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

11 In re Determination of Navigability of  
12 the Upper Salt River;  
13  
14 In re Determination of Navigability of  
15 the Gila River

No. 04-008-NAV (Upper Salt)  
No. 03-007-NAV (Gila)

**THE SAN CARLOS APACHE  
TRIBE'S MEMORANDUM  
REGARDING THE RECORD AS TO  
SEGMENTATION AND ITS NOTICE  
THAT IT JOINS IN SALT RIVER  
PROJECT'S MEMORANDUM  
REGARDING THE EFFECT OF THE  
SUPREME COURT'S OPINION IN  
PPL MONTANA v. MONTANA**

16 Pursuant to the Commission's February 27, 2012 request for memoranda and April 6,  
17 2012 extension of time to submit such memoranda, the San Carlos Apache Tribe ("Tribe")  
18 gives notice that it joins in Salt River Project's Memorandum Regarding Effect of Supreme  
19 Court's Opinion in *PPL Montana* on Remanded Cases Other than Lower Salt River, dated  
20 March 23, 2012. In addition, the Tribe submits its analysis of whether it is necessary for the  
21 Commission to reopen the record and take testimony related to the segmentation issue that the  
22 U.S. Supreme Court focused on in its decision in *PPL Montana, LLC v. Montana*, 132 S.Ct.  
23 1215 (2012) ("PPL Montana").  
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3 **I. ANALYSIS**

4 **A. The Current Record is Adequate and Should Not Be Reopened as to**  
5 **Segmentation.**

6 **1. The record, though expansive, contains no credible evidence which**  
7 **proves navigability for any segment of the Upper Salt or Gila Rivers.**

The burden of proof in these proceedings rests exclusively on the proponents of

8 navigability. Nevertheless, despite years of opportunity to build the record, these parties have  
9 failed to provide any credible evidence which proves that any segments of the Upper Salt<sup>1</sup> or  
10 Upper Gila<sup>2</sup> Rivers were navigable or susceptible of navigation at the time of Statehood. The  
11 record contains no evidence that any segments were used as highways for commerce by  
12 which trade and travel were conducted in modes of trade and travel on water which were  
13 customary at the time of Statehood. The record contains no evidence that any Tribal,  
14 European, Mexican, or American explorers or settlers traveled any segment by canoe, raft,  
15 boat or barge, or conveyed raw material, such as logs, by flotation on any segment prior to  
16 Statehood.  
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22 <sup>1</sup> The Upper Salt River Reach begins at the confluence of the White and Black Rivers and  
23 travels downstream 153 miles downstream to Granite Reef Dam. The approximate location  
24 of the Black and White River Confluence is latitude 33°44'N and longitude 110°13'43" W.  
25 The Granite Reef Dam is located approximately at the center of Section 13 Township 2 N,  
Range 6, at approximately latitude 33°31' N and longitude 11°41' W. ANSAC, *Report,*  
*Findings and Determination Regarding the Navigability of the Upper Salt River from the*  
*confluence of the White and Black Rivers to Granite Reef Dam* at 3-4.

26 <sup>2</sup> The Upper Gila River begins at the New Mexico Border and runs downstream to Florence.  
27 ANSAC, *Report, Findings and Determination Regarding the Navigability of the Gila River*  
*from the New Mexico Border to the Confluence with the Colorado River* at 8.

