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**Navigable Rivers/State Lands Court Actions**

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The issue of the ownership of the beds of navigable rivers in Montana and the use of those beds for utility structures (power generation dams) was the subject of a lawsuit filed initially in October, 2003. The plaintiffs in the case were Richard Dolan and his minor children and Denise Hayman and her minor children, and the Great Falls Elementary and High School Districts. The State of Montana was granted intervenor status and eventually, due to lack of standing by the individuals who filed the case, became the only plaintiff. The Defendants in the case were PPL Montana, PPL Services Corp., Avista Corporation, Pacificorp, and John Does 2 through 10.

The legal approach on this issue was essentially two pronged. The actions were moving forward in both federal and state based courts.

**US District Court**

Citation: CV 03-167-M-DWM

The counts in front of the US district court were:

1. Defendants are liable under the theory of “unjust enrichment” by their use of the state land for power sites;
2. Defendants negligently failed to determine the identity of the rightful owner of the lands on which their power sites are located and to compensate such owner;
3. Seeking declaratory relief to establish the State of Montana as “the rightful owners of the beds and banks of all navigable waters in Montana that aren’t already reserved by the United States and that these lands are state trust and/or school trust lands. Further, the Plaintiffs requested a declaration establishing that the defendants (the Utilities) were obligated to pay full market value for their use of the land and that the payment was to be used to benefit the school trust.
4. “Uncompensated Use of State Land” and challenged the Utilities failure to compensate the state school trust as required by state law (statute and Constitution).
5. Utilities were liable for trespass on state land
6. Alleged that the Plaintiffs were entitled to their attorney’s fees and costs in bringing the action.

The requested relief was:

1. Declaration that the State of Montana owns the beds and banks of navigable waters and that it “holds such lands in trust for the benefit of the school trust”.
2. Declaration concluding that the utilities are obligated to “compensate the beneficiaries of the school trust for past and present use of state land”.
3. Compensatory damages to be paid to the school trust for the Utilities use of state lands.

The Utilities moved to dismiss the case on four grounds:

1. Dismissal was appropriate due to the Plaintiffs failure to add the State of Montana and the Board of Land Commissioners as indispensable parties;
2. The Plaintiffs lack standing;
3. The riverbeds on which the dams sit are not school trust lands; and
4. The Plaintiff’s claims are preempted by the Federal Power Act.

The Court determined there were two issues that were appropriate for US District Court action rather than state based action. These included Federal Preemption of State Law Claims and Standing.

### **Federal Preemption of State Law Claims**

#### **Federal Navigational Servitude**

The Utilities argued that the state’s title to the beds of navigable rivers is subject to the federal navigational servitude<sup>1</sup> which they asserted permits them to use the river beds without compensating the owner for the use. It has been well established however, pursuant to the Equal Footing Doctrine,<sup>2</sup> that the states acquired title to the beds of navigable water upon their admission to the Union. Limitations on the Equal Footing Doctrine were described in Montana v. U.S., 450 U.S. 551 (1981). This decision provided:

*The State’s power over the beds of navigable waters remains subject to only on limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.*

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<sup>1</sup>Federal navigational servitude is the United States reserved easement and dominant powers which it may exercise to control the navigable rivers.

<sup>2</sup> Equal Footing Doctrine – *Montana v. U.s.* 450 U.S. 544, 551 (1981), *U.S. v. Chandler-Dunbar Water Power co.*, 229 U.S. 53, 60 (1913).

The servitude extends only to the beds of navigable waters which includes the lands below the ordinary high water mark. US v. Kansas City Life Ins. Co. 339 U.S. 805 (1950). It has been found that although the federal government must compensate property owners for damages caused to property above and beyond the beds of the rivers when it exercises its powers under the servitude, any damage to or government taking of the property below the ordinary high water mark is not compensable (emphasis added) Kansas City Life Ins. at 805-807. The actions in front of the court addressed only the question on whether the Utilities were obligated to compensate the State for occupying the beds of the navigable waters.

