PPL Montana v. Montana: A Unanimous Smackdown of a State Land Grab

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Who owns the lands lying beneath the waters of the United States? This is not a trivial question. Nationally, there are approximately 25 million acres of submerged coastal lands within a three-mile reach of state government jurisdiction. There are 3,660,000 miles of rivers and streams of which at least 25,000 miles are indisputably navigable and thousands more miles arguably navigable. Millions of acres lie beneath just the *clearly* navigable rivers. Many of these lands are valuable as locations for hydroelectric, transportation, municipal, industrial, agricultural, and recreational facilities. There is much at stake in answering the question of who owns the nation's submerged lands, a question addressed by the Supreme Court this term in *PPL Montana v. Montana*.[1]

The specific issue in *PPL Montana* was whether the State of Montana had legal title to submerged lands occupied by 10 PPL Montana hydroelectric facilities on the Missouri, Clark Fork and Madison Rivers in Montana. The Supreme Court heard the case on appeal from a Montana Supreme Court ruling that, under the equal-footing doctrine, the state holds legal title to the lands and is therefore owed back rent.[2]

The equal-footing doctrine grew out of language in the Northwest Ordinance of 1787:

> And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on

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[1] 132 S. Ct. 1215 (2012).

[2] PPL Montana, LLC v. State, 229 P.3d 421 (Mont. 2010).

> an equal footing with the original States in all respects whatever.[3]

In *Pollard's Lessee v. Hagen*,[4] the U.S. Supreme Court relied on the equal-footing doctrine in holding that title to tidal lands in the state of Alabama, claimed under a post-statehood grant from the United States, was void because the United States lacked authority to make the grant. Under the equal-footing doctrine, Alabama entered the Union with all the same powers and rights as every other state, including title to, and sole authority over, lands affected by the tides. ''[T]he United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State . . . , ''[5] said the Court, because each state possesses those powers on an equal footing with every other state.

From the perspective of the State of Montana, the lands in question are part of its sovereign heritage, not to mention a potential source of revenue. (In a judgment affirmed by the Montana Supreme Court, the trial court awarded the state $41 million in back rent.) From the perspective of PPL, the United States, and numerous *amici* representing a wide array of private interests—including the Cato Institute—the Montana judiciary's affirmation of Montana's claim to the lands was expropriation, a simple land grab.

Given that the state had made no claim to these lands for over a century after statehood, and that it had participated in federal licensing proceedings for the hydropower facilities located on the lands in dispute, to most objective observers, PPL appeared to have the better case. In its unanimous ruling in *PPL Montana*, the U.S. Supreme Court agreed. Finding that the theory under which Montana belatedly claimed title to the lands in question is legally flawed, the Court left little room for the Montana courts to uphold any of the state's claims on remand. In fact, with respect to the five PPL facilities located on a 17-mile stretch of the Missouri River between the towns of Great Falls and Fort Benton, the Court slammed the door on the

[3] An Ordinance for the Government of the Territory of the United States North West of the River Ohio (The Northwest Ordinance), 1 Stat. 50 (1787).

[4] 44 U.S. 212 (1845).

[5] *Id*. at 223.

Montana courts in stating that the river ''is not navigable for purposes of riverbed title under the equal-footing doctrine.''[6]

Case Background

PPL owns and operates seven hydroelectric facilities on two stretches of the Missouri River, two facilities on the Madison River and one on the Clark Fork River. All of these facilities have existed for decades (the oldest since 1891) and are licensed by the Federal Energy Regulatory Commission. PPL and its predecessors have paid rent to the United States on the understanding, not questioned by the State of Montana until 2003, that the United States held title to the submerged lands before Montana became a state in 1889 and retained title after statehood because the rivers at those points are not navigable.

The leading American case setting forth the relevance of a river's navigability to the determination of title to submerged lands is the Supreme Court's 1894 decision in *Shively v. Bowlby*.[7] Justice Horace Gray explained that ''[i]n England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage.''[8] After the American Revolution, said Gray, both the governmental and proprietary prerogatives of the Crown passed to the states. Thus, the original states held title to submerged lands affected by the tides, as did the new coastal states, all of which entered the Union on an ''equal footing'' with the original states. In addition, wrote Justice Gray, states hold ''title to the soil of rivers really navigable.''[9]

Navigability became the determinant of state title in the United States because it was the test for Crown title in the English common law, which had been in force in the North American colonies for a century and a half. A nation founded on the rule of law could have it no other way. Vested private property rights, and personal and commercial relations dependent on those rights, required that there

[6] PPL Montana, 132 S. Ct. at 1232.

[7] 152 U.S. 1 (1894).

[8] *Id*. at 13.

