

1 Michael C. Shiel, AZ Bar #006968  
2 Office of the General Counsel  
3 Salt River Pima-Maricopa Indian Community  
4 10005 East Osborn Road  
5 Scottsdale, Arizona 85256  
6 Telephone: 480-362-7544  
7 [michael.shiel@srpmic-nsn.gov](mailto:michael.shiel@srpmic-nsn.gov)

**received**  
9/7/12

gjm  
Meel

8  
9  
10 **BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION**  
11 **COMMISSION**

12 IN RE DETERMINATION OF NAVIGABILITY  
13 OF THE LOWER SALT RIVER FROM  
14 GRANITE REEF DAM TO THE GILA RIVER  
15 CONFLUENCE

No. 03-005-NAV

SALT RIVER PIMA-MARICOPA  
INDIAN COMMUNITY'S  
MEMORANDUM RE  
NAVIGABILITY OF LOWER SALT  
RIVER

16  
17 Pursuant to the Commission's notice dated July 3, 2012, the Salt River Pima-  
18 Maricopa Indian Community (SRPMIC) submits the following memorandum  
19 addressing the question of whether the Lower Salt River was navigable in its "natural  
20 and ordinary" condition on February 14, 1912, the date of Arizona statehood.

21 The evidence previously admitted in the official record in this proceeding,  
22 including that previously introduced by SRPMIC, clearly establishes that the Lower Salt  
23 River was not navigable on the date Arizona achieved statehood. The proponents of  
24 navigability in this proceeding, relying on allegations of a few isolated, unconfirmed,  
25 and unsuccessful attempts of navigation over the course of decades, as well as  
26 misleading statistics, cannot meet their burden to establish navigability. In the United  
27 States Supreme Court's most recent ruling on navigability-for-title, *PPL Montana, LLC*  
28

1 v. *Montana*, 132 S.Ct. 1215 (2012), the Court rejected the “liberal” interpretation of  
2 navigability adopted by the Montana state courts and confirmed that navigability-for-  
3 title must be assessed as of the date of statehood. Here, the proponents offer unreliable  
4 evidence that dates anywhere from years to decades prior to statehood; thus, the  
5 proponents’ contention that the Lower Salt River would have been navigable in its  
6 “natural and ordinary” condition on February 14, 1912 is, at best, sheer speculation.

7 Under *PPL Montana*, the State of Arizona’s longstanding failure to assert title  
8 and the corresponding reliance of riparian owners along the Lower Salt River, including  
9 SRPMIC, for nearly a century further supports the conclusion that the Lower Salt River  
10 was not navigable for title purposes as of statehood. For those portions of the Lower  
11 Salt River that are within the boundaries of the Salt River Indian Reservation, the State  
12 of Arizona previously agreed and stipulated that those portions were non-navigable – a  
13 stipulation that was incorporated into a final judgment in *Salt River Pima-Maricopa*  
14 *Indian Community v. Arizona Sand & Rock Co*, No. CIV 72-376-PHX (D. Ariz. April  
15 13, 1977).

16 In the unlikely event that the Commission finds that the proponents can meet  
17 their burden of establishing navigability at statehood, such determination of navigability  
18 can have no effect on SRPMIC’s ownership, occupancy, and use of the bed of the Salt  
19 River within the boundaries of the Salt River Indian Reservation, which was established  
20 by Executive Order on June 14, 1879. Even if the Salt River were navigable on  
21 February 14, 1912, the United States affirmatively retained title, for SRPMIC’s  
22 exclusive use and enjoyment, to those segments within the boundaries of the Salt River  
23 Reservation. In addition, in Article 20, Part 4 of its Constitution, Arizona has  
24 affirmatively disclaimed ownership of all lands, including riverbeds, lying within Indian  
25 lands at the time of statehood. Finally, given the United States’ ownership of fee title to  
26 lands within the Salt River Reservation, the United States is an indispensable party to  
27 any proceeding resolving ownership of the riverbed.  
28

1 I. THE NAVIGABILITY PROPONENTS CAN NOT MEET THEIR  
2 BURDEN TO ESTABLISH THE LOWER SALT RIVER WAS  
3 NAVIGABLE FOR TITLE PURPOSES ON FEBRUARY 14, 1912.