So, the question that needed to be answered was **whether or not the federal navigation servitude preempted the state's action**. The federal navigational servitude can only be exercised by an action taken by the federal government, and the exercise of the servitude requires clear authorization by congress. Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954). It has also been found that the federal navigation servitude is a power which only the federal government can assert for the purpose of improving navigation and protecting the flow of commerce. Kaiser Aetna v. U.S. 444 U.S.164 (1979). The Federal Power Act (FPA) contains no express assertion of the federal navigational servitude, and it does not have the same drastic effect as the servitude has. Niagara Mohawk, 347 U.S. at 250-251. In accordance with the Court's conclusion in Niagara Mohawk that Congress did not exercise the full powers of the servitude in enacting the FPA, the Ninth Circuit has held an FPA licensee is not acting in the interests of the United States, and the FPA does not give licensees the authority to exercise the federal government's navigational servitude powers. Accordingly, the court held that the FPA licensee was obligated to compensate the owner of "shorelands" for its taking of that property for the construction of hydroelectric project.

The court found that the Defendants are not operating hydroelectric facilities in the interest of the United States, and they cannot invoke the federal navigational servitude to avoid paying compensation for their occupation of state land.

#### Federal Preemption Under the Federal Power Act (FPA)

In general, pursuant to the Supremacy Clause of the U.S. Constitution federal law is supreme. Federal preemption of state laws occurs either when state law is expressly preempted by Congress, when the federal law occupies the field, or when state law conflicts with federal law.

In this case there was no basis asserted for the application of express preemption. Therefore the two elements to resolve were whether field or conflict preemption existed.

The FPA created the Federal Power Commission (FPC) now known as the Federal Energy Regulatory Commission (FERC), with the authority to license the construction of dams upon navigable waters of the United States. U.S. v. Appalachian Electric Power Co., 311 U.S. 377, 398-99 (1941). However, Congress' intent with the FPA was to preserve the traditional sovereign powers of the states in certain areas and to recognize a dual system of control exercised separately by both sovereigns. First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946). Judge Molloy stated that under the

dual system of control recognized in First Iowa it is clear that field preemption exists only in those “fields” or subject matters over which the United States has final decision-making authority.

A state’s ability to determine real property rights are also a part of the discussion. A FERC license by itself does not give the licensee the right to possess the land on which the project will be constructed without first acquiring the right to use the land, either by negotiation with the owner or by initiating eminent domain.

The Court concluded that the Plaintiffs and the State’s tort law causes of action for damages to the State’s property rights are saved from preemption by the Federal Power Act. As either private entities or as FPA licensees, Defendants do not have the right to possess the beds of the navigable rivers at issue in this case, and the FPA saves from preemption claims for compensation.

### **Standing**

The Court noted on this issue that the parental and school district plaintiffs brought their claim on behalf of the state of Montana, which had since intervened as a plaintiff. The state’s intervention raises the issue of whether these plaintiffs can continue in their role as “private attorney general” when the state has taken over that very role.

Because the dam owners have no independent duty to pay for the state lands to the parental and school district plaintiffs, rather than the state, the dam owners cannot be liable for plaintiff’s injuries.

The Court found that “because the original plaintiffs cannot meet the second prong of the standing analysis, they lack standing and their complaint must be dismissed. “Plaintiffs’ state law claims are not preempted by federal law. However, any injury suffered by the parental and school district plaintiffs is not “fairly traceable” to the dam owners. In contrast, the State has standing to pursue its claims, as any evidence of self-inflicted injury lies outside the allegations of the complaint.

### **Montana First Judicial District Court**

Citation: Cause No. CDV-2004-846

PPL Montana and Avista Corporation v. Montana, Cause No. CDV-2204-846

There were multiple motions for partial summary judgment as well as a Memorandum of Decision and a Findings of Fact and Conclusion of Law. Each of these is outlined below.

