

No. 18-1535

**In The
Supreme Court of the United States**

LETICA LAND COMPANY, LLC,

Petitioner,

v.

ANACONDA-DEER LODGE COUNTY, MONTANA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In its Petition for Writ of Certiorari, Letica Land Company, LLC, erroneously asserts that the Montana Supreme Court concluded that the government can avoid Fifth Amendment liability merely because it believed it had a right to use private property.

The question presented is:

Whether the Montana Supreme Court correctly affirmed the district court's application of the relevant factors developed by this Court to the specific undisputed facts regarding the County's temporary physical invasion under a claim of right, and correctly concluded that the County's conduct did not constitute a taking.

RELATED CASES

Letica Land Company, LLC, et al. v. Anaconda-Deer Lodge County, No. DV-12-24, Montana Third Judicial District Court, Deer Lodge County. Judgment entered Oct. 6, 2014.

Letica Land Company, LLC, et al. v. Anaconda-Deer Lodge County, No. DA-14-0780, Montana Supreme Court, 2015 MT 323, 381 Mont. 389, 362 P.3d 614. Opinion issued Nov. 17, 2015.

Letica Land Company, LLC, et al. v. Anaconda-Deer Lodge County, No. DV-12-24, Montana Third Judicial District Court, Deer Lodge County. Order on Cross Motions for Summary Judgment and Order Denying Plaintiff's Motion to Alter or Amend issued April 10, 2018. Judgment entered May 2, 2018.

Letica Land Company, LLC, et al. v. Anaconda-Deer Lodge County, No. DA-14-0780, Montana Supreme Court, 2015 MT 323, 381 Mont. 389, 362 P.3d 614. Opinion issued Feb. 5, 2019.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
RELATED CASES	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE PETITION.....	5
I. The Montana Supreme Court did not decide an important federal question in a way that conflicts with relevant decisions of this Court.....	5
II. The Montana Supreme Court correctly affirmed the district court's application of the relevant factors developed by this Court in analyzing whether the County's temporary physical invasion constituted a taking.....	9
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Arkansas Game and Fish Commission v. United States</i> , 568 U.S. 23 (2012).....	10, 11
<i>In the Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co. v. United States</i> , 799 F.2d 317 (7th Cir. 1986).....	3, 6, 7
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	10
<i>Langford v. United States</i> , 101 U.S. 341 (1879).....	3, 5, 6, 7
<i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528 (2005).....	10
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982)	10
<i>Nollan v. California Coastal Comm’n</i> , 483 U.S. 825 (1987).....	10
<i>Preseault v. United States</i> , 100 F.3d 1525 (Fed. Cir. 1996)	7
<i>Ridge Line, Inc. v. U.S.</i> , 346 F.3d 1346 (Fed. Cir. 2003)	8
OTHER AUTHORITIES:	
Sup. Ct. R. 10	4, 5
Sup. Ct. R. 10(c)	4

STATEMENT OF THE CASE

This case arises from a dispute over a public right-of-way known as Modesty Creek Road. The road consists of a lower and an upper branch, and had been used to access national forest land and pristine mountain lakes for over 100 years. App. 37-44. Relying on a legal opinion based on a review of county records, maps, surveys, and other evidence relating to historical use of the road, in 2012 the Anaconda-Deer Lodge County Commissioners voted to reaffirm Modesty Creek Road as a county road. App. 42.

After reaffirming the road, the County cut locks on two gates across the lower branch and removed a dirt berm from the upper branch. App. 3, ¶ 4. Shortly thereafter, Letica filed a complaint and sought a preliminary injunction seeking to prevent public use of Modesty Creek Road until a determination was made establishing the existence of a public right-of-way. After holding a hearing, the district court denied Letica's request for preliminary injunction, concluding that both branches of Modesty Creek Road were likely statutorily created county roads established by petition. App. 3, ¶ 5.

