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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>PPL MONTANA, LLC, a Delaware limited liability corporation, and AVISTA CORPORATION, a Washington corporation,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA</p> <p style="text-align: center;">Defendant.</p>	<p>Cause No. CDV-2004-846</p> <p style="text-align: center;"><b><u>MEMORANDUM AND ORDER ON THE NAVIGABILITY OF THE MISSOURI, MADISON AND CLARK FORK RIVERS</u></b></p>
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Defendant and Counterclaimant State of Montana (State) has moved for partial summary judgment on liability and for Rule 37 expenses. The State's motion is in two parts:

- 1) that the Missouri, Madison and Clark Fork Rivers are navigable rivers and that the State owns the streambeds to those rivers; and 2) that the streambeds are part of the State's school trust lands.

Plaintiff and Counterdefendant Avista Corporation

1 for partial summary judgment, contending that the Clark Fork River is not a navigable  
2 river and that title did not pass to the State upon statehood. In addition, Avista and  
3 Plaintiff and Counterdefendant PPL Montana, LLC (PPL), have moved for partial  
4 summary judgment on the issue of whether the streambeds are school trust lands.

5           The motions were heard December 14, 2006. This Order addresses  
6 only the navigability of the rivers. By separate orders, the Court will address the  
7 question of whether the riverbeds are school trust lands and whether the State is  
8 entitled to Rule 37 expenses.

### 9                                   BACKGROUND

10           Avista is a Washington State corporation registered to do business in  
11 Montana, with its principal place of business in Spokane, Washington, and PPL is a  
12 Delaware limited liability corporation registered to do business in Montana  
13 (collectively referred to as "the Utilities"). The Utilities own hydroelectric facilities in  
14 Montana.

15           Avista owns and operates the Noxon Rapids Dam on the Clark Fork  
16 River in Montana. PPL owns the Thompson Falls Dam located on the Clark Fork  
17 River. It also owns seven dams on the Missouri River and a dam on the Madison  
18 River. In addition, PPL owns the Mystic Lake Dam located on the West Rosebud  
19 Creek.

20           In order to operate the facilities the Utilities had to obtain licenses from  
21 the Federal Energy Regulatory Commission (FERC). FERC issues the licenses  
22 pursuant to the Federal Power Act (FPA), 16 U.S.C. § 791a et seq. The Utilities hold  
23 the proper licenses for their respective dams.

24           In October 2003, two residents of **Gallatin** County initiated an action in

1 U.S. District Court against the Utilities and others. **Dolan v. PPL Mont., LLC**, No.  
2 CV-03- 167-M-SWM (D. Mont.). The plaintiffs alleged that state riverbeds are held in  
3 the public school trust by the State and that the Utilities have failed to pay rental  
4 compensation for their use and occupation of the state lands. The federal court  
5 allowed the State to intervene as a plaintiff. Upon motion of the Utilities, all plaintiffs,  
6 except the State, were dismissed from that action. **Id.** The Utilities then moved to  
7 dismiss the action.

8 *////*

9 On November 12, 2004, prior to the federal court issuing its order on  
10 the motion to dismiss, the Utilities filed this action for declaratory relief. In their  
11 complaint, the Utilities asked the Court: 1) to declare that Montana's hydroelectric  
12 resources statute is preempted by the Federal Power Act; 2) to declare that the  
13 State's common-law claims for compensation are preempted by the Federal Power  
14 Act and the federal navigational servitude; and 3) to declare that: a) the Plaintiffs  
15 have acquired a prescriptive easement to use the riverbeds; b) the State is equitably  
16 estopped from asserting a right to lease payments under the hydroelectric resources  
17 statute; c) the State has waived any rights to lease payments; d) the State's request  
18 for payment is barred by laches and applicable statutes of limitation; and e) the State  
19 breached agreements reached with the Utilities in the course of licensing.

20 In response, the State filed an answer and counterclaim containing five  
21 causes of action: declaratory relief, uncompensated use of state lands, unjust  
22 enrichment, trespass, and negligence. The State also filed a motion for summary  
23 judgment on the Utilities complaint for a declaratory judgment.

24 In September 2005, the federal court entered its order adopting Federal

1 Magistrate Judge Erickson's Findings and Recommendation to vacate any rulings  
2 that go beyond the issues of standing and jurisdiction, and to dismiss the action  
3 because the federal court lacked jurisdiction.

4 On April 14, 2006, this Court issued its Memorandum and Order on the  
5 State's motion for summary judgment. In that decision, the Court addressed two  
6 questions of law:

7 1) whether the State's counterclaim for compensation is preempted by the FPA or  
8 the federal navigational servitude, and 2) whether the Utilities can assert any legal or  
9 equitable defense against the State in its role as trustee of state lands. In granting  
10 the State's motion for summary judgment, this Court determined that neither the FPA  
11 nor the federal navigational servitude preempts the State from obtaining  
12 compensation under Section 77-4-208, MCA. The Court further held that the  
13 Utilities cannot assert any of their legal or equitable defenses against the State.

#### 14 **STANDARD OR REVIEW**

15 Summary judgment is appropriate if "there is no genuine issue as to  
16 any material fact and that the moving party is entitled to judgment as a matter of  
17 law." Rule 56(c), M.R.Civ.P. The moving party has the initial burden of showing that  
18 no genuine issues of material fact exist. **Jobe v. City of Polson**, 2004 MT 183, 10,  
19 322 Mont. 157, 10, 94 P.3d 743, 10. Once the moving party establishes no  
20 genuine issues of material fact exist, the burden shifts to the non-moving party  
21 opposing summary judgment to prove otherwise. **Id.** If the court determines no  
22 genuine issues of material fact exist, the court will determine whether the moving  
23 party is entitled to judgment as a matter of law. **Id.**

#### 24 **DISCUSSION**

1           The State asserts two arguments in support of its position that it owns  
2 title to the streambeds of the Missouri, Madison and Clark Fork Rivers. First, the  
3 State argues that because historical records prove that the rivers at issue are  
4 navigable, the State holds title to the riverbeds under the Equal Footing Doctrine.  
5 The State further argues that the Utilities are collaterally estopped from re-litigating  
6 navigability, as the rivers have been determined navigable by FERC and the Federal  
7 Power Commission (FPC), FERC's predecessor. Avista contends that the Clark Fork  
8 River is not a navigable river and that title did not pass to the State upon statehood.

#### 9           Navigability of the Missouri, Madison and Clark Fork Rivers

10           Under the Equal Footing Doctrine, states admitted to the Union after  
11 the original thirteen colonies obtained title to streambeds beneath navigable waters  
12 upon statehood. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845). A  
13 state's claim to the title of streambeds under the Equal Footing Doctrine rests on a  
14 determination of whether the body of water was navigable at the time of the state's  
15 admission to the Union. United States v. Utah, 283 U.S. 64, 75 (1931). Federal law  
16 is the controlling authority used to decide the issue of navigability for title purposes.  
17 Id.; Mont. Coalition for Stream Access v. Curran, 210 Mont. 38, 43, 682 P.2d  
18 163, 166 (1984).

19           The United States Supreme Court established the test for navigability  
20 in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870):

21           Those rivers must be regarded as public navigable rivers in law which  
22           are navigable in fact. And they are navigable in fact when they are  
23           used, or are susceptible of being used, in their ordinary condition, as  
24           highways for commerce, over which trade and travel are or may be  
25           conducted in the customary modes of trade and travel on water.

