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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

**In re: Determination of Navigability of
the Gila River in Maricopa County**

No. 03-007-NAV

**Maricopa County and the Flood Control
District of Maricopa County's
Memorandum to the Arizona Navigable
Stream Adjudication Commission (ANSAC)
Regarding the Need to Re-Open the Record
to Admit Evidence on Segmentation**

The Arizona Navigable Stream Adjudication Commission ("ANSAC" or "Commission") allowed interested parties to submit supplemental memoranda analyzing whether it is necessary for ANSAC to re-open the record and admit evidence on the segmentation issue focusing on the Supreme Court's decision in *PPL Montana, LLC v. Montana*, No. 10-218 (U.S. Feb. 22, 2012) ("*PPL Montana*" or "the Opinion"). This Memorandum is submitted in response to that request on behalf of Maricopa County and the Flood Control District of Maricopa County ("County and FCD") by undersigned counsel. The County and FCD also contemporaneously submitted a memorandum to ANSAC on this

issue with respect to the Salt River. To avoid unnecessary repetition, that Memorandum is hereby incorporated into this document.

For the reasons stated below, Maricopa County and FCD believe that ANSAC must re-open the record on the Gila River and hold public hearings to allow interested parties to present evidence and testimony regarding the ordinary and natural condition of the river and potential segmentation of the Gila River under that standard.

I. Evidence related to potential segmentation of the Gila River was not presented to the Commission, and ANSAC did not analyze segmentation of the Gila River.

Pursuant to A.R.S. § 37-1101 *et seq.*, in 2004 and 2005, ANSAC published notices in Arizona newspapers announcing that it “intends to receive, review, and consider evidence regarding the navigability or non-navigability of the Gila River. [Exhibit A1 to, FINDINGS AND DETERMINATION REGARDING THE NAVIGABILITY OF THE GILA RIVER FROM THE NEW MEXICO BORDER TO THE CONFLUENCE WITH THE COLORADO RIVER (“GILA DETERMINATION”) dated January 27, 2009] Subsequently, ANSAC published notices that it would hold hearings “to receive physical evidence and testimony relating to the [Gila River.]” [*Id.*] Plainly, the Notices of Public Hearing published in the Arizona newspapers make no mention of potential segmentation of the River or the Commission’s willingness to receive evidence on such segmentation. [*Id.*]

The Evidence Log (“EL”) from the hearings on the Gila and the text of the ANSAC report itself demonstrate that evidence analyzing possible segmentation of the river in its normal and natural condition has not been presented to ANSAC. [Exhibit E to Gila Determination] Although some evidence presented was directed at particular portions of the Gila River (notably Hjalmar W. Hjalmarson’s report [EL #23], Dr. Douglas Littlefield’s report [EL #12], Alan Gookin’s presentation [EL #5], and Dr. Stanley Schumm’s report [EL #6]), none of the evidence analyzed how the river would best be segmented, or whether small portions of the larger reaches would be navigable. The Hjalmarson, Littlefield and Schumm reports in particular addressed the lower Gila segment from the Salt River confluence to the Colorado, but only Mr. Hjalmarson’s report analyzed the river in its ordinary and natural

condition instead of its diverted, unnatural condition on the date of statehood. While Mr. Hjalmarson's report does analyze the lower Gila segment in its ordinary and natural condition, ANSAC's report indicates that the Commission did not analyze the susceptibility to navigation of the reach of the lower Gila from the Salt to the Colorado, or any other smaller segment thereof for navigability under ordinary and natural conditions.

The Commission's report itself demonstrates that ANSAC considered the entire river as a whole without evaluating whether particular segments were navigable and others not navigable. [GILA DETERMINATION 5-9] While a detailed analysis of segmentation was not performed by anyone, the Arizona State Land Department's report, entitled GILA RIVER NAVIGABILITY STUDY DRAFT FINAL REPORT dated October 1994 (revised September 1996), does split the Gila River into three large reaches as follows: the upper Gila, which includes two smaller reaches running from the state line through the Safford Valley to east of Florence; the middle Gila from east of Florence to the confluence with the Salt River, and; the lower Gila, running from the confluence with the Salt to the Colorado River. [EL #4 – ASLD GILA RIVER NAVIGABILITY STUDY revised 9/1996, VII-1] According to the report, these segments, while partly arbitrary, are also based upon hydrologic and physiographic boundaries. [*Id.*]