[9] *Id*. at 31.

be as little disruption in the law of property rights as possible. After the Revolution, the American states succeeded to both the sovereign and proprietary positions of the Crown. Thus, in declaring their independence the states were asserting that henceforth they would exercise the full police powers common to all sovereign states and hold title to all properties then held by the Crown.

There is a long and sometimes sordid history of how the English Crown came to hold title to submerged lands affected by the tides.[10] The public rationale was always that the Crown held title as the best means for protecting the public's rights of use in the overlying waters, a theme echoed by Justice Anthony Kennedy in his *PPL Montana* opinion. But the common law did not make those public rights dependent on Crown title to the submerged lands. At no time in English history was the Crown forbidden from alienating its title by grant to private parties (subject to public rights of navigation, commerce and fishing), although, like the State of Montana, the Crown was not above claiming title to submerged lands previously granted to private parties as a means of generating new revenues.[11]

Because England has few navigable waters not affected by the tides, a practical indicator of the extent of Crown title in submerged lands was whether or not they are affected by the tides. In applying the English law to the realities of North American topography, American courts were quick to conclude that the purpose of the English rule was best achieved by recognizing as prima facie evidence of state title proof that overlying waters are ''really navigable'' (''navigable in fact'' in modern parlance), as well as ''affected by the tides'' as under English law.[12]

The discussion of the equal-footing doctrine in *Pollard's Lessee* did not anticipate the legal conditions that would exist in states like Montana. The submerged lands at issue in *Pollard's Lessee* had previously been under the jurisdiction of, and therefore owned by, the

[10] James L. Huffman, Speaking of Inconvenient Truths—A History of the Public Trust Doctrine, 18 Duke Envtl. L . & Pol'y Forum 1, 12–27 (2007).

[11] *Id*. at 23–24. A factor contributing to the beheading of Charles I was the invention from whole cloth of a prima facie rule requiring those who claimed title to submerged lands on the basis of long-established use to prove that title was held by express grant from the Crown—which, of course, most could not do.

[12] The new rule was recognized by several state courts before being confirmed by the Supreme Court in *Barney v. Keokuk*, 94 U.S. 324, 336 (1877).

State of Georgia. As part of its agreement to ratify the Constitution and join the United States, Georgia had ceded those lands to the United States to be held in trust for a future state. Thus, from the Supreme Court's perspective in *Pollard's Lessee*, title to the tidal lands at issue had passed from one state to another under the trusteeship of the United States.

The lands at issue in *PPL Montana*, like all of the land in the state, were part of the Louisiana Purchase and thus originally owned by the United States without previously having been within the jurisdiction of, or owned by, any state. As history demonstrates, the United States was free to sell those lands, as it did under the Homestead Act (albeit it for bargain-basement prices), or to grant lands, as it did in massive amounts to the railroads. But there was one exception: Because of the equal-footing doctrine, the United States could not sell or grant lands under ''rivers really navigable.'' Those lands were held by the United States in trust for the future states. Thus, when Montana became a state in 1889, title to lands underlying actually navigable rivers passed to the state. All other lands not previously granted to private parties or to the state at the time of statehood, including lands under rivers and streams not ''really navigable,'' remained the property of the United States.

Consistent with the original common-law principle from the time of Lord Hale, Montana has been free, since gaining title to submerged lands at statehood, to retain or dispose of those lands as it chooses, subject to its (and its grantees') public trust responsibilities discussed below.[13] The United States, like any other property owner in the state, is similarly free to lease or transfer its interests in its lands.

Under Montana property law, owners of land riparian to a non-navigable waterway own to the middle of the stream or river.[14] Of course if a property extends to both sides of a non-navigable waterway, the owner holds title to the entire bed. Accordingly, when the United States or any other property owner conveys riparian land to another party, Montana law presumes that title to submerged lands to the center of the stream or river is included, unless those lands are expressly excluded in the conveyance.

[13] See *infra* at text accompanying notes 50–57.

[14] Mont. Code Ann. §70–16–201 (2011).

Thus, the alternative answers to the ''who owns the submerged lands'' question in the *PPL Montana* case were three:

1. The State of Montana owns them if the river at that location was ''really navigable'' at the time of statehood;
2. The United States owns them if the river was not navigable at the time of statehood; or
3. The lands are owned by a private party if either Montana or the United States had previously conveyed title.

The third option did not appear to present itself in the case, although the state's theory, if upheld, would have put in doubt the validity of many long-held private titles in properties on which taxes had been paid for decades. This would have been a particularly relevant issue on the Madison River where most deeds to riparian properties indicate ownership to the center of the river with property taxes assessed accordingly.

No one disputed that significant portions of the Missouri River were navigable when Montana became a state in 1889. The first steamboat arrived in Fort Benton from St. Louis in 1860, and the river served as a major highway for commerce until the transcontinental railroads displaced Missouri River steamboat operations by 1890.

