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10 **BEFORE THE ARIZONA NAVIGABLE STREAM**

11 **ADJUDICATION COMMISSION**

12 IN THE MATTER OF THE
13 NAVIGABILITY OF THE SALT
14 RIVER FROM GRANITE REEF DAM
15 TO THE GILA RIVER CONFLUENCE,
16 MARICOPA COUNTY, ARIZONA

No. 03-005-NAV (Lower Salt)

No. 03-007-NAV (Gila)

17 IN THE MATTER OF THE
18 NAVIGABILITY OF THE GILA
19 RIVER FROM THE NEW MEXICO
20 BORDER TO THE COLORADO
21 RIVER, GREENELEE, GILA, PINAL,
22 MARICOPA AND YUMA COUNTIES,
23 ARIZONA

**GILA RIVER INDIAN COMMUNITY'S
MEMORANDUM ON THE EFFECT OF
PPL MONTANA, LLC v. MONTANA
REGARDING RIVER SEGMENTATION
ON PROCEEDINGS BEFORE THE
COMMISSION**

24 **I. INTRODUCTION**

25 Pursuant to the April 6, 2012 request of the Arizona Navigable Stream Adjudication
26 Commission ("ANSAC"), the Gila River Indian Community ("Community") files this legal
memorandum guiding ANSAC regarding the impact of river segmentation on ANSAC's
navigability determinations in the wake of *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215
(2012), ("PPL Montana"), decided unanimously by the Supreme Court of the United States
on February 22, 2012. The Community files this legal memorandum with regard to the

1 Lower Salt River from the Granite Reef Dam to the Gila River Confluence and the Gila
2 River.

3 II. BACKGROUND

4 In *State ex rel Winkleman v. ANSAC*, the Arizona Court of Appeals vacated
5 ANSAC's determination that "the Lower Salt River from Granite Reef Dam to its confluence
6 with the Gila River was not used or susceptible of use for commercial trade or travel as of
7 February 12, 1912 and was therefore not navigable as of that date nor was it susceptible to
8 navigation." 229 P.3d 242 (2010) and ANSAC "Report, Findings and Determination
9 Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila River
10 Confluence," No. 03-005-NAV, September 21, 2005 at 46, respectively. The Court of
11 Appeals directed ANSAC to consider the river's characteristics between the ending time of
12 Hohokam activity and the completion of a new set of diversions by other human settlers in
13 the area. 229 P.3d at 253-254. The Appeals Court's findings are silent as to river
14 segmentation.
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17 Shortly after the Court of Appeals decision, the U.S. Supreme Court issued its
18 decision in *PPL Montana*. *PPL Montana* reaffirms the U.S. Supreme Court's prior holdings
19 regarding navigability under the equal footing doctrine, restating that navigability
20 determinations only be made for the segments of the river(s) actually at issue. 132 S.Ct. at
21 1229, citing *United States v. Utah*, 283 U.S. 64, 77 (1931); *Brewer-Elliott Oil & Gas Co. v.*
22 *United States*, 260 U.S. 77, 85 (1922); and *State of Oklahoma v. State of Texas*, 258 U.S.
23 574, 583, 584, 587-88, 589-91 (1922).
24

25 As a result, ANSAC is now seeking party comment on the impacts of *PPL Montana*
26 on the present proceedings with respect to river segmentation.

1 **III. PPL MONTANA RESTRICTS ANSAC TO DETERMINING**
2 **NAVIGABILITY ONLY WITH REGARD TO RELEVANT RIVER**
3 **SEGMENTS**

4 The *PPL Montana* holding must be considered procedurally and substantively
5 determinative in the instant cases. *PPL Montana* is on point with respect to matters still to be
6 decided on remand. Also, ANSAC must defer to the Supreme Court's decision as
7 establishing, without question, the correct test for navigability to be applied and also as
8 determining the scope of relevant evidence to be considered in making such a finding.

