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Supreme Court Asks Obama Admin to Weigh In on Riverbed Dispute

By LAWRENCE HURLEY of

The Supreme Court asked for the Obama administration's views today on whether the Montana Supreme Court correctly ruled that a power company must pay rent for the use of riverbeds where its hydroelectric dams are located.

The decision to ask for the federal government to weigh in on the case indicates the court has a keen interest in the issues and is more likely than not to eventually decide to hear it.

In its **decision** (pdf), the Montana court held over the objections of power company PPL Montana LLC that the state owned the riverbeds. The power company could be forced to pay millions in retroactive compensation if the ruling is upheld.

Legal groups supportive of the company's position say the ruling could also lead to other states taking similar action if the Supreme Court allows it to stand.

The case will now be on hold until acting Solicitor General Neal Katyal, the administration's chief advocate before the Supreme Court, files a brief outlining the government's position.

"We welcome the opportunity to talk to the solicitor general's office about this case," said Paul Clement, a partner at the King & Spalding law firm who represents the power company. Clement served as solicitor general during the George W. Bush administration.

Prior to the Montana ruling, the riverbeds were assumed to be owned either by private landowners or the federal government. The state asserted its ownership claim as recently as 2004, and then only after private citizens had initially filed suit a year earlier claiming that PPL Montana owed the state millions of dollars in rent.

The company argues that not only does the state not own the riverbeds but also that its claim is pre-empted by federal law regulating the licensing of hydropower projects.

The initial lawsuit, filed in the U.S. District Court for the District of Montana, was dismissed, but the litigation continued in state court.

In its March 30 decision, the Montana Supreme Court held that the state owned the riverbeds based on an 1845 Supreme Court case that said states hold title to riverbeds if the river was navigable at the time the state was admitted to the Union. The state argued that the rivers were navigable when Montana was admitted in 1889, a conclusion the power company disagrees with.

PPL Montana also argues that it should prevail under the Federal Power Act, based on the fact that the dams were approved by the federal government, which has "exclusive jurisdiction" over hydropower licenses.

The implications of the case beyond Montana were raised in a friend-of-the-court brief filed in support of PPL Montana by the Cato Institute, a libertarian think tank.

Attorney Mark "Thor" Hearne, characterized the lower court ruling as a fundamental attack on the Fifth Amendment, which guarantees "just compensation" when the government seeks ownership of property.

The Montana court decision was a "threat to settled property rights" and could lead to other states adopting a similar approach, he wrote. "The emergence of the states as a threat to redefine property rights in this manner is a clear and present danger to rights protected by the Fifth Amendment," he added.

If the Supreme Court does not intervene, "the State of Montana -- and other states -- will be able to appropriate title to any submerged lands and riverbeds they desire," Hearne wrote.

In response, Anthony Johnstone, an attorney for Montana, argued in the state's brief that the case focuses primarily on state law issues that the Supreme Court does not need to interfere with.

"PPL does not, and did not ever, have title to the riverbed lands at issue," Johnstone wrote.

Click here (pdf) to read the Montana Supreme Court ruling.

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