



MONTANA LEGISLATIVE BRANCH

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Director
AMY CARLSON

DATE: June 1, 2010

TO: Members of the Legislative Finance Committee

FROM: Barbara Smith, Fiscal Analyst

RE: Update on PPL Compensatory Damages and Appropriation Authority

Background

In *PPL Montana, LLC v. State*, 2010 MT 64, the Montana Supreme Court determined that title to the riverbeds of the Missouri, Clark Fork, and Madison Rivers passed to Montana when it became a state in 1889. However, the Court also reversed the District Court's conclusion that the riverbeds are "school trust lands" and instead held that they are public trust lands under Article X, Section 11. The state and the Board of Land Commissioners (Land Board) have a fiduciary responsibility to manage the land for the benefit of the public. As part of the decision, the Court upheld the District Court's methodology of calculating damages, and PPL was ordered to pay approximately \$41 million (plus interest) in damages to the state for improper use of the streambed. PPL is in the process of determining whether it will appeal the Court's decision to the United States Supreme Court. The deadline for PPL to submit an appeal is June 28, 2010.

DNRC developed a resolution regarding the use of settlement funds that the Land Board subsequently adopted on May 17, 2010. The resolution asserts that these public trust lands are to be managed for the benefit of education, that the compensatory damages are to make the public land trust "whole" for the unlawful use of state land, and in purchasing land the trust receives assets to make it "whole". This resolution also includes directions regarding the deposit and use of the compensatory damages.

Legislative staff is examining a number of issues relating to Land Board authority, the land purchase, and maximization to the trust. However, the subject of this memo for consideration by the Legislative Finance Committee is the appropriation authority to expend the damages.

The resolution specifically states that the funds are to be:

- 1) Deposited in a state special revenue account that is allowed to keep its own interest; and
- 2) Used to purchase land held in trust for the schools.

It further invokes section 17-8-101, MCA, to classify these funds as non-state revenue not requiring an appropriation so that the funds could be expended prior to the next legislative session. The complete relevant section in the resolution is as follows:

"3. Directs that when the judgment in the litigation is paid by PPL Montana, the entire amount of the compensatory damages, including all post-judgment interest, be deposited in a State Special Revenue Fund under M.C.A. §17-2-102(1)(b)(1), with instructions to invest the fund with the State Board of Investments and retain all earnings from the investment. The principal and all

interest earned on the investment of the fund is to be available¹ consistent with M.C.A. §17-8-101, for the restricted purpose of the acquisition of lands to be held in trust for the common schools beneficiaries by the Board of Land Commissioners. This special revenue fund is secured for the public land trust managed by the Board from non-state, non-federal money, from the judgment entered by law in PPL Montana v. State, 2010 MT 64.”

As part of this resolution, the Land Board provided authority to DNRC to complete due diligence for the purchase of four parcels totaling 54,170 acres.

The Issue

As shown above, the resolution prepared by DNRC and subsequently adopted by the Land Board invokes section 17-8-101², MCA, to classify the damages awarded by the Court as non-state funds not requiring an appropriation for expenditure. Under this resolution DNRC may be able to expend part or all of these funds prior to the 2011 Legislative Session to purchase land.

Initial review indicates that the resolution misclassifies these funds as non-state funds and incorrectly avoids the need for a legislative appropriation of the approximately \$41 million awarded by the Court. Non-state funds, as defined in statute, are those funds from a non-state source that are restricted by law or agreement, such as a contract, trust agreement or donation. *See* §§ 17-2-102(1)(b)(i); 17-8-101, MCA. It is not clear how damages that are derived from the violation of a state statute and generated from a state asset can be classified as non-state funds. Legislative legal staff is currently reviewing the classification of these funds and has requested that executive legal staff explain their reasoning. As of this writing no response has been received. Instead, DNRC has drafted a list of frequently asked questions (FAQs) regarding the PPL settlement, and anticipates having the legal basis for these FAQs completed in time for the June 14 Legislative Finance Committee meeting. The FAQs are attached for reference.

Timing of Expenditures

The question of how quickly these funds will be received by the state is dependent upon whether PPL appeals the Court’s decision to the United States Supreme Court. If PPL appeals to the United States Supreme Court, and the Court does not immediately deny acceptance of the case, the damages could remain unpaid for a period of time, which could give the legislature the opportunity to direct the deposit and subsequent expenditure of the funds.

Conversely, if PPL does not appeal or an appeal is quickly denied the damages could be received by the state prior to the 2011 Legislative Session, which would give the Land Board the opportunity to complete some or all of the proposed land transactions prior to the 2011 session convening.

¹ The words “without legislative approval” were eliminated from this section after the land staffers meeting, prior to consideration by the Board of Land Commissioners.

² 17-8-101. Appropriation and disbursement of money from treasury. (1) For purposes of complying with Article VIII, section 14, of the Montana constitution, money deposited in the general fund, the special revenue fund type (except money deposited in the treasury from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation), and the capital projects fund type, with the exception of refunds authorized in subsection (4), may be paid out of the treasury only on appropriation made by law.

(2) Subject to the provisions of subsection (8), money deposited in the enterprise fund type, debt service fund type, internal service fund type, private purpose trust fund type, agency fund type, and state special revenue fund from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation, may be paid out of the treasury:

(a) by appropriation; or

(b) under general laws, or contracts entered into in pursuance of law, permitting the disbursement if a subclass is established on the state financial system. . . .

Options

Should the committee wish to address the classification of PPL settlement funds as nonstate and nonfederal funds, the committee could:

- Inform the members of the Board of Land Commissioners that the Legislative Finance Committee disagrees with the classification of PPL settlement as nonstate and nonfederal funds and will propose legislation to define the revenue source for the purpose of appropriation.
- Seek an injunction against the Board of Land Commissioners and the Department of Natural Resources prohibiting the expenditures of the funds. The issue of whether the Legislative Finance Committee has standing in court to raise this issue could be challenged. In the event a court determines that standing exists, then the issue of whether appropriation authority is necessary would be determined by a court.
- Continue to monitor the situation.

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