4 In *State of Arizona v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz.  
5 230, 229 P.3d 242 (App. 2010), the Court of Appeals of Arizona confirmed that “the  
6 burden of proof rests on the party asserting navigability.” 229 P.3d at 250.  
7 “Consequently, the burden of proof lies with . . . the proponents of navigability, who  
8 must prove navigability by a preponderance of the evidence.” 229 P.3d at 251. *See*  
9 *also* A.R.S. § 37-1128 (requiring that a claim of navigability be established by a  
10 preponderance of the evidence). Federal courts have also clearly placed the burden of  
11 proof squarely on the proponents of navigability. *North Dakota ex rel. Bd. of Univ. &*  
12 *Sch. Lands v. United States*, 972 F.2d 235, 238 (8<sup>th</sup> Cir. 1992); *Mundy v. United States*,  
13 22 Cl.Ct. 33, 34-35 (1990) (“Navigability is a question of fact, and the burden of proof  
14 is on the party asserting navigability.”); *see also* 78 AM. JUR. 2D *Waters* § 133, at 480  
15 (2002) (“the burden of proof rests upon the party asserting such navigability”).

16 Whether a river is navigable for title purposes is a question of federal law. *PPL*  
17 *Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012). Under the applicable federal  
18 test, the proponents here must prove, by a preponderance of the evidence, that the  
19 Lower Salt River at the time of statehood: (1) was used or was susceptible of being  
20 used, (2) as a highway of useful commerce, (3) in its natural and ordinary condition, and  
21 (4) by the customary modes of trade and travel. *North Dakota*, 972 F.2d at 238, *citing*  
22 *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

23 The recent *PPL Montana* decision confirms that the determination of  
24 navigability-for-title purposes is to be made as of the date of statehood, February 14,  
25 1912. *PPL Montana, LLC*, 132 S.Ct. at 1228, 1233 (“Navigability must be assessed as  
26 of the time of statehood . . .”). In *PPL Montana*, the state court’s reliance on modern  
27 day usage was improper to determine whether the river was navigable at statehood. *Id.*  
28 Arizona statutes properly identify statehood as the key date of inquiry, defining a  
“navigable watercourse” as a watercourse “that was in existence on February 14, 1912,

1 *and at that time was used or was susceptible to being used, in its ordinary and natural*  
2 *condition, as a highway for commerce, over which trade and travel were or could have*  
3 *been conducted in the customary modes of trade and travel on water. A.R.S. § 37-*  
4 *1101(5) (emphasis added). Here, allegations of isolated attempts at navigation occurring*  
5 *years, decades, or centuries before statehood are not sufficient, standing alone, to*  
6 *support a determination of navigability at the key date, which is the date of statehood.*

7 *PPL Montana* also confirms that proponents of navigability must prove more  
8 than isolated and sporadic attempts at navigation. “While the Montana court was  
9 correct that a river need not be susceptible of navigation at every point during the year,  
10 neither can that susceptibility be so brief that it is not a commercial reality.” *PPL*  
11 *Montana, LLC*, 132 S.Ct. at 1234. The Court also confirmed that the relevant inquiry is  
12 on the “river’s usefulness for ‘trade and travel’ rather than for other purposes,” such as  
13 recreational use, or use by initial explorers or trappers. *Id.* at 1233. Under the  
14 applicable federal test, evidence suggesting that a river may have been navigated on  
15 some occasion in its history is not sufficient to prove by a preponderance of the  
16 evidence that the river served, in terms of “commercial reality,” as a “highway for  
17 useful commerce.”

18 Based on *PPL Montana*, the Commission must carefully and cautiously analyze  
19 the evidence presented by the navigability proponents. The Supreme Court clearly did  
20 not approve of the Montana state court’s so-called “liberal construction” of the  
21 navigability for title test. Thus, the Commission must strictly consider whether the  
22 proponents have met their burden to establish by a preponderance of the evidence that  
23 the Lower Salt River was navigable-for-title, on the date of statehood itself (and not at  
24 some other time). To prevail, the proponents’ evidence must be relevant, reliable, and  
25 adequate to overcome the substantial conflicting and/or contradictory evidence in the  
26 record that supports a finding of non-navigability. Speculation, misleading statistical  
27 data, unreliable news reports and other hearsay, and allegations that fail to conform with  
28 the careful and deliberate analysis required by the Supreme Court must be rejected.

