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**WHAT LIES BENEATH TROUBLED WATERS:
THE DETERMINATION OF NAVIGABLE RIVERS
IN PPL MONTANA, LLC V. MONTANA, 132 S.CT.
1215 (2012)**

AMY WEGNER KHO*

I. INTRODUCTION

Recently in *PPL Montana v. Montana*, the Supreme Court of the United States (“Court”) rejected the State of Montana’s claims of title to riverbeds beneath privately owned hydroelectric power plants. The question presented a test of whether three factual determinations of navigability still apply as they have in the past. The three factual questions at issue were: (1) whether the segment-by-segment analysis is appropriate; (2) whether portage defeats navigability; and (3) whether modern modes of travel can provide evidence of navigability that would not exist otherwise. As detailed below, the Court affirmed that determinations of navigability for purposes of deciding riverbed ownership remain the distinctive questions of fact to be proved. Due to the importance of ownership of title to riverbeds, this critical affirmation provides more stability for the future, as states will not be able to take land from the federal government 100 years after the fact.

The case at hand considered the issue of riverbeds beneath particular segments of rivers where the water was so rough that river travelers had to steer around them. It is the land beneath these troubled waters where the controversy lies.¹ States cannot make rulings by determining navigability of rivers that would retroactively grant more land to the state than it actually received upon admission into the United States.²

The doctrine of navigability is a common law doctrine that determines whether a State or the Federal government owns title to riverbeds. The Court’s decision confirmed several aspects of the strictures of the doctrine of navigability for purposes of determining state title to riverbeds, a matter governed by federal law and determined at the date of statehood according to the equal footing doctrine. The law grants States the title to the beds of rivers that were navigable in fact at the time of statehood, while those unnavigable at the time of statehood remain with the federal government to be granted or sold as part of the federal domain.

* With thanks to Alexandra Davis at Vranesh & Raisch, L.L.C., for review and comments.

1. *PPL Montana v. Montana*, 132 S.Ct. 1215 (2012).

2. *Id.* at 1235.

On February 22, 2012, the Supreme Court decided the contested *PPL Montana, LLC v. Montana* case.³ Although the case started in 2003 as a suit by parents looking to raise money for their children's school against a power company, it quickly became a dispute between the State and Federal governments.⁴ The parents of Montana school children sought compensation from the hydroelectric power company, PPL Montana, LLC ("PPL"), for their rent-free use of state-owned riverbeds underneath a number of the company's hydroelectric dams.⁵

Issues addressed by the Supreme Court included the distinction between "navigability" for purposes of title and "navigability" in a regulatory context; the importance of analyzing the navigability of a river on a segment-by-segment approach; and whether evidence of modern day usage of a river may be relied upon in determining navigability at the time of statehood. The court held that: (1) the State did not hold title to riverbed segments that were unnavigable at the time of statehood due to the equal footing doctrine; (2) the 17-mile Great Falls reach of the Missouri River—from the head of the first waterfall to the foot of the last—was unnavigable; (3) the modern recreational use of the Madison River in Montana did not prove the river was navigable at the time of statehood; and (4) the reliance by the utility company and its forerunners upon Montana's long failure to assert title to riverbeds was evidence to support the conclusion that the river segments were unnavigable.⁶ The Court held that the Montana Supreme Court had erred in its application of these rules and remanded the matter back to the Montana Courts for further proceedings.

II. BACKGROUND

The focus of this controversy lies in ownership of the land beneath the troubled waters of three Montana Rivers.⁷ PPL, a Delaware based limited liability company, owns ten facilities that rest on the riverbeds of the Upper Missouri, Madison, and Clark Fork Rivers.⁸ The Court expressed great interest in the histories of these three rough rivers.⁹ In addition to examining the procedural posture and the facts in the case, the Court also spent a great deal of time focusing on the rivers and the historical records describing the Montana rivers at the time of Montana's statehood.¹⁰ The Court examined historical texts, encyclopedias, and journals from Lewis and Clark's historic expedition in order to discover as many facts as possible about the navigable nature of the three rivers at Montana's statehood in 1889.¹¹

3. *Id.*

4. *Id.*

5. *Id.* at 1225.

