

# U.S. Supreme Court Victory in PPL Montana v. Montana

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On February 22, the U.S. Supreme Court unanimously reversed a \$41 million judgment against PPL Montana, LLC that had been affirmed by the Montana Supreme Court in late 2010.

The case revolves around the complex question of who owns the beds and banks of rivers, particularly rivers flowing through the various states in the Western United States. This question arises under the U.S. Constitution, and must be addressed under principles of federal, not state, law. The high court's opinion stated that the Montana state courts had entered the judgment "based upon an infirm legal understanding of this Court's rules of navigability for title under the equal footing doctrine." Holland & Hart played a significant role in this unanimous victory as part of a multi-firm team that handled the lower court proceedings, the certiorari process, the merits briefing, and preparation for the oral argument before the Supreme Court, which occurred on December 7, 2011. The argument was very lively, and the Court quickly issued a 9-0 decision reversing the lower courts' verdict and holding, contrary to the summary judgment below for Montana, that the reach of the river on which the Great Falls of the Missouri and five of the hydroelectric power facilities in issue are located, was not navigable for title purposes at the time of Montana's statehood, and thus that Montana is not entitled to rent for the use of those riverbeds by PPL Montana's facilities. The Court remanded for further proceedings regarding ownership of the river segments on which the other five dams are located, but indicated a "significant likelihood" that Montana's claims as to those segments would "also fail the federal test of navigability for the purpose of determining title."

### **Implications of the Decision**

The Supreme Court reinstated bedrock principles of title navigability that the lower state and federal courts had drifted away from over the decades since the Supreme Court had last ruled on this issue in 1931. The Court reaffirmed that while states do receive title at the time of statehood to the beds and banks of rivers that were "really navigable," the states may not amend the pertinent federal navigability rules in their favor post-statehood because "it is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which would enlarge what actually passed to the State, at the time of her admission." The Court also confirmed that if a river was not navigable at statehood, then title to the river's beds and banks stayed in the United States "to be transferred or licensed if and as it chooses," for example by land patents or grants, leaving private riparian

landholders on either side of a river owning the beds "to the center of the stream." The Court's decision will need to be reviewed and properly understood by parties dealing with a myriad of issues that take place along and under rivers, including:

- Oil and gas exploration and drilling
- Pipeline siting decisions
- Hard rock mining
- Environmental remediation
- Title work near a river

### **The Court's Decision**

The Court's unanimous decision can be found here. Some of the important highlights follow:

1. The Court explained that other than for title, the concept of navigability is also used in different contexts, including for purposes of assessing federal regulatory authority under the Commerce Clause and to determine admiralty jurisdiction, but emphasized "that the test for navigability is not applied in the same way in these distinct types of cases." The Court based its reversal in part on the improper reliance by the lower courts on regulatory navigability case law in a title dispute.
2. The Court reiterated that rivers are deemed 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." Importantly, however, in title disputes, the existence or absence of such commercial "navigation is determined at the time of statehood," it is "based on the natural and ordinary condition of the water," and it cannot be based on improvements made to that natural condition, such as stabilized flows from the storage and release of water from reservoirs.
3. The Court stressed that a river is not properly assessed regarding navigability for title purposes as a whole. Instead, rivers must be assessed on a segment-by-segment basis, with physical characteristics of particular stretches such as gradient and flow being taken into account. In particular as to falls, rapids, rocks and other impediments to navigation, if a stretch of a river is normally portaged, then the bypassed segment of the river is nonnavigable even if commerce is alleged to have been carried on around the impediment.
4. The Court rejected Montana's reliance on present day recreational use of the rivers, including by anglers in modern drift boats, as evidence that the rivers had been susceptible of commercial navigation at the time of Montana's statehood in 1889. The Court held that an assessment for title navigability at statehood "concerns the river's usefulness for trade and travel, rather than for other purposes," and explained that while "a river need not be susceptible of navigation at every point during the year, neither can

that susceptibility be so brief that it is not a commercial reality." The Court then held that "at a minimum" a party "seeking to use present-day evidence for title purposes must show: (1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river's post-statehood condition is not materially different from its physical condition at statehood."

For more information, contact Kyle Gray ([kgray@hollandhart.com](mailto:kgray@hollandhart.com)) or Tom Sansonetti ([tlsansonetti@hollandhart.com](mailto:tlsansonetti@hollandhart.com)).

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