But a few miles upstream from Fort Benton begins a series of waterfalls extending over a distance of 17 miles. It must have been hard for Montana's counsel to argue with a straight face that this stretch was really navigable at statehood or at any time since. In describing the first of these falls in 1805, Meriwether Lewis wrote: ''[T]he whole body of water passes with incredible swiftness . . . over a precipice of at least eighty feet.''[15] Moving upstream from the Great Falls (actually 87 feet) the Lewis and Clark expedition encountered Crooked Falls (19 feet), Rainbow Falls (48 feet), Colter Falls (7 feet), and Black Eagle Falls (26 feet). It took the expedition about a month to portage around these waterfalls. There is no evidence that anyone has ever tried to navigate the several falls, even in a barrel.

Five PPL hydroelectric facilities are located on the reach of the Missouri described above. Two more are located upstream in the

[15] Meriwether Lewis & William Clark, The Journals of Lewis and Clark 136 (Bernard DeVoto ed.) (1981).

Stubbs Ferry stretch of the river. The evidence with respect to navigation on the Stubbs Ferry stretch of the upper Missouri was that two steamboat companies had tried and failed to establish commercial navigation between Canyon Ferry (upriver from the PPL dams) and the city of Great Falls (upriver from Black Eagle Falls). In addition, PPL operates two dams on the Madison River, which, along with the Gallatin and Jefferson Rivers, combine near the town of Three Forks to form the Missouri. The Madison is a rugged mountain river that the state acknowledged had never been commercially navigated, save for an unsuccessful effort to float logs from forest to mill. But the state urged that present-day recreational navigation of the Madison is evidence that the river could have been navigated at the time of statehood.

Finally, PPL operates a hydroelectric facility on the Clark Fork River, a tributary of the Columbia. An 1891 Army Corps of Engineers study depicted the river as ''a mountain torrential stream, full of rocks, rapids, and falls'' and described the current location of PPL's facility (Thompson Falls) as ''a complete obstruction to navigation,'' declaring the river ''utterly unnavigable, and incapable of being made navigable except at enormous cost.''[16] A 1910 federal district court recognized ownership by PPL's predecessor, declaring the relevant stretch of the river non-navigable for purposes of title.[17]

Nonetheless, Montana insisted that, at the sites of all 10 PPL facilities, the three rivers were navigable at the time of statehood and that title therefore rested with the state. Because it was implausible for the state to claim that any of the rivers were ''really navigable'' at the specific locations in question, the only way the state could succeed was to persuade the Supreme Court that navigability should be determined for each river over its entire reach, or at least over the entire stretch downstream from the high point of proven historic navigability. After all, the Great Falls reach of the Missouri extends over 17 miles with waterfalls ranging in height from 7 to 87 feet. In other words, Montana objected to a definition of navigability that would result in segmentation of the river into intermixed navigable and non-navigable stretches.

[16] Brief for Petitioner at 19–20, 132 S. Ct. 1215 (2012) (No. 10-218).

[17] Steele v. Donlan, In Equity No. 950 (D. Mont. July 14, 1910).

Montana's Legal Arguments

Montana's decision to lay claim to the lands underlying PPL's facilities was inspired by a 2003 lawsuit brought in federal court by parents of Montana schoolchildren. Their claim was that the submerged lands in question belonged to the state and were part of Montana's school trust lands. Obviously, their objective was to increase revenues, in the form of rents, to the public schools. The state joined the lawsuit and, for the first time, sought rents from PPL. The case was dismissed for a lack of diversity jurisdiction.[18]

PPL then filed suit in state court against Montana seeking to enjoin the state from charging rents for use of the riverbed. Montana counterclaimed for a declaration that the state owned the land pursuant to the equal-footing doctrine and was therefore entitled to rental payments from PPL. The trial court granted a summary judgment to the state and ordered PPL to pay $40,956,180 in rent for the period 2000 to 2007. A divided Montana Supreme Court affirmed the lower court ruling.[19]

Although revenues generated by PPL rental payments on the ten sites—roughly $5 million per year—would do little to alleviate the challenges of funding Montana's $1.5 billion annual public schools budget, the state was, no doubt, looking ahead to a much larger pay day. Montana has thousands of miles of rivers and streams that the state considers navigable, and on all of them are hydro generation, irrigation, and other facilities for which the state could charge rent if its theory in *PPL Montana* were upheld. The implications of a ruling in favor of Montana would have been even greater nationally, given that every state would have been able to levy similar rents on submerged lands previously thought to be private or U.S. property.

Of course, Montana did not pitch its argument to the Supreme Court on the basis of prospective revenues for the struggling public schools—although the need could have been easily demonstrated. Contrary to Karl Marx and those who ''occupied'' Wall Street and cities across the nation, need (nor want nor envy) does not establish rights.