24           See also United States v. Utah, at 81-83.

1                   While there is no clearly defined meaning of "actual use" or  
2 "susceptible of being used," courts around the country have acknowledged specific  
3 uses of rivers which are sufficient to establish navigability, while meeting the  
4 standard of "trade and travel . . . conducted in the customary modes of trade and  
5 travel on water." With regard to "actual use," the use of the river does not have to be  
6 commercially profitable. See Utah v. United States, 403 U.S. 9, 11 (1971) ("Hence  
7 it is suggested that this was not the use of the lake as a navigable highway in the  
8 customary sense of the word. . . .We think that is an irrelevant detail. The lake was  
9 used as a highway and that is the gist of the federal test.")

10                   The mode or means of travel is also not limited to large-scale  
11 commercial or multiple passenger vessels.

12                   [T]he true test of navigability of a stream does not depend on the mode  
13 by which commerce is, or may be conducted, nor the difficulties of  
14 attending navigation. If this were so, the public would be deprived of  
15 the use of many of the large rivers of the country over which rafts of  
16 lumber of great value are constantly taken to market.

17                   It would be a narrow rule to hold that in this country, unless a  
18 river was capable of being navigated by steam or sail vessels, it could  
19 not be treated as a public highway.

20                   The Montello, 87 U.S. (20 Wall) 430, 441 (1874). See also United States v. Holt  
21 State Bank, 270 U.S. 49, 56 (1926) ("[N]avigability does not depend on the particular  
22 mode in which such use is or may be had - - whether by steamboats, sailing vessels  
23 or flatboats... .") Furthermore, the floating of timber down rivers may also establish  
24 navigability. In Curran, the Montana Supreme Court acknowledged that navigability  
25 in fact under federal law can be determined by the log-floating test. Curran, 210  
Mont. at 44, 682 P.2d at 166.

26                   With regard to assessing navigability under the alternative test,

1 "susceptible of being used," the key inquiry is "susceptibility in the ordinary condition  
2 of the rivers, rather than of the mere manner or extent of actual use." United States  
3 v. Utah, 283 U.S. at 82. In The Montello, the Court explained:

4 The capability of use by the public for purposes of transportation and  
5 commerce affords the true criterion of the navigability of a river. . . .If it  
6 be capable in its natural state of being used for purposes of commerce,  
7 no matter in what mode the commerce may be conducted, it is  
8 navigable in fact, and becomes in law a public river or highway.

9 The Montello, at 442.

10 The Ninth Circuit Court of Appeals has stated that "use of the river  
11 need not be without difficulty, extensive, or long and continuous." Or. v. Riverfront  
12 Prot. Ass'n., 672 F.2d 792, 795 (9th Cir. 1982).

13 a. Missouri River

14 The State has presented considerable evidence that based on  
15 historical use, the Missouri River is a navigable waterway. The State also directs the  
16 Court's attention to the 1948 decision of the FPC, which found that "the Missouri  
17 River, throughout its entire length is a navigable water of the United States." In re  
18 Mont. Power Co., IT-5840, 7 F.P.C. 163 (F.P.C. 1948). In that case, the Montana  
19 Power Company, PPL's predecessor, was challenging the Commission's  
20 determination that Montana Power was required to apply for licenses for its  
21 hydroelectric developments on the Missouri and Madison Rivers.

22 The Commission's decision was affirmed by the United States Court of  
23 Appeals, District of Columbia Circuit. Mont. Power Co. v. Fed. Power Comm'n.  
24 185 F.2d 491 (D.C. Cir. 1950). In that case, the court addressed the question of  
25 whether the Missouri River from Ft. Benton to its headwaters at Three Forks is a  
navigable water of the United States. The court held that it was. In reaching its

1 decision, the court specifically referenced the Great Falls of the Missouri which have  
2 always presented a natural barrier to navigation. Although the falls have never been  
3 navigated, the court noted that there is substantial evidence showing actual use of  
4 the river upstream from Ft. Benton to the falls and from above the falls to Three  
5 Forks.

6           The Mont. Power Co. case dealt with navigability under the FPA, not  
7 with navigability for title purposes. Under the FPA, navigable water is not defeated  
8 by reason of interruptions between the navigable parts of streams by falls or rapids.  
9 **16 U.S.C. §796(8).**

10           This case does not involve federal power plant licensing and PPL  
11 argues that the appropriate analysis to use is to look at the relevant reaches of the  
12 river, not the entire stretch of the river. It claims that the Great Falls clearly prevent  
13 navigability of those reaches of the Missouri and, therefore, the river is not navigable.  
14 The Court concludes otherwise. Navigability based on either actual use or  
15 susceptibility to use may be determined, despite the presence of obstacles to free  
16 passage, such as rapids, riffles or occasional areas of low water requiring portage,  
17 as long as "the natural navigation of the river is such that it affords a channel for  
18 useful commerce. The Montello, at **441**. This was later affirmed in United States  
19 v. Utah, when the Court stated:

20           [T]he mere fact of the presence of such sandbars causing impediments  
21 to navigation does not make a river non-navigable. It is sufficient to  
22 refer to the well-known conditions on the Missouri River and the  
23 Mississippi River. The presence of sandbars must be taken in  
24 connection with other factors making for navigability. In *The Montello*,  
the Court said: "Indeed, there are but few of our fresh-water rivers  
which did not originally present serious obstructions to an uninterrupted  
navigation. In some cases, like the Fox River, they may be so great  
while they last as to prevent the use of the best instrumentalities for



1 carrying on commerce, but the vital and essential point is whether the  
2 natural navigation of the river is such that it affords a channel for useful  
3 commerce. If this be so the river is navigable in fact, although its  
4 navigation may be encompassed with difficulties by reason of natural  
5 barriers such as rapids and sandbars."

6 **United States v. Utah**, 283 U.S. at 86-87 (quoting **The Montello**, 87 U.S. (20  
7 Wall) at 443) (emphasis added).

8 The history of this case and the pleadings filed by PPL also leave  
9 the Court to conclude that the Missouri River is navigable for title purposes. As  
10 noted this case originated in U.S. District Court for Montana. In its answer to  
11 the amended complaint in federal court, PPL admitted that the Missouri River  
12 is navigable. When it filed its complaint in this Court, it alleged that the  
13 Missouri River is navigable and its answer to the State's counterclaim, it  
14 admitted that the Missouri River is navigable.

15 The rule in Montana is that parties are bound by admissions made  
16 in their pleadings. **Fey v. A. A. Oil Corp.**, 129 Mont. 300, 323, 285 P.2d 578,  
17 590 (1955); **Audit Servs. v. Frontier-West, Inc.**, 252 Mont. 142, 148-49, 827  
18 P.2d 1242, \_\_\_ (1992) (citations omitted). The entire focus of this case since its  
19 inception has been whether the State is entitled to compensation because of  
20 the Utilities occupancy of the State owned streambeds. PPL has admitted that  
21 the Missouri River is navigable and is bound by its admissions.

22 b. **Clark Fork River**

23 The State has submitted historical documents showing that the  
24 Clark Fork River is navigable in fact, including documents showing that the  
25 river was used for log drives.

