
PPL Montana's Hydroelectric Project on the Upper Missouri River, Montana

The U.S. Supreme Court has issued its decision in *PPL Montana v. State of Montana*, a fascinating case that combines the colorful history of the American West, the issue of the public's access to state waterways, and a dispute over hefty royalties claimed to be owed the State of Montana for unpermitted use of public lands by a private energy company.

In a unanimous opinion authored by Justice Anthony Kennedy, the Supreme Court ruled that Montana state courts had misapplied federal law in finding the Upper Missouri, Madison and Clark Fork Rivers in Montana to be navigable for title purposes.

The State of Montana claimed that all three rivers are navigable under federal law, and that their beds and banks are therefore public lands owned by Montana in its sovereign capacity under public trust principles. PPL Montana, by contrast, argued that the rivers are non-navigable under federal law; that their beds and banks are therefore private property; and that consequently the company is not obligated to pay the state royalties for PPL Montana's installation and operation of ten hydroelectric facilities on the three waterways. The Montana state courts had sided with the State of Montana, concluding that the rivers are navigable and therefore publicly-owned under federal law.

Not so, declared the U.S. Supreme Court. The justices found that the Montana courts had misapplied the so-called federal title test of navigability. That venerable legal standard limits navigability to those rivers that "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." Critically, navigability under this test is determined not by present-day conditions, but as of the time of statehood–in Montana's case, in 1889.

Specifically, Justice Kennedy opined for the Court, the Montana Supreme Court made two critical errors in applying the federal title test of navigability here: first, the state court had

ignored U.S. Supreme Court precedent requiring that a river's navigability be determined on a segment-by-segment basis. Instead, the lower court had declared the three rivers navigable notwithstanding the fact that there were undisputed, "short interruptions" to navigability along several reaches of the disputed waterways. That misconstrued–and improperly expanded–the federal title test of navigability.

Second, the Montana state courts had relied in part on present-day evidence of the Madison River's navigability, including use by modern recreational craft. According to Justice Kennedy, while use of such contemporary evidence is not improper per se, it is only relevant if: a) the modern recreational watercraft are "meaningfully similar" to watercraft that plied the river for commercial purposes at the time of statehood; and b) the post-statehood condition of the river is not materially different from its condition upon the state's admission to the Union. The Montana Supreme Court had made neither of these findings, observed the U.S. Supreme Court, so its ultimate conclusion that the Madison is navigable for title purposes was fatally flawed.

The justices remanded the case to the Montana courts, with instructions to reconsider their navigability finding based on the principles set forth in Justice Kennedy's opinion. But it appears unlikely that much of the state court's navigability ruling in favor of the State of Montana can or will be sustained on remand. For example, five of PPL Montana's ten disputed hydro facilities are located on a single, 17-mile, stretch of the Upper Missouri River (the so-called "Great Falls" reach), a segment that Justice Kennedy categorically declares in his opinion to be non-navigable.

The Supreme Court's ruling in *PPL Montana* comes as no great surprise. The Montana Supreme Court's now-reversed opinion did play rather fast and loose with certain aspects of the longstanding, multifaceted federal title test of navigability. At the same time, the U.S. Supreme Court's decision appears to interpret and apply that test in a somewhat narrower manner than had its earlier navigability precedents.

One aspect of the Court's decision in *PPL Montana* is particularly troubling. The State of Montana had argued that an adverse ruling on the disputed rivers' navigability would undermine the state's administration of its public trust responsibilities. In rejecting this point, Justice Kennedy and the Court seemingly misconstrue the parameters of the public trust doctrine and disregard its longstanding legal nexus to sovereign ownership of the beds of state waterways. According to Kennedy's opinion, "the public trust doctrine concerns…public access to the waters above [river]beds for purposes of navigation, fishing and other recreational purposes." But while public trust uses unquestionably include those enumerated by Kennedy, they are actually far broader, and include such "uses" as

commerce, ecosystem preservation, and environmental study.

Hopefully, the Court's unduly crabbed enumeration of public trust purposes will do no long-term doctrinal damage. Later in this portion of the opinion, the Court stresses that the public trust doctrine is a creature of state, rather than federal law. Thus, state courts around the nation should have the final word in determining the scope and proper interpretation of the public trust within their respective jurisdictions. And, given the U.S. Supreme Court general hostility to environmental principles in recent years, that's not a bad thing.