

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**

**AMICUS CURIAE BRIEF OF MOUNTAIN
STATES LEGAL FOUNDATION AND
THE UTAH FARM BUREAU FEDERATION
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question “very liberally construed” in the State’s favor?

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**AMICUS CURIAE BRIEF OF MOUNTAIN
STATES LEGAL FOUNDATION AND THE
UTAH FARM BUREAU FEDERATION**

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation and the Utah Farm Bureau Federation, respectfully submit this amicus curiae brief, on behalf of themselves and their members, in support of Petitioner.¹



IDENTITY AND INTEREST OF AMICI CURIAE

Mountain States Legal Foundation (“MSLF”) is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has thousands of members throughout the United States, many of whom own and use property in the West. Since its creation in 1977, MSLF and its attorneys have participated in litigation to defend the

¹ The parties have consented to the filing of this amicus curiae brief by filing a blanket consent with this Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, counsel for amici curiae affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than amici curiae, their members, and counsel made a monetary contribution specifically for the preparation or submission of this brief.

right to own and use property and to prevent governments from redefining property rights. *E.g.*, *State of Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc); *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994), *appeal after remand*, 129 F.3d 1348 (10th Cir. 1997); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997); *McMaster v. United States*, 2010 WL 3582555 (E.D. Cal. 2010).

The Utah Farm Bureau Federation (“UFBF”) is a non-profit corporation organized under the laws of the State of Utah. UFBF was formed in 1916 to protect, promote, and assert business, economic, social, and educational interest of its membership. UFBF is Utah’s largest farming and ranching organization, consisting of 28 county Farm Bureaus and more than 30,000 member families. Many of UFBF’s members are descendants and/or successors-in-interest to the original pioneers, who settled Utah. Like many pioneers in the arid West, these pioneers settled on, improved, and cultivated lands adjacent to water bodies, built diversion works, and, ultimately, received title to these lands, including the beds under non-navigable water bodies, from the United States. *See* Homestead Act of 1862, Act of May 20, 1862, ch. 75, 12 Stat. 392 (1862) (repealed 1976); Desert Land Act of 1877, 43 U.S.C. §§ 321-339 (granting the right to enter upon desert lands and receive title thereto after improving the lands through the beneficial application of water); Paul W. Gates, *History of Public*

Land Law Development 635-36 (1968) (noting that as settlers moved west past the 100th meridian they naturally settled on lands adjacent to streams). Importantly, many of these pioneers received their patents and concomitant property interests before Utah was admitted into the Union.

In the instant case, the Montana Supreme Court, in total disregard of 140 years of this Court's precedents, created a new test for determining whether a water body is navigable for title purposes. In so doing, the Montana Supreme Court not only assessed tens of millions in dollars in back rent against Petitioner, PPL Montana, LLC ("PPL"), but also upset the settled and investment-backed expectations of other landowners along the Missouri, Clark Fork, and Madison Rivers in Montana, who have been using and paying taxes on land they reasonably believed they owned.

Unless this Court corrects the mistakes made by the Montana Supreme Court, the settled and investment-backed expectations of hundreds of other landowners in Montana and Utah, including UFBF and MSLF members, could be destroyed. In fact, there is a current effort by a non-state entity to apply the Montana Supreme Court's new navigability for title test on the Weber River in Utah. *Utah Stream Access Coalition v. Park*, Civ. No. 110500360 (Third Judicial District). UFBF members own land along that river and risk losing title to their land that is critical to their farming and ranching operations, and on which they and their predecessors have been paying taxes on for over 100 years. The State of Utah has also

expressed concerns that this case could adversely impact private property rights and more than 100 years of settled water law. Importantly, the State of Utah has never asserted that the Weber River is navigable for title purposes.



STATEMENT OF THE CASE

This case involves the State of Montana's attempt to redefine private property interests to effectuate a land grab and to reap a huge financial windfall. Specifically, this case involves ownership of riverbeds under more than 500 miles of rivers, including approximately 5,600 acres of riverbeds under dams and reservoirs that are part of two federally licensed hydropower projects on the Missouri, Clark Fork, and Madison Rivers in Montana. The two hydropower projects at issue, the Missouri-Madison Project and the Thompson Falls Project, have a combined generating capacity of approximately 350 megawatts. This valuable energy is sold to customers in Montana and surrounding states.