1 Read as a whole, the evidence in the current record cannot support a finding of  
2 navigability; in fact, the evidence clearly shows just the opposite – that the Lower Salt  
3 River was not used, or susceptible for use, as a highway for commerce on February 14,  
4 1912. This is true even if it is appropriate for the Commission to engage in the  
5 speculative exercise of attempting to re-create what the river might have looked like  
6 without modern-era dams and diversions, as suggested by the Arizona Court of Appeals.  
7 Because the burden of proof is on the proponents, even if the Commission were to find  
8 that the record evidence weighs exactly evenly, the proponents’ effort must fail and the  
9 Commission must find that the Lower Salt River was not navigable at statehood.

10 The proponents have relied, and will likely continue to rely, on allegations of 16  
11 isolated and largely unsuccessful attempts to use the Salt River for navigation over a  
12 span of four decades, as well as misleading statistics regarding the “average” flow of the  
13 Salt River. The proponents’ evidence is contradicted by contemporaneous accounts of  
14 explorers, surveyors, landowners, and courts that the Salt River was not navigable for  
15 useful commerce. The proponents’ evidence is also rebutted by scientific studies and  
16 analyses regarding flow and stream patterns, which show that the Salt River was a  
17 highly erratic and unpredictable multiple-channeled stream, which would regularly  
18 change from a dry or virtually dry bed to a raging torrent of flood flows.

19 The Commission’s 2005 Report, Findings, and Determination Regarding the  
20 Navigability of the Salt River From Granite Reef Dam to the Gila River Confluence  
21 (2005 Report) comprehensively evaluated the evidence presented by the navigability  
22 proponents and found that the evidence clearly failed to establish navigability. The  
23 Commission should repeat and re-affirm its finding of non-navigability.

24 In 2005, the Commission found “no evidence other than speculation that the  
25 Hohokam utilized the Salt River for commerce or travel.” 2005 Report, at 25. The  
26 Commission also found that the trappers and explorers in the area in the 1830s and early  
27 1840s “did not use boats for travel on the rivers or streams in this area but traveled by  
28 foot, horses, or mules along the sides of the rivers or the streams.” 2005 Report, at 26.  
This finding takes on new significance following *PPL Montana*, as the Court there

1 found that evidence of land portage by explorers will typically be sufficient to defeat a  
2 claim of navigability. *PPL Montana*, 132 S.Ct. at 1231 (stating, “the Montana Supreme  
3 Court was wrong to state . . . that portages ‘are not sufficient to defeat a finding of  
4 navigability.’ In most cases, they are, because they require transportation over land  
5 rather than water.”). Here, the fact that these 19<sup>th</sup> century trapping activities occurred  
6 over land rather than water is strong evidence of non-navigability.

7 The Arizona Court of Appeals opinion directed the Commission to focus on  
8 evidence of navigation prior to the modern irrigation era, which began in 1867. 229  
9 P.3d at 254 (characterizing evidence from the time period “before the commencement  
10 of modern-era settlement and farming in the Salt River Valley, when some of the  
11 Hohokam’s diversions were returned to use and other man-made diversions and  
12 obstructions began to affect the River” as the “best evidence of the River’s natural  
13 condition.”). Yet, as summarized by the Commission’s 2005 Report, there is not  
14 evidence that the Lower Salt River was used as a highway for commerce prior to, or  
15 after, 1867. Thus, examining the evidence directed by the Court of Appeals, the claim of  
16 navigability must fail.