[18] Dolan v. PPL Montana, LLC, No. 9:03-cv-167 (D. Mont. Sept. 27, 2005).

[19] Justice James A. Rice dissented because ''the Court has erred in its analysis of the law governing title navigability.'' PPL Montana, 229 P.3d at 462.

But Montana did urge other, less evidently self-serving, moral and policy reasons for the Court to recognize title in the state. In its brief to the Supreme Court, Montana described the three rivers as ''home to some of the most prized trout fishing in the world,'' and wrote that the Great Falls, which appear on the ''official seal of Montana''[20] have been ''a symbol of Montana since territorial times.''[21] The state quotes Meriwether Lewis's description of the Great Falls as ''the grandest site I ever beheld,''[22] Norman Maclean for the proposition that ''prized fishing'' like that on the Madison River is ''something close to 'religion' in Montana,''[23] and Justice Oliver Wendell Holmes's statement that ''a river is more than an amenity, it is a treasure.''[24]

All of this and more set forth reasons why the state might be the best owner of the submerged lands in dispute, but they are not legal reasons to conclude that the state actually owns them. The state, like any other property right claimant, must have demonstrable legal title. Determining the existence and scope of title requires reference to the controlling property laws, including what Justice Antonin Scalia described in *Lucas v. South Carolina Coastal Council* as ''background principles,''[25] and to the chain of title dating back to the first owner.

Montana did set forth some legal arguments in support of its title claim. The state contended that the court should recognize title in the state because no one had ever ''asserted title against the state.''[26] But that ignores the default rule of Montana property law that, absent an express grant or exclusion, title to riparian lands on non-navigable waterways extends to the center of the stream or river.[27]

By implication, Montana also argued that the background principle of the public trust doctrine supported a judicial finding of title in the state. But this argument reflects a misunderstanding of the

[20] Brief for Respondent at 1, 132 S. Ct. 1215 (2012) (No. 10-218).

[21] *Id*. at 52.

[22] *Id*. at 9.

[23] *Id*. at 14.

[24] *Id*. at 2.

[25] 505 U.S. 1003, 1029 (1992).

[26] Brief for Respondent, *supra* note 20, at 7.

[27] Mont. Code Ann. §70-16-201 (2011).

public trust doctrine. By ''background principles,'' Scalia meant only those general rules that have application to all property rights in a particular jurisdiction. So, for example, a Montana property owner has the right to exclude, but may be required to allow, access in the event of an emergency on his neighbor's property, or has the right to use his property as he chooses, except for uses that are a nuisance to his neighbors. These are not *ex post* limits on property rights. Rather they are part of the definition of the scope of rights attached to all properties of a particular character. Thus, background principles serve to define the sticks in the bundle of rights held, not to establish the existence of title.

Pursuant to the equal-footing doctrine, Montana gained title at the time of statehood to all lands under waters then navigable in fact. For this purpose, the extent of navigable waters established the geographic boundaries (like metes and bounds) of submerged land ownership in the state. At the same time, navigability defined the waters in which the public held a public trust right of navigation, commerce, and fishing. The background principle of the public trust doctrine provides default definitions of what can and cannot be done with properties so bounded. Though coincident at the time of statehood, state title in submerged lands under navigable waters and public rights of use in navigable waters did not need to remain coincident. Public rights could be neither diminished nor expanded, but the state could choose to dispose of submerged lands so long as the public rights were unaffected.

But Montana had a different idea. By linking the two doctrines, Montana sought to expand, at the expense of vested private rights, both state ownership of submerged lands and public rights in use of the state's waters. By conflating the equal-footing and the public trust doctrines, Montana was inviting the Montana Supreme Court to be as creative in its interpretation of the equal-footing doctrine as it had been two decades earlier in its public trust cases.[28] The Montana court was more than willing, concluding that ''navigability for title purposes is very liberally construed.''[29]

[28] See *infra* at text accompanying notes 50–57.

[29] PPL Montana, 229 P.3d at 438.

In its public trust doctrine cases, the Montana Supreme Court made clear that it was then prepared to change and adapt background principles to suit the state's changing policy objectives. Montana invited similar judicial flexibility in the *PPL Montana* case by linking its title claim to Montana's already transformed public trust doctrine. Defenders of the Montana public trust decisions and similar decisions rendered by courts in other states argue that such changes in background principles are part of the natural and necessary evolution of the common law. Critics, including this author, contend that such judicial alterations of fundamental principles of property law violate the Takings Clause of the Fifth Amendment to the U.S. Constitution. If state courts are free to modify background principles of property law and reassign title from one party to another, the Takings Clause becomes an empty promise. *Amici* in *PPL Montana* briefed the judicial takings argument,[30] but the issue was mooted by the Supreme Court's rejection of the Montana Supreme Court's amendment to the long-standing navigability for title definition. Judicial takings remain an important issue, however, in the context of ongoing judicial modifications of the background principles of property law.

