

February 28, 2012

Practice Groups:

Energy and Utilities

Appellate

Real Estate

Unanimous Supreme Court Decision Supports Hydropower Industry and Private Landowners

By Elizabeth Thomas, Kari L. Vander Stoep, Donald A. Kaplan

The United States Supreme Court gave the hydropower industry a major victory last week in the closely watched case of *PPL Montana, LLC v. State of Montana*, 565 U. S. ____ (2012). The Court sided with PPL Montana on the proper application of the federal navigability-for-title test, overturning a decision of the Montana Supreme Court permitting the State to start charging rent for existing hydropower facilities, some of which were built over 100 years ago.

The decision provides much-needed certainty to the hydropower industry at a time when the nation is seeking new sources of clean power. It makes clear that States are not free to start charging the owners of dams and reservoirs, or other water-based facilities, millions of dollars of “rent” based on novel and sweeping claims of riverbed ownership. For PPL Montana, the State’s claim for back rent was over \$50 million and it claimed many millions of dollars going forward.

Montana’s recent demand for rent was based on its assertion that the rivers where the facilities are located had been navigable for title at the time Montana became a State – in 1889 – and that the State therefore gained title to the riverbeds under the “equal footing doctrine.” The Montana courts looked at the rivers as a whole and brushed past PPL Montana’s expert evidence of non-navigability, awarding summary judgment to the State on the question of navigability, and thus title.

The United States Supreme Court agreed with almost all of PPL Montana’s arguments challenging the Montana courts’ conclusion. Carefully distinguishing the test of navigability for title from the navigability test used to determine Congress’ power to regulate interstate commerce, the Court ruled that the Montana courts should have considered the rivers on a segment-by-segment basis; that portages demonstrate non-navigability; that present-day use is of limited relevance; and that States’ trust powers have no bearing on the federal law that determines riverbed title under the equal footing doctrine.

The Court held that the Great Falls reach, where five of the ten dams at issue in the case are located, is non-navigable and not subject to the State’s title claims and rent demands. The Court remanded for proper application of the federal navigability-for-title test to the river segments where PPL Montana’s five other dams are located. With respect to these river segments, the Court said the state courts ignored substantial evidence that these five dams are located on stretches of the Missouri, Madison, and Clark Fork rivers that were not navigable when Montana became a state. The court did not expressly rule on whether Montana’s long delay in asserting ownership barred its claims, but noted it was further evidence reflecting the understanding that the river segments at issue were not navigable at the time of statehood.

Unanimous Supreme Court Decision Supports Hydropower Industry and Private Landowners

The decision and briefs can be found at the Court's website, and the case is Docket No. 10-218¹: <http://www.supremecourt.gov/opinions/slipopinions.aspx> . K&L Gates LLP, together with other counsel, represented PPL Montana in the case.

Authors:

Elizabeth Thomas

liz.thomas@klgates.com
+1.206.370.7631

Kari L. Vander Stoep

kari.vanderstoep@klgates.com
+1.206.370.7804

Donald A. Kaplan

don.kaplan@klgates.com
+1.202.661.6266

K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg
Hong Kong London Los Angeles Miami Milan Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh
Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2012 K&L Gates LLP. All Rights Reserved.

¹ K&L Gates LLP, together with other counsel, represented PPL Montana in the case.