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U.S. Supreme Court Relieves Power Companies in Unanimous Opinion

On February 22, 2012, the U.S. Supreme Court, in a unanimous decision, clarified the test for determining state ownership of riverbeds. The Court reversed the Montana Supreme Court's order for PPL Montana, LLC (PPL), a power company, to pay over \$40 million in rent to the state.

BACKGROUND

At issue in *PPL Montana, LLC v. Montana* is ownership of the riverbeds along three Montana rivers, where PPL has operated 10 hydroelectric dams but never paid the state for its use. PPL sued Montana in state court, seeking a declaration that Montana could not seek compensation for PPL's use of riverbeds at its federally licensed dams. Montana counterclaimed, seeking a declaration that it owned the riverbeds under the "equal footing doctrine" and could therefore charge for PPL's use of its lands.

Title to riverbeds traces back to English common law. The 13 colonies held title to riverbeds that were navigable, which the Supreme Court came to interpret as "navigable in fact" or actually navigable. In *United States v. Utah*, 283 U.S. 64 (1931), the Court articulated that rivers "are navigable in fact when they are used, or are susceptible of being used, in their natural and 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[.]" Under the equal footing doctrine, all states are sovereigns with equal powers; therefore, when a new state joins the Union, it obtains all rights held by the other states. Thus, the key inquiry in determining whether a state holds title to riverbeds under the equal footing doctrine is whether a river is "navigable in fact" at the time the state enters the Union.

The First Judicial District Court of Montana granted the state's motion for summary judgment, finding that the riverbeds are public trust lands, and ordered PPL to pay over \$40 million for its use of the riverbeds. The Montana Supreme Court affirmed.

THE U.S. SUPREME COURT'S DECISION

Montana argued that navigability should be determined by looking at whether the river as a whole is susceptible to commercial use, which can be informed by current uses. Montana also contended that natural obstacles such as waterfalls should not render rivers nonnavigable if people can portage around them. On the other hand, PPL asserted that the test articulated long ago by the U.S. Supreme Court still applies—namely, that navigability for title purposes depends on individual segments of the rivers and the actual commercial use of the rivers when Montana became a state in 1889.

The U.S. Supreme Court reversed and remanded the Montana Supreme Court's decision and reaffirmed its test for determining title in riverbeds. As an initial matter, the Court distinguished the test for navigability for title purposes from navigability for commerce or federal regulatory authority. The Court explained that navigability for title is determined at the time of statehood using a segment-by-segment approach, as set forth in its earlier decisions, and it turns on the river's usefulness for "trade and travel."

Modern uses can support a determination of navigability only if the watercrafts are similar to those used for trade and travel at the time of statehood and the condition of the river has not changed. Moreover, the need to portage around segments of a river generally indicates that the segment is not navigable. Importantly, the Court found that Montana's long-term failure to assert title to the riverbeds, while the dams had been operating for generations on the reliance that the state does not own the riverbeds, constitutes evidence that those river segments were nonnavigable when Montana became a state.

The Court stated that if there were a *de minimis* exception to the segment-by-segment approach, it would consider principles of ownership and title, such as whether the parcel is so small that it cannot be administered or is worthless. These considerations clearly do not apply to the substantial and, obviously, valuable segments like the Great Falls reach.

In addition, the Court explained that the equal footing doctrine stems from the Constitution and is therefore federal law while the scope of the public trust doctrine is a matter of state law. Accordingly, upholding the equal footing doctrine does not adversely affect the state's ability to define its public trust doctrine.

Ultimately, the Court found that the 17-mile stretch constituting the Great Falls reach on the Upper Missouri River, where PPL has five hydroelectric dams, was nonnavigable, and it remanded to the state court to determine the navigability of the other river segments at issue in accordance with its opinion.

IMPLICATIONS

Power companies and other riparian landowners have been relieved of a precarious burden. Following the Montana Supreme Court's decision, power companies and riparian landowners were potentially liable for significant sums of money for which they never expected to be billed. The U.S. Supreme Court's decision is aligned with riparian landowners' expectations and practicality. If the river segment was actually able to be navigated at the time of statehood, the state has title. If not, it does not own the riverbed. It is important to remember that title to riverbeds around the country may not be settled in some instances, but at least this

case makes clear the test for determining navigability for title purposes.

Navigability for title purposes is a factual inquiry. On remand, and in future disputes of navigability, historical documents and experts' testimony will be critically important, and they will play out in trials rather than on paper in summary judgment. In this case, the journals of Lewis and Clark were admitted into evidence and informed the U.S. Supreme Court's finding that the Great Falls reach is not navigable.

CONTACT US

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