Upon discovering a Road Record book in August 2013, the County conceded that it could no longer rely on its position that the upper branch of Modesty Creek Road was a statutorily created county road, and would rely on public prescriptive easement. Letica filed another motion for preliminary injunction seeking to block access to the upper branch, which was denied by the court based on substantial credible evidence

supporting the existence of a public prescriptive easement over the upper branch. App. 43.

In May 2014 the district court conducted a five-day bench trial. At the conclusion of trial, the court also conducted a site view of Modesty Creek Road and the surrounding area. On October 6, 2014, the district court issued its 74-page Findings of Fact, Conclusions of Law and Order properly concluding, *inter alia*, the lower branch of Modesty Creek Road was statutorily created by petition and declared a county road in 1889, and the upper branch of Modesty Creek Road was established by a public prescriptive easement and was not extinguished by reverse adverse possession. Letica and McGee appealed. App. 43-44.

The Montana Supreme Court affirmed the district court's ruling that the lower branch is a county road created by petition in 1889. App. 52, 56, and 67. The court also assumed for purposes of analysis that the district court correctly found a public prescriptive easement had been established over the upper branch, but reversed the district court's determination that the easement had not been extinguished by reverse adverse possession. App. 56-67. The case was remanded for further consideration of Letica's takings claim. App. 67.

On remand, the parties filed cross motions for summary judgment. The district court granted summary judgment in favor of the County dismissing all of Letica's claims. In doing so, the district court properly analyzed the legal authority applicable to Letica's

takings claim, correctly applied the law to the undisputed facts, and correctly concluded that the County's temporary physical invasion of the upper branch of Modesty Creek Road pursuant to a claim of right did not constitute a taking. App. 18-32. Letica appealed.

The Montana Supreme Court affirmed the district court, concluding that it had correctly applied the fact specific complex balancing process established by this Court to the County's temporary physical invasion and correctly determined that such conduct did not constitute a taking. App. 6-8. Relying on this Court's decision in *Langford v. United States*, 101 U.S. 341 (1879) and the Seventh Circuit Court of Appeals' decision in *In the Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co. v. United States*, 799 F.2d 317 (7th Cir. 1986), the Montana Supreme Court correctly concluded that the County acted under a claim of right when it removed the dirt berm.

As the court explained, the basis for the County's claim of right was reasonable. Specifically, the County relied on county records, maps, surveys, and other evidence related to historical use of the road in reaffirming the upper branch. In addition, the County's claim of right was reinforced by the district court's denial of Letica's request for a preliminary injunction, concluding that the County was likely to succeed. App. 7. In fact, the County's claim of right was reasonable up until the Montana Supreme Court determined in November 2015 that the public prescriptive easement over the upper branch had been extinguished by reverse adverse possession. App. 56-67.

The court also agreed with the district court's determination that the record is devoid of any evidence that the County's temporary invasion of the upper branch damaged Letica's property or resulted in any significant burden or substantially interfered with Letica's use of its property. Viewing the evidence in the light most favorable to Letica, the court concluded that the district court did not err when it granted summary judgment in the County's favor, concluding that because a taking did not occur, and the upper branch was not damaged, Letica is not entitled to compensation under the United States or Montana Constitutions. App. 8.

Letica filed a petition for rehearing, claiming the decision overlooked this Court's controlling takings authority. In denying the petition, the Montana Supreme Court noted that it did not overlook a question presented by counsel that would have proven decisive to the case nor does the decision conflict with a statute or controlling decision not addressed. App. 70-71. Letica subsequently filed a Petition for Writ of Certiorari.



SUMMARY OF ARGUMENT

Letica's Petition for Writ of Certiorari should be summarily denied because compelling reasons do not exist for granting the Petition. Sup. Ct. R. 10. The Montana Supreme Court did not decide an important question of federal law in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

Letica argues that the Montana Supreme Court misinterpreted rules applicable to inverse condemnation claims and therefore applied the Fifth Amendment in a way that conflicts with this Court's decisions. As the Supreme Court Rules plainly state, a petition for writ of certiorari is rarely granted when the asserted error consists of an alleged misapplication of a properly stated rule of law. Sup. Ct. R. 10.