1 In a proceeding for the licensing of the Thompson Falls Dam, the

2 FPC found:

3 The section of the Clark Fork River between Pend Oreille Lake in  
4 Idaho and the mouth of the Jocko River in Montana was used for  
5 the transportation of persons and property between areas now  
6 constituting the states of Oregon, Idaho, and Montana from 1810  
7 to 1870, such use being canoe and bateaux transportation of furs  
8 by the fur traders of the British Northwest Fur Co., the canoe  
9 transportation of the original missionaries to the Indian tribes in the  
Clark Fork basin, and with the use of short portages around the  
Cabinet Rapids and Rock Island Rapids, by steamboats of the  
Oregon Steam Navigation Co. and its subsidiary, the Oregon &  
Montana Navigation Co. in the carriage of substantial numbers of  
gold miners, their pack animals and supplies, as well as  
commercial freight consigned to the gold camps in the vicinity of  
what is now Helena, Mont.

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11 **The Mont. Power Co., Project No. 1869**, 8 F.P.C. 751, at Finding 13 (F.P.C.  
12 1949). The Montana Power Company, PPL's predecessor, did not contest that  
13 finding

13

14 The FPC also found that the Clark Fork was navigable when it  
15 licensed the Cabinet Gorge in Noxon Rapids Projects in Montana. **Wash.**  
16 **Water Power Co., Project No. 2058**, 10 F.P.C. 657 (F.P.C. 1951) ("[T]he  
17 Clark Fork River is navigable water of the United States at least from the Pend  
18 Oreille Lake in the state of Idaho to the mouth of the Jocko River in the state of  
19 Montana."); **Wash. Water Power Co., Project No. 2075**, 14 F.P.C. 731  
20 (F.P.C. 1955) ("Clark Fork is a navigable water of the United States, at least  
21 from Pend Oreille Lake in Idaho to the mouth of the Jocko River in Montana,  
22 within which stretch proposed Project No. 2075 is to be located") (citations  
23 omitted).

23

24 Although neither the Montana Power Company nor the

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1 Washington Water Power Company, Avista's predecessor, challenged the  
2 FPC's findings, the Utilities contend they are not estopped from contesting the  
3 navigability of the Clark Fork River in this proceeding since the test for  
4 navigability before the FPC is different from the test for navigability in  
5 determining title.

6 The differences between navigability for title and navigability for  
7 proceedings before the FPC is succinctly set forth by the Ninth Circuit Court:

8 Navigability for title to riverbeds differs in three important  
9 respects from navigability for federal regulatory jurisdiction over  
10 power plants under the Commerce Clause. The former must exist  
11 at the time the State is admitted into the Union. Also it must exist  
12 in the river's ordinary condition. . . .it cannot occur as a result of  
13 reasonable improvements. . . .Finally to support federal regulatory  
14 jurisdiction over power plants the river must by statute be, or have  
15 been, "suitable for use for the transportation of persons or  
16 property in the interstate or foreign commerce." 16 U.S.C. §  
17 796(8) (1976). No such "in interstate or foreign commerce"  
18 requirement exists when the issue is navigability for title.

19 **Riverfront Prot. Ass'n**, 672 F.2d at 794, n. 1 (citations omitted).

20 After reviewing the cases relied on by the parties and the various  
21 documents which have been submitted, the Court concludes that the Clark  
22 Fork River is navigable. In licensing the dams, the FPC, of course, was  
23 proceeding under its regulatory jurisdiction over power plants. That, however,  
24 does not mean that this Court cannot rely on the FPC's findings in a case  
25 involving navigability for title. As discussed above, obstructions which require  
portages do not defeat a finding of navigability for title where the river provides  
a channel for commerce. Here, the record shows that the Clark Fork River  
was used for the transportation of persons and property and that use meets  
**The Daniel Ball** test for navigability.

1                   Furthermore, like the Missouri River, both PPL and Avista have  
2 admitted in pleadings in the federal action and in this action that the Clark Fork  
3 River is navigable. In its answer to the State's counterclaim in this action,  
4 Avista denied that the Clark Fork River is navigable. However, paragraph 18  
5 of the Utilities' complaint specifically states that Avista's Clark Fork projects are  
6 "on the Clark Fork River, a navigable river." The Court concludes that PPL and  
7 Avista are bound by their admissions.

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10           c.     Madison River

11                   PPL's Madison Dam and the related Hebgen Dam Storage Facility  
12 operate under the same federal license as the Missouri River dams. However,  
13 during the 1948 licensing proceeding, the FPC did not need to address the  
14 issue of the Madison River's navigability because those projects also occupy  
15 federal lands

16                   There apparently is little historical documentation regarding the  
17 navigability of the Madison River. In 1986, the Heritage Research Center in  
18 Missoula prepared the "Montana Navigable Water Study" for the Montana  
19 Department of State Lands. That study states: "The Madison River has  
20 experienced considerable use historically by explorers, trappers, miners,  
21 farmers, and loggers, and is generally considered to have high potential for  
22 navigation. However, recorded entrances of commercial navigation are few."  
23 (Mason Aff., Ex. A, at 52 ("Montana Navigable Water Study")).

24                   The study does note that in 1913 the Madison River was used to

1 float logs from the mouth of the West Fork of the Madison to Varney, a  
2 distance of 55 miles and that Hebgen Lake has been navigated. (Id.) Today,  
3 the Madison River experiences considerable recreational use.

4           Despite the sparse historical record, the Court concludes the  
5 Madison River is navigable. As with the Missouri and Clark Fork Rivers, PPL  
6 has admitted in its pleadings that the Madison River is navigable, and PPL is  
7 bound by its admissions.

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13           For the foregoing reasons, the Court concludes that the State's  
14 motion for partial summary judgment on the navigability of the Missouri,  
15 Madison and Clark Fork Rivers should be granted, and Avista's motion should  
16 be denied.

17           **IT IS SO ORDERED.**

18           DATED this \_\_\_\_\_ day of August 2007.

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THOMAS C. HONZEL  
District Court Judge

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22 pc: Robert L. Sterup/Kyle Ann Gray  
23 Stephen R. Brown  
Mike McGrath/Anthony Johnstone/Candace West/Jon Ellingson

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS & CLARK COUNTY**

<p>PPL MONTANA, LLC, a Delaware limited liability corporation, and AVISTA CORPORATION, a Washington corporation,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA,</p> <p>Defendant.</p>	<p>Cause No.: CDV-2004-846</p> <p><b><u>MEMORANDUM AND ORDER ON PPL'S MOTION FOR PARTIAL SUMMARY JUDGMENT BARRING THE STATE'S COUNTERCLAIMS FOR MONETARY DAMAGES</u></b></p>
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Plaintiff and Counterdefendant PPL Montana, LLC (PPL) has moved for partial summary judgment on Defendant and Counterclaimant State of Montana's (State) counterclaims which seek monetary damages. The motion was heard December 13, 2006. The Court concludes that PPL's motion should be denied.

**DISCUSSION**

PPL seeks partial summary judgment and dismissal of the State's counterclaims for trespass, negligence, uncompensated use of state lands and unjust enrichment on grounds that any claim for damages under those theories is barred by the applicable statutes of limitation. Prior to PPL filing its motion, the State filed a similar

1 motion for partial summary judgment. In that motion the State argued that Plaintiff and  
2 Counterdefendant Avista Corporation (Avista) and PPL could not assert legal or  
3 equitable defenses against the State's counterclaims.

4           On April 14, 2006, this Court issued its Memorandum and Order,  
5 concluding that PPL and Avista (the Utilities) cannot assert any of their legal or equitable  
6 defenses against the State.