The Missouri-Madison project includes nine dams built between 1891 and 1958 on the Missouri and Madison rivers. Because they are designed to generate hydropower, the dams were constructed on sections of the river with flowing rapids and vertical drops. Five dams are on the Missouri River near Great Falls, Montana. At the time of statehood, this 17-mile stretch of the Missouri contained five historic waterfalls and had an elevation drop of more than

600 feet. Two other dams are located on the Stubbs Ferry stretch of the Missouri River, near Helena, Montana. The last two dams are on the Madison River. One of these dams, the Hebgen Dam, stores and releases water to regulate flow to the other downstream dams. The Missouri-Madison project was first licensed in 1956 and, in September 2000, the federal government issued a new license that expires in 2040.

The Thompson Falls project, which began operations in 1915, is located on the Clark Fork River at Thompson Falls, Montana. This project, which was constructed on a naturally occurring waterfall, was first licensed by the federal government in 1949, and re-licensed in 1979. This license expires in 2025.

The State of Montana participated in the federal licensing proceedings for both of these projects and neither claimed ownership of the riverbeds under the projects nor suggested that it was entitled to lease payments for the use of the riverbeds. For decades the riverbeds under the dams and reservoirs were understood to be either private lands owned by the Montana Power Company (“MPC”) or other private parties from whom flood easements were granted, or federal lands for which the federal government was paid substantial sums of money for the use thereof. *See* 16 U.S.C. § 803(e).

In 1999, PPL purchased the two hydropower projects from MPC and, with the federal government’s approval, continued to operate them. Importantly, when PPL purchased the hydropower

projects, the State never suggested that it held title to the riverbeds or that PPL may owe rent for the use thereof.

In 2003, two Montana citizens sued PPL and two state-regulated hydropower companies, in the U.S. District Court for the District of Montana, asking that retroactive compensation be awarded to the State for the use of riverbeds under hydropower facilities in Montana. The plaintiffs' attempted to apply the Equal Footing Doctrine in arguing that the riverbeds were owned by the States and that PPL and the other companies owed hundreds of millions of dollars in unpaid rent to the State. In 2004, the State intervened as plaintiff. In September 2005, the district court dismissed the case for lack of diversity jurisdiction.

PPL and the other state-regulated hydropower companies then filed this case in the Montana First Judicial District Court seeking a declaration that federal law precludes or preempts any claim for compensation. In response, the State filed a counterclaim, contending that it was entitled to back rent for the use of its lands.

After the state-regulated hydropower companies settled, the State then moved for partial summary judgment against PPL. The State asserted that the Missouri, Clark Fork, and Madison Rivers were navigable in 1889, when Montana was admitted to the United States, and, therefore, the States owned title to the riverbeds under the Equal Footing Doctrine.

In response, PPL argued that, pursuant to this Court's well-established navigability for title test, navigability is determined on a section-by-section basis in light of navigability at the time of statehood, not on a river-as-a-whole basis in light of present-day use.

Notwithstanding the substantial evidence submitted by PPL showing that navigation was impossible on the date of statehood, the trial court mistakenly concluded that there were no disputed issues of material fact regarding navigability at statehood, and granted partial summary judgment in the State's favor. In so doing, the trial court ruled that navigability need not be determined on a section-by-section basis and that, in light of present-day recreational use on some parts of the rivers, the entire rivers were navigable in 1899.

On June 13, 2008, the trial court awarded the State \$34 million in retroactive back-rent for PPL's use of the riverbeds from 2000 through 2006; an additional \$6 million for its use of the riverbeds in 2007; and whatever future amounts the Montana State Land Board may determine that PPL owes for its use in 2008 and the future.

PPL naturally appealed to the Montana Supreme Court. On March 30, 2010, the Montana Supreme Court, over a powerful dissent, affirmed the trial court. *PPL Montana, LLC v. State of Montana*, 229 P.3d 421 (Mont. 2010). Specifically, the Montana Supreme Court affirmed the trial court's ruling that the relevant stretches of the rivers were navigable at

statehood. *Id.* at 449. In so doing, the Montana Supreme Court made several critical errors. One error of particular interest to both MSLF and UFBF was the Montana Supreme Court's reliance on present-day recreational use and its disregard of evidence showing impossibility of navigation on the date of statehood. *Id.* at 446. According to the Montana Supreme Court, the navigability for title test is "fluid" and "very liberally construed" in favor of the State. *Id.* Thus, in the opinion of the Montana Supreme Court, it is appropriate to consider present-day use to determine whether a river is navigable for title purposes on the date of statehood. *Id.* at 449 ("[I]t is equally clear that the present-day usage of the Madison, Clark Fork, and Missouri rivers demonstrates that these rivers were susceptible of providing a useful channel of commerce throughout the state of Montana at the time of statehood."). The result of this decision is shocking: private property interests, thought to have been established more than a century ago and relied upon for the construction of large hydropower projects and other private diversion works for the beneficial use of water, were eviscerated by the Montana Supreme Court.