Contrary to Letica's conclusory assertions, the Montana Supreme Court correctly affirmed the district court's application of the factors established by this Court for analyzing temporary physical invasion takings, and correctly concluded that the County's conduct did not constitute a taking. Accordingly, Letica's Petition must be denied.



REASONS FOR DENYING THE PETITION

I. The Montana Supreme Court did not decide an important federal question in a way that conflicts with relevant decisions of this Court.

In its Petition for Writ of Certiorari, Letica argues that the Montana Supreme Court's reliance on this Court's decision in *Langford* is incorrect. Letica claims that the Montana Supreme Court misstated this Court's inverse condemnation jurisprudence and created a new statewide standard inconsistent with the Fifth Amendment.

To the contrary, the Montana Supreme Court squarely cited to the takings clauses of both the United States and Montana Constitutions in affirming the district court's decision. App. 6. The court properly affirmed the district court's application of the legal framework developed by this Court for analyzing whether the County's temporary physical invasion under a claim of right constituted a taking, and correctly concluded that the undisputed facts established that the County's conduct did not constitute a taking. App. 5-8.

In affirming the district court, the Montana Supreme Court correctly noted the distinction drawn by this Court in *Langford* between when the government takes private property for public use and asserts no claim of title and when the government asserts that it is dealing with its own property and recognizes no title superior to its own, such as the situation at issue in this case. App. 6 (citing *Langford*, 101 U.S. at 343-44). This Court stated that it was not prepared to deny that when the government takes private property for public use to which it asserts no claim of title, a taking may arise. *Langford*, 101 U.S. at 343. However, this Court explained that, "[i]t is a very different matter where the government claims that it is dealing with its own, and recognizes no title superior to its own." *Id.*, at 344.

The Montana Supreme Court correctly noted that the *Langford* decision was cited with approval by the Seventh Circuit Court of Appeals in *In the Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 799

F.2d 317, 325-26 (7th Cir. 1986). The Seventh Circuit examined the question of when “does an error ‘take’ property?” *Id.* The court described several situations and cited to the holding in *Langford*, stating: “when agents of the United States wrongly believe that the government owns some land, and occupy it under a claim of right, the occupation is a noncompensable tort rather than a taking.” *Id.* (citing *Langford v. U.S.*, 101 U.S. 341, 344-45 (1879)).

The Federal Circuit Court of Appeals’ decision in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), cited to by Letica, is not applicable to this case because it involves permanent physical occupation. That case involved whether the government’s conversion of a long unused railroad right-of-way to a public recreational hiking and biking trail under the Rails-to-Trails Act constituted a taking. *Id.*, 100 F.3d at 1529. The Federal Circuit analyzed the scope of the easement held by the railroad and the government’s mistaken belief regarding the status of the railroad’s easement after it was abandoned. *Id.*, 100 F.3d at 1549-52. The court noted that a paved path was established over Preseaults’ property, 60 feet from their front door, that was used regularly by up to 200 people an hour on warm weekends. *Id.*, 100 F.3d at 1550. The court concluded that when the city took possession of the Preseaults’ property, pursuant to a federal statute, a permanent physical taking occurred, for which the constitution requires just compensation to be paid. *Id.*, 100 F.3d at 1552.

The Federal Circuit Court of Appeals analyzed the distinction between a taking and a tort in *Ridge Line, Inc. v. U.S.*, in relation to Ridge Line’s inverse condemnation claim arising from increased storm drainage caused by construction of a USPS facility. 346 F.3d 1346, 1355-58 (Fed. Cir. 2003). The court stated that Ridge Line’s inverse condemnation claim invokes a two-part analysis because “[i]nverse condemnation law is tied to, and parallels, tort law.” *Id.*, 346 F.3d at 1355 (citation omitted). “First, Ridge Line must establish that treatment under takings law as opposed to tort law is appropriate under the circumstances.” *Id.* The tort-taking inquiry “requires consideration of whether the effects Ridge Line experienced were the predictable result of the government’s action, and whether the government’s actions were sufficiently substantial to justify a takings remedy.” *Id.*

The court in *Ridge Line* went on to state that “not every ‘invasion’ of private property resulting from government activity amounts to an appropriation.” *Id.* “The line distinguishing potential physical takings from possible torts is drawn by a two-part inquiry.” *Id.* “First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the ‘direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.’” *Id.* (citations omitted). “Second, the nature and magnitude of the government action must be considered.” *Id.*, at 1356.