7           The Utilities seek a declaratory judgment that the State is barred  
8 from obtaining rental payments by the doctrine of laches or the applicable  
9 statutes of limitation. However, neither can be asserted in an action  
10 involving the protection of state lands. . . . Therefore, the Court concludes  
11 that the Utilities cannot assert the defense of laches or any statute of  
12 limitation against the State.

13 (Memorandum and Order, April 14, 2006, p.16: 33-17: 13). In support of its decision the  
14 Court relied on Montana Supreme Court decisions **State ex rel. Boorman v. State Bd. of**  
15 **Land Comm'rs**, 109 Mont. 127, 94 P.2d 201 (1939) and **Norman v. State**, 182 Mont.  
16 439, 597 P.2d 715 (1979). In both of those cases, the supreme court recognized that the  
17 provisions of the Montana Constitution addressing state public lands and their disposition  
18 must be strictly observed. **Boorman**, 109 Mont. at 133, 94 P.2d at 303; **Norman**, 182  
19 Mont. at 446-47, 597 P.2d 715 at 719.

20           In this motion, PPL contends that the Court's April 14, 2006, Memorandum  
21 and Order only addressed whether PPL could assert a statute of limitation defense against  
22 the State's counterclaim that it holds title to the streambeds of the Missouri, Madison and  
23 Clark Fork Rivers and not whether PPL can assert a statute of limitation defense against  
24 the State's claims for monetary damages under the theories listed above. As a result,  
25 because the statutes of limitation found at Section 27-2-201, MCA, et seq, apply to the  
State "in the same manner as to actions by private parties," Section 27-2-103, MCA, the  
State's claims are time barred.



1 The State argues that the Court ruled on this issue in its April 14, 2006,  
2 Memorandum and Order, and it cannot be relitigated. The Court agrees.

3 The April 14, 2006, Memorandum and Order is clear that PPL and Avista  
4 cannot assert a statute of limitation defense against the State on its counterclaims.

5 Moreover, the State's counterclaims are based entirely on its allegations that PPL and  
6 Avista have and continue to occupy state lands without paying rental compensation.

7 Pursuant to Article X, Section 11, of the Montana Constitution, the State is the trustee of  
8 state lands and those lands may only be disposed of as provided by law. Accordingly,

9 PPL and Avista may not argue that the statutes of limitations have run on the State's  
10 counterclaims because the disposition and use of state public lands protected by the  
11 Montana Constitution are directly at issue.

12 **NOW, THEREFORE, IT IS ORDERED** that PPL's motion for partial  
13 summary judgment that the State of Montana's counterclaims for monetary damages are  
14 barred by the statute of limitations **IS DENIED**.

15 DATED this \_\_\_\_\_ day of August 2007.

16 \_\_\_\_\_  
17 THOMAS C. HONZEL  
18 District Court Judge

19 pcs: Robert L. Sterup/Kyle Ann Gray  
20 Stephen R. Brown  
21 Mike McGrath/Anthony Johnstone/Jon Ellingson

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS & CLARK COUNTY**

<p>PPL MONTANA, LLC, a Delaware limited liability corporation, and AVISTA CORPORATION, a Washington corporation,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Cause No.: CDV-2004-846</p> <p style="text-align: center;"><b><u>MEMORANDUM AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT ON WHETHER THE STREAMBEDS OF THE MISSOCRI, MADISON AND CLARK FORK RIVERS ARE SCHOOL TRUST LANDS</u></b></p>
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Defendant and Counterclaimant State of Montana has moved for partial summary judgment asserting that the streambeds of the Missouri, Madison and Clark Fork Rivers are school trust lands. Plaintiffs and Counterdefendants PPL Montana, LLC (PPL), and Avista Corporation (Avista) have moved for partial summary judgment contending that the streambeds are not school trust lands. The motions were heard December 16, 2006.

Related to this motion are the State's motion for partial summary judgment that the rivers are navigable and Avista's motion for partial summary judgment that the rivers are not navigable. By separate Order, the Court has held that

1 the rivers are navigable and, therefore, the State owns the streambeds.

2 **DISCUSSION**

3 Montana was admitted to the Union pursuant to the Enabling Act of  
4 February 22, 1889. Enabling Act, ch. 180, 310, 25 Stat. 676; **Dep't of State Lands v.**  
5 **Pettibone**, 216 Mont. 361, 369, 702 P.2d 948,952-53 (1985). Section 10 of the  
6 Enabling Act granted certain lands to the State to be held by it for the support of  
7 common schools. Section 11 placed restrictions on the disposition of those lands. It  
8 also provided that the lands may be leased.

9 In accordance with Section 11 of the Enabling Act, the 1889 Montana  
10 Constitution, Article XI, Section 2, placed those lands in what is referred to as the  
11 public school fund. That section provided in part:

12 The public school fund of the state shall consist of the proceeds of  
13 such lands as have heretofore been granted, or may hereafter be granted,  
14 to the state by the general government, known as school lands; and those  
15 granted in lieu of such: lands acquired by gift or grant from any person  
16 or corporation under any law or grant of the general government; and of  
17 all other grants of land or money made to the state from the general  
18 government for general educational purposes, or where no other special  
19 purpose is indicated in such grant. . . .

17 (Emphasis added.)

18 The provisions of Article XI, Section 2, of the 1889 Constitution are  
19 carried forward in Article X, Section 2, of the 1972 Constitution. It provides in part:

20 **Public school fund.** The public school fund of the state shall  
21 consist of:

22 (1) Proceeds from the school lands which have been or may  
23 hereafter be granted by the United States,

24 (4) All other grants of land or money made from the United  
25 States for general educational purposes or without special purpose. .

24 (Emphasis added.)

25 A determination as to whether the streambeds of navigable rivers of the

1 State are school trust lands is an issue of first impression. Although the streambeds of  
2 navigable waterways are not part of the express grant of land "for the support of  
3 common schools" under the Enabling Act, the State argues that the Equal Footing  
4 Doctrine implies a grant. The State further argues that because title to the streambeds  
5 vested in the State upon its admission to the Union, the streambeds are grants "without  
6 special purpose" under Article X, Section 2, of the 1972 Montana Constitution and,  
7 therefore, they are school trust lands.

8 The Utilities contend that the streambeds were not granted to the State  
9 under the Enabling Act, but that they passed to the State automatically under the Equal  
10 Footing Doctrine as part of the State's sovereignty. In the alternative, the Utilities  
11 argue that if the streambeds were granted to the State, the streambeds have a "special  
12 purposu" because they are public trust lands that must be held in trust for the benefit  
13 and use of all Montanans under the Public Trust Doctrine. PPL also argues that the  
14 flooded lands (those lands outside the streambed and submerged by water upland from  
15 the dams) are not school trust lands.

#### 16 1. **The Equal Footing Doctrine**

17 Under English common law, the Crown held sovereign title to lands  
18 under navigable waters for the benefit of the people. When the thirteen colonies  
19 gained their independence, they claimed title to those lands as the sovereign successors  
20 to the English Crown. **Utah Div. of State Lands v. United States**, 482 U.S. 193. 195-  
21 96 (1987). Under the Equal Footing Doctrine, states admitted to the Union after the  
22 original thirteen colonies obtained title to the land under navigable waters within their  
23 boundaries upon statehood. **Pollard's Lessee v. Hagan**, 44 U.S. (3 How.) 212, 229  
24 (1845). Prior to a state being admitted to the Union, the United States held the land in  
25 trust for the future states. **Id.**, at 212.