17 The Commission also found that “from 1867 to Statehood, there is no record of  
18 any sustained commerce, travel, or fishing on the Lower Salt River. There are isolated  
19 instances of attempted boating or floating of logs. . . . All travel along the river during  
20 this period was by wagons, horses, mules or on foot.” 2005 Report, at 30. The  
21 Commission analyzed the proponents’ reliance on 16 isolated accounts of boating that  
22 occurred over a span of forty-two years. Even if all of these accounts occurred (which  
23 is doubtful), and even if they were all successful (which they were not), an “average” of  
24 one navigation attempt every 2.625 years hardly qualifies as evidence of a useful  
25 highway for commerce. The Commission was clearly correct to find, and should find  
26 again, that “there was no sustained operation of commercial boating or use of this river  
27 as a highway for commerce.” 2005 Report, at pp. 34-35. The Commission’s conclusion  
28 that the boating accounts are not sufficient evidence to support navigability is fully

1 consistent with *PPL Montana*. The evidence in the record fails to show that the Lower  
2 Salt River supported navigation as a “commercial reality.”

3 The Commission also addressed the proponents’ presentation of “average” flow  
4 data, but correctly found that, even if reliable flow gauge data were available (which it  
5 is not), “computing averages is not particularly meaningful since the average is skewed  
6 by the heavy floods and the periods of drought.” 2005 Report, at p. 38. Obviously,  
7 flood flows of 100,000 to 200,000 cfs dramatically skew the average flow figures  
8 upward in an inaccurate and misleading fashion. The average flow data cannot support  
9 a finding of navigability here.

10 In contrast to the speculative and misleading evidence put forward in support of  
11 navigability, there is substantial evidence in the record that affirmatively supports a  
12 finding of non-navigability. This evidence includes prior contemporaneous court  
13 decisions that described the Lower Salt River as a non-navigable stream. 2005 Report,  
14 at pp. 18-21. The evidence supporting a non-navigability finding also includes  
15 numerous contemporaneous accounts from people living near the Salt River, who  
16 reported that the river was not navigable. 2005 Report, at 30-34.

17 Whether the Commission examines the evidence regarding navigability as of the  
18 date of statehood (as required by the United States Supreme Court) or as of 1867 when  
19 modern-era irrigation and farming practices began (as suggested by the Arizona Court  
20 of Appeals), or some other date in between – the conclusion remains the same. That is,  
21 the preponderance of the evidence clearly supports a finding that the Lower Salt River  
22 was not navigable on February 14, 1912, and was not susceptible of navigation as a  
23 useful highway for commerce in its ordinary and natural condition.

24 **II. THE LONGSTANDING RELIANCE BY RIPARIAN OWNERS,  
25 BASED UPON THE STATE’S FAILURE TO CLAIM TITLE, AND  
26 THE STATE’S AFFIRMATIVE DISCLAIMERS, FURTHER  
27 SUPPORTS THE CONCLUSION OF NON-NAVIGABILITY.**

28 For most of a century, the State of Arizona did not claim title to the beds of  
Arizona watercourses. During this time, the State watched as riparian owners engaged

1 in substantial utilization of the area within and adjacent to the Lower Salt River. In  
2 litigation specifically addressing claims to title within the reach of the Salt River  
3 between approximately Granite Reef Dam and Hayden Road in the City of Tempe, the  
4 State of Arizona affirmatively disclaimed ownership of the bedlands in that reach,  
5 stipulating that “The Salt River is not now and never has been a navigable river” and  
6 that, with regard to the beds in this reach, “fee title to [the disputed] property is vested  
7 in the United States.” See SRPMIC Submission of Relevant Historical and Other  
8 Evidence, filed with the Commission on June 12, 1996, Exhibit B at p. 1063 and 1068.  
9 These findings were incorporated into a final judgment in *Salt River Pima-Maricopa  
10 Indian Community v. Arizona Sand & Rock Company, et al.*, No. CIV 72-376-PHX (D.  
11 Ariz., April 13, 1977).