- NAVIGABILITY OF THE MISSOURI, MADISON, AND CLARK FOR RIVERS

The State of Montana moved for partial summary judgment on liability and for expenses. The State’s motion was in two parts:

1. That the Missouri, Madison, and Clark Fork rivers are navigable rivers and that the State owns the streambeds to those rivers; and

2. That the streambeds are part of the State's school trust lands.

Avista moved for partial summary judgment contending that the Clark Fork River is not a navigable river and that title did not pass to the State upon statehood.

Avista and PPL moved for partial summary judgment on whether the streambeds are school trust lands.

In this order, the Court addressed only the navigability of the rivers.

The Court once again looked to the Equal Footing Doctrine in this case. The Court stated that a state's claim to the title of streambeds under the Equal Footing Doctrine rests on a determination of whether the body of water was navigable at the time of the state's admission to the union. United States v. Utah, 283 U.S. 64, 75 (1931). Federal law is the controlling authority used to decide the issue of navigability for title purposes. Id.; Mont. Coalition for Stream Access v. Curran, 210 Mont. 38, 43, 682 P.2d 163, 166 (1984).

The test for navigability was established in The Daniel Ball, 77 U.S. (10 Wall) 557, 563 (1870):

*Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they 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. (emphasis added)*

The Court concluded that both Avista and PPL were bound by their admissions in the Federal Court case (discussed above). In pleadings in the federal action both Avista and PPL admitted that the Clark Fork River is a navigable river. Similarly, PPL admitted that the Missouri River was navigable and is bound by its admissions. Although there was sparse historical record for the Madison River, the Court again held that PPL must be bound by its admissions that the Madison River is navigable in other Court proceedings.

Therefore, the Missouri, the Madison, and the Clark Fork Rivers are all deemed navigable.

- UTILITIES MOTION FOR PARTIAL SUMMARY JUDGMENT THAT THE RIGHT TO APPROPRIATE WATER FOR THE BENEFICIAL USE OF HYDROPOWER INCLUDES THE INCIDENTAL RIGHT TO USE STATE LAND

PPL and Avista moved for partial summary judgment arguing that the right to appropriate water for the beneficial use of hydropower includes the incidental right to use state land. The Court concluded that the motions should be denied. A brief synopsis of the court's findings is below.

Article IX, section 3(2), of the 1972 Montana Constitution confirms the generation of hydropower is a beneficial use. However, Judge Honzel stated that "neither the Montana Constitution nor any other state law expressly or by implication allows a party to use state lands while appropriating water for beneficial use, without paying the state for the use and occupancy of the lands."

In the August 28, 2007 Memorandum and Order on the Navigability of the Missouri, Madison, and Clark Fork rivers the Court determined that because the Rivers are navigable, the State holds title to the streambeds. In this decision, the court went on to provide that “As a result, the State, as trustee of state lands under Article 10, section 11(1) and (2), of the Montana Constitution has a constitutional obligation to protect those lands. Indeed, the Constitution prevents the state from selling or conveying any interest in state lands, in this case, the streambeds, without obtaining full market value for them.”

The Court ordered that the motion for partial summary judgment that the right to appropriate water for the beneficial use of hydropower includes the incidental right to use state land is **denied**.

- SUMMARY JUDGMENT ON WHETHER THE STREAMBEDS OF THE MISSOURI, MADISON, AND CLARK FOR RIVERS ARE SCHOOL TRUST LANDS

The State of Montana moved for partial summary judgment asserting that the streambeds of the Missouri, Madison, and Clark Fork Rivers are school trust lands.

PPL Montana and Avista moved for partial summary judgment contending that the streambeds are not school trust lands.

