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 Montana

BRIEF OF THE MONTANA WATER RESOURCES ASSOCIATION, THE NATIONAL WATER RESOURCES ASSOCIATION, HEIDI GILDRED, PATRICK BYRNE, CLINTON IRRIGATION DISRICT, BOYD STANDLEY, FRANK SOMMER AND JEFFREY CARLILE AS *AMICI 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 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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INTEREST OF *AMICI CURIAE*[1]

MONTANA WATER RESOURCES ASSOCIATION

Amicus Montana Water Resources Association ("MWRA") is an association of holders of appropriated water rights, and other individuals and entities interested in issues related to water rights in Montana. 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.

Many of MWRA's members hold water rights on rivers that Montana claims are navigable, and own and operate diversion and impoundment structures located in the beds of such rivers. These members have a direct pecuniary interest in asking this Court to overturn the Montana Supreme Court's decision because, if it is left standing, it will lead to the imposition of charges for their use and operation of their diversion and impoundment structures, whether as

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

owner 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 because it disturbs their long-standing property interests. 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. 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 and operate diversion and impoundment structures built on or into the riverbeds, and by deed, prescriptive easement, or rights otherwise long-settled under state law hold the property right to continue to operate, without charge, those structures to divert or impound water allowing the exercise of their water rights. The Montana Court's decision upsets both types of these foundational rights. Whether by fee ownership or as part of their water rights under the beneficial use doctrine, MWRA's members had for decades exercised their right to continue to operate their diversion and impoundment structures on the riverbeds with no payment to anyone. This was the long-settled law in Montana in accordance with western water law generally. The Montana Supreme Court has now

taken these long held critical riverbed ownership and access rights and granted them to the State.

Some MWRA members also own real property along other rivers Montana claims are navigable and have a direct pecuniary interest in the value of that real property not being diminished by attacks on the historic and continuing right to appropriate and store water pursuant to appurtenant water rights and related diversion and impoundment structures located on navigable riverbeds.

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.

MWRA members use numerous 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 required by law for maintenance of these rights. MWRA's members cannot access water from a river without some use of the riverbed, even if that use is as limited as livestock walking onto the riverbed to stand and drink.

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 the issues raised by PPL Montana's Petition, and will suffer direct, pecuniary losses as well as the diminishment or loss of property rights if this Court lets stand the rulings of the Montana Supreme Court. The interests at stake in this matter are not just those of "out-of-state corporations" as argued by the Montana Attorney General. Instead, MWRA's members, the irrigators, ranchers, small cooperatives, ditch companies, etc., will suffer the most if this Court does not reverse the decision.

NATIONAL WATER RESOURCES ASSOCIATION

Amicus the National Water Resources Association ("NWRA") is a nonprofit federation, with roots going back to the 1890s, of associations and individuals dedicated to the conservation, enhancement, and efficient management of our Nation's most precious natural resource: water. The NWRA is the oldest and most active national association concerned with water resources policy and development. Its strength is a reflection of the tremendous "grassroots" participation it has generated on virtually every national issue affecting western water conservation, management, and development.

The mission of *amicus* NWRA is to advocate federal policies, legislation, and regulations promoting protection, management, development, and beneficial use of water resources to:

- Achieve sustainable water supply for all beneficial uses in an economical and environmentally responsible manner.
- Promote the development, conservation, preservation and utilization of the water resources of the nation.

Amicus NWRA is a voluntary organization of state water associations whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the Reclamation states of the Western

United States. *Amicus* NWRA has member associations in California, Colorado, Idaho, Montana, North Dakota, Nebraska, New Mexico, Nevada, Oregon, South Dakota, Texas, Utah, and Washington.

NWRA, its association members and their members share the concerns of its association member MWRA and its members, and are concerned that if this Court does not reverse the decision of the Montana Supreme Court, that the anti-water user policies from that decision could spread to their states as well.

PRIVATE PARTY LANDOWNERS

Amicus Heidi Gildred ("Gildred") owns riparian land along the Madison River in Montana. She draws water from the river to water livestock, has paid all property taxes assessed by Montana on all her lands, and believes that before this case that assessment included the beds and banks of the Madison to the middle of the stream along her riparian lands. Since this case, Montana has claimed ownership of those beds and banks that she continues to believe she owns, and has not offered her a tax refund. Gildred is concerned about what this uncertainty does to the value of her land as a whole (including her appurtenant water rights), and her ability to freely sell or transfer real property, along with water rights and their diversion structures. Gildred asks this Court to overturn the decision of the Montana Supreme Court

so that Montana will stop claiming ownership of what she believes to be her Madison riverbed lands.

