

SUPREME COURT CLARIFIES TEST TO DETERMINE NAVIGABILITY FOR TITLE TO RIVERBEDS

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In a case that turned on whether the Missouri, Madison, and Clark Fork rivers in the State of Montana could be navigated for commercial purposes at the time of statehood, the U.S. Supreme Court clarified the federal navigability-for-title test to resolve whether Montana owns the riverbeds occupied by ten PPL Montana hydropower facilities. *PPL Montana, LLC v. State of Montana*, 565 U.S. ____ (Feb. 22, 2012). At stake is more than \$50 million in back rent claimed by the State, and many millions more in annual rent payments going forward.

The Court's unanimous decision in *PPL Montana*'s favor highlights for water users, and the users of riverbeds and shorelands, the important distinctions between the federal tests for navigability for title, navigability for federal regulatory jurisdiction, and navigability for admiralty jurisdiction.

Background

The dispute between Montana and PPL Montana arose in 2003, when two parents of Montana school children sued PPL Montana and two other hydropower owners in federal district court. The parents claimed that the riverbeds occupied by the hydropower projects are owned by Montana and are school trust lands for which the hydropower owners must pay the State back and future rent. After the State joined the litigation, the federal district court dismissed for lack of diversity jurisdiction. PPL Montana and the other owners subsequently filed a declaratory judgment action against Montana in state court to resolve whether they owed the State rent. Nine of PPL Montana's dams were built before 1931 and the tenth was built in the 1950s.

Notwithstanding a "mountain" of expert and documentary evidence in support of PPL Montana's position that the relevant river segments were not navigable at statehood, the state trial court awarded summary

judgment to the State and held that Montana owned all of the riverbeds under the Missouri, Madison, and Clark Fork rivers. Under the Equal Footing Doctrine, new states take ownership of the beds of rivers that are navigable at the time they join the Union. Under the federal navigability-for-title test,

[u]pon statehood, the State gains title within its borders to the beds of waters then navigable . . . "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."

Id., slip op. at 12–13 (emphasis added) (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)). The Montana Supreme Court affirmed the trial court's determination that Montana owned all of the riverbeds within Montana on the theory that the Missouri, Madison, and Clark Fork were navigable at statehood under what the Supreme Court referred to as the lower courts' "infirm legal understanding" of the federal navigability-for-title test. *Id.* at 26.

U.S. Supreme Court's Holding

PPL Montana petitioned the U.S. Supreme Court for a writ of certiorari, contending that the Montana state courts had misinterpreted and misapplied the federal navigability-for-title test. The U.S. Supreme Court granted the writ of certiorari, heard arguments in December 2011, and issued a unanimous decision in PPL Montana's favor on February 22, 2012. The Supreme Court concluded, as a matter of law, that the Great Falls reach of the Missouri River was nonnavigable at statehood. *Id.* at 20. Based on this determination, Montana does not own the riverbeds underlying at least five of PPL Montana's dams and cannot charge PPL Montana rent for those dams. With respect to PPL Montana's five other dams (two located upstream from Great Falls on the Missouri, two located on the Madison, and one located on the Clark Fork), the Supreme Court clarified the federal navigability-for-title test and stated that "based on evidence in the record,"

there is “a significant likelihood” that the disputed portions of the other rivers were not navigable for title purposes at statehood. *Id.*

Supreme Court Precedent Requires a Segment-by-Segment Analysis of Navigability for Title

Despite evidence demonstrating that the Lewis and Clark Expedition took “at least 11 days and probably more” (*id.* at 18) to portage around the Great Falls segment of the Missouri River where five of PPL Montana’s dams are located, the Montana state courts held that the Missouri River as a whole was navigable at the time of statehood. The state courts concluded that as long as the river—viewed as a whole—could be said to be generally navigable, any nonnavigable portions or segments would not defeat navigability for title purposes.