1 The proponents of navigability have had the burden to prove navigability by a  
2 preponderance of the evidence throughout these proceedings. It stands to reason that any  
3 evidence in support of a finding of navigability as to any segment of river would have already  
4 been submitted and made part of the record, and therefore it should not be necessary to reopen  
5 the record and take additional testimony.  
6

7 **2. The record contains sufficient evidence to support a finding that no**  
8 **segments of the Upper Salt and Gila Rivers are navigable.**

9 The evidence of the physical condition of the rivers in the record reflects that the  
10 Commission examined the rivers, segment by segment, and gave practical consideration to the  
11 impacts of such physical conditions on navigability. *PPL Montana*, 132 S.Ct. at 1229-30.  
12

13 Although the burden of proof rests on the proponents of navigability, the current record  
14 contains sufficient evidence to support a finding that none of the segments of the Upper Salt  
15 and Gila Rivers were navigable at the time of Statehood. This is clear for the river segments  
16 which are found within the San Carlos Apache Reservation. The evidence of non-navigability  
17 in the record which pertains to these segments is discussed below.  
18

19 **a. Segments of the Upper Gila River on the Tribe's Reservation**

20 There is abundant evidence in the record to support the Commission's findings that the  
21 Upper Gila River was not navigable at Statehood. The current record for the Upper Gila  
22 River includes evidence that the Commission gave practical consideration of the appropriate  
23 physical conditions of both the segment of the river which begins at the Twin Buttes<sup>3</sup> area and  
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27 <sup>3</sup> The southwest corner of Section 11, Township 4 S, Range 11 E (G&SRB&M).

1 travels upstream to the base of Coolidge Dam<sup>4</sup> (“Lower Reservation Segment”), and the  
2 segment which begins at the base of Coolidge Dam and travels upstream to Geronimo<sup>5</sup>  
3 (“Upper Reservation Segment”) to determine that these segments were not navigable at the  
4 time of Statehood. The evidence shows that there are geomorphic obstacles such as rapids,  
5 waterfalls, and bedrock on both ends of each of these segments of the Upper Gila, which  
6 would have impeded navigation at the time of Statehood. In addition, the evidence in the  
7 record shows that braided channels on the Upper Reservation Segment were dominated by  
8 periods of low flows which were too unreliable to support navigation, and that these channels  
9 also experienced sporadic flood flows which would have made navigation impossible.  
10  
11

12 Evidence in the Commission’s record shows similar considerations by the Commission of  
13 such physical conditions to determine that the Lower Reservation Segment, located downstream from  
14 Coolidge Dam, has geographical barriers that prevent it from being navigable. In its final report, the  
15 Commission states that much of the River, referred to here as the Lower Reservation Segment, flows  
16 through “deep bedrock canyons” which are comprised of “rapids, waterfalls and other obstacles that  
17 prevent [the Upper Gila] from being navigable or susceptible of navigability as a highway for  
18 commerce.”<sup>6</sup> Evidence in the record also shows the reach of the river referred to here as the Upper  
19 Reservation Segment runs through “broad alluvial plains . . . a braided stream of two or more  
20 channels interspersed with sandbars, sand islands and other obstacles which shifted with floods and  
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23 \_\_\_\_\_  
24 <sup>4</sup> Section 17, Township 3 S, Range 18 E (G&SRB&M).

25 <sup>5</sup> The southwest corner of Section 5, Township 7 S, Range 26 E.

26 <sup>6</sup> Arizona Navigable Stream Adjudication Commission, *Report, Findings and Determinations*  
27 *Regarding the Navigability of the Gila River From the New Mexico Border to the Confluence*  
*with the Colorado River* at 87 (January 27, 2003) (“Gila Report”).

1 high water flow of water . . . a configuration that would be impossible to be considered navigable or  
2 susceptible to navigability as of Statehood.” *Id.* at 88.

3 Evidence provided by Dr. Douglas R. Littlefield quotes a series of Water Supply  
4 Papers (“WSP”) drafted by the United States Government in the late nineteenth and early  
5 twentieth centuries that discusses the unpredictable nature of the Gila River. WSP No. 38,  
6 describes the bed of the Gila as being “sandy and shifting,” a description Dr. Littlefield used  
7 as evidence that the Upper Gila River was non-navigable.<sup>7</sup>