Section 10 of the Enabling Act of 1889 granted certain lands to the State to be held by it for the support of common schools. In order to become part of the United States, Montana had to agree to the terms of the Enabling Act – including how the State would use lands that were granted to the state. In accordance with Section 11 of the Enabling Act, the 1889 Montana Constitution, Article XI, Section 2, placed those lands in what is referred to as the public school fund. The 1972 Constitution carried forward these provisions in Article X, section 2. It provides:

***Public school fund.*** *The public school fund of the state shall consist of:*

*(1) Proceeds from the school lands which have been or may hereafter be granted by the United States,*

*...*

*(4) all other grants of land or money made from the United States for general educational purposes or without special purpose . . . . (emphasis added)*

The State argued two points with regard to the streambeds. It argued that although the streambeds of navigable waterways are not part of the express grant of land “for the support of common schools” under the Enabling Act, the State argues that the Equal Footing Doctrine implies a grant. The State further argues that because title to the streambeds vested in the State upon its admission to the Union, the streambeds are grants “without special purpose” under the Constitution and, therefore, they are school trust lands.

Under the Equal Footing Doctrine, states admitted to the Union after the original thirteen colonies obtained title to the land under navigable waters with their boundaries upon statehood. Pollard’s Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845). Prior to the state being admitted to the Union, the United States held the land in trust for the future states. Id., at 212.

The Court states that “while the underlying basis for transferring title to the streambeds of navigable waterways is the Equal Footing Doctrine, the transfer could only be accomplished through the Enabling Act which was an act of Congress.

The Court concluded that the streambeds of the rivers are part of the public land trust. Section 77-1-202(1), MCA, gives the Board of Land Commissioners the authority to manage state lands. In exercising its authority, the board is guided by the principle “that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well being of the people of this state as provided in the Enabling Act.” *Id.* Thus the Board has the authority to lease the streambeds and use the funds for the support of public education.

PPL argued that the lands that were flooded as the result of their projects were not school trust lands. PPL did concede that 6 of its dams occupy section 16 and 36 lands and that those would be school trust lands. PPL further argued that it purchased the lands outright or easement rights to flood the lands. The Court concluded that with respect to the flooded lands, there were genuine issues of material fact that precluded summary judgment.

The Court issued the following order:

1. The State’s motion for partial summary judgment that the streambeds of the Missouri, Madison, and Clark Fork Rivers are school trust lands was **granted**.
2. Avista and PPL’s motion for summary judgment that the streambeds are not school trust lands was **denied**.
3. PPL’s motion for partial summary judgment that the flooded lands are not school trust lands was **denied**.
- PPL’s MOTION FOR PARTIAL SUMMARY JUDGMENT BARRING THE STATE’S COUNTERCLAIMS FOR MONETARY DAMAGES

PPL sought partial summary judgment and dismissal of the State’s counterclaims for trespass, negligence, uncompensated use of state lands and unjust enrichment on the grounds that any claims for damages under those theories is barred by the applicable statutes of limitation.

The Court found that in both State ex rel. Boorman v. State Bd. Of Land Comm’rs, 109 Mont. 127, 94 P.2d 201 (1939) and Norman v. State, 182 Mont. 439, P.2d 715 (1979) the supreme court recognized that the provisions of the Montana Constitution addressing state public lands and their disposition must be strictly observed.

The State argued that the Court ruled on this issue in the April 14, 2006 Memorandum and Order, and it cannot be relitigated and the Court agreed.

The Court determined that PPL and Avista may not argue that the statutes of limitations have run on the State’s counterclaims because the disposition and use of state public lands protected by the Montana Constitution are directly at issue. Therefore, PPL’s motion for partial summary judgment was **denied**.

- MEMORANDUM OF DECISION

The Memorandum of Decision was issued on June 16, 2008. In April 2006, the Court granted the State's motion for summary judgment on all of PPL's claims, but left open the question of whether what is commonly referred to as the Montana Hydroelectric Resources Act, Section 77-4-201, et seq., MCA, is preempted, as applied, by the FPA.