PPL Montana contended that the state courts misapplied *United States v. Utah*, 283 U.S. 64 (1931), which requires that navigability for title purposes be assessed on a segment-by-segment basis. The Supreme Court agreed, concluding that the “primary flaw” in the Montana courts’ reasoning was their failure to consider navigability “on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not.” *PPL Montana*, slip op. at 14. The Court further concluded that portages around Great Falls demonstrated the Great Falls segment of the Missouri was nonnavigable at statehood. The Court expressly rejected the Montana courts’ “short interruptions” approach and concluded that portages, in “most cases,” are conclusive evidence that the portaged segment was nonnavigable for title purposes. *Id.* at 18–19 (“the Montana Supreme Court was wrong to state, with respect to the Great Falls reach and other stretches of the rivers in question, that portages ‘are not sufficient to defeat a finding of navigability.’”).

Present-Day Evidence of Navigability Is of Limited Value in Determining Navigability at Statehood

The Montana state courts relied on evidence of present-day fishing and recreation on the Madison

River, where two of PPL Montana’s dams are located, to conclude that the Madison River was navigable at statehood.

PPL Montana contended that the state courts ignored the fundamental tenets of the navigability-for-title test by relying on present-day usage to assume navigability at the time of statehood. Furthermore, the Montana state courts improperly ignored PPL Montana’s evidence that the Madison River has changed significantly since statehood.

The Supreme Court concluded that present-day evidence of fishing and recreation on a river is only relevant to determining navigability at statehood if, “at a minimum” (*id.* at 22), the party seeking to rely on present-day usage can 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.” *Id.* at 23. As the Court explained, “[i]f modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has little or no bearing on navigability at statehood.” *Id.*

Findings of Navigability for Federal Regulatory Purposes Are Not Relevant to Navigability for Title at Statehood

The Montana state courts relied on decisions by federal agencies and courts establishing navigability for federal regulatory purposes to conclude that the Missouri, Madison, and Clark Fork rivers were navigable for title purposes.

Because conditions at the time of statehood have no bearing on the test of navigability for regulatory purposes, and because regulatory navigability can be created by improvements to a river, PPL Montana argued that the state courts erred in their reliance on regulatory navigability cases to conclude that the Missouri, Madison, and Clark Fork rivers were navigable for title at statehood.

The Supreme Court agreed. In a key passage, it criticized the Montana Supreme Court for relying on the navigability analysis conducted in *The Montello*, 20 Wall. 430 (1874). *The Montello* disregarded a portage in the context of determining navigability of a river for federal regulatory jurisdiction. *PPL Montana*, slip op. at 19–20. The Court emphasized that navigability assessments to determine regulatory jurisdiction rely on a “doctrinally distinct” inquiry and should not be applied to cases requiring the assessment of navigability for title purposes. *Id.* Accordingly, the Montana courts erred in ignoring the evidence of portages and other navigation interruptions on the Missouri, Madison, and Clark Fork rivers. *Id.* at 13–14, 19–20.

Distinguishing Title Navigability from Regulatory Navigability

To the confusion of many courts and practitioners, navigability tests are used for at least three different federal purposes: (1) determining title to the beds of waterbodies, (2) determining the extent of federal regulatory jurisdiction under the Commerce Clause, and (3) determining the extent of admiralty jurisdiction. However, as Justice Kennedy noted in *PPL Montana*, “the test for navigability is not applied in the same way in these distinct types of cases.” *Id.* at 13.

The navigability-for-title test, the test at issue in the *PPL Montana* case, is used to determine whether title to the land beneath a segment of a waterbody passed to the state at statehood. Under the Equal Footing Doctrine, title to the beds of rivers within a new state passes to that state upon admittance to the Union, provided that the river segments at issue were navigable for title purposes at the time of the state’s admittance. *United States v. Utah*, 283 U.S. 64, 75 (1931). Further, as the Court in *PPL Montana* confirmed, the navigability for title test is not applied to the entire watercourse; rather it is to be applied to segments with particular characteristics of navigability or non-navigability. *Id.* at 77.