Montana also sought to ''import into the title context''[31] the test first applied in *The Daniel Ball*[32] for determining the scope of congressional power to regulate navigation under the Commerce Clause. There the question is whether the river ''forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried . . . in the customary modes in which such commerce is conducted by water.''[33] Relying on *The Montello*[34] in which the court found that portages did not necessarily interrupt a ''continued highway'' of commerce, Montana argued that the Great Falls portages did not make those segments of the Missouri nonnavigable. It was another attempt by Montana to change the long-established navigability-for-title test in a way that would allow the state to claim title to more submerged lands.

[30] Brief for the Montana Farm Bureau and the Cato Institute as Amici Curiae in Support of Petitioner, 132 S. Ct. 1215 (2012) (No. 10-218).

[31] PPL Montana, 132 S. Ct. at 1232.

[32] 77 U.S. 557 (1870).

[33] *Id*. at 563.

[34] 87 U.S. 430 (1874).

The Supreme Court's Ruling

A unanimous Supreme Court—including even the avid fisherman Justice Scalia—properly ignored Montana's paean to blue-ribbon trout streams and scenic wonders. With the discipline of well-trained property lawyers, the justices asked only what the law of title to submerged lands dictates with respect to rivers that are clearly not navigable-in-fact at the locations of PPL facilities. Without saying so, the Court dismissed the Montana Supreme Court's analysis for what it is: a judicial amendment of the law of title to submerged lands resulting in an uncompensated expropriation of lands owned by the United States and private parties. It did not matter if Montana offered persuasive moral and public-interest reasons for a change in the law. By whatever name it is called, Montana was asserting title to that which it did not own. It was looking to the courts to ratify a blatant land grab.

The problem with Montana's core argument against segment-by-segment determination of navigability is that there is Supreme Court precedent directly contrary. As Justice Kennedy wrote for the unanimous court, ''The primary flaw in the reasoning of the Montana Supreme Court lies in its treatment of the question of river segments and overland portage.''[35] In *United States v. Utah*, the Court stated that ''[e]ven where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends.''[36] The Court emphasized the importance of determining ''the exact point at which navigability may be deemed to end.''[37]

Although the Montana Supreme Court had dismissed the segment-by-segment approach approved in *Utah* and several other U.S. Supreme Court cases as ''a piecemeal classification of navigability,'' Justice Kennedy emphasized the practical benefits of segmentation where rivers ''traverse vastly different terrain and the flow of which can be affected by varying local climates.'' He also noted that ''[a] segment approach . . . is consistent with the manner in which private parties seek to establish riverbed title,'' and observed that the claim

[35] 132 S. Ct. at 1229.

[36] 283 U.S. 64, 77 (1931).

[37] *Id*. at 90.

that ''segmentation is inadministrable'' is belied by the fact that the state ''managed to divide up and apportion the underlying riverbeds for purposes of determining their value and corresponding rents owed by PPL.'' ''The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded,'' concluded Kennedy.[38]

The Court also rejected Montana's effort to import into the navigability-for-title test the unrelated test for determining ''the navigable waters of the United States'' over which Congress has regulatory power under the Commerce Clause. Pointing out that the question of the scope of Congress's Commerce Clause authority addressed in *The Montello* (on which the Montana court relied) is entirely different from the question of the extent of state title to submerged lands at issue in *PPL Montana*, Justice Kennedy wrote that ''[t]he reasoning and the inquiry of *The Montello* does not control the outcome where the quite different concerns of the riverbed title context apply.''[39]

Although the unanimous Court got the controlling law correct, Justice Kennedy regrettably and inadvertently contributed to a growing confusion in the legal literature and case law by suggesting that ''[a] key justification for sovereign ownership of navigable riverbeds is that a contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public's right to use the waters as a highway for commerce.''[40] In this statement Kennedy gave at least some credence to Montana's linking of the equal-footing and public trust doctrines. But it is not true that, absent state ownership of submerged lands, the public's right of use in navigable waters could be obstructed by private improvements. Even when beds of navigable rivers are privately owned, which they sometimes are, the public right of use is unaffected. Kennedy's suggested justification for the segment-by-segment approach confuses two distinct doctrines, one relating to title to lands underlying navigable waters and the other relating to public rights of use in navigable waters. The former—the equal-footing doctrine—is that on which the decision in *PPL Montana* turned. The latter—the public

[38] PPL Montana, 132 S. Ct. at 1229.

[39] *Id*. at 1232.

