



Montana Legislative Services Division

Legal Services Office

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DATE: October 12, 2010

TO: LFC State Land Subcommittee

FROM: Jaret Coles, Staff Attorney

RE: October 13, 2010, Meeting – Subject Topics for Discussion

The Legislative Finance Committee (LFC) State Land Subcommittee will meet on October 13, 2010, at 10 a.m. to discuss LFC options as they pertain to the Montana Supreme Court's decision in *PPL Montana, LLC v. State*, 2010 MT 64. The last subcommittee meeting was held on June 25, 2010, and the committee was involved in a discussion pertaining to whether the Board of Land Commissioners (Land Board) has authority to purchase land using proceeds from the approximately \$41 million (plus interest) in compensatory damages from the *PPL Montana* decision.

This memorandum summarizes the status of the *PPL Montana* case in the United States Supreme Court and provides potential LFC options. Essentially, the Court's decision on whether to hear the case should be available on the morning of November 1, 2010. The Land Board is currently scheduled to meet on November 15, 2010, and the LFC meets on November 16, 2010. Consequently, the Land Board could pass a resolution to purchase land prior to the November LFC meeting.

UNITED STATES SUPREME COURT

As this subcommittee is aware, PPL Montana, LLC, filed a petition for a *writ of certiorari* in the United States Supreme Court on August 12, 2010. Three *amici curiae* briefs were filed on September 15, 2010, by Edison Electric Institute, the Montana Water Resources Association, and the Montana Farm Bureau Federation. The State of Montana then filed a brief in opposition to the petition for a *writ of certiorari* on October 1, 2010, and PPL Montana is likely to file a reply brief. According to Montana Solicitor General Anthony Johnstone, the United States Supreme Court is likely to determine whether the case will be accepted on October 29, 2010, and the public will be made aware of that decision on the morning of November 1, 2010, via the United States Supreme Court website. In the event the Court does not decide whether to accept the case

on October 29, 2010, it meets again on November 5, 2010. After the Court meets, any of the following things can happen:

- 1) The Court can accept the case by granting the petition for a *writ of certiorari*. In the event this occurs, the Court could hear the case early next year and a decision could be issued by next June.
- 2) The Court can deny PPL Montana's petition, the case would be over, and the State of Montana would receive the approximately \$41 million (plus interest from date of the district court judgment).
- 3) The Court could ask the United States Solicitor General to comment, which would delay the decision on whether to accept the case.

As a practical matter, a petition for a *writ of certiorari* is rarely granted. However, according to a recent article in the *New York Times* over 40% of the cases the United States Supreme Court has decided to hear have a corporation on one side, which is higher than normal.¹ Accordingly, there is no way to predict what will happen.

FURTHER ACTION REQUIRED BY THE LAND BOARD

On May 17, 2010, the Land Board adopted a resolution entitled Resolution of Montana Board of Land Commissioners for Disposition of Award of Compensatory Damages in *PPL Montana, LLC v. State of Montana* and Preliminary Approval for Acquisition of Lands to Be Held in Trust. Paragraphs three and four of the resolution provide as follows:

3. Directs that when the judgment in the litigation is paid by PPL Montana, the entire amount of the compensatory damages, including all postjudgment interest, be deposited in a State Special Revenue Fund under M.C.A. §17-2-102(1)(b)(1)[sic], with instructions to invest the fund with the State Board of Investments and retain all earnings from the investment. The principal and all interest earned on the investment of the fund is to be available consistent with M.C.A. §17-8-101, for the restricted purpose of the acquisition of lands to be held in trust for the common schools beneficiaries by the Board of Land Commissioners. This special revenue fund is secured for the public land trust managed by the Board from non-state, non- federal money, from the judgment entered by law in PPL Montana v. State, 2010 MT 64.

¹ See Editorial, *First Monday*, N.Y. Times, Oct. 4, 2010, at A26, available at http://www.nytimes.com/2010/10/04/opinion/04mon1.html?_r=2&hp

4. Directs the disbursement of compensatory damages from the special revenue trust account will be made *only upon final approval of the Board of Land Commissioners* for the acquisition of additional lands to be held in trust for the support of education for common schools. (emphasis added).

The Land Board's resolution provides that final approval of the Land Board is required before the acquisition of additional land. As such, the Land Board needs to meet before any land is purchased. The next Land Board meetings are scheduled for October 18, 2010, and November 15, 2010. Additionally, the LFC meets again on November 16, 2010.

LFC OPTIONS

The LFC has at least four options at this stage, including:

1. Direct staff to pursue legal action (explained in a June 10, 2010, legal opinion²);
2. Direct staff to draft a committee bill addressing LFC concerns (brought forward as a potential option by LFC members on June 29, 2010);
3. Continue negotiations with the Land Board and Land Board Staffers (process started on June 15, 2010³); or
4. Do nothing.

I will cover these options at the subcommittee meeting on October 13, 2010. Additionally, the following is a summary of points to consider.

Legal Action.

The option of legal action was identified back in June of this year, and the LFC wrote a letter to the Land Board on June 15, 2010, "in an attempt to resolve the differences in legal analyses regarding the disposition of Pennsylvania Power and Light compensatory damages." The letter mentioned further that a "disagreement between branches of government that leads to court action is best avoided."

In the event the LFC passes a motion to pursue legal action, a variety of choices would need to be made during the process and potentially during the Legislative Session. The first choice would be whether to pursue the action in a District Court or the Montana Supreme Court. Additionally, as part of the legal action the LFC would need to consider filing an injunction and potentially a temporary restraining order in order to stop any anticipated purchases. There is also

² A copy of this memorandum is available on line at:

<http://www.leg.mt.gov/content/Publications/fiscal/interim/financemty-june2010/2010-06-09-PPL-legagl-opinion.pdf>

³ A copy of the LFC letter to the Land Board is available on line at:

<http://www.leg.mt.gov/content/Publications/fiscal/interim/financemty-june2010/Land%20Board.pdf>

the issue of whether the LFC has standing in court to pursue a lawsuit. In order to gain standing, the LFC would need to show a threatened injury to a property right or a civil right. Due to the unprecedented nature of this issue, it is impossible to predict whether a court would grant the LFC standing. The alleged injury could be that the LFC has general oversight over state fiscal matters and that committee members will have fewer state funds to appropriate during the session. Lastly, the LFC would need to determine what level of staff resources should be spent on the case, although to some extent this is outside the control of the LFC once a legal action is pursued.

A more detailed analysis of these issues is available in a memorandum to Senator Ripley dated August 25, 2010.

Committee Bill.

On June 29, 2010, the LFC met during a phone conference. Unfortunately the call ended prematurely and a motion was not brought forward, but discussions started in regard to whether the LFC should sponsor a committee bill that would clarify how compensatory damages from a future court action could be expended. In order to obtain drafting priority I asked whether the chair or vice chair desired to sponsor a bill, and Senator Williams agreed to pick it up. As such, if the LFC desires to pursue a committee bill (and Senator Williams agrees to let the LFC take her bill draft request) it can pursue this option in November. I would need to work with LFC members prior to the November 16, 2010, meeting in order to develop sufficient information for the bill draft request.

Continuation of Negotiations.

The LFC or the LFC State Land Subcommittee can continue negotiations with Land Board members and/or Land Board staffers prior to the November Land Board meeting.