 708 (Mont. 1921).

Drinking water, irrigation water, industry water, stock water, water needed for crops, for lawns, for faucets and toilets, for bathtubs and fish ponds – is primarily diverted from Montana rivers, and often there is not enough water for everything and everyone. Thus, water rights are sacred property rights in western states like Montana, and constitutions have long protected them as such.

The 1889 Montana Constitution formally adopted the rule of appropriation:

> The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.

Art. III, §15, 1889 Mont. Const. Most states in the Western United States follow this well recognized doctrine.[2]

In 1895, Montana's Legislature codified the appropriation doctrine. Sec. 1880, Mont. Civ. C. 1895. Cases such as *Smith v. Deniff*, 60 P. 398, (Mont. 1900); *Prentice v. McKay*, 98 P. 1081 (Mont. 1909); *State ex rel. Crowley v. District Court*, 88 P.2d 23, (Mont. 1939); and *Jones v. Hanson*, 320 P.2d 1007, (Mont. 1958), made it clear that while use of private property for water appropriation required compensation to the private property owner, because beneficial uses of water are a public use, use of public state land required no such compensation.

This long-standing recognition of the right to free and unencumbered use of state land to appropriate water for beneficial uses was recognized in MWRA's 2006 resolution supporting PPL's position in this case. This doctrine was not only clearly recognized by Montana authority, but other courts reported this as established Montana law. *See, e.g., Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co.*, 239 F. 638, 644-45 (9th Cir. 1917) (discussing *Prentice v. McKay* and appropriation upon the public lands of a state); and *Wiley v. Decker*, 73 P. 210, 214 (Wyo. 1903)

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[2] The problems raised by PPL's petition and highlighted here by MWRA are not limited to Montana. Far from it. Property rights long settled throughout the Western United States are in jeopardy.

("In Montana it seems one may make a valid appropriation of water with the same effect on unsold state lands").

This doctrine was reaffirmed in the Montana 1972 Constitution, as explained in *General Agriculture Corp. v. Moore*, 534 P.2d 859 (Mont. 1975), which held that Article IX, Section (3)(1) of the 1972 Constitution "reaffirm[ed] the public policy of the 1889 Constitution" and "recogniz[ed] and confirm[ed] all rights acquired under that Constitution and the implementing statutes enacted thereunder." *Id.*, at 862. In short, **all** water rights that existed under Montana laws prior to July 1, 1973, are rights that still existed until the decision at issue here was made by the Montana Supreme Court – 120 years after statehood and 119 years after the first dam at issue was built on one of the riverbeds.

Construction of diversion structures and instrumentalities on the riverbeds is open and obvious, particularly for such large structures as dams, dikes and weirs. As the Montana Supreme Court, itself, described in 1908, the Hauser dam (one of the PPL dams at issue in this case) is "an immense structure of steel and concrete, built across the Missouri river . . . about 70 feet high." *Spratt v. Helena Power Trans. Co.*, 94 P. 631, 633 (Mont. 1908).

If the right to freely use Montana's public riverbeds for such a public use without charge was not firmly established and widely understood, it is difficult to understand why the State did not assert a

right to rent for use of the riverbeds for over a century. Searching for an explanation, the Montana Supreme Court resorted to characterizing the State's inaction for nearly a century regarding its now-recognized ownership interests and its purported right and duty to demand rentals as a mere "lack of diligence" on the part of the State and its land boards. (Pet. App. 68).

In fact, the State had not been dilatory all those decades, it was correct. There was no right to collect rent and no reason to request it until the Montana Supreme Court totally rewrote this Court's federal law on navigability and state law on beneficial use.

Under the decision at issue here, these long-established property rights of MWRA's members have effectively been judicially taken. This was accomplished by the artifice of the Montana Supreme Court simply saying that its earlier decisions do not say what they actually do say.

The ramifications, unknown in detail, are clearly wide in scope. Parties interested in seeing every nickel possible charged for any use of state trust lands will have every reason to force state agencies either to charge exorbitant prices for uses long free, or to lease exclusive riverbed rights to the highest bidder, stripping all value from water rights that cannot be effectively used without access to riverbeds for diversion ditches, dams, pipelines, and the like. *See, e.g., Montanans For The Responsible Use Of The School Trust v. State ex rel. Board of Land Commissioners,* 989 P.2d 800 (Mont. 1999).

River by river, diversion by diversion, riverbed structure by riverbed structure, each rancher, farmer, ditch company, or the like, next focused on by the State, will have to pay up or fight. That fight will necessarily take place in state courts because of the Eleventh Amendment, but under *Stop The Beach Renourishment v. Florida Dep't of Environmental Protection*, ___ U.S. ___, 130 S.Ct. 2592 (2010), this Court's assistance will ultimately be sought. The only way that this will not happen is for this Court to accept PPL's petition now.

B. The Enforcement By This Court Of Its Federal Navigability Rules Is A Backstop Against Judicial Takings.

As shown above, the Montana Supreme Court, by judicial fiat, took property rights that MWRA members believed they had owned since the founding of the State. It buttressed this taking by removing all defenses from MWRA's members, including statutes of limitation and rights by prescription, which would have protected MWRA's members if the long lost riverbed owner the Montana Supreme court discovered had been anyone else but the State as trustee. (Pet. App. 67-69). The Montana Supreme Court could only work these judicial takings by first erroneously concluding that the State owned these riverbeds as a matter of law, despite the mountain of evidence that PPL proffered to the contrary.

This Court has long recognized the importance of stability for property rights. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) (observing that "contractual [and] property rights [are] matters in which predictability and stability are of prime importance"); *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994) (noting "[w]e have said that 'the general welfare of society is involved in the security of titles to real estate") (*quoting American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911); *Colorado v. New Mexico*, 467 U.S. 301, 316 (1984) (recognizing society's "interest in increasing the stability of property rights" when discussing water rights); and *Peralta v. United States*, 70 U.S. 434, 439 (1865) ("The right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions.").

In its early days, Montana welcomed corporations, in-state and out-of-state, to build dams on its riverbeds and to provide electricity to its industry and citizens. It enacted a constitution and statutes precisely to encourage such conduct. *See, e.g., Spratt v. Helena Power Trans. Co.,* 94 P. 631, 634 (Mont. 1908). Likewise, as discussed above, Montana encouraged and enforced stability of title and water rights.

Sadly, in Montana today, that critical stability as to ownership of lands and water rights can only be maintained if this Court accepts certiorari and reverses the judgment that Montana owns the entirety of the riverbeds of the three rivers in question, and the underlying implicit holding that Montana also

owns all of the riverbeds of the over 30 rivers on its navigable rivers list.

Indeed, the combined action of Montana's executive and judicial branches in this matter make it clear this Court was right to question whether states can be trusted with making decisions about riverbed ownership. *Brewer-Elliot Oil & Gas Co. v. United States,* 260 U.S. 77, 89 (1922) (recognizing the problem that "[s]ome states have sought to retain title to the bed of streams by recognizing them as navigable when they are not actually so.") Without this Court's enforcement of its federal navigability rules that were ignored by the Montana courts, the obvious answer is no. Only acceptance of PPL's petition, and reversal of the judgment, can remedy these important property ownership concerns of the members of MWRA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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