Amicus Patrick Byrne ("Byrne") owns riparian land along the Clark Fork River in Montana around fourteen miles east of the City of Missoula. He has paid all property taxes assessed by Montana on all his lands, and believes that before this case that assessment included the beds and banks of the Clark Fork to the middle of the stream along his riparian lands. Following the decision by the district court in this case, Montana claimed ownership of those beds and banks that Byrne continues to believe he owns, and has not offered him a property tax refund. Byrne is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with appurtenant water rights and their diversion structures. *Amicus* Byrne lives along the East Mullan Road. As detailed in the report of Petitioner's expert historian, Dr. David Emmons, the Mullan Road was constructed by the United States Army, beginning in 1865, to connect the head of navigation on the Missouri River, Fort Benton, to the head of navigation on the Columbia River, Wallula Washington. (Pet. App. 242-43). That road was not "terminat[ed] on the Clark Fork [because] it was no more navigable than the upper Missouri." *Id.* Byrne agrees and asks this Court to overturn the decision of the Montana Supreme Court so Montana will stop claiming ownership of what he believes to be his Clark Fork riverbed lands.

Amicus Clinton Irrigation District ("CID") is an irrigation district on the Clark Fork River. Irrigation districts are limited purpose governmental units created by the district courts under Montana law. CID, created in 1919, is about 20 miles above Missoula on the Clark Fork River, and over 150 miles upstream of Thompson Falls, where PPL Montana's sole hydroelectric project on the Clark Fork River is located. CID holds water rights recognized under Montana law and diverts water from the Clark Fork River for its members using two headgates located on the river bank. After the district court's decision, CID received a letter from the Montana Department of Natural Resources and Conservation ("DNRC") telling CID that in order to continue making use of its headgates to divert water for its members, it would need to pay for an annual license or obtain an easement from the State for the stated reason that the Clark Fork is a navigable waterway, the streambed of which is owned by the State of Montana. CID believes the Clark Fork is not navigable, and that it has the right to have and use its headgates on the beds and banks of that river without any charge due to Montana. CID asks this Court to overturn the decision of the Montana Supreme Court so that it can continue to make use of its headgates on the Clark Fork riverbeds to divert and appropriate water for its members, without charge from the State, as it has always done before this case.

Amicus Boyd Standley ("Standley") owns riparian land along the upper Missouri River above the Great Falls and Fort Benton. His address is in Cascade,

Montana. Standley holds water rights on the Missouri, and irrigates his land and waters his livestock from the upper Missouri River using sump pumps and pipes located on and in the riverbeds. He has paid all property taxes assessed by Montana on all his lands, and believes that before this case that assessment included the beds and banks of the Missouri to the middle of the stream along his riparian lands. Since this case, Montana has claimed ownership of those beds and banks that he continues to believe he owns, and has not offered him a property tax refund. Before this case, Standley was never asked to pay a fee for his pumps and pipes on and in the riverbed, and has always appropriated and diverted water in accord with his water rights, for free and with no charge for a license or easement from the State. Standley is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with appurtenant water rights and their diversion structures. Standley asks this Court to overturn the decision of the Montana Supreme Court so that Montana will stop claiming ownership of what he believes to be his Missouri riverbed lands, and so that he will continue to be able to divert and appropriate water without charge as he and his family have always done.

Amicus Frank Sommer ("Sommer") owns riparian lands along the Bull River in Montana near its confluence with the Clark Fork River. When Sommer recently purchased his land, he believed it to include

the beds and banks of the Bull River to the middle of the river. Sommer has since paid all property taxes assessed by Montana on all his lands, and believes those assessments include the beds and banks of the Clark Fork to the middle of the stream along his riparian lands. Sommer has become aware that the Bull River is included on the State of Montana's "Navigable Rivers List," (Joint Appendix 196, 198), and that his riparian lands lie along the part of the river the State claims was navigable at statehood, and so claims that it, not Sommer (and his riparian neighbor across the river), owns the Bull River's beds and banks. As far as Sommer knows, although the State claims ownership of what he believes are his riverbed lands, it has not instructed the county to remove those lands from his property tax assessment, nor has it offered him a refund for taxes already paid. Sommer is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with water rights and their diversion structures. Sommer asks this Court to overturn the decision of the Montana Supreme Court so that Montana will stop claiming ownership of what he believes to be his Bull riverbed lands.

