



# Water Policy Interim Committee

## 61st Montana Legislature

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June 9, 2010

TO: Water Policy Interim Committee (WPIC)

FR: Todd Everts, WPIC Legal Staff

RE: Followup on Navigability for Title Test in Light of the PPL Montana, LLC v. State of Montana Supreme Court Decision

In September of 2009, I provided the WPIC with an explanation and analysis of the various legal tests of navigability under federal and Montana law related to ownership of riverbeds and lakebeds, use of state waters, and application of those tests under the federal Clean Water Act and pending legislation.<sup>1</sup> I noted in that analysis that the Montana Supreme Court would further clarify the navigability for title test related to ownership of riverbeds based on a pending PPL Montana, LLC v. State of Montana<sup>2</sup> decision. The purpose of this followup memorandum is to summarize the Supreme Court's recent ruling as it relates to navigability for title in Montana.

### Refresher on Navigability for Title/Ownership Purposes

When the great state of Montana entered the Union on November 8, 1889, it did so on an equal footing with the original states. Under the Equal Footing Doctrine, Montana received title to the beds beneath navigable waters on the date of statehood.<sup>3</sup> If a court with requisite jurisdiction and authority determines that a water body is navigable, the disposition, use, and ownership interests in the underlying beds is governed by state law subject to the paramount powers of the federal government.<sup>4</sup> If a court determines that a water body is not navigable, the owners of riparian

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<sup>1</sup> Todd Everts, Overview of the Legal Tests of Navigability, Memorandum, September 16, 2009,

[http://leg.mt.gov/content/Committees/Interim/2009\\_2010/Water\\_Policy/Meeting\\_Documents/September/navigabilitymemo.pdf](http://leg.mt.gov/content/Committees/Interim/2009_2010/Water_Policy/Meeting_Documents/September/navigabilitymemo.pdf)

<sup>2</sup> PPL Montana, LLC v. State of Montana, 2010 MT 64, DA 08-0506, 2010

<sup>3</sup> United States v. Oregon, 295 U.S. 1, 14 (1935), State Land Bd. v. Corvallis Sand & Gravel, 429 U.S. 363 (1977); Pollard's Lessee v. Hagan, 44 U.S. 212 (1845).

<sup>4</sup> Montana v. United States, 450 U.S. 544 (1981)

land may own the adjacent riverbed.<sup>5</sup> What is or is not navigable is a judicial determination. It is akin to a quiet title action in a court of competent jurisdiction.<sup>6</sup> The Legislature has statutorily authorized the State Land Board to take all necessary actions for the purpose of determining title to beds of lakes and other bodies of water and streams within the state, including bringing or defending suits or other proceedings in court.<sup>7</sup>

### **Montana Supreme Court Clarifies the Navigability for Title Test**

The Montana Supreme Court, in PPL Montana, LLC v. State of Montana, outlined the following factors in determining whether a water body was navigable at the time of statehood:

1. The concept of navigability for title purposes is very liberally construed by the United States Supreme Court.<sup>8</sup>
2. A river does not have to experience “actual use” at or before the time of statehood, so long as it was “susceptible” of providing a channel for commerce.<sup>9</sup>
3. The term “commerce” in the navigability for title context is very broadly construed such that newly discovered forms of commerce can be retroactively applied to considerations of navigability. Standard, present day usage of a river may be useful information regarding the status of the river as navigable at the time of statehood.<sup>10</sup> Present day recreational use is sufficient for purposes of commerce.
4. Carrying places, portages, or other obstructions that require artificial means of navigation do not defeat a finding of navigability.<sup>11</sup>
5. So long as the river was susceptible for use during portions of the year, it is considered navigable at the time of statehood.<sup>12</sup>

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<sup>5</sup> Id. at page 551

<sup>6</sup> See [Title 70, chapter 28, of the Montana Code Annotated](#)

<sup>7</sup> [77-1-105, MCA](#)

<sup>8</sup> See footnote #2 at page 50

<sup>9</sup> Id.

<sup>10</sup> Id. at pages 52 and 54

<sup>11</sup> Id. at page 51

<sup>12</sup> Id. at page 54

6. A particular stretch of a river that is nonnavigable based on particular physical characteristics (i.e., Great Falls Reach of the Missouri) does not defeat a finding of navigability with respect to the whole river, nor does it require that some stretches of the river be declared navigable and others declared nonnavigable. Short interruptions of navigability in a river that it otherwise navigable is insufficient as a matter of law to declare any portions of a river nonnavigable.<sup>13</sup>

### **Parting Thoughts**

The Montana Supreme Court's ruling broadly defines navigability for title purposes. The Court's ruling provides the legal framework for the Legislature as it moves forward on policy development with respect to state land management and the ownership and use of underlying beds of water bodies.<sup>14</sup> It bears repeating -- the Judiciary, not the Legislature, ultimately determines what is or is not navigable for title purposes.

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<sup>13</sup> Id. at pages 55 through 57

<sup>14</sup> It should be noted that PPL Montana is currently in the process of deciding whether to appeal the Montana Supreme Court's decision to the U.S. Supreme Court or pursue other actions in the federal court system.