6. *Id.* at 1215.

7. *Id.* at 1225.

8. *Id.*

9. *Id.* at 1222.

10. *Id.*

11. *Id.*

The specific hydroelectric facilities, or dams, that PPL owns include the Thompson Falls Project, built in 1915 and located on the Clark Fork River, and the Missouri-Madison Project on the Missouri and Madison Rivers.¹² The Federal Government originally licensed the Thompson Falls facility in 1949, and the Federal Energy Regulatory Commission (“FERC”) re-licensed it in 1979.¹³ The dams on the Madison and Missouri river, built between 1891 and 1958, are together called the “Missouri-Madison Project” and were relicensed by FERC on September 27, 2000.¹⁴

PPL bought the Thompson Falls and Missouri-Madison Projects from the Montana Power Company on December 17, 1999.¹⁵ Although some of the dams were over 100 years old when PPL bought them, Montana had never once sought rent from those previous owners—this made it all the more confusing when, PPL found itself in the middle of a legal whirlpool just four years later.¹⁶ Suddenly, the idea of demanding rent became very important to the parents of some Montana school children, who then sued PPL based on the premise that the riverbeds underneath the dams were part of the school trust lands and PPL was thus duty-bound to pay rent for using the school trust lands for their hydroelectric power plants.¹⁷

Despite the fact that Montana had never previously sought payment for the use of the state-owned riverbeds, the State decided to join in the federal suit against PPL, filing its own complaint and requesting compensation from PPL under the school trust theory and also under the Hydroelectric Resources Act.¹⁸ Suddenly the case became more than just a dispute over payment—it was now about sovereignty.

After being dismissed by the federal court for lack of diversity jurisdiction,¹⁹ PPL and two other power companies sued Montana in the First Judicial District Court of Montana, seeking a declaratory judgment action against the State and contesting Montana’s power to seek compensation for riverbed rent at the FERC-licensed dams on the Clark Fork, Missouri, and Madison Rivers.²⁰ In a counterclaim, Montana argued for ownership of the riverbeds based on the equal-footing doctrine, and thus demanded the requisite rent from PPL for using the land.²¹ The Montana trial court granted summary judgment to Montana ruling that the state owned the riverbeds and ordering PPL to pay back rents of \$40,956,180 for use of the riverbeds between 2000 and 2007.²² The Montana Supreme Court

12. PPL Montana v. State, 229 P.3d 421, at 426 (Mont. 2010).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. PPL Montana v. Montana, at 1225.

20. PPL Montana v. State, 229 P.3d at 427.

21. PPL Montana v. Montana, at 1225.

22. *Id.* at 1226.

("court") affirmed reasoning that "navigability for title purposes is very liberally construed."²³ The court found that independent review of case law in this area "establishes unequivocally" that the lower court's decision was correct in determining that the navigability for title test was "somewhat fluid."²⁴ The court found the case law to suggest a very "narrow rule," that while rivers do not have to have experienced "actual use" at the time of statehood, they must show the potential of providing passage for steam or sail vessels so as to be viewed as a thoroughfare for interstate commerce.²⁵ In addition, the court embraced the idea that modern navigation and commerce could be "retroactively applied to considerations of navigability."²⁶

The United States Supreme Court's review of this case arose from a petition of certiorari from the Montana Supreme Court's affirmation of the lower court's grant of summary judgment in favor of the state.²⁷

III. SUPREME COURT DECISION

PPL argued that the Montana Supreme Court's decision was incorrect for several reasons.²⁸ First, the court failed to analyze the segments of the rivers in question with enough care to determine whether they were navigable in fact.²⁹ Second, the court improperly addressed the question of portage and whether the necessity of portage defeated navigability and mistakenly relied on evidence of modern-day use on the Madison River to determine navigability.³⁰ Finally, the court erred by relying on the belief that any other decision would undermine the public trust doctrine.³¹ The United States joined PPL as *amicus curiae* in support of PPL's arguments.³²

After taking a historical detour through the geography of Montana, the United States Supreme Court began analyzing the case by discussing the two legal principles that control the case: the doctrine of navigable waters, and the equal-footing doctrine.³³

The navigability doctrine under English common law created the basis for the American law that gives states title to riverbeds beneath navigable waters as sovereigns.³⁴ In England, the courts distinguished between tidal waters and nontidal waters, as tidal waters were royal rivers and non-

23. PPL Montana v. State, 229 P.3d at 446.

24. *Id.*

25. *Id.*

26. *Id.* at 446-47.