Amicus Jeffrey Carlile ("Carlile") owns riparian lands along the Smith River in Montana near its confluence with the upper Missouri River. Since long before this case, Carlile and his family have believed that riparian land to include the beds and banks of

the Smith River to the middle of the river. Carlile has paid all property taxes assessed by Montana on all his lands, and believes those assessments include the beds and banks of the Smith River to the middle of the stream along his riparian lands. Since this case, Carlile has become aware that the Smith River is included on the State of Montana's "Navigable Rivers List," (Joint Appendix 196, 199), and that his riparian lands lie along the part of the Smith River that the State claims was navigable at statehood, and so claims that it, not Carlile, owns the river's beds and banks. As far as Carlile can ascertain, although the State claims ownership of what he believes are his Smith riverbed lands, it has not instructed the county to remove those lands from his property tax assessment, nor has it offered him a refund for taxes already paid. Carlile is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with water rights and their diversion structures. Carlile asks this Court to overturn the decision of the Montana Supreme Court so that Montana will stop claiming ownership of what he believes to be his Smith riverbed lands.

SUMMARY OF ARGUMENT

Amici agree with Petitioner that the Montana Supreme Court's ruling regarding navigability is erroneous and should be reversed. This Court's precedent,

in particular *United States v. Utah,* 283 U.S. 64 (1931), contains federal protective rules that underlie an ancient doctrine of the law, which provides critical protection to owners of private property along non-navigable rivers. *Amici* urge this Court to uphold and reaffirm that precedent.

The ability of elected and appointed state court judges to take private property by simply ignoring or misconstruing state and federal precedent, including this Court's decisions, brings into sharp focus why this Court's review and authority over state courts regarding federal navigability title rights is a necessary and indispensible backstop against state takings of property rights that cannot be effectively challenged in any other court. What Montana has done will spread to other states unless this Court puts a stop to this now by overturning the decision of the Montana Supreme Court and reaffirming its long-standing, federal rules regarding what constitutes a navigable river at the time of statehood.

Along with rejecting this Court's precedent on navigability, the Montana Supreme Court also overturned a century of its own precedent recognizing and allowing free use of state owned riverbeds to appropriate water for beneficial use. It apparently did this so that the State of Montana could charge multiple millions in back and future rents to long-time beneficial users of riverbeds that the State now, a century after statehood and contrary to its prior acts and inactions, claims to own. Without the Montana Supreme Court's second action, rejection of the ancient

doctrine of free, beneficial use of the public riverbeds, which was fundamental to the development of the West, the navigability ruling would have had less monetary effect. Likewise, without the navigability ruling, the rejection of the beneficial use doctrine would not have brought much (if any) money into the State's empty coffers.

The Montana Supreme Court's joint rulings took the property of hundreds of riparian landowners and water rights users along the many hundreds of miles of the upper Missouri, Madison and Clark Fork Rivers that run through Montana, and threaten to do the same to the thousands of riparian owners and water rights users along the thirty-four other rivers on the list of what Montana claims as navigable rivers in the state. (Joint Appendix 196). If the Montana Supreme Court's navigability ruling is not reversed, water users throughout the West face a similar threat.

The large amount of precedent the Montana Supreme Court summarily rejected, implicitly if not directly, demonstrates the necessity for this Court to protect the stability and applicability of its controlling precedent on the foundational federal issues regarding navigability determinations, for the benefit of *amici* here and similarly situated persons throughout the West.

ARGUMENT

Amici rely upon and join in with the brief of Petitioner, and will not burden the Court with yet more argument regarding how the Montana Supreme Court so egregiously erred in its decision to reject this Court's precedent and controlling federal law, when declaring the entirety of the beds and banks of the upper Missouri, Madison and Clark Fork Rivers (and presumptively the beds and banks of the other thirty-four rivers on the State's Navigable Rivers List), to be owned by Montana since its statehood in 1889. Instead, by focusing on and explaining the historical background of the rest of that lengthy opinion, these *amici* offer context for *why* that decision was made, and to illustrate why it is so important for this Court to hold states to the long-standing *federal* rules for navigability: this case stands as a veritable "poster child" that demonstrates it is far too easy for *state* courts to sweep away long-standing *state* court precedent for result-driven reasons, implicitly violating fundamental federal rules if this Court does not act as a bulwark against such caprice.

I. The Montana Supreme Court Rejected Long-Established Precedent To Confiscate The Property Of The Montana *Amici* And To Prepare The Path For Charging Petitioner (And Others) Multiple Millions Of Dollars In Past And Future Riverbed Rents.

Once the Montana Supreme Court declared the State the indisputable owner of the riverbeds, by

rejecting (indeed eviscerating) this Court's federal title navigability rules, the State demanded monetary compensation for past and future uses, not only from Petitioner, but from *amicus* CID and other water users along the rivers. But to get to this point, the Montana Supreme Court first wrote out of state law a doctrine that had existed since the State first came into being, *i.e.,* that beneficial uses of water are public uses, and Montanans may freely use public state lands (including public riverbeds) to effectuate those public uses as an incident to the holding of water rights, without payment to the State.

