

## RIVER SEGMENT MUST BE NAVIGABLE IN FACT FOR COMMERCIAL PURPOSES AT STATEHOOD FOR STATE TO OBTAIN TITLE TO RIVERBED UNDER THE EQUAL FOOTING DOCTRINE

*PPL Montana, LLC v. Montana*, 565 U.S. \_\_\_\_ (2012) (decided Feb. 22, 2012)

March 5, 2012 by *Keith Garner, Michael Wilmar, and Alexander Merritt*

Two weeks ago, the United States Supreme Court issued its decision in *PPL Montana v. Montana*. The Court held that the Supreme Court of Montana had incorrectly determined that certain segments of the Upper Missouri, Madison, and Clark Fork Rivers were “navigable” at the time of statehood. The Court therefore set aside the Montana court’s determination that title to the beds of those rivers passed to the state upon statehood under the equal footing doctrine and remanded the case to the Montana Supreme Court for further proceedings consistent with the Court’s opinion.

### Background

PPL Montana is a power company that owns and operates hydroelectric dams built on the beds of the Upper Missouri, Madison, and Clark Fork Rivers in Montana. PPL holds federal licenses for its facilities and pays rent to the United States for its use of the riverbeds.

The State of Montana knew of the existence of the facilities for many years, but never claimed title to the riverbeds or asked PPL for compensation. That changed in 2003 when parents of Montana school children sued PPL in federal district court, arguing that PPL had built its facilities on state-owned and school trust lands. The state joined the suit seeking to collect rent from PPL. The case was dismissed on jurisdictional grounds, and ownership of the riverbeds remained an open question.

PPL then brought an action in state court to bar Montana from seeking compensation for its use of the riverbeds. Montana counterclaimed seeking a judgment that it owned the riverbeds and could charge PPL for rent. The trial court ruled in favor of Montana and ordered PPL to pay

almost \$41,000,000 for its use of the riverbeds between 2000 and 2007. PPL appealed and the Montana Supreme Court affirmed. PPL then appealed to the United States Supreme Court which granted certiorari and reversed.

### **Equal Footing Doctrine**

Under the equal footing doctrine, when a state joins the Union, it obtains title to land underneath waters that are “navigable” at the time of statehood, while the United States retains title to land underneath waters that are non-navigable at the time of statehood. Thus, the fundamental question in the case was the interpretation of the term “navigable” in the context of title under the equal footing doctrine.

The Montana Supreme Court found that the rivers in question were navigable at the time of statehood and Montana had therefore obtained title to the riverbeds. On appeal, PPL argued that the Montana Supreme Court had erred in finding the rivers navigable.

### **Navigability Analysis**

Navigability is determined by the “navigable in fact” rule. As the Court explained in 1871 in *The Daniel Ball*, waters “are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” For purposes of the equal footing doctrine, and therefore determinations of the extent of state versus federal ownership, navigability is analyzed at the time of statehood. By contrast, for other purposes, such as determining admiralty jurisdiction or federal regulatory authority, navigability is analyzed from other points in time. In other words, that federal regulatory jurisdiction over “navigable waters” might extend to waters that are not navigable and never have been but might become so with reasonable improvements does not mean that the beds of waters that met that test at the time of statehood passed to the state under the equal footing doctrine. (See Slip Op. at pp. 13 14.)

### **Segmentation**

The issue was critical in the case because PPL's facilities were located on stretches of river that contained waterfalls, rapids, and other features that prevented actual navigation. PPL argued that the Montana Supreme Court should have analyzed navigability of the rivers on a segment-by-segment basis, and determined the segments at issue to be non-navigable.

The Court had applied a segment-by-segment approach in two earlier cases—*United States v. Utah* (1931) and *Brewer-Elliott Oil and Gas Co. v. United States* (1922)—but the Montana Supreme Court chose not to apply it.

The Court noted sharply:

The Montana Supreme Court discounted the segment-by-segment approach of this Court's cases, calling it a "piecemeal classification of navigability—with some stretches declared navigable, and other declared non-navigable." This was error. The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded.

(Slip Op. at p. 15; internal citations omitted.)

### ***"Short Interruptions" and Portage***

The Montana Supreme Court also found that the segment-by-segment approach did not apply to "short interruptions" of navigability. Applying the "short interruptions" approach, the Montana Supreme Court reasoned that although short stretches of the rivers contained rapids and waterfalls, the rivers remained navigable because boats could portage around those features.

The Court first disagreed that there was a short interruptions exception to the segment by segment approach. It found that the Montana Supreme Court had misinterpreted the case law. Furthermore, the Court noted that even if there were a de minimis exception, it would not apply in this case because the river segments at issue were discrete and substantial.

