



Montana Legislative Services Division
Legal Services Office

March 5, 2012

To: Legislative Finance Committee

From: Julie Johnson, LSD Legal Staff

Re: PPL Montana, LLC v. Montana, 565 U.S. __ (2012).

In March 2010, the Montana Supreme Court ruled that PPL Montana (PPL) was responsible for paying the State of Montana for its use of Montana's riverbeds in its hydroelectric facilities and affirmed an award of approximately \$41 million to the State from PPL for back rents from 2000-2007. The Montana Supreme Court's decision hinged primarily on its conclusion that the stretches of rivers (Missouri, Madison and Clark Fork Rivers) upon which PPL's dams are located were "navigable" at the time of Montana's statehood. As part of the test, the Montana Supreme Court determined that river stretches with only short interruptions of navigability were still "navigable" for purposes of establishing title. Accordingly, the Montana Supreme Court held that the State had title to those riverbeds at the time of statehood, and having title, it could assess rent to those using those riverbeds. PPL appealed to the United States Supreme Court and it accepted the case.

On February 22, 2012, the United States Supreme Court reversed the Montana Supreme Court's decision and remanded the case back to the state appellate court for further proceedings consistent with its ruling. The U.S. Supreme Court concluded that the Montana Supreme Court had erred in its conclusion that the stretches of riverbeds in question were navigable at the time of statehood. The U.S. Supreme Court explained that in determining whether a river was navigable at the time of statehood, the Montana Courts should have considered the rivers in question on a *segment-by-segment* basis. This means that each section of a river is viewed as a discrete, identifiable segment, which must be navigable "in fact." For example, the U.S. Supreme Court focused on the section of the Missouri River portion located near Great Falls and the fact that during the days of Lewis and Clark, well before statehood, the party had to portage their boats and gear instead of using the river to travel. Given the that the falls could not be navigated, and required portage around, the U.S. Supreme Court concluded that those segments of the Missouri River were not navigable in fact.

On remand, the Montana Supreme Court is to consider "the relevant evidence in light of the principles" announced in the U.S. Supreme Court's ruling on how navigability is determined. Application of the principles in the U.S. Supreme Court decision, however, guarantees that the \$41 million award will be reduced, by what sum cannot be estimated presently. As a side note, the Department of Natural Resources and Conservation does not anticipate that the U.S. Supreme Court's ruling will affect the current lease payments from Avista and Pacificorp.