From its earliest days, Montana recognized by Constitution, statute and case authority, that the right to make beneficial use of water is a vital part of the life of the State and its citizens; and further, that a necessary part of the exercise of the right to appropriate water is the right to free and open use of riverbeds for dams, ditches and other diversion and impoundment structures. This law – the law of appropriated water put to beneficial use – was, and is, part of the fabric of the Western United States, including the states where NWRA's members put their states' waters to beneficial use.

Montana's adoption of this doctrine was not a casual, infrequent or careless reference in the law: it is stated over and over again as a vital right critical to the development and character of Montana, and decade after decade, as an important part of life in Montana. Nevertheless, both the district court and the Montana Supreme Court ripped this ancient

doctrine from the pages of Montana's law books, and the concomitant property rights from its people, with the following holding:

> The District Court determined that Montana law did not exempt PPL from paying the State for the use of state lands while appropriating water for a beneficial use. . . . We affirm the District Court. The cases relied on by PPL simply do not establish that PPL has a right to make *free* appropriation of waters on and within state-owned [riverbed] lands without paying any compensation to the State.

(Pet. App. 65). *Amici* believe that Petitioner PPL Montana was correct, and that the decision of these 21st Century Montana courts to reject the 19th Century doctrine of beneficial use, represents nothing less than a critical cog in a massive land grab by the State for its own purposes, taken not only without just compensation paid to the prior owners, but with charges assessed to those prior owners for their past use.

Amici set out prior Montana law in some detail below, so that this Court can see the entire context of the erroneous decision it now has under review.

A. Montana Law Before The Current Decision.

1. Territorial Law.

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).

2. Montana's First Constitution.

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.

3. Montana's First Law Code.

In 1895, Montana's first Legislature codified the appropriation doctrine:

> The right to the use of running water flowing in the rivers, streams, canyons, and ravines of this state, may be acquired by appropriation.

(Section 1880, Civ. C. 1895). The 1895 Code also recognized the right to construct a "ditch, flume, pipe or aqueduct by which the diversion [of the water] is

made," and provided as follows regarding dams and reservoirs:

> The right to conduct water from or over the land of another for any beneficial use, includes the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor, may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use.

(Sections 1882, 1894, Civ. C. 1895; now 85-2-414, Mont. Code Ann.; Sec. 1880, Mont. Civ. C. 1895). Thus, compensation was required for constructing a diversion structure on private land owned by another, but no such payment was required for beneficial use of the public lands.

4. Case Law and Relevant Statutes.

In 1900, the Montana Supreme Court decided the seminal case of *Smith v. Denniff*, 60 P. 398 (Mont. 1900). *Smith* involved someone who had appropriated water from a stream along which he owned no riparian land. The court gave a detailed explanation regarding water rights, including appropriations made on state owned land:

> By section 1880 et seq. of the Civil Code the right is conferred upon any one to make a valid appropriation of water on the unsold

> state lands. But such permission can and does apply only to lands owned by the state.

Id. at 399.

The court explained that a ditch "over the public domain or state lands" is "an easement in the stream" . . . "a burden upon the land which [the appropriator] occupies but does not own," and held that this "servitude thereon or easement therein is a vested interest in the public domain. . . ." *Id.* at 400. Since an irrigation ditch by its nature must be cut into a riverbed, the State's navigable riverbeds were plainly included in this holding allowing free use of the state's public lands for diversion and appropriation of water.

In 1907, the Montana federal court discussed the right to construct diversion structures on the public lands as "an incident of" the right of appropriation. *United States v. Conrad Inv. Co.,* 156 F. 123 (D. Mont. 1907):

> [Plaintiff] could rightfully divert water from streams coursing through the public domain. . . . If it was entitled to do this, then it was entitled to do that which was reasonably necessary to effectuate the diversion, by the construction of a dam . . . *the right to do so would be but an incident of the right of diversion*.

Id. at 128 (emphasis added).

Also in 1907, several cases proceeded through Montana's courts regarding the Hauser dam (one of the dams now at issue in this case). None of those

cases suggested the State should be paid rent for the Missouri riverbeds where that dam and reservoir would be built, even as the dam builder sought eminent domain rights to take and pay private landowners for the lands to be submerged. In *Helena Power Trans. Co. v. Spratt*, 88 P. 773, 776 (Mont. 1907), the Montana Supreme Court determined that a non-public, for-profit use of water to generate power is a beneficial, public use, as is the storage and sale of water for irrigation, and allowed eminent domain, compensated takings of the private land at issue. *Id.* at 776.