2 Section 8 of the 1889 Enabling Act provided that upon approval of its  
3 Constitution, Montana "shall be deemed admitted by congress into the Union under and  
4 by virtue of this act on an equal footing with the original states from and after the date  
5 of said proclamation." The United States Supreme Court has stated:

6 [T]he ownership of land under navigable waters is an incident of  
7 sovereignty. As a general principle, the Federal Government holds such  
8 lands in trust for future States. To be granted to such States when they  
9 enter the Union and assume sovereignty on an "equal footing" with the  
10 established States. After a State enters the Union, title to the land is  
11 governed by state law.

12 **Mont. v. United States**, 450 U.S. 544, 551 (1981) (citations omitted). The Court went  
13 on to hold that "title to the bed of the Bighorn River passed to the State of Montana  
14 upon its admission into the Union." *Id.*, at 556-57.

15 Apparently, **Mont. v. United States** is the only United States Supreme  
16 Court case which has used the term "grant" when discussing the Equal Footing  
17 Doctrine. In other cases, it has used the term "vest." **Ariz. v. Cal.**, 373 U.S. 546, 597  
18 (1963) ("[L]ands underlying navigable waters within territory acquired by the  
19 government are held in trust for future states and that title to such lands is  
20 automatically vested in the States upon admission to the Union."); **Or. v. Corvallis**  
21 **Sand & Gravel Co.**, 429 U.S. 363, 371 (1977) ("the State's title to the riverbed vests  
22 absolutely as of the time of its admission.")

## 23 2. The Montana Constitutions

24 The Equal Footing Doctrine concerns only whether a state has obtained  
25 title to the land under navigable waterways. As stated in **Mont. v. United States**, once  
title has passed, title to the land is governed by the laws of the State. Thus, the issue is  
whether the term "grant" as used in Article XI, Section 2, of the 1889 Constitution and  
Article X, Section 2, of the 1972 Constitution includes property received by the State

1 under the Equal Footing Doctrine.

2 Article X of the 1972 Constitution is the article on education and public  
3 lands. Section 2 establishes the public school fund. Section 11 establishes a public land  
4 trust and provides for the disposition of public lands. Both Sections use the terms  
5 "granted" and "grant". Article X, Section 2, states in pertinent part:

6 The public school fund of the state shall consist of:

7 (1) Proceeds from the school lands which have been or may  
8 hereafter be granted by the United States;

9 . . . .  
10 (4) All other grants of land or money made from the United  
11 States for general educational purposes or without special purpose. . . .

12 (Emphasis added.)

13 In part, Article X, Section 11, states:

14 (1) All lands of the state that have been or may be granted by  
15 congress, or acquired by gift or grant or devise from any person or  
16 corporation, shall be public lands of the state. They shall be held in trust  
17 for the people. to be disposed of as hereafter provided. for the respective  
18 purposes for which they have been or may be granted, donated or devised.

19 Article XI, Section 2, and Article XVII, Section 1, of the 1889 Constitution  
20 contained similar language.

21 "The term "grant" is both a verb and a noun, and it has a number of  
22 meanings, depending on how it is used. When used as a verb, BLACK'S LAW  
23 DICTIONARY defines "grant" as "1. To give or confer (something), with or without  
24 compensation. 2. To formally transfer (real property) by deed or other writing. 3. To  
25 permit or agree to. 4. To approve, warrant or order." When used as a noun, "grant"  
means "1. An agreement that creates a right of any description other than the one held by  
the grantor. 2. The formal transfer of real property. 3. The document by which a transfer  
is effected. 4. The property or property right so transferred." BLACK'S LAW DICTIONARY

1 (8th ed., 1999).

2 In determining how the terms "granted" and "grant" are to be interpreted, it  
3 is necessary to look at the context in which the term is being used. In Article Y, Section  
4 2(1), of the 1972 Constitution, it is clear that school lands which have been granted by  
5 the United States means those lands specifically identified in the Enabling Act.

6 In Article X, Section 11(1), the term "granted" describes all lands which  
7 have been transferred to the state through the action of Congress. While the underlying  
8 basis for transferring title to the streambeds of navigable waterways is the Equal Footing  
9 Doctrine, the transfer could only be accomplished through the Enabling Act which was  
10 an act of Congress.

11 As used in Article X, Section 2(4), the term "grants" is a noun and means  
12 the transfer of title to lands owned by the United States. It does not include the transfer  
13 of lands which were only held in trust by the federal government and which were  
14 automatically vested in Montana upon its admission to the Union.

15 For these reasons, the Court concludes that the streambeds of the rivers are  
16 part of the public land trust. As public lands of the State, the State has the authority  
17 under Article X, Section 11, to classify the lands. Section 77-1-202(1), MCA, gives the  
18 Board of Land Commissioners (the Board) the authority to manage state lands. In  
19 exercising its authority, the Board is guided by the principle "that these lands and funds  
20 are held in trust for the support of education and for the attainment of other worthy  
21 objects helpful to the well-being of the people of this state as provided in The Enabling  
22 Act." **Id.** Thus, the Board has the authority to lease the streambeds and use the funds for  
23 the support of public education.

### 24 **3. Flooded Lands**

25 PPL also has argued that the flooded lands are not school trust lands.

1 Under The Enabling Act, the federal government granted Section 16 and 36 of every  
2 township in Montana to the State as school trust lands. PPL has conceded that six of its  
3 dams occupy Section 16 and 36 lands. PPL further argues that it purchased the lands  
4 outright or casement rights to flood the lands. The Court concludes that with respect to  
5 the flooded lands, there remain genuine issues of material fact which preclude summary  
6 judgment.

7 **NOW, THEREFORE, IT IS ORDERED:**

8 1. The State's motion for partial summary judgment that the  
9 streambeds of the Missouri, Madison and Clark Fork Rivers are school trust lands  
10 **IS GRANTED.**

11 2. Avista and PPL's motion for summary judgment that the streambeds  
12 are not school trust lands **IS DENIED.**

13 3. PPL's motion for partial summary judgment that the flooded lands  
14 are not school trust lands **IS DENIED.**

15 DATED this \_\_\_\_\_ day of August 1, 2007.

16 \_\_\_\_\_  
17 THOMAS C. HONZEL  
18 District Court Judge

19 pcs: Robert L. Sterup/Kyle Ann Gray  
20 Stephen R. Brown  
21 Mike McGrath/Anthony Johnstone/Jon Ellingson

22 d/TCH:PPL MT & Avista-St of MT  
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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS & CLARK COUNTY**

PPL MONTANA, LLC, a Delaware limited liability corporation, and AVISTA CORPORATION, a Washington corporation,

Plaintiffs,

v.

STATE OF MONTANA,

Defendant.

Cause No.: CDV-2004-846

**MEMORANDUM AND ORDER  
ON PPL AND AVISTA'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT  
REGARDING THE FLOODED  
LANDS AND PPL AND  
AVISTA'S MOTION TO DISMISS  
THE FLOODED LANDS CLAIM**

Plaintiffs and Counterdefendants PPL Montana, LLC (PPL) and Avista Corporation (Avista) have moved for partial summary judgment arguing that Defendant and Counterclaimant State of Montana (State) does not hold title to the flooded lands. PPL has also moved to dismiss the State's flooded lands claim for failure to name all the persons affected. The motions were heard December 14, 2006.