SUMMARY OF THE ARGUMENT

The importance of private property is deeply entrenched in the history of this Nation. Indeed, it has long been understood that the protection of private property is necessary for the security of all individual liberties. Private property, however, ceases to exist if there is not certainty of title. As a result, this Court and others have consistently recognized the importance of certainty of title.

The Montana Supreme Court orchestrated an enormous land grab by redefining property rights under the auspices of the Equal Footing Doctrine and, thereby violated certainty of title principles. Pursuant to the Equal Footing Doctrine, navigability for title purposes is determined on the date a state is admitted into the Union. Thus, on that date, the state, the federal government, and private landowners all know for certain – based on the condition of the river on that date – who owns the bed of the river.

The Montana Supreme Court, however, ignored certainty of title principles and evidence showing that it was impossible to navigate the relevant stretches of the rivers at statehood. Instead, it held that the present-day recreational use of the rivers was “sufficient” to prove that the rivers were navigable over 120 years ago, even though the subsequent construction of dams had significantly altered the flow of the rivers. Thus, under the Montana Supreme Court’s new test, title to a riverbed is never certain and can never be relied upon. Instead, ownership of a riverbed

may shift depending on natural and/or manmade changes to the flow of a river. This blatant disregard for certainty of title is incompatible with the notion of private property that is essential for the protection of other individual liberties. As a result, this Court should reverse the decision of the Montana Supreme Court and emphatically declare that present-day use has little, if any, role in determining navigability for title purposes.

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ARGUMENT

I. PRIVATE PROPERTY IS THE GUARDIAN OF LIBERTY.

The importance of private property in America can be traced to the Magna Carta (1215), which many colonists believed to be part of their birthright as English subjects. *See United States v. Lee*, 106 U.S. 196, 228 (1882). Chapter 29 of the Magna Carta provides: “[n]o freeman shall be taken or imprisoned, or disseised of his free tenement or of his liberties or free customs . . . unless by the lawful judgment of his peers, or by the law of the land.” Thus, the Magna Carta secured the rights of property owners against deprivations by the government without due process of law. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (2d ed. 1998).

In 1687, William Penn advised the colonists “not to give away any thing of *Liberty* and *Property* that at

present they do . . . enjoy.” *Id.* (quoting William Penn, *The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England* (William Bradford 1687)) (emphasis in original). Shortly thereafter, in 1690, John Locke published his famous *Second Treatise of Government*, in which he opined that legitimate government was based on a compact whereby people gave their allegiance to the government in exchange for protection of their property rights. John Locke, *Second Treatise of Government*, §§ 123-131 (1690) (C.B. Macpherson ed., 1980). According to Locke, private property existed under natural law before the creation of governments. *Id.* §§ 25-51. Locke further believed that the major purpose of government was to protect private property. *Id.* § 124 (“The great and *chief end* therefore, of men’s uniting into common-wealths, and putting themselves under government, *is the preservation of their property.*” (emphasis in original)). More importantly, Locke equated property with liberty. *Id.* § 123 (Men are “willing to join in society with others, who are already united, or have a mind to unite for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property.*” (emphasis in original)).

Influenced by Locke, “colonial leaders viewed the security of property as the principal function of government.” *The Guardian of Every Other Right* 28. In fact, Thomas Jefferson incorporated Locke’s compact theory into the *Declaration of Independence*:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.^[2]

The Framers of the Constitution also recognized that “principles of good government started with the protection of private property[.]” Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 *Cato Sup. Ct. Rev.* 5 (2002). For example, utilizing the philosophy of Locke, John Rutledge of South Carolina told the delegates at the Philadelphia Convention that “[p]roperty was certainly the principal object of Society.” *The Guardian of Every Other Right* 43 (quoting 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed. 1937)). Likewise, Alexander Hamilton stated “[o]ne great objt. of Govt. is personal protection and the security of Property.” *Id.* (quoting 1 *The Records of the Federal Convention of 1787* 302). Thus, the Framers saw “property ownership as a buffer protecting individuals from government coercion.” *Id.*

² Although Jefferson substituted “Pursuit of Happiness” for “estates,” this change should not be interpreted as lessening the importance of property rights. In fact, “the acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both.” *The Guardian of Every Other Right* 29 (quoting Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (University of North Carolina Press 1980)).