### **1. Preemption as applied claim.**

PPL argued that it is impossible for them to comply with both the FPA and the Hydroelectric Resources Act. Section 77-4-209, MCA limits the lease of state land for a hydroelectric facility to fifty years, while FERC requires that within five years of its issuance of a license a licensee must, "acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States. (emphasis added)

The Court, similarly to the Federal District Court, held that the FPA does not preempt the State's property rights in the riverbeds. The FPA establishes a system of dual control between the states and the federal government. First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946). The Court summarized it on page 5 of the Memorandum as follows:

*"To put it another way, the law expressly recognizes all private rights established and determined by the law of the state and expressly requires the permittee, where it interferes with such rights, to compensate the owners therefor."*

The Court also found that the requirement that a licensee obtain the right to use land in perpetuity may be modified. This was based on a decision that dealt with lands owned by the State of Alaska. Cooper Valley Elec. Assoc., Inc. 4 F.E.R.C. P61, 336 (Sept. 22, 1978). In Cooper Valley, the licensee petitioned FERC to revise the license to allow the licensee to gain an interest in land that would be part of its hydroelectric facility, but not in perpetuity.

### **2. Acreage Below the Dams**

At issue are 290 acres of state owned riverbed located below the dams. Those acres are within the boundaries of the Thompson Falls and the Missouri-Madison Projects.

PPL claimed that under 77-4-202, MCA, which defines a power site, the state cannot claim rent for the acreage below the dams. The State argued that it was entitled to compensation for those acreages.

Section 77-4-202, MCA, provides:

*The words "power site" as used in this part shall mean not only the state-owned land on which the dam is constructed, but also each separate tract of such land which will become part of the reservoir and which in and of itself makes an essential contribution to the value of the power site as a whole of not less than 5% of the entire value of such power site.*

The State's claim for compensation is based on Article X, sections 11(1) and (2), of the Montana Constitution. The Court noted that FERC requires PPL to obtain the right to use all land within the

boundaries of a dam project. (emphasis added) Because the acreage below the dams is within the boundaries of the project as defined by FERC the State is entitled to compensation for that.

### **3. Prejudgment Interest**

With regard to this issue the Court found that although PPL's obligation to compensate the State for use of the state owned riverbeds existed when it purchased the projects, the amount was not certain or capable of being made certain by calculation at that time. Neither DNRC nor the Land Board has adopted a rule as to how the rent for a power site is to be set or what sources are to be considered in setting the rent.

The Court found that, "[a]lthough the settlements with Avista and PacificCorp may have been premised on the shared net benefits methodology, those settlements came well after this case was filed, and they cannot be used to support an award of prejudgment interest."

### **4. Shared Net Benefits Methodology**

The State has a constitutional duty to obtain full market value for the use of school trust lands. MONT. CONST., art X section 11(2); Montanans for the Responsible Use of the Sch. Trust v. State (Montrust I), 1999 MT 263, 296 Mont 402, 989 P.2d 800. The full market value is to be ascertained in the manner provided by law.

Since the value of riverbeds is directly related to the production of hydropower, the net benefits method best takes into consideration the economic contribution the riverbeds make to that production.

The Court concluded that the shared net benefits method is the most appropriate method to meet the State's constitutional and statutory mandate that it obtain the full market value for the use of state school trust lands.

### **5. Land Board**

PPL argued that pursuant to the Hydroelectric Resources Act, the Land Board, not the Court, must decide the fair market value of the riverbeds. This contention was not set out in the Pretrial Order. Additionally, PPL argued that the Court is precluded from determining the full market value of the rent due the State because the Supreme Court has held that it will not substitute its opinion for that of the Land Board. Montanans for the Responsible Use of Sch. Trust v. Darkenwald, 2005 MT 190, 328 Mont. 105, 199 P.3d 27 Pursuant to the Court's opinion, Darkenwald involved challenging actions taken by the Land Board. This case does not involve a challenge to Land Board actions.