In this case, the County did not intend to invade private property. Based on county records, maps, surveys, and other evidence regarding historical use of the road, the County believed it owned Modesty Creek Road. The nature and magnitude of the County's actions in cutting locks on two gates across a county road and removing a dirt berm that posed a safety hazard was minimal and had no impact on Letica's use of the property.

The Montana Supreme Court correctly concluded that the district court properly applied the factors established by this Court to the undisputed situation-specific facts and correctly concluded that reasonable minds cannot differ, no taking occurred. App. 18-32. The district court also properly analyzed Letica's tort claims and correctly concluded that since Letica failed to provide any genuine issue of material fact or legal authority in support of such claims, the undisputed facts established that the County is entitled to judgment as a matter of law. App. 32-33; App. 8.

II. The Montana Supreme Court correctly affirmed the district court's application of the relevant factors developed by this Court in analyzing whether the County's temporary physical invasion constituted a taking.

Just as it had before the district court and the Montana Supreme Court, Letica continues to refuse to acknowledge that this Court has established different standards in its takings jurisprudence for analyzing

permanent physical occupation, regulatory, conditional use permit approval, and temporary physical invasion takings. Although Letica did not dispute that this case involved a temporary physical invasion, it chose not to cite to this Court's temporary taking line of cases and did not present any genuine issue of material fact concerning the factors applicable to a temporary physical invasion.

Instead, Letica relied solely on standards applicable to permanent takings. App. 19-21. As a result, the takings cases cited by Letica are not applicable: *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (whether United States could require public access to private pond as a result of improvements to marina rendering it a navigable water); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (suit challenging condition to approval of rebuilding permit that owners provide public access across property); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (suit challenging Hawaii statute limiting rent that oil companies could charge dealers leasing company-owned service stations).

As this Court stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), contrary to permanent physical occupations, temporary invasions are “**subject to a more complex balancing process to determine whether they are a taking.**” *Loretto*, 458 U.S. at 435, fn. 12 (emphasis added). In *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012), this Court examined its takings jurisprudence and reiterated the standard for determining whether a temporary physical invasion is a

taking, and stated the relevant considerations include: 1) the time or duration of the physical invasion, 2) the degree to which the invasion is intended or is the foreseeable result of authorized government action, 3) the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use, 4) severity or substantiality of the interference, and 5) causation of damages. *Id.*, 568 U.S. at 522-23.

Letica presented no evidence that the public's temporary use of the upper branch to access national forest land or mountain lakes interfered with its use and plans for its property. It is undisputed that the character of the land remained the same – the public merely temporarily resumed using a road that had been in existence for decades. Moreover, Letica did not present any evidence that the County's temporary physical invasion of the upper branch interfered with its reasonable investment-backed expectations regarding the land's use, substantially interfered with its use, or caused any damages. App. 8. Accordingly, the Montana Supreme Court properly affirmed the district court's application of the relevant factors established by this Court to the County's temporary physical invasion of Modesty Creek Road, and correctly concluded that it did not constitute an unlawful taking. App. 7-8; App. 18-32.



CONCLUSION

Letica failed to establish that the Montana Supreme Court's decision conflicts with relevant decisions of this Court. Letica merely disagrees with the way in which the Montana Supreme Court applied the relevant decisions of this Court to the facts of this case. Letica's disagreement, however, is not sufficient to satisfy the standard necessary for granting a Petition for Writ of Certiorari. Accordingly, Letica's Petition for Writ of Certiorari should be summarily denied.

July 11, 2019.

Respectfully submitted,

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