PO BOX 201704
Helena, MT 59620-1704
(406) 444-3742
FAX (406) 444-3971

Montana Legislative Services Division

Legislative Environmental Policy Office

July 8, 2010

To: EQC members
From: Hope Stockwell, research analyst
Re: Land Board action on use of damages awarded in *PPL Montana, LLC v. State, 2010 MT 64*

On July 22, you will receive an update from legislative attorney Jaret Coles regarding the $41 million in damages awarded to the state in *PPL Montana, LLC v. State 2010 MT 64* for improper use of streambeds.

At the request of the Legislative Finance Committee, Mr. Coles has authored an opinion on whether the Land Board may use the damages to purchase land without legislative appropriation, an action the Land Board approved at its May 17 meeting.

Attached are two documents -- one summarizing Mr. Coles' legal opinion that a legislative appropriation is required for such a land purchase and another written by DNRC Chief Legal Counsel Candace West who says that a legislative appropriation is not required.

A discussion of the differing opinions will occur on July 22 at the EQC meeting. If after reading the attached summary you would like a copy of Mr. Coles' entire opinion, please let me know.

Cl2255 0189hsxc.

Montana Legislative Services Division

Legal Services Office

Room 110 Capitol Building * P.O. Box 201706 * Helena, MT 59620-1706 * (406) 444-3064 * FAX (406) 444-3036

DATE: June 28, 2010

TO: Legislative Finance Committee by Request of the State Land Subcommittee

FROM: Jaret Coles, Staff Attorney

This one-page summary was requested by the State Land Subcommittee on June 25, 2010. All page references are to my 22-page legal opinion on this subject dated June 10, 2010. All paragraph references are to the Montana Supreme Court's opinion in *PPL Montana, LLC v. State,* 2010 MT 64.

In *PPL Montana* the Court ordered PPL to pay nearly $41 million to Montana for using state riverbeds from 2000–2007. *The Court never classified the $41 million in damages as principal*. However, the Court did "note that the State [was] seeking damages for past due rent." (¶ 136, fn. 10). If the Land Board had leased the riverbeds pursuant to its fiduciary obligations, then the rent was required to be distributed as income on an **annual basis** to offset operating expenses for the support and maintenance of state institutions of the Land Board's choosing (pp. 10-12). An annual and perpetual appropriation exists for the purposes of distributing the rental income (p. 11). Since the rent had to be distributed on an annual basis, it is the past beneficiaries who were harmed. The **trust (*i.e.*, riverbeds) is already whole for future beneficiaries** who will receive rent payments (pp. 15-16). The riverbeds still exist as principal of the trust.

The Land Board is taking the position that it can buy land and treat the damages as principal, despite the fact that the Land Board does not have an appropriation to buy land using damages. The Land Board cites to section 17-8-101, MCA, which provides that money deposited in the treasury "from **nonstate** . . . sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation" is exempt from an appropriation. The term "nonstate" encompasses donations, funds from a political subdivision for investment, and funds from escheated estates (pp. 14-15). Here, **the Court ordered** PPL to pay the state money for violating Montana law; it did not determine how the damages could be expended. **This was not a negotiated settlement** or a trust agreement where the parties crafted how the damages could be used (*i.e.*, paid to private parties or used to mitigate environmental issues in conjunction with federal government oversight). It is clear that this is state money from a state source (*i.e.*, riverbeds).

In addition, the Land Board does not have the express authority to purchase land outside of bonding or land banking (p. 12). Article X, § 11(4), of the Constitution provides that public land "may be exchanged for other land", and the Legislature has enacted statutes for this purpose. Pursuant to section 77-1-220, MCA (bonding), the Land Board can use bonds to purchase land and it is required to offset the purchases by selling an equal amount of land. Additionally, pursuant to section 77-2-361(2), MCA (land banking), the Land Board may sell land and use the proceeds to buy additional land (p. 12). Section 77-1-202, MCA, which gives the Land Board general authority, direction, and control over the care, management, and disposition of lands does not give the Land Board authority to buy land. The terms "buy" or "purchase" are never used in section 77-1-202, MCA.

In conclusion, the Legislature did not give the Land Board authority to expend the damages on land, nor did it declare whether past, present, or future beneficiaries are entitled to the money. As such, this power is reserved by the Legislature as a trustee for the people (pp. 17-18). The Legislature can direct the damages to the common schools or state institutions that were objects of The Enabling Act (p. 18).

June 28, 2010

TO: State Lands Subcommittee of the Legislative Finance Committee
FR: Candace West, DNRC Chief Legal Counsel
RE: Land Board Use of Compensatory Damages Awarded in *Montana, LLC v State of Montana*

This summary explains the constitutional and statutory basis for the Land Board's intended expenditure of $41 million specifically awarded for compensatory damages in the *PPL Montana, LLC v. State* case. A more detailed legal opinion of the Land Board's position was presented to the subcommittee at their June 25, 2010 meeting.

The Supreme Court directed compensatory damages be awarded to compensate the trust for past damages and that PP&L must pay future rents through a lease agreement. As a matter of law compensatory damages are directed to the principal of the trust.

The principal of the trust is the Public School Fund account and the state lands that compose the body of the trust. The Land Board has directed these compensatory damages be placed into the principal of the land trust by acquiring land to be held as part of the permanent land trust for the long-term support of education.

I—LAND BOARD AUTHORITY TO ACT: The Montana Constitution in Art. X, Sec. 4 expressly establishes the Land Board's authority to direct, control, lease, exchange, and sell lands which have been or may be granted for the support and benefit of the various state educational institutions. Sec. 11, also provides that all public land shall be classified by the board of land commissioners in a manner provided by law.

II—TRUST PRINCIPAL: The court ordered PP&L to pay compensatory damages for the unauthorized occupation of trust lands. General trust law establishes the presumption these receipts should become trust principal in keeping with the Board's and the state's fiduciary duty to be impartial, fair, and reasonable to all current and future beneficiaries. MCA 72-34-423

III---EXEMPTION FROM LEGISLATIVE APPROPRIATION: The expenditure by the Land Board of the court-ordered PP&L compensatory damages for the "restricted purpose of the acquisition of lands to be held in trust for the common schools beneficiaries" meets the conditions of the court's award. It falls squarely within the exemption from legislative appropriation because it is "money deposited in the treasury from non-state and non-federal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement or donation." In this case these are funds restricted by the order of the court which is law.

It should be noted there are currently numerous similar "exempt from appropriation funds" existing within different state agencies. They are most often administered for the benefit of a public health or public resource trusts.