The Court then went on to reject the portage analysis. It noted that a portage undermines navigability because, no matter how short, it "demonstrates the need to bypass the river segment, all because that part of the river is non-navigable." (Slip Op. at pp. 18 20.)

### ***Recreational Use***

The Montana Supreme Court also relied on evidence that present-day recreational fishing boats were able to navigate the river stretches in question. The Court found that evidence of present-day use may be considered, but only to the extent that it demonstrates navigability in fact *at the time of statehood*—the relevant inquiry. In turn, this would require findings of "meaningful similarity" between watercraft and river conditions at the time of statehood and at the present day. (Id. at pp. 22 23.)

The Montana Supreme Court did not make these findings. Moreover, evidence suggested that present-day recreational fishing boats were better able to navigate the rivers than boats in use at the time of statehood, and that the rivers had undergone physical changes since statehood making them easier to navigate. Therefore, the Court found that the evidence did not bear on navigability at statehood, and that to the extent the Montana Supreme Court had relied on it, the state court was wrong as a matter of law.

## Public Trust Doctrine

Montana argued that denying it title to the riverbeds would undermine the public trust doctrine. The Court quickly disposed of this argument, noting that the public trust doctrine is a matter of state law, and that "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal footing doctrine."

## Implications

With respect to title and use of waters within California, some of the questions this case may raise are:

1. Whether and to what extent California's prior decisions and determinations as to the extent of its ownership of the beds of its streams and rivers meet the criteria articulated by the Court. In particular, the Court reconfirmed that, for title purposes, "susceptibility" for navigation means susceptibility for navigation of such waters in their ordinary condition at the time of statehood, which would not include waters that were non-navigable at that time but that could be made navigable with reasonable improvement—a standard used in connection with federal regulatory authority. The Court also held that short interruptions of navigability or the need for portages around non-navigable waters at the time of statehood must be considered in determining the extent of navigability for title purposes.

A related question is the nature of the use required in order to establish navigability. The Court emphasizes that the assessment of "navigability" for title purposes turns on the question of a river's usefulness for "the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood." (Slip Op. at p. 21.) Recreational, personal, or private use now or in the past is only relevant to the extent it bears on the susceptibility of the waterway for commercial use at the time of statehood.

The extent to which prior California state case law and title determinations may have been inconsistent, if at all, with this decision is beyond the scope of this post.

Moreover, because navigability determinations are highly fact specific, the impact of these aspects of the decision, if any, on titles in California will have to be resolved on a case by case basis.

2. Whether California's application of the public trust doctrine will be affected. Most California public trust cases have dealt with lands that California acquired in its sovereign capacity under the equal-footing doctrine because those lands lay beneath navigable waters as of statehood, with the applicability of the public trust to those

waters stemming from the state's sovereign ownership of the underlying land. The Court, however, seems to separate the two when it states that the states are free to determine the scope of the trust over “waters” within their jurisdiction even though title may reside elsewhere. To that extent, the decision appears to validate the approach the California Supreme Court took in *National Audubon Soc. v. Superior Court (Alpine County)* (1983) 33 Cal.3d 419, which is cited with approval by the Supreme Court in this opinion. (Slip Op. at p. 25.) It also appears to validate, at least indirectly, other California court decisions using a broader definition of navigability without determining title to uphold the right of the public to use waterways for other purposes such as boating, swimming, and other forms of water recreation even where such waterways are only navigable by oar or motor propelled small craft. (See, e.g., *People ex rel. Baker v. Mack* (1971) 19 Cal.App. 3d 1040, 1049.) It also suggests that a state may extend the public trust doctrine to waters that flow over lands it does not now own and may never have owned. Last but by no means least, this articulation of the doctrine appears to reconfirm the Court’s approach in *Stop the Beach Renourishment v. Florida Department of Environmental Protection* (2010) 130 U.S. 2592, 2612 that the application of the public trust is a background principle of state law that may be applied to defeat or limit takings claims under the Fifth Amendment.

3. What rules regarding changes to water boundaries as a result of accretion, erosion, avulsion, and reliction will apply in determining the present extent of state sovereign ownership of waters that were navigable at the time of statehood but are not navigable now. The decision is silent on this issue. However, the law in this area remains uncertain, and it may be at least arguable that as the between a state and the United States, the state cannot apply its own rules of property to subsequently defeat the title of the United States, and perhaps its successors in interest as well, established at the time of statehood. (See generally, Flushman, *Water Boundaries* (2002 ) §§ 2.6 2.8, pp. 56 67.) One hopes that the decision will not be seen as support, even indirectly, for such a position, given the additional uncertainty it would inject into long established titles and rules of property in California.