[40] *Id*. at 1230.

trust doctrine—is, as Kennedy himself later recognizes, irrelevant to the case.

Public rights of use in navigable waters do not exist because the state owns the riverbed. Instead, they operate as limits on the state's use of those riverbeds when the state is the owner. States are free to alienate their interest in submerged lands under navigable waters so long as the grant does not create obstacles to the public trust rights of commerce, navigation, and fishing. A private grantee, who acquires nothing more than what the state had, is subject to the same public rights of use in navigable waters. In other words, whether submerged lands *under navigable waters* are owned privately or by the state ''the public's right to use the waters as a highway for commerce'' remains protected.

While ''conflict between private and public interests'' is probably reduced by having the initial assignment of right in the state, as Kennedy suggests, implying that the public right of use for particular purposes is linked to state ownership of submerged lands confuses these two distinct doctrines. Proving that a river was navigable in fact at the time of statehood establishes that the state had title when it became a state. It does not prove that the state still has title. What it does do is establish a prima facie, but not conclusive, case for current state title. A private claimant can overcome the prima facie case by offering proof of a grant from the state or of a grant made prior to statehood by any party then holding legal title. (As the Supreme Court ruled in *Pollard's Lessee*, a pre-statehood grant from the United States would not be valid because the United States only held title in trust for the future state.)

Proving that a river is navigable for the purpose of establishing a public right to engage in commerce, navigation, or fishing is conclusive as to the existence of the public right without regard to who owns the underlying lands. There is nothing the state or a private owner of submerged lands can do to overcome the limitations inherent in the existence of the public right. As will be explained below, the confusion of these two doctrines has led the Supreme Court astray in another case involving state expropriation of private property.[41]

[41] See *infra* at text accompanying notes 57–59.

Finally, the Supreme Court also found that the Montana court had ''erred as a matter of law in its reliance upon the evidence of present-day, primarily recreational use of the Madison River.''[42] Present-day uses could provide evidence of navigability for title, but only if it ''shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood.''[43] In this conclusion, as in its adherence to the ''well settled'' segment-by-segment approach, the Court was true to the minimal requirements of the rule of law. Changed public values and increased demands for public uses of Montana's waters might inform the state's public policies, but they could not justify divesting the United States or private parties of property rights dating, in many cases, from statehood.

Governments as Rent-Seeker

Though rent-seeking (in the economist's sense of that term) is usually associated with private interests seeking favor and advantage in the political process—as opposed to generating new wealth on their own—it applies to governments as well, particularly governments engaged in essentially proprietary activities. This is especially so in a federal system where there is competition among governments for limited revenue.

Like Montana's claim in *PPL Montana*, private rent-seeking almost always masquerades under the banner of legitimate and constructive policy objectives. One never hears advocates for particular legislation or litigants urging a particular interpretation of the law argue that the outcome they propose will serve their personal interests. No, they all purport to stand as disinterested advocates for the public interest or the rule of law. But when the state is the rent-seeker, as Montana was in *PPL Montana*, it often has an advantage relative to private rent-seekers. For private rent-seekers, success depends largely on political acumen, influence, and financial resources. Private rent-seekers, no less than true advocates for the public good, must score their victories in the rough-and-tumble of democratic politics. Government rent-seekers, on the other hand, have the considerable advantage of their coercive powers and their status as agent

[42] PPL Montana, 132 S. Ct. at 1233.

[43] *Id*.

for the public, which is why American governments are forbidden by the Fifth Amendment to the Constitution from using their otherwise legitimate powers to take private property.[44] The Takings Clause is a constraint on government rent-seeking.

It might be urged that what I have labeled government rent-seeking is really government acting in service to private rent-seekers, but uncounted examples of empire-building by government agencies belie the objection. Of course, if all government efforts to expand the influence and resources of government agencies are reduced to the private ambitions of government officials, the objection might stand—but doing so obliterates the useful and important distinction between public and private action.

Though no government official is blind to his or her personal interests, most take seriously their role as public servants. In the case of Montana's land/revenue grab at issue in *PPL Montana*, it is part and parcel of larger ambitions on the part of many Montana officials to promote their understanding of the public interest by expanding the state's control over the waters of the state. (More about those ambitions below.) In other words, we can assume the state's claims to proprietary title are well-intended. The issue was thus not whether it was in the public interest for Montana to have legal title to the submerged lands in question, but rather whether or not those claims were legally sound.