In 1790 John Adams declared: “[p]roperty must be secured or liberty cannot exist.” *Id.* (quoting *Discourses on Davila*, in 6 *The Works of John Adams* 280 (Charles Francis Adams ed., 1851)). The next year, the Fifth Amendment became effective and expressly incorporated into the Constitution Adams’s belief that property is fundamental to liberty. As finally adopted:

[T]he Fifth Amendment contains two important property guarantees, along with procedural safeguards governing criminal trials. The amendment provides in part that no person shall be “deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” Madison’s decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. *Individuals needed security against both arbitrary punishment and deprivation of property.*

The Guardian of Every Other Right 54 (emphasis added).

This Court has also consistently recognized that private property is essential to a free society. For example, in 1897, this Court declared:

Due protection of the rights of property has been regarded as a vital principle of republican institutions. “Next in degree to the right of personal liberty . . . is that of enjoying

private property without undue interference or molestation.” The requirement that the property shall not be taken for public use without just compensation is but “an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.”

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (citations omitted). Seventy-five years later, this Court again emphasized that private property was an essential component to liberty:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted).

In sum, “[t]he right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.” *The Guardian of Every Other Right* 26 (quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (New York 1775)).

II. CERTAINTY OF TITLE IS OF PARAMOUNT IMPORTANCE TO PRIVATE PROPERTY OWNERS AND SOCIETY.

Private property is meaningless if settled expectations regarding the ownership thereof may be dashed at the whim of any branch or level of government. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994) (noting that “the presumption against statutory retroactivity” is strongest when new legislation “affect[s] contractual or property rights, matters in which predictability and stability are of prime importance.”); *Peralta v. United States*, 70 U.S. 434, 439 (1865) (refusing to relax the evidentiary requirements for recognition of a Mexican land grant because “[t]he right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions.”); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592, 2602 (2010) (plurality opinion) (“[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking.” (emphasis in original)). In fact, it is the responsibility

of governments to ensure certainty of title because “the general welfare of society” is at stake. *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911) (“As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government.”); *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (Ruling that a clear and convincing evidentiary standard for the diversion of interstate water “accommodates society’s competing interests in increasing the stability of property rights and in putting resources to their most efficient uses. . .”).

Based upon these principles, this Court has always sought to preserve certainty of title.³ *See e.g.*, *Doolittle’s Lessee v. Bryan*, 55 U.S. 563, 567 (1852) (Refusing to void a sale of land by a marshal who had been previously removed from office because “[t]he purchaser paid his money and obtained his deed upon the faith of a judgment of the court that the sale was regular, and has held the land under this title ever since. . . . Under such circumstances a court should be

³ Congress has also sought to preserve certainty of title by prohibiting resurveys from “impairing the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.” 43 U.S.C. § 772; *see United States v. Reimann*, 504 F.2d 135, 138 (10th Cir. 1974) (Once patents are issued, “the rights of patentees are fixed and the government has no power to interfere with these rights, as by a corrective resurvey.” (citing, *inter alia*, 43 U.S.C. § 772)).

even [sic] astute in avoiding a construction which may be productive of much litigation and insecurity of titles.”); *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U.S. 196, 207 (1886) (Rejecting the argument that surface lines of a mining claim should be readjusted as a vein is developed because “[s]uch readjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims. The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty.”); *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452, 460 (1903) (noting that “it would be likely to do more harm than good to” upset title that was passed “on the faith of” earlier decisions).

Indeed, this Court reaffirmed this principle in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). That case involved the checkerboard land pattern created by the railroad land grants. *Id.* at 676-77. The Leo Sheep Company, as successor-in-interest to the Union Pacific Railroad, owned the odd-numbered sections of land and the United States owned the even-numbered sections. *Id.* at 677-78. After the United States constructed a road across the corners of Leo Sheep’s property, Leo Sheep brought a quiet title action against the United States. *Id.* at 678.

The district court quieted title in favor of Leo Sheep. *Id.* However, on appeal, the Tenth Circuit reversed. *Id.* In so doing, the Tenth Circuit opined that when Congress granted the land to the Union Pacific Railroad it implicitly reserved an easement to

cross over the odd-numbered sections in order to reach the even-numbered sections that were still owned by the United States. *Id.* In reversing the Tenth Circuit, this Court ruled that an easement across private land should never be implied in favor of the United States when doing so would “upset settled expectations”:

This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Id. at 687-88.

