



## State: PPL, others have no case for U.S. Supco appeal of riverbed-rental case

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HELENA — The U.S. Supreme Court should not accept PPL Montana's appeal of a decision leading to a multimillion-dollar state river lease, because Montana clearly owns the riverbeds under the company's hydroelectric power projects, a top state attorney has told the high court.

"PPL repeatedly misstates the record, and that record presents no important federal question," state Solicitor Anthony Johnstone wrote in arguments filed Friday with the U.S. Supreme Court. "PPL does not, and did not ever, have title to the riverbed lands at issue."

PPL Montana, the largest private generator of electric power in the state, is asking the nation's high court to overturn a Montana Supreme Court ruling in January that said the state owns the riverbed under PPL's 10 hydroelectric projects on the Madison, Missouri and Clark Fork Rivers.

The Montana ruling, which said those rivers are "navigable" and therefore the riverbeds are owned by the state, upheld a state claim that PPL owes \$41 million in back rent for using the riverbeds from 2000-2007. The ruling also allows the state to charge rent in subsequent years.

The U.S. Supreme Court is expected to decide the end of this month whether to accept PPL Montana's appeal. The high court accepts about 1 percent of the 8,000 cases it is asked each year to consider on appeal.

PPL has said the Montana ruling either ignored or incorrectly interpreted federal law and earlier court decisions, and should be overturned.

Two groups representing Montana water-users, the Cato Institute, a Libertarian think tank, and power-industry groups also have asked the Supreme Court to take the case.

They've argued that the Montana court decision is flawed and threatens ownership rights of "thousands of landholders" along rivers, and amounts to a "judicial taking" of private property.

Johnstone took on those arguments as well, saying neither PPL nor any landholders have ever owned title to the bed of "navigable" rivers, which were granted to the state at statehood.

"(They) will be disappointed by the fact that PPL's deeds and pleadings show it has no riverbed property to take," he wrote. "Given this, the only way 'thousands ... will lose their property rights' is if PPL takes Montana's great rivers from the people who have navigated, enjoyed and owned them since statehood."

The Montana decision came in a lawsuit filed in 2003 by several parents of Montana schoolchildren and later taken over by the state. It said the riverbeds used for generating power are school-trust land.

Two other power companies — PacifiCorp. and Avista Corp. — settled the case and agreed to pay rent, but PPL Montana has fought the issue in court.

The Montana Supreme Court's 5-2 decision said the riverbeds are owned by the state because the rivers are "navigable" streams.

PPL and its allies say the U.S. Supreme Court has ruled that the navigability of a river must be determined "section by section," and that Montana courts didn't follow that standard.

Johnstone said ample historical evidence and other court rulings state clearly that the Missouri, Clark Fork and Madison rivers were navigable at statehood, and that brief interruptions by waterfalls or rapids don't make the rivers non-navigable.

PPL has "cherry-picked" historical reports and statements on how stretches of the river weren't passable by large, powered watercraft such as steamboats, he said.

"What PPL calls a 500-page 'mountain of contrary evidence' is a pile of largely immaterial government reports on vast interstate

river basins,” Johnstone wrote. “They contain only a molehill’s worth of specific historical navigability analysis behind the 50 words PPL quotes in its petition.”