The Gila is not a uniform river—quite the contrary. The ASLD report states that historical changes on the Gila River “are not the same along all reaches of the river.” [*Id.* at VII-1] The ASLD report states further:

Alluvial reaches, i.e., segments not confined by bedrock, are prone to greater changes in channel position and form. Furthermore, because of physiographic variability and a climatic gradient across the Gila River watershed, different reaches have unique hydrologic characteristics (Hirschboek, 1985), and thus as one might expect, channel transformation along separate reaches are not synchronous or uniform. In addition, dams and irrigation diversion have altered different reaches of the Gila River.

[*Id.*] While ANSAC's report acknowledged these important distinctions between the several reaches stating, “Because of the geographic, geologic and man-constructed dams and reservoirs, as well as diversions for irrigation, the Gila River has been divided into three separate reaches,” [Gila Determination, 8] the Commission made no effort to separately analyze the evidence of navigability regarding these three segments under the ordinary and

natural condition standard but instead treated the river as a 500-mile single unit. The Commission's focus on unnatural dams, reservoirs, and irrigation diversions and the human-caused disturbance to the river indicates that it did not give adequate consideration to the ordinary and natural features emphasized by *PPL Montana* to consider the river segments. Instead, the Commission merely observed that these three reaches existed and then proceeded to analyze the entire river in its un-naturally diverted condition to reach its conclusion.¹ Because the Commission did not evaluate any of the watercourses in Arizona according to the "natural and ordinary" legal standard required by *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) and reiterated in *PPL Montana*, and to permit additional evidence on the segmentation of the Gila, ANSAC should re-open the record to allow interested parties to submit further evidence on the "natural and ordinary" condition of the watercourses and on appropriate segmentation. Those hearing should take place "at the commission's office or, in the case of a hearing concerning a watercourse located principally outside of Maricopa county, [sic.] at the county seat of the county in which the predominant portion of the particular watercourse is located."

¹ It bears noting the during the vote to determine the navigability of the Salt River, at least one member of ANSAC, Commissioner Brashear, explicitly refused to consider that river in its natural condition. Mr. Brashear stated:

I had something of a struggle with some of the argument that the river, the Lower Salt, was navigable but for man's interference. Man's interference screwed up the river and brought that into question, and this led me to ponder the problem of nature and navigability. It seem to me that there is one view which I discard and that is that you have to consider the river without any human presence around it. That leads me to a further conclusion that it; it is like the philosophy 101 thing that if a tree falls in a forest and there is no one around to hear it fall, did it make a noise when it fell? How can you have a navigable waterway with no human kind to float on it? And it seems to me like the experience on this Commission is that at a very minimum we need some lawyers to argue about whether it was navigable or not, and, so I kind of dismissed the Bambi school of nature when it comes to navigability.

[REPORT, FINDINGS AND DETERMINATION REGARDING THE NAVIGABILITY OF THE SALT RIVER FROM GRANITE REEF DAM TO THE GILA RIVER CONFLUENCE dated September 21, 2005, Exhibit F-2, at 2] Undoubtedly, Mr. Brashear had the same opinion regarding the normal and natural condition of the Gila when he voted to find it not navigable over two years later.

A.R.S. § 37-1126(A). Accordingly, ANSAC should re-notice hearings, as it did previously, to gather evidence on the “natural and ordinary” condition of those watercourses and the potential segmentation of each watercourse.

II. The types of evidence on segmentation to be accepted should be guided by *PPL Montana*.

PPL Montana identifies several criteria that should be helpful to the Commission in determining segmentation and to identify the types of evidence required. The *PPL Montana* court stated that the segments should be “discrete and identifiable” *Id.* at 1. Using topography, geography and other physical features will assist in drawing the boundaries of each segment. *Id.* at 16. For example, a river that runs through steep canyons could be segmented from a reach that runs through comparatively flat topography. A reach of a river that is so rocky that boats do not traverse it could be segmented from a reach that has sandy banks and sandbars. To determine where to draw the line between the segments, the Commission should look at natural physical features such as the presence of a box canyon, the location of a tributary joining another river, or a natural point of constriction on the river like the Powers Butte.