27. PPL Montana v. Montana, at 1226.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

tidal were considered to be public highways.³⁵ The English Crown held title to the land beneath the royal rivers, but the public had the right of passage and right to fish in the waters.³⁶ Private owners held the title of the riverbed and soil of nontidal waters, however, as with the royal rivers, the public still had right of passage over these public highways.³⁷ Early American law adopted the English common law for riverbed title. That law evolved to the point that "a State holds presumptive title to navigable waters whether or not the waters are subject to the ebb and flow of the tide."³⁸ This title rule, known as navigability in fact, generally deems waters navigable only when they are in fact.³⁹

The equal-footing doctrine states that upon admission into the United States, each new state enters with the same or equal rights as the original states; this creates a "federal constitutional significance" in the rules for state riverbed title.⁴⁰ Less than seventy years after the United States declared its independence, the Supreme Court ruled that, based on sovereignty the 13 original states "hold the absolute right to all their navigable waters and the soil under them, subject only to rights surrendered and powers granted by the Constitution to the federal government."⁴¹ This was consistent with the Constitutional premise that the federal government had only those specific powers ceded by the States and no more.

Under the equal-footing doctrine, upon statehood, the state gains title to the land beneath navigable rivers.⁴² The navigability in fact doctrine asserts "those rivers must be regarded as public navigable rivers in law which are navigable in fact."⁴³ The test for navigability in fact is whether rivers "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."⁴⁴ Navigability is a question of fact determined at the time of statehood and by the "natural and ordinary condition" of the river.⁴⁵ The Montana Supreme Court misapplied the test for navigability and used the test in the context of interstate commerce to determine admiralty jurisdiction, which allows a waterway to be determined navigable even if not originally so but was later improved or changed to allow commerce.⁴⁶ However, in the test for navigability in fact, the analysis focuses only on navigation and not on interstate travel.⁴⁷

35. *Id.*

36. *Id.* at 1226-27.

37. *Id.* at 1227.

38. *Id.* (see, *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810)).

39. *PPL Montana v. Montana*. at 1227.

40. *Id.*

41. *Id.* (quoting *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842)).

42. *Id.* at 1227-28.

43. *Id.* at 1228 (quoting *The Daniel Ball*, 77 U.S. 557 (1871)).

44. *Id.*

45. *Id.* at 1228 (see, *Oklahoma* at 591, 42 S.Ct. 406).

46. *Id.*

47. *Id.* at 1228-29.

Thus, under American common law, the English common law and the equal-footing doctrine dictate title to riverbeds. The United States Supreme Court addressed several issues that arose in the lower court's ruling: (1) whether the segments of the rivers are navigable in fact; (2) if the necessity of portages defeat navigable rivers; (3) if present-day recreation on the Madison River establishes navigability; (4) and if an alternate ruling would undermine the public trust doctrine. Because its rulings on these four issues was enough to reverse the lower court's grant of summary judgment, the Court did not reach the question of whether the Montana Supreme Court erred in respect to the burden of proof regarding navigability.⁴⁸ The Court's analysis of these questions provides affirmation that title indeed vests at statehood and establishes stability for future uses of riverbeds.

A. NAVIGABLE IN FACT

Justice Kennedy wrote that the "primary flaw in the reasoning of the Montana Supreme Court lies in its treatment of the question of river segments and overland portage."⁴⁹ These two questions are important factual questions that determine whether a river is navigable.

1. Segments: River as a Whole or River in Part

In order to evaluate the correct title to submerged lands under the equal-footing doctrine, the Supreme Court adjudicates a river based on a segment-by-segment analysis to determine whether each specific section of river is navigable.⁵⁰ In support of its ruling in favor of State title, the Montana Supreme Court had dismissed the segment-by-segment method, referring to it as "a piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable." The United States Supreme Court called this "an unequivocal error" noting that the segment-by-segment approach to navigability for title is "well settled."⁵¹ In the PPL decision, the Court relied on precedent set in *United States v. Utah*, noting

the controversy relates only to the sections of the rivers which are described in the complaint . . . even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends⁵²

In *Utah*, the Court examined the Colorado River, section by section, and pointed out the importance of determining the specific locations

48. *Id.* at 1234.