In 1909, the Montana Supreme Court reaffirmed its seminal holding in *Smith* about beneficial uses on the state's public lands, while explaining again that a private landowner must be paid for such a use of his lands:

> The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation. . . . The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation, and *the statutes of this state* (sections 4840-4891)[2] only *apply to appropriations made on the public lands of the United States* ***or*** *of the state,* and to such as are made by individuals who have riparian rights either as owners of riparian lands or

[2] Section 1880, *et seq.*, recodified in 1907.

> through grants from such owners. *This is the doctrine announced in Smith v. Denniff.*

Prentice v. McKay, 98 P. 1081, 1083 (Mont. 1909) (emphasis added, citations omitted).

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

Construction of instrumentalities on the riverbeds was open and obvious, particularly for such large structures as dams, dikes and weirs. As the Montana Supreme Court described in 1908, the Hauser dam 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 (Mont. 1908). If the right to freely use Montana's public riverbeds for such a public use was not firmly established, it is difficult to understand why the State did not assert a right to rent for use of the riverbeds at that time or for roughly 100 years after.

In 1923, a Madison River landowner complained that the Hebgen facility had injured his land. *Jeffers v. Montana Power Co.*, 217 P. 652 (Mont. 1923). The Montana Supreme Court held:

> [W]e find that the operation of the Hebgen reservoir, the sale of the use of the water stored therein, and the transportation of such waters so stored through the channels of the Madison river for a useful purpose is authorized by statute and is a lawful business. (Sections 7093, 7096, 7113, Rev. Code 1921). [The 1895 statutes, recodified in 1921].

Id. at 659.

In 1926, the Montana Supreme Court again addressed dams and reservoirs:

> the practice of impounding water in reservoirs has obtained in this state from the earliest days. . . . [C]ounsel for respondents insist that reservoirs should not be permitted in the course of, or at the headwaters of, adjudicated streams. This argument cannot be admitted.

Donich v. Johnson, 250 P. 963, 965-66 (Mont. 1926).

In 1927, Montana's Legislature addressed riverbed leases. It did not grant the Board of State Lands, or the newly-created Department of State Lands, plenary authority over the riverbeds. (Ch. 60, Mont. Laws 1927). Instead, by separate act the Legislature provided solely for oil and gas leasing on "any state lands," extending "[t]his power and authority to lease state lands for such purposes . . . to and include all lands owned by the State under navigable lakes and streams. . . ." (Sec. 1, Ch. 108, Mont. Laws 1927).

In 1930, the Montana Supreme Court made its first (and until this case, only) exception to the beneficial use doctrine. It addressed the appropriation of water on School Trust lands, not state owned riverbeds. *See Newton v. Weiler*, 286 P. 133 (Mont. 1930). Newton's rights depended upon establishing that her predecessor had acquired a prescriptive ditch easement against the State. Newton's counsel invoked *Smith*, which the Montana Supreme Court distinguished because the Weiler land was school land:

> The precise question here presented was not involved in [the *Smith*] case, and it appears not to have been heretofore passed upon by this court. Here the land in controversy is part of the land granted to the state of Montana by . . . the Enabling Act, for the support of common schools.

Id. at 136 (emphasis added). The court concluded that because of the requirements of federal law, Montana law could not be construed "as authorizing the right of one to obtain title to, or any estate or interest in, any part of the school lands of the state by adverse possession."

This was because such a construction "would readily appear [to] impinge upon the terms of the grant from the United States" set forth in the Enabling Act. *Id.* In other words, the public lands at issue in *Smith* and its progeny (*e.g.*, riverbeds) were distinguishable from school lands that are subject to the

Enabling Act's restrictions regarding their use and transfer.[3]

In 1931, the Montana Legislature enacted "An Act relating to Hydro-Electric Power Sites on State Lands." ("The HRA"). The 1931 Act granted the Land Board authority to lease power sites on "state lands." However, that power was *not* broadened to "include all lands owned by the State under navigable lakes and streams," as it specifically was in the 1927 Act, discussed above, or in a later 1937 law about mineral prospecting. (*Compare* Sec. 1, Ch. 108, Mont. Laws 1927; Sec. 1-6, Ch. 123, Mont. Laws 1931; Sec. 2, Ch. 148, Mont. Laws 1937). Thus, the HRA applied to *Newton v. Weiler* school lands, not *Smith v. Denniff* riverbeds and other state public lands.