Creative Theories of State Title

Although Montana is among a few states leading the present-day charge to assert previously unfounded claims of state proprietary interests in water-related resources, there is earlier precedent for judicial support of governmental grabs of submerged lands. The most ambitious was undertaken by the United States during the Franklin Roosevelt and Truman Administrations. Coastal states had long claimed title to submerged land extending three miles from the shoreline—three leagues or 10.35 miles in the cases of Texas and Florida's Gulf Coast—and several states had leased the oil and gas rights in many of those lands. Interior Secretary Harold Ickes disagreed with the state claims, notwithstanding several Supreme Court

[44] The Fifth Amendment provides: ''nor shall private property be taken for public use, without just compensation.'' U.S. Const. amend. V, §1.

decisions that appeared to recognize state title, and authorized federal oil and gas leases in some of the same coastal waters. The United States then brought a lawsuit against the State of California claiming title to the three-mile zone also claimed by the state.

In *United State v. California*, a divided Supreme Court ruled in favor of the federal government, finding that the United States possesses ''paramount rights'' that supersede the ''bare legal title'' and ''mere property ownership'' of the states and their lessees.[45] A year later, a still-divided Court held for the United States in similar lawsuits against the states of Texas and Louisiana.[46] Outrage among the coastal states led Congress to pass legislation in 1952 to reverse those decisions.[47] The bill was vetoed by President Truman,[48] but the following year the Submerged Lands Act, recognizing state title to the submerged coastal lands, was passed and signed by President Eisenhower.[49]

Although they had been the target of this massive federal government land-grab in the name of higher national purposes, the states have not hesitated to appeal to the greater good in visiting similar attempts at expropriation upon their own property-holding citizens. Various legal theories, some arcane, have been relied upon to support state claims of title to lands generally thought to be private.

For example, after more than a century of what most owners of coastal property assumed was a right to exclude the public from dry-sand beaches adjacent to their properties, the Oregon Supreme Court ruled in 1969 that, pursuant to the English doctrine of custom, there is a public right of access to all dry-sand beaches along the entire Oregon coast.[50] Given the prior understanding of the law, it was not unreasonable for coastal property owners to believe that the decision effected an unconstitutional taking (not to mention a denial of due process to the thousands of property owners not represented in the case). But in a later case, the Oregon court held

[45] 332 U.S. 19 (1947).

[46] United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950).

[47] S.J. Res. 20, 82d Cong., 2d Sess. (1952).

[48] Veto message, 98 Cong. Rec. 6251 (1952).

[49] Submerged Lands Act of 1953, 43 U.S.C. § 1301 et seq. (1953).

[50] State ex rel. Thornton v. Hay, 462 P.2d 671 (Or. 1969).

that there was no taking because, whether or not the property owners were aware and notwithstanding the boundaries set forth in their deeds, the custom had operated to encumber private titles from the time of first acquisition.[51]

Thus, the key to the state's successful land grab was the importation (and misapplication) of a previously unrecognized doctrine to the effect that a court could hold that the claimed private rights never existed in the first place. From the state's perspective, this is far better than acknowledging private title and imposing a regulation mandating public access. That approach raises takings claims that will likely succeed given the physical occupation inherent in public access.[52] But there can be no unconstitutional taking if the state already has title to the property interest at issue.

The doctrine of custom had rarely surfaced in American law prior to the Oregon case and has not been relied upon since. But the strategy of asserting preexisting state title has remained the preferred approach to avoiding takings claims when water-related property rights stand in the way of public purposes. The most common doctrine relied upon to establish such preemptive state title is the aforementioned public trust doctrine, which the Montana Supreme Court was quick to embrace as a way to expand the state's controls over private uses of Montana's waters and submerged lands. In two cases applying the public trust doctrine, the Montana court effectively curtailed previously recognized private rights to exclude the public from submerged and riparian lands on over 170,000 miles of rivers and streams.[53] While the state gained no new revenues from this massive land grab, it did affect private values inherent in the right to exclude and avoid the budgetary burdens of compensating for the taking of private properties, had the state undertaken to mandate public access via regulation.

Given the Montana Supreme Court's previous enthusiasm for the public trust doctrine, it was not surprising that a majority of the

[51] Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994).

[52] Physical occupation constitutes a prima facie case of takings under the Fifth Amendment. Loretto v. Teleprompter Manhattan, 458 U.S. 419 (1982).

[53] Montana Coal. for Stream Access, Inc. v. Curran, 210 Mont. 38, 53, 682 P.2d 163, 171 (1984) and Montana Coal. for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984).

court endorsed the state's claim of title in the *PPL Montana* case. The method in both cases is similar. Dust off an old common-law doctrine, adapt it to modern circumstances, and reach a conclusion that denies the existence of rights that would otherwise conflict with pursuit of public purposes.