49. *Id.* at 1229.

50. *Id.*

51. *Id.* at 1229 (quoting PPL Montana v. State, at 448-49.)

52. *Id.* (quoting Utah, 283 U.S. 64, at 77).

where the river is no longer navigable.⁵³ Here, the Court examined legal precedent court determined navigability in fact section by section, evaluating whether the rivers in question were “navigable in fact at the *locus in quo*.”⁵⁴

Further, the Court noted that in addition to legal precedent, other matters also encouraged segmentation, including the physical features of a river.⁵⁵ When a river stretches across a wide expanse of geography, each segment of river can be vastly different from another.⁵⁶ For example, the Missouri River runs over 2,000 miles from steep mountains with waterfalls to rapids where the river foams and splashes to flat plains with a multitude of agricultural diversion ditches where the river moves significantly slower.⁵⁷ The Missouri River is much different at the headwaters in Montana than it is when it joins the Mississippi River; thus, the segment-by-segment approach would be the only accurate way to determine navigability in fact.⁵⁸

The segment-by-segment approach to determining riverbed title under the equal-footing doctrine is also in accord with the ways in which riparian landowners allocate riverbed title, as each owner owns bed and soil along the length of his adjacent land.⁵⁹ The Supreme Court noted that, despite the fact that the Montana Supreme Court held that segmentation is “inadministrable,” it had enough information to “divide up and apportion” the river segments in order to appraise the land and place a value on unpaid rents owed by PPL.⁶⁰ The Supreme Court determined from the facts that a number of the specific sections of rivers at issue here are “both discrete⁶¹ as defined by physical features characteristic of navigability or unnavigability, and substantial, as a matter of administrability for title purposes.”⁶²

Thus, the segment-by-segment approach to determining a river’s navigability for title has been well established under legal precedent, encouraged by the distinct physical features of a river, and is supported by a long history of riparian landowners claiming title to riverbeds. Accordingly, the Supreme Court found the lower court erred in disregard for the

53. *Id.* (quoting *Utah at 90*).

54. *Id.* (quoting *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 85 (1922) where the segment of “the Arkansas River that ran along the Osage Indian Reservation was navigable, and thus, whether the United States originally, and the Osages as its grantees, unequivocally held title to the riverbeds because the Arkansas River ‘is and was not navigable at the place where the river bed lots, here in controversy, are’”).

55. *Id.* at 1230.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (a specific example of the discrete locations of the segments is the Great Falls section of the Upper Missouri River, with five waterfalls and rapids along 17 miles of the river).

62. *Id.* at 1231.

segment-by-segment approach in determining river navigability for title.⁶³ This decision affirms long established law regarding the methods for determining navigability.

2. Portages

When a segment of a river is so turbulent, or has obstacles that prevent a boat from passing through the section, the boat and cargo must be lifted out of the river and carried to a point where the river is once again navigable, and this action is termed "portage." Thus, the second issue arising in this case was whether the need to portage defeats navigability with PPL arguing that portage seems to underscore the inability to navigate that segment of river.

Using the "short interruptions" approach, the Montana Supreme Court ruled that the Great Falls reach was navigable because it could be managed by way of land route portage.⁶⁴ The court held that the section-by-section approach to determining navigability in fact was not defeated by a "short interruption" where portage was necessary.⁶⁵ According to the lower court, these short interruptions of travel along the Montana rivers, where travelers were forced to carry their boats and cargo over waterfalls, rapids or past other obstructions, was not enough to defeat navigation even if the short interruption was several miles and required days added onto the journey.⁶⁶