8  
9 Dr. Stanley Schumm described the low flow of the Gila River near Calva<sup>8</sup> as, “a very  
10 wide braided river with probably islands developing with vegetation, colonizing the islands.”<sup>9</sup>  
11 The Gila Report concluded that navigability would be impossible “where a braided stream of  
12 two or more channels interspersed with sandbars, sand islands and other obstacles, which shift  
13 with floods and high flow of water.” *Id.* at 88.  
14  
15

16 In conclusion, the Commission considered evidence in the record concerning the  
17 physical condition of the river which demonstrates that some parts of the Upper Gila River  
18 were erratic, unstable, and unpredictable, with shallow flows and periodic floods which could  
19 be extreme and which would have the effect of changing the channel of the Gila River. The  
20 evidence also demonstrates that the reach of the river located within the alluvial plain in the  
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23 <sup>7</sup> *Assessment of Navigability of the Gila River Basin Between the Mouth of the Colorado*  
24 *River Prior to and on the Date of Arizona’s Statehood* at IV-10; WSP No. 38 at 314.

25 <sup>8</sup> Lat 33°11’ 10”, Long 110° 13’ 10” in SW ¼ sec. 8, T.3 S, R.21 E. in San Carlos Indian  
26 Reservation, at head of San Carlos Reservoir 1.5 miles northwest of Calva.

27 <sup>9</sup> Transcript of Dr. Stanley Schumm, testifying before the Arizona Navigable Stream  
Adjudication Commission, October 20, 2005. T.R., pp. 87 and 88.

1 Upper Gila River was not accessible by navigation from either upstream or downstream. The  
2 evidence shows that physical conditions at specific locations on the river such as waterfalls,  
3 bedrock canyons, rapids and other geological impediments, prevented these segments of the  
4 Upper Gila River from being considered navigable or susceptible to navigability. Evidence in  
5 the record shows other reaches of the Upper Gila to have been broad alluvial plains, where a  
6 braided stream of two or more channels was characterized by sandbars, sand islands and other  
7 obstacles which can easily shift during periodic floods and the occasional and unpredictable  
8 high flow of water. Evidence in the Commission's record clearly supports the determination  
9 that these two segments of the Gila River, which are separately identified here as located  
10 within the San Carlos Apache Reservation, were non-navigable and not susceptible to  
11 navigation at the time of Statehood.  
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15 **b. Segments of the Upper Salt River**

16 The record also contains plentiful evidence showing the Commission's careful  
17 consideration of the physical conditions of segments of the Upper Salt River to support the  
18 Commission's findings that the segments making up the Upper Salt River were non-navigable  
19 at the time of Statehood. First, the record shows that the Commission considered evidence  
20 that the Upper Salt River has geographical barriers, such as powerful rapids, that prevent it  
21 from being navigable. When a geographical barrier becomes an obstacle for navigation, that  
22 segment of the river is considered non-navigable. Evidence in the record shows that, ". . . for  
23 the 60 miles above Roosevelt Dam Spillway, which is river mile one, there's a rapid on  
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27

1 average every 3.3 miles . . .”<sup>10</sup> The record provides further evidence that when rapids are  
2 frequent, as they are on the Upper Salt River, the river is not considered navigable or  
3 susceptible to navigation.  
4

5 Second, evidence in the record shows that, most of the Upper Salt River is within deep  
6 canyons with bedrock that runs along the channel margins. These channels have bedrock  
7 outcrops that created rapids, waterfalls and narrow canyons.<sup>11</sup> Evidence of bedrock  
8 outcroppings, narrow canyons, waterfalls and rapids, all support the determination that the  
9 Upper Salt River is not navigable or susceptible to navigation.  
10

11 Third, even if the water flow over bedrock, waterfalls, and rapids in the riverbed was  
12 not as torrential as the evidence shows, the steep gradient of the river would alone make  
13 navigation impossible.<sup>12</sup> Any river steeper than 4 feet per mile is not navigable for any river  
14 borne commerce vessel. *Id.* at 87. The record provides sufficient evidence to determine that,  
15 “the numerous rapids and bedrock impacts on the river prevent navigation, but even more  
16 important are the very steep gradients ranging from 17 to 31 ft/mile. . . If at 4 feet per mile,  
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22 <sup>10</sup> Transcript of Dr. Stanley Schumm, testifying before the Arizona Navigable Stream  
23 Commission, October 20, 2005. T.R., at 87-88.