Until Professor Joseph Sax invited judges to ''liberat[e] . . . the public trust doctrine from its historical shackles,''[54] and the California Supreme Court took him up on the challenge in the *Mono Lake* case,[55] the public trust doctrine was important but had limited application. In a nutshell, it established a public right of access to navigable waters for purposes of commerce, navigation, and fishing. In England, navigable waters were limited to those affected by the tides. In the United States, navigable waters were held to include non-tidal waters that are ''navigable in fact.'' The practical effect of the historic doctrine was that neither the state nor private owners of submerged and riparian lands could use those lands in a manner that obstructed these public uses. Owners of submerged and riparian lands had no complaint about these limits on their right to exclude because their title was always encumbered by this public right of use.

Sax saw in the doctrine an opportunity to greatly expand public rights of use and access if the courts would expand either or both the affected waters and the protected uses. That is exactly what the Montana court did in its public trust decisions. It extended the affected waters from those that are navigable in fact to virtually all waters of the state, and it expanded the protected uses to include every conceivable recreational activity.

Although one U.S. Supreme Court decision has been the ''lodestar''[56] for advocates of an expansive interpretation of the public trust doctrine, the Court has rendered few decisions on the legal content and scope of the doctrine because, as the *PPL Montana* opinion states, it raises questions of state, not federal, law. But in one of its rare opinions addressing the public trust doctrine, the Supreme

[54] Joseph L. Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U.C. Davis L. Rev. 185 (1970).

[55] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (1983).

[56] Joseph Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 89 (1970).

Court gave Montana reason to believe that its land grab in *PPL Montana* might be successful.

As in the *PPL Montana* case, the question in *Phillips Petroleum v. Mississippi* was whether the state had legal title to particular submerged lands.[57] The lands in question were non-coastal but still affected by the tides. Phillips Petroleum held record title (dating back to pre-statehood Spanish land grants) to the lands in dispute and had long paid taxes on those lands. Reminiscent of the federal effort in the 1940s to commandeer submerged coastal lands claimed by the states, Mississippi issued oil and gas leases on the lands to which Phillips Petroleum held record title. Like Montana in the *PPL Montana* case, Mississippi was in search of a new revenue source.

As it had in *United States v. Texas* and *United States v. Louisiana*, the Supreme Court ruled for the expropriator, this time on the theory that Mississippi had acquired title of all lands affected by the tides and that its public trust responsibility prevented it from recognizing the pre-statehood grants of private title. As Justice Kennedy did, before correcting himself, in *PPL Montana*, the *Phillips Petroleum* Court confused the equal-footing and public trust doctrines.

In *PPL Montana*, the State of Montana argued that the public trust doctrine is ''embodied in the constitutional equal-footing doctrine.''[58] In ruling for the State of Mississippi in *Phillips Petroleum*, the Supreme Court described as ''the 'settled law of this country' that the lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union.''[59] The first statement is clearly incorrect. The latter is true only if one understands the term ''public trust'' to be the general trust obligation a state has to the public rather than the specific trust obligations of the public trust doctrine.

The equal-footing doctrine guarantees that new states will enter the union with title to all lands under navigable waters then held or previously granted by the United States. It does not guarantee that new states will acquire title to submerged lands then held by private parties pursuant to grants made by the United States' sovereign predecessors. Thus, because the equal-footing doctrine gave

[57] Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988).

[58] Brief for Respondent, *supra* note 20, at 53.

[59] Phillips Petrol., 484 U.S. at 479.

the State of Mississippi no basis for claiming title to lands granted by Spain, the state appealed to the public trust doctrine as authority for asserting title in the tidelands from which it sought to extract royalties. But the public trust doctrine has nothing to do with title. Rather, it operates as an encumbrance on title to lands beneath navigable waters, whether the owner is the state or some other party.

Dissenting in *Phillips Petroleum*, Justice Sandra Day O'Connor called the state's claim ''belated and opportunistic.''[60] The same can be said of Montana's claims in *PPL Montana*. One might even call it state rent-seeking.

Conclusion

Notwithstanding that the Fifth Amendment's Just Compensation Clause has been narrowly construed by the courts for decades, many states, including Montana, have taken sometimes extreme measures to circumvent potential takings claims. This has been particularly true with respect to regulation of water and water-related resources. There is clear recognition by state officials that regulations limiting the exercise of water rights and the use of submerged lands might violate even the limited protections of private property currently enforced by the courts.

State and local governments possess clearly constitutional powers to achieve many of their public policy objectives: They can purchase lands from willing sellers or, where they seek to provide for a public use, they can use the eminent domain power to acquire lands from unwilling sellers. But both of these methods require expenditure of public resources and therefore taxation. Regulation pursuant to the police power is the only other alternative, but that approach invites takings challenges from affected property owners. Such challenges will be easily rebuffed if the states can successfully claim that they, not the private complainants, actually hold title to the affected resources.

That was Montana's position in *PPL Montana v. Montana*. Property owners and supporters of individual liberty and free markets should be pleased with the Supreme Court's unanimous ruling against such an audacious claim.

[60] *Id*. at 492.