If – as the State argued 70 years later, and the Montana Supreme Court decided in the opinion on review – the HRA was meant to apply to the hydroelectric dams already in existence in 1931, there would surely have been mention of those dams, either in the Act as offered or enacted, in the Legislative Minutes or the Commissioner's reports. There is not. This conclusion is further bolstered by the fact (conceded by the State) that for the next *seventy plus years*, the Land Board and the people who actually drafted and

[3] Although it misunderstood or ignored the importance of its ruling, the Montana Supreme Court in the case on review, properly recognized that the riverbeds are *not* Enabling Act school lands. (Pet. App. 64).

implemented the statute *never* attempted to apply the Act to any of the pre-existing hydroelectric dams or those later constructed on rivers the State now claims to be navigable. Rather, only after the elapse of decades and the passing of the drafters and legislators who crafted the HRA, did anyone suggest that it was somehow meant to apply to hydroelectric facilities *not* on school section lands, but on riverbeds the State now – a century after statehood and decades after passage of the HRA – claims it owns.

In 1932 (a year after enactment of the HRA), the Montana Supreme Court minced no words about a dispute over a dam:

> The law recognizes the right of an appropriator to construct a permanent dam in a stream, when necessary to raise the surface to the level of his headgate, and to maintain the same as a part of his irrigation system . . . , so long as such a dam is constructed and maintained in a safe condition. . . .

Geary v. Harper, 12 P.2d 276, 280 (Mont. 1932).

In 1939, the Montana Supreme Court again dealt with dams on the Madison River bed. In *State ex rel. Crowley v. District Court of Sixth Jud. Dist.*, 88 P.2d 23 (Mont. 1939), downstream water right holders sued the owner of the Hebgen dams regarding its operation of that dam. Crowley "maintained a wing dam constructed of brush, rocks and dirt extending into said Madison River at the head of his diversion ditch," to divert water into that ditch. *Id.* at 2.

The Montana Power Company (owner of the dam before PPL Montana) argued Crowley did not have a valid complaint because there was water for him to appropriate, he simply needed to build a better dam. The Montana Supreme Court firmly rejected that argument, holding instead that once a dam is built, as long as it remains "reasonably efficient" it cannot be interfered with. This is so because:

> *His right is to divert and use the water, not merely to have it left in the streambed*; that is the essential difference between riparian and appropriation rights.

Id. at 27 (emphasis added).

Quoting the Utah Supreme Court, the Montana Supreme Court concluded:

> We think the original taker or appropriator from a stream or body of water also *acquires the right to continue to use his method or means of diverting, which he has installed.*

Id. (emphasis added).

Completing its rejection of the Montana Power Company's arguments, the Montana Supreme Court invoked the then half-century old 1895 Code sections (recodified in 1921), and told the company to take any complaints to the legislature:

> [D]efendants must address themselves to the legislative branch, which expressly authorized that practice in 1894 by an enactment

> which now appears as section 7110, Revised Codes, and which reads in part as follows: *The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended.*

Id. at 30 (emphasis added). If the company did complain, it got nowhere. The law remained the same.

In 1941, the Montana Supreme Court again addressed the issue of dams, reaffirming *Jeffers:*

> [R]eservoirs, dams, ditches and flumes are the instrumentalities for the impounding and conveyance of the waters. . . .
>
> Our Constitution, Article III, Sec. 15, provides that the appropriation and use of these waters, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. . . . The storage of water in Montana is not new. *The western part of our state is now dotted with reservoirs, usually built near the headwaters of streams. This work has been encouraged at all times. . . .*

Federal Land Bank v. Morris, 116 P.2d 1007, 1011 (Mont. 1941) (emphasis added).

In 1958, the Montana Supreme Court once again reaffirmed *Smith* and *Prentice*, again in the context of requiring payment for beneficial use of private land, but not public land:

> The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation. . . . The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation . . . and *the statutes of this state* . . . only *apply to appropriations made on the public lands of the United States or of the state.*

Jones v. Hanson, 320 P.2d 1007, 1013 (Mont. 1958) (emphasis added).

In 1966, the State Fish & Game Commission refused to re-license a fishing pond. The parties disputed whether the Commission could require Paradise Rainbows to construct a fishladder on its dam seven years after the Commission had inspected it. The Montana Supreme Court said no:

> Under Article III, § 15 of the Montana Constitution, a private beneficial use of water is declared to be a public use. *Individuals who have put water to a beneficial use should not have their rights arbitrarily diluted, under claim of sovereign right or otherwise.*

Paradise Rainbows v. Fish & Game Commission, 421 P.2d 717, 721 (Mont. 1966) (emphasis added).