Lower federal courts have also recognized that certainty of title is necessary for protection of private property and society. *See, e.g., Fulton v. Harris*, 658 F.2d 641, 644 (8th Cir. 1981) (“[O]ur decision is not inconsistent with and does not undermine legitimate state interests in the orderly disposition of decedents’ estates and the certainty of title to property.”); *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960) (“Certainty of title is an elementary prerequisite for the sound development of any mineral resource.”); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 845 (D. Wyo. 1981) (“Predictability and certainty of title are mandatory to the entire oil and gas leasing system.”). Indeed, as Judge Matthew Deady explained 150 years ago: “[s]ecurity and certainty of title to real property are among the most important

objects of the law in any civilized community.” *Lownsdale v. Portland*, 15 F. Cas. 1036, 1039 (D. Or. 1861).

Many state courts also recognize that public policy favors certainty of title to private property. *See, e.g., Alvey Dev. Corp. v. Mackelprang*, 51 P.3d 45, 50 (Utah Ct. App. 2002) (“[I]n Utah there is an important interest for property owners to possess unencumbered titles because public policy favors certainty in title to real property, to protect bona fide purchasers and to avoid conflicts of ownership, which may engender needless litigation.” (internal quotation omitted)); *Matter of Estate of Violi*, 482 N.E.2d 29, 32 (N.Y. 1985) (recognizing “public policy favoring certainty in title to real property”); *Shields v. Collins*, 268 N.W.2d 371, 373 (Mich. Ct. App. 1978) (certainty of title represents “important public policy”); *Carpenter v. Duke*, 56 S.E. 938, 940 (N.C. 1907) (certainty of title is a requirement of “sound public policy”); *Morse v. Lorenz*, 104 N.E. 237, 239 (Ill. 1914) (“security and certainty of titles to land is of the utmost public importance”). Needless to say, the Montana Supreme Court may not be one of them. *See, e.g., Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984) (upsetting settled expectations regarding ownership of streambeds and adjoining fee land); *Galt v. State Dept. of Fish, Wildlife & Parks*, 731 P.2d 912 (Mont. 1987) (same); *Seven Up Pete Venture v. Montana*, 114 P.3d 1009 (Mont. 2005), *cert. denied*, 546

U.S. 1170 (2006) (upsetting settled and investment-backed expectations regarding contract and property rights).

As the foregoing demonstrates, the importance of certainty in title for private property owners and society cannot be understated. This explains why so many legal principles were developed to protect certainty of title. For example, the primary purpose of the doctrine of adverse possession and its first cousin, prescriptive easements, is to provide certainty of title. Indeed, adverse possession “has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.” Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135 (1918). Similarly, statutes of limitations involving claims to land are also based upon the importance of certainty of title. *E.g.*, *United States v. Beggerly*, 524 U.S. 38, 49 (1998) (ruling that the statute of limitations in the Quiet Title Act, 28 U.S.C. § 2409a, must be strictly construed because landowners must “know with certainty what their rights are, and the period during which those rights may be subject to challenge.”); *McIver v. Ragan*, 15 U.S. (2 Wheat.) 25, 29 (1817) (noting that the policy behind statutes of limitations is not to punish those who neglected to assert their rights, but to establish certainty of title); *see also Proctor v. Sagamore Big*

Game Club, 265 F.2d 196, 202 (3rd Cir. 1959) (noting that a statute of repose is “intended to insure greater certainty of title and make more secure the enjoyment of real estate”); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 347-48 (1985) (concluding that statutes of limitation benefit society). Estoppel principles were also developed, in part, to ensure certainty of title and to avoid upsetting settled and investment-backed expectations.⁴ See *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (“While the consent of individual officials representing the United States cannot ‘estop’ the United States, it can lead to the fruition of a number of expectancies embodied in the concept of ‘property’ – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner’s property.” (internal citations omitted)); see also *United States v. Wharton*, 514 F.2d 406, 410 (9th Cir. 1975) (noting that estoppel was available against the

⁴ These principles were implicated in the instant case because the State of Montana sat idly by and watched PPL’s predecessor construct the facilities and operate the facilities for decades. See *Sumner v. Seaton*, 19 A. 884, 887 (N.J. Ch. 1890) (“[W]here a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. . . .”). Even during the relicensing of PPL’s facilities, the State never raised the issue that, perhaps, the facilities were on State lands. Notwithstanding this egregious behavior, these principles could not be used to stop the State’s massive land grab. *PPL Montana*, 229 P.3d at 430-31, 451.

federal government when real property interests are at stake); *United States v. Locke*, 471 U.S. 84, 110-12 (1985) (O'Connor, J., concurring) (same).

III. THE EQUAL FOOTING DOCTRINE IS IN ACCORDANCE WITH CERTAINTY OF TITLE PRINCIPLES.

The principles behind the Equal Footing Doctrine predate the formation of this Nation.

Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. When the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown.