24 <sup>11</sup> See Dr. Stanley Shumm, *Report, Geomorphic Character of the Upper Salt River*, (January  
25 2005) Quoting Dr. J.E. Fuller, *Report, Geomorphology of the Upper Salt River; Report  
26 prepared for SFC Engineering Company and Arizona State Land Department* at 4-13 (2003).

27 <sup>12</sup> Transcript of Dr. Stanley Shumm before the Arizona Navigable Stream Adjudication  
Commission, October 20, 2005. T.R., pp. 87-88.

1 commercial navigation is inhibited, certainly 17 to 31 [feet] per mile, the gradients measured  
2 on the Upper Salt River, navigation would be impossible.”<sup>13</sup>

3  
4 Although the Salt River has a more steady flow of water than the Gila River, and both  
5 the segment from Pinal Creek to the junction of the White and Black Rivers, and the segment  
6 from the junction of the White and Black Rivers up to the headwaters, appear to be contained,  
7 within deep sheer-walled canyons, the evidence in the record demonstrates that the gradient in  
8 the Upper Salt River is so dramatic and the flows are so torrential through its canyons, that the  
9 Upper Salt could not have been navigable or susceptible to navigation at the time of  
10 Statehood.  
11

12 The record shows that the Commission gave practical consideration of abundant  
13 evidence that the Upper Salt River was not navigable at the time of Statehood due to  
14 geomorphic impediments. In sum, evidence in the record supports the determination made  
15 earlier by the U.S. Forest Service that, “no water craft capable of being used for sustained  
16 trade and/or travel at the time of Statehood could have gone upstream through the Salt River  
17 Canyon. The cliffs at water’s edge, the swift current and numerous rapids would have even  
18 precluded pulling an empty watercraft back upstream. Even now, no watercraft has ever gone  
19 up the 48 miles of this section of the river.”<sup>14</sup>  
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25 <sup>13</sup> See Dr. Stanley Shumm, *Report, Geomorphic Character of the Upper Salt River*, at 12  
26 (January 2005).

27 <sup>14</sup> See U.S. Forest Service, *Evaluation at the Time of Statehood: Salt River* at 8 (January  
1998).



1 **II. CONCLUSION**

2  
3 The Commission need not reopen the record. It is clear the Commission received and  
4 carefully considered evidence of the physical conditions which would have practical impact  
5 on navigability at appropriate locations on the rivers. The Commission's findings that the  
6 Upper Salt and Gila Rivers were not navigable at Statehood are supported by the record and  
7 the Commission should affirm its previous findings on the Rivers. To this date the  
8 proponents of navigation have failed to show that any segment of any watercourse in Arizona  
9 brought before ANSAC was navigable at Statehood, and there is abundant evidence in the  
10 record to support the Commission's findings. The current record is adequate to show that the  
11 Commission gave proper consideration of these rivers segment by segment. It would be  
12 unnecessary to reopen the record to take additional evidence of the navigability of individual  
13 segments of the Upper Salt and Gila Rivers.  
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20 DATED this 8th day of June, 2012.

21  
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23  
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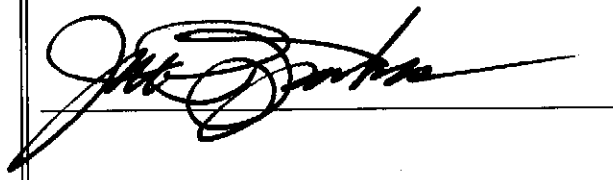
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