5. The 1972 Montana Constitution.

This was the history and status of Montana's law on beneficial use of water, and its appropriation and

capture by dams, reservoirs and other structures, when the delegates met in 1972 to promulgate Montana's new constitution. Up to this point, there is no question that ditches, headgates and dams of any nature were considered instrumentalities of appropriation for a beneficial, public use (including hydropower), and that since the navigable riverbeds are state public domain lands, they were freely available to be used for the construction and maintenance of these means of appropriation. The historic actions (and inactions) of Montana's legislative, judicial and executive branches make no sense if this were not so.

The delegates expressed their strong intent to maintain the law on appropriation as it had developed over the decades, stating that *they "felt it very important to preserve 80 years or more of water law litigation*." (Verbatim Trans. March 2, 1972, p.1303) (emphasis added). Thus, *Smith*, *Prentice*, *Jeffers*, *Crowley*, etc., were all accepted by the delegates as controlling and continuing law. Indeed, the delegates felt so strongly about this that they made virtually no changes in the language of Article III, Section 15 of the old constitution, but imported it almost verbatim into Article IX, Section 3(2) of the new constitution.

Delegate Berg discussed the concept that "[t]he State of Montana owns the water for the use and for the benefit of the people of this state," and for "navigable streams," the beds and banks are "*considered to be, on a navigable stream, public domain."* (1972 Montana Const. Conv. Verbatim Trans.) (emphasis added). This is the very concept applied by the Montana

Supreme Court in *Smith* and its progeny. The ratified language of Montana's constitution provides that waters in the state "are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." 1972 Mont. Const. Art. IX, § 3(3).

Finally, and most importantly, the delegates adopted the following provision:

> All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(1972 Mont. Const. Art. IX, § 3(1)). By this language, the Montana Constitution "grandfathered" in all beneficial uses in lawful existence before July 1, 1973 – the effective date of the new constitution – including all the diversion structures owned and operated by these *amici* and, and the dams of PPL Montana at issue herein.

The Montana Supreme Court quickly confirmed that the language in Article IX, Section 3(1) of the new constitution did precisely what the delegates intended. In *General Agriculture Corp. v. Moore*, 534 P.2d 859 (Mont. 1975), the court upheld a notice of water right filed under the old law against a new law passed by the legislature, which became effective on July 1, 1973:

> We construe Article IX, Section (3)(1) of the 1972 Constitution as not only reaffirming the public policy of the 1889 Constitution but also as recognizing and confirming all rights

> acquired under that Constitution and the implementing statutes enacted thereunder. Construed in this context, Article IX, Section 3 . . . is self-executing. . . . The word 'rights' is limited only by the word 'existing.' Outside this limitation it extends to 'All,' a word that needs no definition.

Id., 535 P.2d at 862-63. In short, *all* rights that existed under the water laws prior to July 1, 1973, are rights that still exist:

> The supremacy of constitutional mandates is too well established to require citation. . . . 'The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations.'

Id.

In 1984, the Montana Supreme Court adjudicated a dispute between a junior appropriator under Montana's new water permit law and senior appropriators under the old law. The senior beneficial users prevailed. As the court described the parties:

> Montana Power Company, a Montana corporation, owns and operates six hydroelectric generation facilities located on the Missouri River downstream from the [plaintiff's] proposed diversion point. Numerous existing

> water rights are appurtenant to these hydro-electric plants.

Montana Power Co. v. Carey, 685 P.2d 336, 338 (Mont. 1984).

Based on Montana's "water law" stretching back to "*Smith v. Denniff (1900)*," the Court affirmed DNRC's accommodation of the "Cochrane facility [which] has the largest turbine capacity of putting water to beneficial use on the Missouri River,. . . ." *Id.* at 339-40. Here again, as it did for Hauser in *Spratt,* and Hebgen in *Jeffers*, the Montana Supreme Court (and also the Montana DNRC) recognized the lawfulness of yet another of the dams in issue, and its status as a proper instrumentality for appropriation of water for a public, beneficial use.

In 1985, the Montana Supreme Court once again reaffirmed the continuing validity of *Smith* regarding use of the state public domain for appropriation of water – *i.e.*, "ordinary public trust lands held broadly in trust for the people" – as opposed to the school trust lands granted by the Enabling Act, "which are subject to a different set of rules than other public lands." *Dept. of State Lands v. Pettibone*, 702 P.2d 948, 955 (Mont. 1985); *distinguishing* and *affirming Smith v. Denniff*. That was the law in 1889, and under the 1972 Constitution, that continued to be the law for appropriation structures constructed before 1973, and "grandfathered" for all time, until 2010, when the Montana Supreme Court said: "never mind, we really didn't mean it."