12 The Arizona Court of Appeals found that the *Arizona Sand & Rock* judgment and  
13 determination regarding navigability was not res judicata for the purposes of legally  
14 barring the State’s subsequent claim to title. 224 P.3d at 244. Even if that Court is  
15 correct that the State is not legally barred from asserting its claim to title at this late  
16 date, and despite the State’s prior representations, the Supreme Court in *PPL Montana*  
17 found, on similar facts:

18 It may be that by virtue of the State’s sovereignty, neither laches nor estoppel  
19 could apply in a strict sense to bar the State’s much belated claim. Still, the  
20 reliance by PPL and its predecessors in title upon the State’s long failure to  
21 assert title is some evidence to support the conclusion that the river segments  
22 were nonnavigable for purposes of the equal footing doctrine.

23 132 S. Ct. at 1235. Similarly here, the delayed nature of the State’s claim and the  
24 reliance by riparian owners that has ensued over many decades adds support to the  
25 other compelling evidence of non-navigability in the record.

26 **III. DETERMINATION OF WHETHER THE LOWER SALT RIVER WAS  
27 NAVIGABLE AT STATEHOOD CAN HAVE NO EFFECT ON TITLE  
28 TO PORTIONS OF RIVERBED LYING WITHIN THE SALT RIVER  
INDIAN RESERVATION**

As discussed above, SRPMIC finds it unlikely that the Commission could  
conclude that the proponents have carried their burden to prove the Lower Salt River



1 was navigable under the applicable federal law test as of February 14, 1912. However,  
2 in an abundance of caution, SRPMIC notes that any determination of navigability made  
3 in this proceeding cannot and will not grant Arizona any interest to the bed of that  
4 portion of the Salt River within the boundaries of the Salt River Indian Reservation.  
5 This Commission's determination regarding navigability is relevant only to those  
6 portions of water courses that had not been previously reserved or set aside by the  
7 United States prior to statehood. Those non-reserved bedlands are the only ones in  
8 which the State of Arizona could claim title in the event that the Commission renders a  
9 determination in favor of navigability. The Salt River Indian Reservation was reserved  
10 and set aside for the exclusive use and occupation of SRPMIC in 1879, thirty-three  
11 years before Arizona achieved statehood. Any title that the State may have acquired in  
12 1912 under the equal footing doctrine could not include riverbeds within Indian lands  
13 previously set aside by the United States.

14 The Supreme Court has made clear that a determination of navigability, standing  
15 alone, will not affect title to Indian lands set aside prior to statehood. If the Federal  
16 Government has set aside lands prior to statehood in a way that shows intent to retain  
17 title, a determination of navigability is not dispositive. *Alaska v. United States*, 545  
18 U.S. 75 (2005). "Creation of an Indian reservation [containing the bed of navigable  
19 waters] is an appropriate public purpose justifying defeat of state title to submerged  
20 lands." *Idaho v. United States*, 533 U.S. 262, 276 n. 6 (2001). Here, the Executive  
21 Order creating the Salt River Indian Reservation in 1879 expressly defined the south  
22 boundary of the Reservation as "up and along the middle of [the Salt River]." Congress  
23 has confirmed this to mean the middle of the "south channel of the Salt River." Public  
24 Law 95-399, Sept. 30, 1978. Title to any portions of riverbed lying within the  
25 reservation boundaries cannot be altered by a finding of navigability in this proceeding.

26 In addition, in Article 20, Part 4 of the Arizona Constitution, the State of Arizona  
27 affirmatively disclaimed ownership of the bed of the Salt River located within the Salt  
28 River Indian Reservation on the date of statehood. Finally, given the fee title ownership  
interest that the United States holds in reservation lands, the United States is an

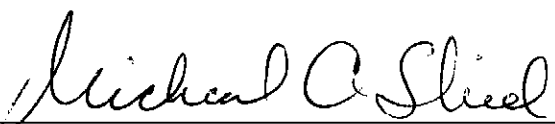
1 indispensable party to any determination involving title to Indian lands. *United States v.*  
2 *City of Tacoma*, 332 F.3d 574, 579-80 (9<sup>th</sup> Cir. 2003).

3 If the Commission determines, as it should, that the Lower Salt River was not  
4 navigable as of February 14, 1912, these unique issues of federal Indian law will have  
5 no relevance. The State's belated claim of title will simply fail on the Commission's  
6 findings. However, if the Commission makes a determination in favor of navigability,  
7 the Commission should make clear that its determination has no application or effect  
8 within Indian lands that were reserved and set aside by the United States prior to  
9 Arizona statehood, such as those portions of the riverbed lying within the Salt River  
10 Indian Reservation.