**BACKGROUND**

Avista owns and operates the Noxon Rapids Dam and the Cabinet Gorge Dam on the Clark Fork River in Montana. Avista acquired title or other flowage easement rights to lands which would be submerged as a consequence of the construction

1 of its dams and the resulting formation of a reservoir. Significantly, Avista obtained  
2 flowage easements from the State prior to flooding its lands.

3 PPL owns and operates the Thompson Falls Dam located on the Clark Fork  
4 River. It also owns seven dams on the Missouri River and a dam on the Madison River.  
5 In addition, PPL owns the Mystic Lake Dam located on the West Rosebud Creek. Prior  
6 to constructing dams on the rivers, PPL attempted to acquire title to the lands which  
7 would be flooded. Although PPL was unable to secure title to all lands, it did obtain  
8 flood easements from private landowners, as well as the United States, to flood their  
9 respective lands.

#### 10 STANDARD OR REVIEW

11 Summary judgment is appropriate if "there is no genuine issue as to any  
12 material fact and that the moving party is entitled to judgment as a matter of law." Rule  
13 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no genuine  
14 issues of material fact exist. Jobe v. City of Polson, 2004 MT 183, ¶ 10, 322 Mont. 157,  
15 ¶ 10, 94 P.3d 743, ¶ 10. Once the moving party establishes no genuine issues of material  
16 fact exist, the burden shifts to the non-moving party opposing summary judgment to  
17 prove otherwise. Id. If the court determines no genuine issues of material fact exist, the  
18 court will determine whether the moving party is entitled to judgment as a matter of law

19 Id.

#### 20 DISCUSSION

#### 21 **1. PPL and Avista's Motions for Partial Summary Judgment on the State's** 22 **Flooded Lands Claim**

23 In its counterclaim the State seeks a declaratory judgment that it owns title  
24 to the streambeds of the Missouri, Madison and Clark Fork Rivers (collectively "the  
25 Rivers") and that it owns title to the flooded lands—those lands outside the navigable

1 streambed which are upland from the dam and have been submerged by flooding. In its  
2 August 28, 2007, "Memorandum and Order on the Navigability of the Missouri, Madison  
3 and Clark Fork Rivers" the Court determined that because the Rivers are navigable the  
4 State holds title to the streambeds.

5 In this motion, PPL and Avista (collectively "the Utilities") seek partial  
6 summary judgment that the State does not own title to the flooded lands. The Utilities  
7 argue that when it flooded the lands at issue, title to those lands, which are held in part by  
8 the Utilities, the United States, the State of Montana and other private owners, did not  
9 extinguish and vest in the State under the Equal Footing Doctrine or by operation of law,  
10 Section 70-1-202(1), MCA. They also argue that pursuant to Section 70-16-201, MCA,  
11 the State's ownership in the streambeds only extends to the low water mark in its natural  
12 condition. Finally, the Utilities argue that the State is judicially estopped from claiming  
13 ownership to the flooded lands in this case, when it disclaimed ownership to similar lands  
14 in the federal court action regarding the cleanup of the Milltown Reservoir.

15 The State asserts that once title to the streambeds of navigable rivers were  
16 granted to the State, state property law controls the resolution of property disputes. As a  
17 result, because the flooded lands are navigable, the state holds title to such lands under  
18 Section 70-1-202(1), MCA. The Court disagrees.

19 Section 70-1-202(1), MCA, states: "The state is the owner of: (1) all land  
20 below the water of a navigable lake or stream. . . ." Section 70-16-201, MCA, states:

21 Except where the grant under which the land is held indicates a different  
22 intent, the owner of the land, when it borders upon a navigable lake or  
23 stream, takes to the edge of the lake or stream at low-water mark; when it  
24 borders upon any other water, the owner takes to the middle of the lake or  
25 stream

(Emphasis added.)

Both code sections were enacted in 1895, six years after Montana was

1 admitted into the Union, and neither has been amended since then. Section 70-1-202(1),  
2 MCA, codifies the Equal Footing Doctrine's transfer of title to the beds of navigable  
3 rivers and lakes to the State, and Section 70-16-201, MCA, establishes the boundary to  
4 the beds of navigable rivers and lakes.

5 On the admission of the state to the union it became the owner of the bed  
6 of the river, subject to the rights of the government in respect to  
7 navigation, as indicated by the following statutory provision: "The state  
8 is the owner of all land below the water-of a navigable lake or stream. . . ."  
9 [§ 70-1-202(1), MCA.] And the further provision as to the boundaries of  
10 water: "Except where the grant under which the land is held indicates a  
different intent, the owner of the land, when it borders upon a navigable  
lake or stream, takes to the edge of the lake or stream at low-water mark;  
when it borders upon any other water, the owner takes to the middle of  
the lake or stream." [§ 70-16-201, MCA.]

11 United States v. Eldridge, 33 F. Supp. 337, 339-40 (D. Mont. 1940) (emphasis added).

12 Furthermore, the Equal Footing Doctrine does not grant to a state title to beds of  
13 navigable rivers and lakes formed following the state's admission into the Union. The  
14 United States Supreme Court explained this in Or. ex rel. State Land Bd. v. Corvallis  
15 Sand & Gravel, 429 U.S. 363,376 (1977).

16 [D]etermination of the initial boundary between a riverbed, which the  
17 State acquired under the equal-footing doctrine, and riparian fast lands  
18 likewise be decided as a matter of federal law rather than state law. But  
19 that determination is solely for the purpose of fixing the boundaries of  
the riverbed acquired by the State at the time of its admission to the  
Union; thereafter the role of the equal-footing doctrine is ended, and the  
land is subject to the laws of the State.

20 (Emphasis added.)

21 Because Section 70-1-202(1), MCA, only codifies the Equal Footing  
22 Doctrine, it does not support the State's argument that it owns title to the flooded lands.  
23 Moreover, the lands were not flooded until well after the State's admission into the  
24 Union. As a result, the State is unable to support its position with any state law. While  
25 the State cites Pewaukee v. Savoy, 79 N.W. 436, 438 (Wis. 1899), and Burrus v.

1 **Edward Rutledge Timber Co.**, 202 P. 1067, 1068 (Idaho 1921), for the proposition that  
2 navigable flooded lands belong to the state, their reliance on these cases is misplaced. In  
3 those cases, the issue was the use of the flooded lands by the general public, not whether  
4 the property owners' title was divested as a result of the lands being flooded. **Pewaukee**,  
5 79 N.W. at 438; **Burrus**, 202 P. at 1068. The Utilities have not contended that the  
6 reservoirs cannot be used by the public for recreational purposes.

7           On the other hand, the Utilities have presented the Court with substantial  
8 evidence that they either own the flooded lands or have obtained the right to flood the  
9 lands. Avista has produced evidence that, prior to flooding the lands abutting the  
10 streambeds, it acquired title and flowage or similar easement rights to those lands.  
11 Notably, Avista pays the State yearly to flood state lands. Similarly, PPL pays  
12 substantial sums of money annually to flood lands owned by the United States as well as  
13 other private property owners. Moreover, if the Court were to conclude that the State  
14 gained ownership of the flooded lands, it would necessarily defeat the Utilities  
15 intentional acquisition of fee title to certain lands and flowage easement rights over other  
16 lands. Therefore, the Court concludes that the State did not gain title to the flooded lands  
17 by virtue of the Equal Footing Doctrine or Section 70-1-202(1), MCA.