Utah Div. of State Lands v. United States, 482 U.S. 193, 195-96 (1987) (internal citation omitted).

Based upon these principles, the Northwest Ordinance, enacted under the Articles of Confederation in 1787, provided that new states would be admitted to the Union "on an equal footing with the

original States in all respects whatever. . . .” Northwest Ordinance of 1787, art. V. Two years later, this principle was incorporated into an act by the First Congress. An Act to provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50, 53 (1789). As a result:

In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within [a state] passed to that state when it was admitted to the Union, if the rivers were *then navigable*; and, if they were not *then navigable*, the title to the river beds remained in the United States

United States v. Utah, 283 U.S. 64, 75 (1931) (emphases added). Importantly, “[o]nce the equal-footing doctrine vested title to the riverbed . . . as of the time of [statehood] . . . *the force of that doctrine was spent*; it did not operate after that date to determine what effect on titles the movement of the river might have.” *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977) (emphasis added). Thus, on the date of admission to the Union, title to a riverbed either vests in a state or it does not, depending on whether the river is navigable in fact on that date. By requiring the determination be made as of a precise date, the Equal Footing Doctrine is in accordance with certainty of title principles. Therefore, neither subsequent events (such as natural changes in hydrology of a water body and/or the construction of dams), nor present-day use have any bearing on title under the Equal Footing Doctrine.

**IV. THIS COURT SHOULD EMPHATICALLY
DECLARE THAT EVIDENCE OF PRE-
SENT-DAY USE HAS LITTLE, IF ANY,
ROLE IN DETERMINING NAVIGABILITY
FOR TITLE PURPOSES BECAUSE IT
CREATES UNCERTAINTY OF TITLE.**

**A. Navigability For Title Purposes Is De-
termined By Federal Law.**

The test for determining navigability for title is a question of federal law. *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1, 14 (1935) (“Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local, one.”); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926) (“Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.”). Moreover, because of the important federal, state, and private interests at stake, having one test for navigability for title purposes is crucial. *Id.* at 56 (rejecting the use of state law to determine navigability for title purposes because “uniformity” is needed).

The federal test for determining navigability for title has remained virtually unchanged since it was first articulated by this Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870):

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.^{5]}

Thus, the elements necessary to establish navigability for title purposes are: (1) the water body was used, or was susceptible of being used; (2) in its “*natural and ordinary condition*”; (3) as a highway of useful commerce, and (4) by the customary modes of trade and travel at the time of statehood. *Holt State Bank*, 270 U.S. at 56 (emphasis added). If the state fails to prove any one of these elements, it does not own the bed of the water body. *North Dakota ex rel. Bd. of*

⁵ Granted, *The Daniel Ball* involved a navigability determination relative to Congress’s power to regulate under the Commerce Clause. 77 U.S. at 563-64. However, this Court has never questioned its applicability for title purposes. And, although the navigability for title test is similar to the test for navigability for the exercise of the Commerce Clause power, the two tests are different. Indeed, the navigability for title test is much narrower than the navigability test for Commerce Clause purposes because navigability for title is determined as of a specific date, *i.e.*, the date the state was admitted into the Union. Compare *Oregon ex rel. State Land Bd.*, 429 U.S. at 371 (navigability for title is to be determined as of the date of admission) with *Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979) (noting that to Congress’s Commerce Clause power may be extended to water bodies made susceptible to interstate commerce by man-made efforts after statehood).

Univ. and Sch. Lands v. United States, 972 F.2d 235, 238 (8th Cir. 1992) (burden of proof rests with the party asserting navigability).

B. The Montana Supreme Court Created A New Navigability For Title Test That Is Based Upon Present-Day Use.

This Court has recognized that states may not always be trusted when navigability for title is at issue. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922) (“Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control.”). This is especially true considering that some states have shown a tendency to redefine property rights when it either serves their purposes or will allow them to avoid paying just compensation. *Hughes v. State of Wash.*, 389 U.S. 290, 296-97 (1967) (Stewart, J., dissenting) (“For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“[A] State, by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.”); *cf. Kaiser Aetna*, 444 U.S. at 170-71 (rejecting the federal government attempt to

redefine private property to avoid having to pay just compensation).