The Court determined that under the Pretrial Order, the full market value of the rent due the State is for the Court to decide. It also stated that although a lease is required, any lease must be approved by the Land Board, and the Court Cannot set the terms of the lease, including provisions for calculating future rents.

- FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact are lengthy and can be provided upon request. The Findings of Fact do include the formula that was used to determine the amount owed to the State by PPL. The net benefits analysis is applied.

The Conclusions of Law are provided below.

1. The Court has jurisdiction over the parties and this matter.
2. The riverbeds at issue are state school trust lands.
3. The State has a constitutional duty to obtain full market value for the use of school trust lands. MONT. CONST. art. X, section 11. In administering the trust, the Land Board must “ensure the largest measure of legitimate and reasonable advantage to the state.” Section 77-1-202(1)(a), MCA.
4. Under Section 77-4-208, MCA, the rental for state land used for a power site “shall not be less than the full market value of the estate or interest disposed of through the granting the lease or license, such value to be carefully ascertained from all available sources.”
5. The Federal power Act does not preclude the State from seeking compensation for state trust land used in conjunction with the power sites.
6. The shared net benefits methodology relied on by the State is the most appropriate means of determining the full market value of the riverbeds.
7. The State is entitled to compensation for the acreage of the riverbeds both below and above the dams that is within the Thompson Falls and the Missouri-Madison Projects’ boundaries.
8. The State is not entitled to prejudgment interest.
9. The State is entitled to compensation from PPL Montana for the years 2000 through 2006 in the amount of \$34,748,261.
10. The State is entitled to compensation from PPL Montana for 2007 in amount of \$6,207,919.
11. The terms of any lease must be approved by the Land Board. This includes provisions for calculating future rents.
12. The reasons for the Court’s conclusions are set out in the Memorandum of Decision entered June 13, 2008.

### **Montana Supreme Court**

On October 10, 2008, PPL Montana filed its Notice of Appeal with the Montana Supreme Court. The Notice of Appeal included :

1. Memorandum of Decision – June 13, 2008

2. Findings of Fact and Conclusions of Law – June 13, 2008
3. Judge Honzel’s Oral Ruling on PPL Montana’s May 22, 2006 Motion to Amend – October 29, 2007, Trial Transcript, pp. 1045-49, 1053-54
4. Memorandum and Order on the State’s Motion in Limine to Exclude Expert Witnesses – October 17, 2007
5. Order on Avista’s Motion in Limine No. 4 – October 16, 2007
6. Order on the Parties’ Motions for Summary Judgment on the Issue of Damages – October 16, 2007
7. Order on PPL Montana’s Motion In Limine to Limit Damages Evidence for Purported Wrongful Occupation of Streambeds to Acreage Occupied by Dams or Other Physical Structures – October 16, 2007
8. Memorandum and Order on the Parties’ Motion to Strike – September 13, 2007
9. Memorandum and Order on the Utilities’ Motion for Partial Summary Judgment that the Right to Appropriate Water for the Beneficial Use of Hydropower Includes the Incidental Right to Use State Land – September 12, 2007
10. Memorandum and Order on PPL and Avista’s Motion for Partial Summary Judgment on the Application of the Hydroelectric Resources Act of 1931 – September 6, 2007
11. Memorandum and Order on Motions for Summary Judgment on Whether the Streambeds of the Missouri, Madison and Clark Fork Rivers are School Trust Lands – August 28, 2007
12. Memorandum and Order on the Navigability of the Missouri, Madison and Clark Fork Rivers – August 28, 2007
13. Memorandum and Order on PPL’s Motion for Partial Summary Judgment Barring the State’s Counterclaims for Monetary Damages – August 28, 2007
14. Memorandum and Order – April 14, 2006

***This paper is a brief overview, based on the author’s interpretations, of various court actions regarding the occupancy of the beds of navigable river beds in Montana. This is not a legal opinion and is not intended to be a legal opinion. Legal counsel should be consulted for more specific information and legal advice.***