Unlike the navigability-for-title test, the Commerce Clause navigability test establishes the boundaries of federal regulatory jurisdiction over the nation’s water-

ways. It is for a different purpose and is a different test, as the *PPL Montana* Court confirmed. Congress has the power to regulate activities upon the “Waters of the United States” under the Commerce Clause of the Constitution. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940). It is through this Commerce Clause power that the United States exercises regulatory authority under the Federal Power Act, the River and Harbors Act, and the Clean Water Act.

In *PPL Montana*, the Court clarified the three major differences between the application of the test for title purposes and for determining if federal regulatory jurisdiction exists under the Commerce Clause (slip op. at 13–14):

1. Unlike navigability for title purposes, navigability for regulatory purposes may be determined by analyzing whether the river was navigable in fact at any time.
2. Unlike navigability for title purposes, navigability for regulatory purposes may be premised on the suitability of the watercourse for navigation as a result of reasonable improvements.
3. Unlike navigability for title purposes, for navigability for regulatory purposes, the watercourse may require a nexus to interstate or foreign commerce.

Finally, a third area where a federal navigability determination is made is to decide whether federal admiralty jurisdiction is proper. Federal district courts have original jurisdiction over any civil case within admiralty jurisdiction. 28 U.S.C. § 1333(1). Admiralty jurisdiction requires that the alleged wrong occur on the navigable waters of the United States and bear a significant relationship to traditional maritime activities. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Navigable waters of the United States for admiralty jurisdictional purposes are those where the relevant portion of the watercourse is presently serving as an interstate artery of commerce. *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975).

All three federal navigability tests have certain shared historic roots. However, as the Court made clear in *PPL Montana*, the application of the test depends on the purposes for which navigability is being determined.

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K&L Gates, LLP was one of the firms that represented *PPL Montana* in state court and the U.S. Supreme Court.

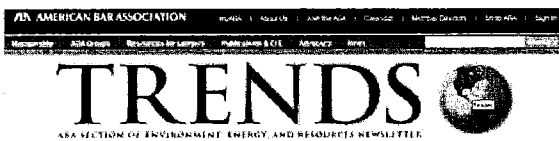
COURT HOLDS FEDERAL AGENCIES RESPONSIBLE FOR PAYMENT OF PAST-DUE STORMWATER SERVICE CHARGES

Lawrence R. Liebesman

Municipal stormwater management agencies achieved a major victory on May 25, 2012, when a federal judge in Washington State ruled for the cities of Renton and Vancouver, Washington, holding the federal government must pay those cities for the costs of cleaning up stormwater from federal facilities for assessments made prior to the passage of clarifying legislation that took effect in January 2011. Pub. L. No. 111-378, 124 Stat. 4128 (signed into law Jan. 4, 2011). This ruling supports local governments nationally in their efforts to collect past-due stormwater service charges from federal facilities discharging into municipal storm sewer systems that have previously refused to meet these obligations.

Sovereign Immunity and the District Court's Decision

The case of *United States v. City of Renton, et al.* revolves around the issue of whether federal facilities owned by the Bonneville Power Agency (BPA) were legally obligated to pay fees imposed by the cities of Renton and Vancouver in order to fund the stormwater mitigation efforts required under state law and the Clean Water Act (CWA). *See U.S. v. City of Renton et al.*, No. C11-1156JLR (W.D. Wash. May 25, 2012) (order granting in part and denying in part motion for partial summary judgment). The legal principle of sovereign immunity at issue in the case states that the federal government cannot be held liable for fees assessed by state and local governments, absent a clear congressional waiver. While Congress broadly waived the federal government's sovereign immunity in 1977 under section 313(a) of the CWA for the payment of "reasonable service charges," federal agencies in recent years have refused to pay the assessments for expensive stormwater cleanup throughout the United States, claiming that Congress did not expressly include such fees in enacting the 1977 waiver and that such assessments were a tax—



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