In the instant case, the Montana Supreme Court effectuated a massive land grab and bestowed a huge financial windfall on the State when it held that the relevant stretches of Missouri, Clark Fork, and Madison Rivers were navigable for title purposes. One basis for this holding was the ruling that “present-day recreational use is sufficient” to prove that a river was navigable at the time the State was admitted to the Union. *PPL Montana*, 229 P.3d at 448. The Montana Supreme Court further expounded that, in spite of PPL’s substantial evidence to the contrary, it is “clear that the *present-day usage* of the Madison, Clark Fork, and Missouri Rivers demonstrates that these rivers were susceptible of providing a useful channel of commerce throughout the state of Montana at the time of statehood.” *Id.* (emphasis added). In short, the Montana Supreme Court concluded that the present-day recreational use of a water body trumps evidence of impossibility of navigation at statehood.⁶

⁶ The relevant inquiry is commercial use, *i.e.*, whether the water body “is used, or is susceptible of being used, in its natural and ordinary condition *as a highway for commerce*, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922) (emphasis added). Thus, the Montana Supreme Court’s reliance on recreational use was totally erroneous. *Parm v. Shumate*, 513 F.3d 135, 143 (5th Cir. 2007) (“Neither navigation nor commerce encompass recreational

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C. The Montana Supreme Court's New Present-Day Use Test Has No Support In This Court's Decisions Or Those Of Other Courts.

This Court's precedents do not support the Montana Supreme Court's belief that present-day use trumps all other evidence when it comes to determining whether a river was navigable for title purposes on the date of statehood. This is especially true when post-statehood events, such as the construction of dams, have changed a river's hydrology, as in this case.

For example, in *United States v. Utah*, this Court ruled that the question of navigability "is one of fact as to the capacity of the rivers in their *ordinary condition* to meet the needs of commerce. . . . And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams *have been put*." 283 U.S. at 83 (emphases added). Accordingly, this Court considered evidence that showed the relevant section of river had been navigated prior to Utah's admission to the Union in 1896. 283 U.S. at 81-82. Granted, this Court also considered evidence that, in the years immediately following Utah's admission to the Union, navigation

fishing.") *cert. denied*, 555 U.S. 813 (2008); *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) ("[T]o our knowledge none of the authoritative cases has liberalized the [navigability for title] rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would constitute navigability.").

occurred on the relevant section of river. *Id.* at 82. However, there was no evidence that major projects that could have altered the river’s navigability – such as dams – were built between the time of admission and the years immediately following Utah’s admission to the Union.⁷ *Id.* at 77-86. That is not true in the instant case. *PPL Montana*, 229 P.3d at 426 (noting that PPL Montana’s dams were all constructed after statehood).

Moreover, although *United States v. Utah* considered some post-statehood evidence, it did not suggest that “present-day use” could trump all other evidence. Instead, this Court allowed the consideration of post-statehood evidence in the years immediately following statehood to corroborate the pre-statehood evidence of navigability. *Id.* at 81-82. It stretches *United States v. Utah* beyond its breaking point to conclude, as did the Montana Supreme Court, that evidence of present-day use *ipso facto* proves that the relevant

⁷ Later, in *Utah v. United States*, this Court reaffirmed these principles in holding that the Great Salt Lake was navigable in 1896. 403 U.S. at 11-12. In so doing, this Court ruled that the question of who owned title to the “bed of the Great Salt Lake – *whether now submerged or exposed* – ultimately rests on whether the lake was navigable at the time of Utah’s admission.” *Id.* at 10 (emphasis added) (internal citation omitted). By noting the irrelevancy as to whether the bed was “now submerged or exposed,” this Court implicitly rejected the Montana Supreme Court’s present-day use theory.

portions of the rivers were navigable more than 120 years earlier.⁸

Not surprisingly, no other court has applied the Montana Supreme Court's present-day use test in making a navigability for title determination. In *North Dakota ex rel. Bd. of Univ. and Sch. Lands v. United States*, North Dakota argued that "modern day recreational canoe use on some portions of the Little Missouri," that were "similar to that of watercraft historically used on waterways for commerce" was sufficient to prove the river was navigable upon the state's admission to the Union. 972 F.2d at 240. The Eighth Circuit, however, rejected this argument. Instead, the Eighth Circuit affirmed the district court's holding that such "modern day canoe use and modern day 'boatability' data are not reliable indicators of the River's navigability at statehood." *Id.*; see also *North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982) (the issue is one of "navigability at the time of statehood, *not in the present day*"), *rev'd on other grounds*, 461 U.S. 273 (1983) (emphasis added); *Arkansas River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003) ("present-day navigability"

⁸ Importantly the *United States v. Utah* was handed down only 35 years after Utah was admitted into the Union. 283 U.S. at 73. In contrast, the Montana Supreme Court made its navigability determination based upon present-day use 120 years after statehood.

may be relevant to navigability for Commerce Clause purposes but not for title purposes).