## 18 **2. PPL's Motion to Dismiss the State's Flooded Lands Claim**

19           PPL has also moved to dismiss the State's counterclaim regarding the  
20 flooded lands for failure to join all parties affected by the State's claim. Avista has  
21 joined in this motion.

22           In this motion the Utilities argue that the State's claim to ownership of the  
23 flooded lands must be dismissed for failure to name all interested parties. Because the  
24 Court has concluded that State did not gain ownership of the flooded lands, the motion to  
25 dismiss is now moot. However, in its response to the State's motion for summary

1 judgment on whether the streambeds of the Missouri, Madison and Clark Fork Rivers are  
2 school trust lands, PPL argued that the flooded lands are not school trust lands. In its  
3 August 28, 2007, Memorandum and Order on that motion, the Court concluded that with  
4 regard only to the school trust lands, genuine issues of material fact precluded summary  
5 judgment. Accordingly, the Court concludes that it should not dismiss the State's  
6 flooded lands claim in its entirety because issues of fact remain whether PPL is  
7 occupying State school trust lands.

8 For these reasons,

9 **IT IS ORDERED** that:

10 1. Plaintiffs and Counterdefendants PPL and Avista's motion for  
11 partial summary judgment that the State of Montana does not own the flooded lands **IS**  
12 **GRANTED.**

13 2. Plaintiffs and Counterdefendants PPL and Avista's motion to  
14 dismiss the flooded lands claim **IS DENIED.**

15 DATED this \_\_\_\_\_ day of September 2007.

16 \_\_\_\_\_  
17 THOMAS C. HONZEL  
18 District Court Judge

19 pcs: Robert L. Sterup/Kyle Ann Gray  
20 Stephen R. Brown  
21 Mike McGrath/Anthony Johnstone/Jon Ellingson

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS & CLARK COUNTY**

PPL MONTANA, LLC, a Delaware limited liability corporation, and AVISTA CORPORATION, a Washington corporation,

Plaintiffs,

v.

STATE OF MONTANA,

Defendant.

Cause No.: CDV-2004-846

**MEMORANDUM AND ORDER  
ON PPL'S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT REGARDING  
PRIMA FACIE OWNERSHIP  
OF LANDS**

Plaintiff and Counterdefendant PPL Montana, LLC (PPL) has moved for partial summary judgment arguing that the warranty deeds it holds constitute prima facie evidence of ownership of lands associated with their hydroelectric projects. The motion was heard December 14, 2006. The Court concludes the motion should be granted.

**BACKGROUND**

In October 1998, PP&L Global, LLC entered into an agreement to purchase most of The Montana Power Company's (MPC) assets in Montana, including eleven hydroelectric generation plants. Ten of those plants are at issue in this litigation.

1 In 1999, PP&L Global assigned its rights and interest in the purchase agreement to  
2 PPL. As part of the purchase, PPL acquired title to lands associated with the  
3 hydropower projects. Additionally, PPL also obtained right of ways owned by MPC  
4 and flood easement rights. MPC transferred by way of warranty deed title to those lands  
5 and rights to PPL. Many of the warranty deeds describe the flooded lands which are at  
6 issue in another motion. Significantly, excepted from the warranty deeds are the beds  
7 of the Missouri, Madison and Clark Fork Rivers.

### 8 STANDARD OR REVIEW

9 Summary judgment is appropriate if "there is no genuine issue as to any  
10 material fact and that the moving party is entitled to judgment as a matter of law." Rule  
11 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no genuine  
12 issues of material fact exist. Jobe v. City of Polson, 2004 MT 183, ¶ 10, 322 Mont. 157,  
13 ¶ 10, 94 P.3d 743, ¶ 10. Once the moving party establishes no genuine issues of material  
14 fact exist, the burden shifts to the non-moving party opposing summary judgment to  
15 prove otherwise. Id. If the court determines no genuine issues of material fact exist, the  
16 court will determine whether the moving party is entitled to judgment as a matter of law.

17 Id.

### 18 DISCUSSION

19 PPL argues that the warranty deeds that were conveyed to them from MPC  
20 constitute prima facie evidence that it holds record title to the lands described in the deed  
21 and flood easements over other lands. In support they cite Nixon v. Huttinga, 163 Mont.  
22 499, 501, 518 P.2d 263, 265 (1974), holding that while a warranty deed "is generally  
23 considered prima facie proof of good title . . . this presumption extends only to property  
24 specifically described by such deed." (Citation omitted.)



2 The State contends that the warranty deeds do not include the riverbeds of  
3 the Missouri, Madison and Clark Fork Rivers. In fact, the State conccdes that PPL has  
4 received deeds evidencing record fee title to certain properties associated with the  
5 dams, as well as easements permitting them to flood lands.

6 **NOW, THEREFORE, IT IS ORDERED** Plaintiff and Counterdefendant  
7 PPL Montana, LLC's motion for partial summary judgment that the warranty deeds it  
8 holds constitute prima facie evidence of ownership of lands associated with their  
9 hydroelectric projects **IS GRANTED.**

10 DATED this \_\_\_\_\_ day of September 2007.

11 \_\_\_\_\_  
12 THOMAS C. HONZEL  
13 District Court Judge

14 pcs: Robert L. Sterup/Kyle Ann Gray  
15 Stephen R. Brown  
16 Mike McGrath/Anthony Johnstone/Jon Ellingson

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**MONTANA FIRST JUDICIAL DISTRICT COCHT  
LEWIS & CLARK COUNTY**

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<p>PPL MONTANA, LLC, a Delaware limited liability corporation, and AVISTA CORPORATION, a Washington corporation,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA,</p> <p>Defendant.</p>	<p>Cause No.: CDV-2004-846</p> <p><b>MEMORANDUM AND ORDER ON PPL AND AVISTA'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON 'THE APPLICATION OF THE HYDROELECTRIC RESOURCES ACT OF 1931</b></p>
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Plaintiff and Counterdefendant PPL Montana, LLC (PPL) has moved for partial summary judgment arguing that Defendant and Counterclaimant State of Montana (State) cannot base its claim for compensation from PPL on the Hydroelectric Resources Act of 1931 (Act), Sections 77-4-201, MCA, *et seq.* Plaintiff and Counterdefendant Avista Corporation (Avista) has joined in this motion. The motion was heard December 14, 2006. The Court concludes that the motion should be denied.

**STANDARD OR REVIEW**

Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule

1 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no genuine  
2 issues of material fact exist. Jobe v. City of Polson, 2004 MT 183, ¶ 10, 322 Moot. 157,  
3 ¶ 10, 94 P.3d 743, ¶ 10. Once the moving party establishes no genuine issues of material  
4 fact exist, the burden shifts to the non-moving party opposing summary judgment to  
5 prove otherwise. Id. If the court determines no genuine issues of material fact exist, the  
6 court will determine whether the moving party is entitled to judgment as a matter of law.

Id.

### 8 DISCUSSION

9 In its counterclaim the State seeks compensation from PPL and Avista  
10 (collectively "the Utilities") for use and occupation of state lands under the Act. The  
11 State's claim for compensation lies in Article 10, Section 11(1) and (2) of the Montana  
12 Constitution and the Act.

13 Those sections of the Constitution state:

14 (1) All lands of the state that have been or may be granted by congress, or  
15 acquired by gift or grant or devise from any person or corporation, shall be  
16 public lands of the state. They shall be held in trust for the people, to be  
disposed of as hereafter provided, for the respective purposes for which  
they have been or may be granted, donated or devised.