In its analysis, the Supreme Court of the United States reviewed letters and journals written during the Lewis and Clark expedition in 1805, and noted that when Lewis and Clark reached the Great Falls section of the Missouri River the rapids were so rough that the explorers had to abandon their larger boats and haul their canoes and supplies out of the river and carry them around eighteen miles over land, which took at least 11 days.⁶⁷ The Court affirmed that the length of time it took to traverse the rough sections of river did not matter, as "even if portage were to take travelers only one day, its significance is the same: it demonstrates the need to bypass the river segment, all because that part of the river is unnavigable."⁶⁸ This test of portages on the navigability in fact of rivers states that if the obstruction is significant enough that it makes travels on the river get out of the boat in order to traverse the obstacle the river is unnavigable in fact at that location.⁶⁹ Therefore, the lower court erred in its statement concerning the rough sections of river in question that portages "are not sufficient to defeat a finding of navigability."⁷⁰

63. *Id.* at 1229.

64. *PPL Montana v. State*, 229 P.3d at 449.

65. *Id.*

66. *Id.*

67. *PPL Montana v. Montana*, at 1231.

68. *Id.*

69. *Id.*

70. *Id.* (quoting *PPL Montana v. Montana*, 229 P.3d, at 446).

In reaching its conclusion that the court misapplied this Court's decision in *The Montello*,⁷¹ the Supreme Court noted that

[t]he consideration of portage in *The Montello* was for a different purpose . . . not upon navigability in fact but upon whether the river was a navigable water of the United States . . . ⁷² [t]he latter inquiry is doctrinally distinct, turning upon whether the river 'forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States or foreign countries in the customary modes in which such commerce is conducted by water'⁷³

However, in regards to navigability in fact, if the segment of river is so obstructed that portage is necessary, then that segment of the river is un-navigable.

B. RECREATION ON THE MADISON RIVER

The Supreme Court of the United States ruled that Montana's highest court erred again in relying on evidence of modern use of recreational boats on the Madison River to show the river was navigable.⁷⁴ The correct analysis for using modern day river usage to show navigability for title purposes, requires a party to prove "the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and the river's post-statehood condition is not materially different from its physical condition at statehood."⁷⁵ However, if the boats used to navigate the river in the present allow "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."⁷⁶ The Montana Supreme Court's ruling did not show that it made these findings or that the watercraft used at the time of statehood was similar to recreational boats currently used; therefore, the court erred as a matter of law on its reliance on this modern, recreational use of the Madison River.⁷⁷

Evidence presented must show that the river, at the time of statehood, could allow commercial use that might have occurred in 1889, such as travel and customary business.⁷⁸ In addition, the Court believed that the state supreme court failed to adequately study the changes of the river's flow movement throughout Montana's state history, as these

71. *Id.* at 1231.

72. *Id.* at 1231.

73. *Id.* at 1231-32.

74. *Id.* at 1233.

75. *Id.* at 1233.

76. *Id.* at 1234.

77. *Id.* at 1233-34.

78. *Id.*

changes could dramatically change navigability and might actually cause it to be easier to navigate now than at statehood.⁷⁹

The Court ruled that while the lower court was correct in that a navigable river "need not be susceptible of navigation at every point during the year, neither can that susceptibility be so brief that it is not a commercial reality."⁸⁰ The recreational activity occurring on the river currently could not be used as evidence proving navigability for title purposes at statehood and the lower court's reliance on such evidence without further investigation was "wrong as a matter of law."⁸¹ Thus, the Court's decision now provides important stability in maintaining that the navigability test applies as of the time of statehood.

C. UNDERMINING THE PUBLIC TRUST DOCTRINE

The state of Montana also contended that if the lands beneath the Montana rivers do not belong to the state, it will be a blow to the public trust doctrine, "which concerns public access to the waters above those beds for purposes of navigation, fishing, and other recreational uses."⁸² However, the Court states that Montana's argument shows the State's misinterpretation of the public trust doctrine.⁸³ This additional argument is interesting because it attempts to bring modern day resource values to a simple question of ownership.