9 *PPL Montana* reaffirms the holding that "navigability" with respect to state title
10 under the equal footing doctrine as asserted in the instant case must be determined on a
11 "segment-by-segment basis." 132 S.Ct. at 1229. In its holding, the Court cites its prior
12 decision in *United States v. Utah*, 283 U.S. at 77, addressing the navigability of the Colorado
13 River. In making its determination in that case, the Court emphasized the criticality of
14 identifying "the exact point at which navigability may be deemed to end" and considered that
15 "even where the navigability of a river . . . is common knowledge . . . it may yet be a
16 question to be determined upon evidence how far navigability extends." 132 S.Ct. at 1229
17 (citations omitted).

18 In *PPL Montana*, the U.S. Supreme Court deems the Montana Supreme Court's
19 rejection of this methodology as "disregard" for the Court's "well settled" "segment-by-
20 segment approach to navigability for title" and as ignoring the "practical consideration" that
21 "physical conditions . . . affect navigability [and] often vary significantly over the length of a
22 river." 132 S.Ct. at 1229-30. As such, any digression from this analysis by ANSAC would
23 be equally erroneous.
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1 **IV. ANSAC HAS SUFFICIENT EVIDENCE UPON WHICH TO DETERMINE**
2 **NAVIGABILITY FOR RELEVANT RIVER SEGMENTS**

3 ANSAC considered the Lower Salt River's flooding characteristics and frequency,
4 general precipitation profile, channelization, area weather pattern data dating back several
5 hundred years and river flow averages as historically reported. ANSAC Salt River Report at
6 38-41. The scope of this effort was comprehensive and focused on the relevant stretch of the
7 rivercourse for the purpose of the proceeding, i.e. the river between Granite Reef Dam and its
8 connection with the Gila River.

9 With respect to the Gila River proceeding, ANSAC considered the geology,
10 geomorphology and hydrology of the River's corridor from its entrance to the State at the
11 boundary with New Mexico to its termination at the Colorado River near Yuma. ANSAC
12 "Report, Findings and Determination Regarding the Navigability of the Gila River from the
13 New Mexico border to the Confluence with the Colorado River," No. 03-007-NAV, January
14 27, 2009 at 62-79. In this effort, ANSAC addresses the River's flood history, historic flows
15 and distinguishes the River's upper and lower segments, noting that the "Upper Gila is . . .
16 mostly within . . . narrow canyons of the Central Mountain Province . . ." and describing its
17 flow through the Lower Gila Valley as across "broad alluvial plains," where "the river tends
18 to spread out and is braided and shallow . . ." ANSAC Gila Report at 63-64. Additional
19 description is also included, noting the segments of the River "above the Gila Box," "below
20 the Gila Box in the Safford Valley," "from Coolidge Dam down to . . . Pinal County," "from
21 Winkleman to Calvin and onto Twin Buttes," "east of Florence to the Phoenix Basin," ". . .
22 through the Gila River . . . Reservation until [its] confluence with the Salt River," from ". . .
23 the lower end of the Arlington Valley and Painted Rock Dam between the Gila Bend
24 between the Gila Bend Mountains and Painted Rock Mountains," into the Wellton Mohawk
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1 Valley, into the Dome Valley, and ultimately to its intersection with the Colorado River.
2 ANSAC Gila Report at 63-64. Furthermore, features of tributaries within the Gila River
3 watershed's approximately 66,000 square miles are also presented and discussed. ANSAC
4 Gila Report at 64.

5 This use of geomorphology is consistent with the Court's reasoning in *PPL Montana*.
6 Referencing the Missouri River, the Court states that:

7 "Physical conditions that affect navigability can vary significantly over the length of a
8 river. This is particularly true with longer rivers, which can traverse vastly different
9 terrain and the flow of which can be affected by varying local climates." 132 S.Ct. at
10 1230.
11

12 Then later:

13 "These shifts in physical conditions provide a means to determine appropriate start
14 points and end points for the segment in question. Topographical and geographical
15 indicators may assist." *Ibid*.

