



Montana Legislative Services Division
Legal Services Office

Date: September 28, 2011
To: Legislative Finance Committee
From: Jaret Coles, Legislative Staff Attorney
RE: Status of PPL Montana, LLC v. Montana

SUMMARY

PPL Montana, LLC v. Montana, 2010 MT 64, 355 Mont. 402, 229 P.3d 421, is still an active case and there is continued uncertainty as to when the litigation will end. As it stands, the United States Supreme Court has decided to review the case and oral argument is set for December 7, 2011. The decision to review a case is an extremely rare event.

Based on correspondence from the attorneys representing the State of Montana, a decision is expected sometime between April and June of 2012. If the United States Supreme Court affirms the decision of the Montana Supreme Court, then the case would end. However, the United States Supreme Court could also reverse and remand the case to the Montana courts. If a remand occurs it is difficult to predict with any accuracy how long the case would last, and a legal analysis would need to be performed at that time by reviewing the opinion. A timeline of major events in the litigation is presented below in order to give this committee an idea of how long a case can take to go through the system.

If the litigation is still pending when the 2013 Legislative Session starts, the Legislature may desire to appropriate any potential proceeds in a subsequent appropriations bill. Based on the passage of Senate Bill No. 410 (2011), any recovered funds from the litigation are to be deposited into a state special revenue account. The money in the account is to be used for land purchases subject to offsetting sales of an equal amount of land, while interest on the account is to be deposited in the guarantee account. The Legislature appropriated the proceeds from this state special revenue account in House Bill No. 2 (2011), but that appropriation expires at the end of fiscal year 2013.

Additionally, in the event the state is not successful in the litigation, other power producers could stop paying rent for power facilities or modify existing contracts. Both Avista and PacifiCorp entered into settlement agreements with the State of Montana. The agreements have provisions that provide for a reduction in rents or the total elimination of rent, depending on how navigability for title purposes is determined by the courts. Also, as it stands, it is my understanding that PPL is not paying rent.

TIMELINE OF MAJOR EVENTS

- ◆ **Future Event -- April 2012 - June 2012:** The United States Supreme Court is expected to issue a decision. Potential outcomes include: (1) a reversal of the Montana Supreme Court decision with a remand to the Montana Supreme Court to apply a different test for determining title navigability (*i.e.*, a loss by the state); or (2) the Montana Supreme Court is affirmed (*i.e.*, a win by the state).
- ◆ **September 12, 2011:** The United States Supreme Court set the case for oral argument on December 7, 2011.
- ◆ **September 7, 2011:** The United States filed a brief recommending that the Montana Supreme Court be reversed and that the case should be remanded to the Montana courts for further proceedings. This was a change in position from the brief filed by the United States on May 20, 2011.
- ◆ **August 31, 2011:** PPL filed a brief arguing that the United States Supreme Court should reverse the Montana Supreme Court and remand the case to the Montana courts to apply the correct federal test for determining title navigability.
- ◆ **July 14, 2011:** The United States Supreme Court extended Montana's deadline to file a brief to October 27, 2011.
- ◆ **June 20, 2011:** The United States Supreme Court granted PPL's petition for *writ of certiorari*. The question that will be reviewed by the court was phrased as follows: "Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?"
- ◆ **June 16, 2011:** The Justices of the United States Supreme Court met in conference to discuss whether to accept the case.
- ◆ **May 20, 2011:** The United States filed a brief recommending that the United States Supreme Court should not review the case.
- ◆ **May 9, 2011:** Governor Schweitzer signed Senate Bill No. 410 (2011), which directs any recovered funds from the litigation to a state special revenue account. Any money deposited in the account is to be used for land purchases that are subject to offsetting sales of an equal amount of land, while interest on the account is to be deposited in the

guarantee account.

- ◆ **November 1, 2010:** The United States Supreme Court invited the Acting United States Solicitor General to express the views of the United States.
- ◆ **October 1, 2010:** Montana filed a brief in opposition to review by the United States Supreme Court.
- ◆ **August 12, 2010:** PPL asked the United States Supreme Court to review the case by filing a petition for *writ of certiorari*.
- ◆ **March 30, 2010:** The Montana Supreme Court determined that title to the riverbeds of the Missouri, Clark Fork, and Madison Rivers passed to Montana when it became a state in 1889. As part of the decision, the court upheld the District Court's methodology of calculating damages, and PPL was ordered to pay approximately \$41 million (plus interest) in compensatory damages.
- ◆ **September 16, 2009:** The Montana Supreme Court received oral argument.
- ◆ **June 13, 2008:** The First Judicial District Court of Montana issued an opinion in favor of the state and determined that it is entitled to compensatory damages of approximately \$41 million for improper use of the riverbed from 2000-2007.
- ◆ **October 2007:** The First Judicial District Court of Montana conducted a bench trial.