The public trust doctrine is ancient, tracing its history as far back as the Roman Empire, and more recently the tidal rivers owned by the English crown and the early history of the United States.⁸⁴ "Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law, subject as well to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power."⁸⁵ While case precedent gives authority for states to take title to the land beneath rivers to hold in trust for public good, the public trust doctrine too arises from state law rather than the Constitution.⁸⁶ Federalism principles give states the power to establish the breadth of the public trust over waters within their state, while federal law allows the equal-footing doctrine to control riverbed title.⁸⁷

The public trust doctrine has many ramifications that mere ownership does not. For example, where the public trust doctrine exists, a third party may sue the state and water users to prevent certain actions that are against the public trust. By refusing to tie navigability in fact, which is a

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1234.

83. *Id.*

84. *Id.*

85. *Id.* at 1235.

86. *Id.*

87. *Id.*

question of title, to the public trust doctrine, the Court maintained a bright line distinction between federal common law and state law.

IV. DISCUSSION

The Supreme Court of the United States held that the lower court's ruling, that Montana owned the land beneath the three contested rivers, showed an "infirm legal understanding" of the "rules of navigability for title under the equal-footing doctrine."⁸⁸ States cannot make rulings by determining navigability of rivers that would retroactively grant more land to the state than it actually received at the state's admission into the United States.⁸⁹ The Court reversed the lower court's ruling, and remanded the case.⁹⁰

This case seems to suggest that the Court might be departing from its traditional precedent in dealing with state courts, instead of reviewing errors in applying federal law and remanding for retrial, the Court's ruling that the Great Falls section was unnavigable potentially suggests a shift in the way the Court will deal with state court decisions in the future. This case reached the Supreme Court from the petitioner's writ of certiorari, not a claim under federal law demanding a judgment; however, the Court still treats this case as an appeal from a lower court.⁹¹

In regards to the public trust doctrine, the Court emphasizes this as a matter of state law not governed by the Constitution. The Court's treatment of the public trust doctrine was interesting in its limitations on the definition of the doctrine. While the Court explained that the public trust doctrine is a matter of state law, its definition of the doctrine was narrow, "the public trust doctrine...concerns public access to the waters above those [river]beds for purposes of navigation, fishing, and other recreational uses."⁹² It is intriguing that the short list enumerated by the Court does not include other common public uses such as environmental protection and commerce. In future public trust doctrine cases, it should be fascinating to see effects of this ruling and its limited enumeration of public trust uses, specifically whether it applies solely in the realm of state law. The principles of federalism enunciated in *PPL Montana v. Montana* would support the theory that in the future the public trust doctrine is for the states to apply, but not for determining title or navigability in fact.

88. *Id.* at 1235.

89. *Id.* at 1235.

90. *Id.*

91. Thomas W. Merrill, *Opinion Analysis: Montana Dunked on Riverbeds*, SCOTUS Blog. (Feb. 23, 2012, 11:03 AM), <http://www.scotusblog.com/2012/02/opinion-analysis-montana-dunked-on-riverbeds/> (As Prof. Merrill notes, "Ordinarily, when the Court reviews a decision of a state supreme court, it will correct errors in federal law, and remand for application of the correct legal principles [in the instant case, an accurate application of the navigability-for-title test] by the state courts.")

92. *PPL Montana v. Montana* at 1234.

V. CONCLUSION

On remand to Montana State Court, the United States Supreme Court ordered that the lower court reassess their findings on navigability based on the principles set forth in the opinion. However, the Court also ruled that the Great Falls section of the Upper Missouri River was un-navigable in fact. That holding, and the fact that five of the ten hydroelectric facilities are in the Great Falls section, indicates that Montana might not succeed at retrial in their claims that all three rivers are navigable and that the riverbeds are therefore public lands owned by Montana.

The Court affirmed the traditional methods of determining title of rivers and that navigable rivers are navigable in fact. Sections of rivers that are obstructed by rapids or waterfall preventing navigation are un-navigable. If the rivers are troubled to the degree that boats must be lifted out of the river and carried on land, those segments are unnavigable. Modern day use of the river by recreational rafting or fishing does not mean the river was navigable in fact at the time of statehood without meeting the specific elements of the test.

Finally, by refusing to tie the title issue of navigability in fact to the public trust doctrine, the Court maintained a bright line distinction between federal common law and state law. This decision solidifies the fact that individual states cannot make rulings by determining navigability of rivers that would retroactively grant more land to the state than it had originally received at the date it entered the union.