B. Montana Law Today.

Under the decision at issue here, long-established property use rights of the Montana *amici* have effectively been judicially taken. This was accomplished by the artifice of the Montana Supreme Court simply saying that its earlier decisions, above, do not say what they actually do say, and that the understanding of water users throughout the State for decades was wrong. Thus, with the erroneous navigability ruling also in hand, the State was set free to run roughshod over the water related property rights of Petitioner, MWRA's members, the other *amici*, hereto, and thousands like them who own land and use water along Montana's rivers. And the decision provides a roadmap for the courts in the other states where NWRA's members reside, to do the same.

Needing an explanation for why Montana waited until the 21st century to claim rent due for dams built in the 19th and early 20th centuries, and for the decades of inexplicable inaction of the entirety of the mechanisms of state government to even suggest that beneficial users of public riverbeds were required to pay compensation to the State for public uses of the public's land, the Montana Supreme Court retreated into denial. The answer was not that *it* was wrong, and that *its* new reading of old precedent ran contrary to a century of history written large onto the Montana landscape by the very dams, ditches, headgates and weirs that stand in quiet rejection of its ruling. Instead, its answer was a mere "lack of diligence" on the part of the State and its land boards.

(Pet. App. 68). In point of fact, the State had not been dilatory all those decades, *it was correct*. There was no right to collect rent and no reason for the State to request it until the Montana Supreme Court totally rewrote this Court's federal law on navigability, and its own state law on beneficial use.

Understanding it could not leave other water users like these *amici* – who made their disbelief and anger at the district court's treatment of fellow beneficial user PPL known through *amicus* briefs in the state court proceedings – the Montana Supreme Court conceded they, too, could no longer rely on the ancient beneficial use doctrine, which it had now so facilely written out of existence. Instead, the "irrigators, stockmen, recreationists, and other water users" must look to the Montana legislature to what proper outcome is required by "the public trust with respect to these different classes of usage." (Pet. App. 90).

Before this Court granted PPL's Petition, MWRA and others did just that, finding the current legislature willing to at least set some limits on what they will be charged for uses once free. *See* Senate Bill 35, 62nd Legislature, Montana 2011. But this is at best a sop, and a likely short-lived one at that. What is clear now is that parties interested in seeing every nickel that could possibly be charged for any use of state trust lands will have every reason to file more lawsuits 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.*, *Amicus* Brief of Teacher's Unions, etc., (Joint Appendix 961) (asking the Montana Supreme Court to affirm the large rent award against Petitioner in order to increase state education revenue).

And there is no reason to believe that the current Montana Supreme Court, or a later elected one, will not agree and make real these Montana *amici's* worst fears. *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) (holding unconstitutional decades old statutes on setting charges for use of School Lands, and *inter alia,* forcing DNRC to put cabin leases long held by families up for lease to the highest bidder, and requiring DNRC to charge members of the public to gather dead wood from public lands).

II. Unique Federalism Concerns Cry Out for This Court to Reverse the Decision of the Montana Supreme Court.

Federalism is a two-way street. While states can look to this Court to protect it from improper actions by the federal government, surely the citizens of those states must be able to count on long-standing federal law, and this Court's enforcement of that law, to protect them from the confiscatory actions of their own states.

Here, in order to strip away long-established rights of *amici*, the first step was for the Montana Supreme Court to 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, and in complete reliance on a "River Study" it itself had commissioned. (Pet. App. 193). This preemptive navigability conclusion is the foundation of Montana's confiscatory conduct, and if it is reversed, the other concerns discussed herein will, in largest part, go away. Without the ability to simply declare navigable, and thus owned by the State, without a trial of the facts, thirty-seven rivers that were not navigable at statehood, the State's new ability to charge for past and future beneficial uses made of newly state-owned riverbeds would have less effect. If the decision is not reversed, that flawed foundation will remain in place and a flood of judicial takings litigation will surely follow.

If the decision is not reversed, 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,* 130 S.Ct. 2592 (2010), this Court's assistance will ultimately be sought, in case after case across Montana and across the West. The only way to avoid this slow motion property

rights train wreck that the Montana Supreme Court has put in motion is for this Court to reverse the decision before it and reinstate the fundamental, long-standing rules of title navigability.

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 in-state and out-of-state corporations alike to build dams on it riverbeds and to provide electricity to its industry and citizens, and 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 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 thirty-seven 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 enforcement of the federal navigability rules adopted by this Court, and ignored by the Montana courts, the obvious answer is no. Only reversal of the Montana Supreme Court's decision can remedy the important property ownership concerns of these *amici*.

CONCLUSION

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

Respectfully submitted,

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