17 (2) No such land or any estate or interest therein shall ever be disposed of  
18 except in pursuance of general laws providing for such disposition, or until  
19 the full market value of the estate or interest disposed of, to be ascertained  
in such manner as may be provided by law, has been paid or safely secured  
to the state.

20 (Emphasis added.)

21 Section 77-4-201, MCA, provides that the state land board "may issue a  
22 lease or license to any person, corporation, or municipality for the development of power  
23 sites and the distribution, use, and disposition of the electrical energy generated on the  
24 sites. . . ." Section 77-4-208, MCA, further provides that a licensee must pay rent  
25 annually or semiannually and such rental shall not be less than the full market value of

1 the estate or interest disposed of through the granting of the lease or license, such value  
to be carefully ascertained from all available sources."

3 The Utilities assert three arguments in support of their position that the Act  
4 does not require them to pay for the use of State owned lands. First, the Act does not  
5 apply to the streambeds of navigable rivers. Second, because this Court determined, by  
6 separate order, that Section 77-4-203, MCA is preempted by the Federal Power Act  
7 (FPA), the remaining non-preempted parts cannot be severed without invalidating the  
8 entire Act. Finally, the Act does not retroactively apply to PPL's hydroelectric facilities  
9 built before the adoption of the Act.

10 The application of the Act is a question of law.

#### 11 **The Applicability of the Act to the Streambeds of Navigable Rivers**

12 **1.**

The Utilities argue that because the Act does not explicitly include the  
13 streambeds of navigable rivers, it does not apply to them. Rather, the Act only applies to  
14 the state owned uplands. The Court disagrees.

15 Throughout the Act, the terms "state lands" and "state-owned lands" are  
16 used. Section 77-1-101, MCA, defines state lands. In pertinent part, it provides:

17 Unless the context requires otherwise and except for the definition  
18 of state land in 77-1-701, in this title, the following definitions apply:

19 " " (6)(a) "State land" or "lands" means:  
20 (i) lands granted to the state by the United States for any purpose,  
either directly or through exchange for other lands;

21 (Emphasis added.)

22 As already determined by the Court in a separate order, the streambeds  
23 were granted to the state from the United States. Moreover, the Act's definition of  
24 "power site" contemplates that the streambeds are state lands. Section 77-4-202, MCA.  
25 states "power site as used in this part shall mean not only the state-owned land on which

1 the dam is constructed, but also each separate tract of such land which will become part  
2 of the reservoir. . .” The State’s counterclaims are entirely based on its allegations that  
3 the Utilities have and continue to occupy state lands without paying rental compensation.  
4 Because the Jams were constructed on the state owned riverbeds of the Missouri,  
5 Madison and Clark Fork Rivers. the Court concludes that the Act applies to the  
6 streambeds of the navigable rivers at issue.

7 **2. Whether the Portion of the Act Preempted by the Federal Power Act**  
8 **Invalidates the Entire Act**

9 The Utilities contend that because the Court's April 14, 2006,  
10 Memorandum and Order concluded that Section 77-4-203, MCA, conflicts with the FPA.  
11 the entire Act must be invalidated as the remaining non-preempted portions of the Act  
12 cannot be severed from the Act. The State argues that the Court decided the preemption  
13 issue in its April 14, 2006, Memorandum and Order and it cannot be relitigated. The  
14 Court agrees.

15 The April 13, 2006, Memorandum and Order is clear that while Section 77-  
16 4-203, MCA, conflicts with the FPA, this does not preclude the State's claim for  
17 compensation. In pertinent part, this Court stated:

18 Although Section 77-4-203 conflicts with the Federal Power Act and is  
19 preempted, this is not fatal to the State's claims for compensation. . . .  
20 Instead, the State is only seeking compensation for the use of state land  
21 under Section 77-4-208. As previously noted, the State's rights of  
22 ownership and possession are saved from preemption. Although the State  
23 cannot regulate a hydroelectric project, nothing prevents the State from  
24 obtaining rental compensation under Section 77-4-208.

25 (Memorandum and Order, April 14, 2006, p. 12:18-21 and 13:2-8).

Accordingly, the entire Act is not invalidated because the Court has  
determined that Section 77-4-203, MCA, is preempted by the FPA.

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1 3. Whether the Act Retroactively Applies to the Utilities' Hydroelectric Projects

2 The Utilities argue that the Act cannot apply retroactively to nine of the  
3 hydroelectric projects at issue since they were built before the Act was passed in 1931.  
4 Furthermore, the Act fails to expressly make the law retroactive and the Act would  
5 impose new duties or obligations of the Utilities vested rights.

6 In general, a statute is not applied retroactively unless the statute expressly  
7 provides for retroactivity. Section 1-2-109, MCA. The Montana Supreme Court has  
8 defined a retroactive law as "one which takes away or impairs vested rights acquired  
9 under existing laws or creates a new obligation, imposes a new duty, or attaches a new  
10 disability in respect to transactions already passed." Porter v. Calarneau, 275 Mont.  
11 174, 183, 911 P.2d 1143, 1148-49 (1996) (citations omitted). In St. Vincent Hosp. v.  
12 Blue Cross, 261 Mont. 56, 60, 862 P.2d 6, 9 (1993), the court stated that a retroactive  
13 law is one that gives a "transaction a different legal effect from that which it had under  
14 the law when it occurred." As a result, the Utilities claim that the Act imposes a new  
15 licensing process, bidding for the proposed lease or license, and undefined financial  
16 obligations on their hydroelectric projects, which would impair their vested rights. The  
17 Court disagrees.

18 Article XVII, sections 1 and 3, of the 1889 Montana Constitution stated:

19 § 1. All lands of the state that have been, or that may hereafter be granted  
20 to the state by congress . . . shall be public lands of the state, and shall be  
21 held in trust for the people, to be disposed of as hereafter provided . . . and  
22 none of such land, nor any estate or interest therein, shall ever be disposed  
of except in pursuance of general laws providing for such disposition, nor  
unless the full market value of the estate or interest disposed of, to be  
ascertained in such manner as may be provided by law.

23 . . .  
24 § 3. All other public lands may be disposed of in such manner as may be  
provided by law.

25 ///

1 The 1889 Constitution, which predated any of the Utilities hydroelectric  
2 facilities, prevented the state from selling or conveying interest in state lands, in this case  
3 the streambeds, without obtaining full market value for them. Indeed, because the 1889  
4 Constitution established the state's interest in the riverbeds, the Utilities have never had  
5 an interest in the streambeds. The Act provides statutory authority for the lease or  
6 license of the streambeds for purposes of hydroelectric generation under the Montana  
7 Constitution. **As** a result, the Act is not being applied retroactively; rather the State, as  
8 trustee of public lands, is complying with its constitutional mandate.

9 For these reasons,

10 IT IS ORDERED that Plaintiffs and Counterdefendants PPL and Avista's  
11 motion for partial summary judgment that the State of Montana cannot base its claim for  
12 compensation from them on the Hydroelectric Resources Act of 1931 IS DENIED.

13 DATED this \_\_\_\_\_ day of September 2007.

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THOMAS C. HONZEL  
District Court Judge

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18  
19 pcs: Robert L. Sterup/Kyle Ann Gray  
Stephen R. Brown  
20 Mike McGrath/Anthony Johnstone/Jon Ellingson

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22 d/TCH/PPL MT & Avista-St of MT  
23  
24  
25