11 IV. CONCLUSION

12 In conclusion, SRPMIC respectfully requests that the Commission determine,  
13 based on the substantial evidence existing in the record, that the Lower Salt River was  
14 neither navigable nor susceptible to navigation at the date of Arizona statehood.

15 RESPECTFULLY SUBMITTED this 6th day of September, 2012.

16  
17  
18 By: 

19 Michael C. Shiel  
20 10005 E. Osborn Road  
21 Scottsdale, AZ 85256  
22 Tel.: 480-362-7544  
23 [michael.shiel@srpmic-nsn.gov](mailto:michael.shiel@srpmic-nsn.gov)  
24 *General Counsel for SRPMIC*

1 ORIGINAL AND SIX COPIES of the foregoing sent for filing this 6th day of  
2 September, 2012 to:

3  
4 Arizona Navigable Stream Adjudication Commission  
5 1700 West Washington, Suite B-54  
6 Phoenix, AZ 85007

7 AND COPY mailed this 4<sup>th</sup> day of September to:

8 Laurie A. Hachtel  
9 Attorney General's Office  
10 1275 West Washington Street  
11 Phoenix, AZ 85007-2997  
12 *Attorneys for State of Arizona*

13 Joy E. Herr-Cardillo  
14 Timothy M. Hogan  
15 Arizona Center for Law in the Public Interest  
16 18 East Ochoa Street  
17 Tuscon, AZ 85701  
18 *Attorneys for Defenders of Wildlife, et al.*

19 Sally Worthington  
20 John Helm  
21 Helm & Kyle, Ltd.  
22 1619 E. Guadalupe #1  
23 Tempe, AZ 85283  
24 *Attorneys for Maricopa County*

25 Sandy Bahr  
26 202 E. McDowell Road, Ste. 277  
27 Phoenix, AZ 85004  
28 *Sierra Club*

Julie Lemmon  
930 S. Mill Avenue  
Tempe, AZ 85281  
*Attorney for Flood Control District of Maricopa County*

Carla Consoli  
Lewis and Roca  
40 N. Central Avenue  
Phoenix, AZ 85004

1 *Attorneys for Cemex*  
2 L. William Staudenmaier  
3 Snell & Wilmer LLP  
4 One Arizona Center  
5 400 E. Van Buren  
6 Phoenix, AZ 85004-2202  
7 *Attorneys for Freeport-McMoran Corporation*

8 Charles Cahoy  
9 P.O. Box 5002  
10 Tempe, AZ 85280  
11 *Attorney for City of Tempe*

12 William Taebel  
13 P.O. Box 1466  
14 Mesa, AZ 85211-1466  
15 *Attorney for City of Mesa*

16 Cynthia Campbell  
17 200 W. Washington, Suite 1300  
18 Phoenix, AZ 85003  
19 *Attorney for City of Phoenix*

20 Thomas L. Murphy  
21 Gila River Indian Community Law Office  
22 P.O. Box 97  
23 Sacaton, AZ 85147  
24 *Attorney for Gila River Indian Community*

25 Michael J. Pearce  
26 Maguire & Pearce LLC  
27 2999 N. 44<sup>th</sup> Street, Suite 630  
28 Phoenix, AZ 85018-0001  
*Attorneys for Chamber of Commerce and Home Builders' Association*

James T. Braselton  
Mariscal Weeks McIntyre & Friedlander PA  
2901 N. Central Avenue, Suite 200  
Phoenix, AZ 85012-2705  
*Attorneys for Various Title Companies*

Steve Wene  
Moyes Sellers & Associates

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1850 N. Central Avenue, Suite 1100  
Phoenix, AZ 85004-4527  
*Attorneys for Arizona State University*

By: *David Dallas*

T:\WPDOCS\0319\State v. Arizona Navigable Stream Commission\ANSAC Brief\090712\_01.doc  
tds:9/4/12