The GILA RIVER NAVIGABILITY STUDY prepared by the State Land Department includes two chapters that may be helpful to the Commission in determining segmentation according to the *PPL Montana* parameters—Chapter VI-Hydrology, and Chapter VII-Geomorphology. Chapter VI identifies at least twelve discrete sections of the Gila River from the New Mexico state line to the confluence with the Colorado. [EL #4, VI-2] The segments run within deep walled canyons in the east, through wide valleys and again through canyons and finally through fertile valleys in the west. These varied sections provide a preliminary means of segmenting the river according to geology, geomorphology, and hydrology.

Within the boundaries of Maricopa County, after leaving the Gila Indian Reservation, the Gila River joins with the Salt, which provides a significant inflow to the Gila River. The Gila then flows west approximately three miles before being supplied by the Agua Fria River. [EL #4, VI-2] The river then passes through the Buckeye Valley for about twenty-five miles to the Arlington Valley and there receives the waters of the Hassayampa River. [*Id.*] The river

then flows approximately twenty-five miles south through an unnamed valley to Gila Bend and enters the Citrus Valley. [*Id.*] The river then turns northwest and flows through the Gila Bend Reservation and the Painted Rock Mountains. [*Id.*] The river then enters the Dendora Valley and flows southwest approximately ten miles to Oatman Flat where it briefly contracts before entering the Hyder Valley on Sentinel Plain as it leaves Maricopa County. [*Id.*] This brief summary indicates that the Gila River, in Maricopa County alone, has several discrete sections with three tributaries supplying significant inflows and at least two constrictions at Arlington and Painted Rock Mountains. [*Id.*, at VI-2, VII-5] The lower Gila was perennial downstream from the Salt River all the way to the Colorado River. [*Id.*, at VII-6] In addition, there is evidence of successful boating on the lower Gila during the 1800's. [*Id.*]

The ASLD report provides some evidence of the physical conditions of the Gila in its ordinary and natural condition, and provides a starting point for segmentation of the river. Nevertheless, additional evidence should be allowed to be presented that focuses on the natural and ordinary river and identifies segments that were susceptible to navigation at statehood.

The *PPL Montana* Court also recognized that some interruptions to navigation might be so insignificant (or de minimis) that they “merit treatment as part of a longer, navigable reach for purposes of title under the equal-footing doctrine.” *Id.* at 17. The Commission must analyze the capabilities of watercraft available at statehood and whether the natural and ordinary physical conditions could support navigation of those vessels. This determination must be done for segments in accordance with *PPL Montana*, and any breaks in navigability must be evaluated to judge the significance and whether it should create a non-navigable segment (*e.g.*, the seventeen mile Great Falls reach found not navigable in *PPL Montana*).

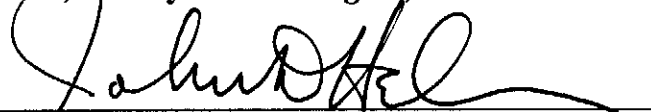
III. Conclusion

There is ample evidence in the record to support finding portions of the Gila River navigable and other portions non-navigable depending of the segment under consideration. ANSAC, however, did not analyze whether any discrete segment of the river was susceptible to navigation or non-navigation, but instead discounted evidence pertaining to segments that

might be navigable and found the entire river, as a whole, not navigable because the entire river could not be navigated without interruption. Therefore, in accordance with the holding in *PPL Montana*, ANSAC must re-open the record to allow interested parties to present evidence of the natural and ordinary condition of the Gila River related to segmentation and then the Commission must reevaluate the Gila River on a segment-by-segment basis to evaluate that evidence and determine whether any "discrete and identifiable" segment of the river was navigable, or susceptible to navigation, in its "natural and ordinary" condition.

Respectfully Submitted this 8th day of June 2012.

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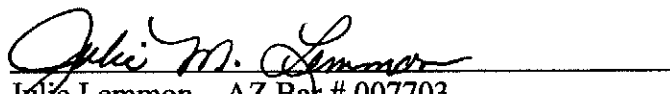
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