Even the decision relied upon by the Montana Supreme Court for the proposition that present-day use trumps evidence of non-navigability at statehood, *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1402 (9th Cir. 1989), does not stand for that proposition. See *PPL Montana*, 229 P.3d at 447. In *Ahtna*, the Ninth Circuit was asked to determine title to 30 miles of the lower Gulkana River in Alaska. 891 F.2d at 1402. Although the Ninth Circuit allowed present-day use of the Gulkana River to be considered, *id.* at 1402-03, it did so only because the parties stipulated “that the River’s physical characteristics have remained unchanged since statehood.” *Ahtna*, 891 F.2d at 1405. Thus, the Ninth Circuit did not hold, as the Montana Supreme Court seemed to believe, that present-day use of a river is “sufficient” to prove that the river was navigable upon statehood when physical characteristics of the river were significantly altered after statehood. See *PPL Montana*, 229 P.3d at 447-48.

As the foregoing demonstrates, the Montana Supreme Court’s present-day use theory has no support in this Court’s decisions or those of lower courts. This is especially true when the hydrology of the relevant stretch of the river has been significantly altered post-statehood by immense hydropower facilities.

D. The Montana Supreme Court's Present-Day Use Test Violates Certainty Of Title Principles And Undermines Private Property Rights.

Under the Montana Supreme Court's novel present-day use theory, title to a bed of a water body is never certain. A future event, either natural or artificial, that transforms a non-navigable water body into a navigable water body could suddenly transfer title of the bed to the state.

The ramifications of such a rule are startling. For example, a landowner may reasonably believe that he owns title to a riverbed underlying a section of river that everyone assumed was non-navigable when the state was admitted into the Union. Based upon that reasonable belief, the landowner may have invested substantial sums of money in constructing water diversion facilities and may have used those facilities for decades for irrigation purposes. But under the Montana Supreme Court's new interpretation of the Equal Footing Doctrine, present-day use of the river could trump the landowner's settled and investment-backed expectations and transfer ownership of the portion of the riverbed to the state.⁹ In other words,

⁹ More to the point, if the Montana Supreme Court's present-day use test was in effect back in the day when private dam building was prevalent, no dams would have been built because the dam owners would not want to risk losing their investment by making the rivers navigable.

the Montana Supreme Court's decision allows present-day use of a river to upset certainty of title.

Indeed, if *United States v. Utah* were litigated today under the Montana Supreme Court's novel present-day use test, the outcome may have been significantly different. In *United States v. Utah*, this Court explained that "there is no controversy as to the nonnavigability" of the Colorado River through Cataract Canyon at statehood. 283 U.S. at 80. However, in 1963 the Glen Canyon Dam was constructed, which flooded about 30 miles of Cataract Canyon. See Steven W. Carothers & Dorothy A. House, *Decommissioning Glen Canyon Dam: The Key to Colorado River Ecosystem Restoration and Recovery of Endangered Species?*, 42 Ariz. L. Rev. 215, 219 (2000). Thus, applying the Montana Supreme Court's novel test, that the flooded, flatwater portion of Cataract Canyon may be navigable today would be "sufficient" to conclude that the entirety of Cataract Canyon was navigable upon statehood. The possibility of this outcome shows why present-day use should not be considered in navigability for title determinations and why Montana Supreme Court's decision is so seriously flawed.

Moreover, if the Montana Supreme Court's decision is allowed to stand, notions of certainty of title would be further eroded.¹⁰ A state would be encouraged to sit

¹⁰ The Montana Supreme Court's complete disregard for certainty of title is most obvious in its flippant dismissal of a
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on its hands and wait until such time as a section of river may support recreational use – through the construction of a dam, or some other man-made or even natural cause – and then assert that it owned the relevant section of riverbed all along. To make matters worse, a state could then seek retroactive rent payments from those who reasonably believed that they, not the state, owned the riverbed. Therefore, this Court should emphatically reject the Montana Supreme Court’s present-day use test.

◆

CONCLUSION

As the foregoing demonstrates, the Montana Supreme Court’s present-day use test violates certainty of title principles. It is also incompatible with any notion of private property that is essential for the protection of other individual liberties. Accordingly, this Court should reverse the decision of the Montana

1910 decision by a federal district court finding that the stretch of the Clark Fork River in Sanders County, Montana, to be non-navigable and quieting titled to the bed in favor of PPL’s predecessor. *PPL Montana*, 229 P.3d at 434, 448. By rejecting the 1910 decree, and, instead, relying on present-day use, the Montana Supreme Court upset the settled and investment-backed expectations of PPL and, perhaps, other landowners.

Supreme Court and emphatically declare that present-day use has little, if any, role in determining navigability for title purposes.

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