16 ANSAC has accordingly compiled sufficient evidence relevant to both cases at
17 issue.
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19 **V. ANSAC SHOULD REISSUE ITS ORIGINAL DECISIONS OF NON-
NAVIGABILITY**

20 The Supreme Court's unanimous decision in *PPL Montana* and ANSAC's analysis
21 consistent with the parameters stated by the Court in that case affirm that ANSAC's original
22 findings defining the Lower Salt and Gila Rivers as non-navigable are the correct results in
23 both matters. ANSAC's decisions are based on the evidence available in relation to the
24 entire course of the Gila River within Arizona and the Salt River between Granite Reef Dam
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1 and its confluence with the Gila River, the stretches at issue in the two proceedings. ANSAC
2 Gila Report at 87-88 and Salt River Report at 22, respectively.

3 The issues addressed by the U.S. Supreme Court in *PPL Montana* are on point with
4 the matter addressed by ANSAC in its prior holdings. In *PPL Montana*, the Court
5 considered the navigability determination made by the Montana Supreme Court that “short
6 interruptions” in an otherwise navigable watercourse did not dictate a non-navigable finding
7 due to a history of portage by users in those stretches. 132 S.Ct. at 1231. The U.S. Supreme
8 Court reversed, holding that “a comparison of the non-navigable segment’s length to the
9 overall length of the stream . . . would be . . . irrelevant . . .” and that the Montana Supreme
10 Court’s navigability analysis had to consider river segmentation as tied to the areas actually
11 in dispute. 132 S.Ct. at 1231 and 1229 respectively, citing its “*locus in quo*” finding
12 regarding the Arkansas River in *Brewer-Elliott Oil & Gas*, 260 U.S. at 85.

14 With respect to the Lower Salt River, proponents of navigability have argued that
15 navigability should be found despite only incidental instances of water depths sufficient to be
16 and actually used for any type of commercial activity. In so arguing they also invoke
17 examples of conditions not along the segment actually at issue and reference boating activity
18 without specificity as to location. See Defenders of Wildlife’s Opening Post-Hearing
19 Memorandum (Salt River Proceeding), June 6, 2003, at pp. 12–16 and 18, discussing Arizona
20 Dam and river conditions “upstream” from Granite Reef Dam and citing “ferries in various
21 locations,” respectively.

23 With respect to the Gila proceeding, navigability proponents argue that the river’s
24 recent or present day use for adventure boating in the vicinity of the Gila Box is consistent
25 with a finding of navigability along the river in its entirety. See Defenders of Wildlife’s
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1 Opening Post-Hearing Memorandum (Gila River Proceeding), February 6, 2006, at p. 10.
2 ANSAC's findings, consistent with the extensive record generated in the case, however,
3 encompass the river in its entirety and show only that boating on any segment up to the time
4 of statehood was incidental and correspondent with sporadic high water periods. Gila River
5 Report at 85-87. ANSAC also correctly concluded that intermittent, modern-day recreational
6 boating in the Gila Box segment using watercraft not available at statehood does not
7 influence a finding of navigability at the time of statehood. ANSAC Gila Report at 85.

8 ANSAC's own relevant findings in this regard support a reissuance of its original
9 decisions of non-navigability. Specific such findings include:

10 - That the [Salt] river segment being addressed "is an erratic, unstable and
11 undependable stream characterized by period floods, sometimes extreme, followed by
12 periods of drought when there is little or no water in the riverbed." ANSAC Salt River
13 Report at 45-46.

14 - "The [Gila River] reaches . . . upriver of Safford near . . . New Mexico and below
15 Coolidge Dam have rapids, waterfalls and other obstacles that prevent them from being
16 considered navigable or susceptible of navigability . . ." and

17 - Those portions of the river which lie in the broad alluvial plains, . . . below Safford
18 to Coolidge Dam and Twin Buttes to the confluence with the Salt River and from there down
19 to the Colorado . . . had a configuration that would be impossible to be considered navigable
20 . . . as of statehood." ANSAC Gila River Report at 87-88.
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