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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

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

No. 03-005-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 Gila River. 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 Lower Salt River and hold public hearings to allow interested parties to present evidence and testimony regarding the "natural and ordinary" condition of the river and potential segmentation of the Lower Salt River.

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

Pursuant to A.R.S. § 37-1101 *et seq.*, in 2003, ANSAC published notices in the Arizona Republic announcing that it "intends to receive, review, and consider evidence regarding the navigability or non-navigability of the Lower Salt River between Granite Reef Dam and the confluence with the Gila River in Maricopa County, Arizona. [Exhibit A to, REPORT, FINDINGS AND DETERMINATION REGARDING THE NAVIGABILITY OF THE SALT RIVER FROM THE GRANITE REEF DAM TO THE GILA RIVER CONFLUENCE ("SALT DETERMINATION") dated September 21, 2005] Subsequently, ANSAC published notices that it would hold hearings "to receive physical evidence and testimony relating to the Lower Salt River between Granite Reef Dam and the confluence with the Gila River in Maricopa County." [Exhibit B to SALT DETERMINATION] Plainly, the Notices of Public Hearing makes no mention of potential segmentation of the Lower Salt River and leave one with the impression that there could be no alternative segmentation to that contained in the notice. [*Id.*]

A review of the documents listed on the Evidence Log ("EL") from the hearings on the Lower Salt and the text of the ANSAC report itself demonstrate that evidence analyzing possible segmentation of the river in its ordinary and natural condition was not presented to ANSAC. [Exhibit E to SALT DETERMINATION] Indeed, there is no apparent reason or evidence supporting or an ordinary or natural condition that supports the Salt River being split into

the Lower and Upper Salt at the unnatural Granite Reef Dam. There is nothing in the record supporting the seemingly arbitrary decision to split the Salt River at Granite Reef Dam. According to the *PPL Decision*, which requires segmentation to be based on natural features of the watercourse, and the evidence in the record, it makes more sense to include the Verde River confluence with the lower segment and limiting the upper segment to the upstream canyons.

Even within the Lower Salt reach, ANSAC's report itself demonstrates that ANSAC considered the entire 37-mile Lower Salt without evaluating whether particular sub-segments were navigable and others not navigable. While a detailed analysis of segmentation was not performed by anyone, the Arizona State Land Department's report, entitled ARIZONA STREAM STUDY FOR THE SALT RIVER: GRANITE REEF DAM TO THE GILA RIVER CONFLUENCE dated December 1993 ("ASLD SALT RIVER STUDY") (revised September 1996 and April 2003), states that although the entire reach has similar geomorphic, hydrologic, and hydraulic characteristics, a natural dividing point does exist at Tempe Butte. [EL #30—ASLD SALT RIVER STUDY revised 4/2003, 5-1 & 7-1] In the past, shallow bedrock at Tempe Butte forced groundwater to the surface sustaining river flow in the reach immediately downstream from the Butte. [*Id.* at 5-8] Although pre-statehood irrigation diversions eliminated all but rare high flow and wastewater return flows. [*Id.* at 5-4] Early Anglo explorers described the Salt as a perennial stream, 200' wide and 2-3' deep with abundant beaver, fish, and riparian vegetation. [*Id.* at 5-9] Evidently, those early observers felt the river was navigable at some point. By the time of statehood, Anglo settlement and a period of high flows had permanently altered the geomorphology of the river. [*Id.*] Such evidence clearly indicates that natural segmentation remains to be considered.

The Commission's focus on unnatural dams, reservoirs, and irrigation diversions and human-caused disturbance to the river indicates that it did not give adequate consideration to the natural features emphasized by the *PPL Montana* decision in determining segmentation. By selecting a dam as a cutoff point, without any natural justification, ANSAC may in fact be violating *PPL Montana* and *State ex rel. Winkleman v. Arizona Navigable Stream*

Adjudication Comm'n, 224 Ariz. 230, 229 P.3d 242 (App. 2010).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* and reiterated in *PPL Montana*, and to permit additional evidence on the segmentation of the Lower Salt, ANSAC must 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 under “natural and ordinary” conditions. 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.” A.R.S. § 37-1126(A). Accordingly, ANSAC should re-notice hearings to gather evidence on the “natural and ordinary” condition of those watercourses and appropriate natural and ordinary potential points of segmentation of the 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 to establish a segment. The *PPL Montana* court stated that the segments should be “discrete and identifiable” *Id.* at 1. The court observed that topography, geography and other physical features will assist in drawing the boundaries of each segment. *Id.* at 16. For example, a river

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 ther 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 kin d 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.

[Exhibit F-2 to SALT DETERMINATION, at 2]

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 Tempe Butte.

The ASLD report provides some evidence of the physical conditions of the Salt 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 in their natural and ordinary course.

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*).

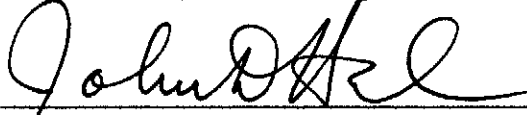
III. Conclusion

There is ample evidence in the record to support finding portions of the Salt River were navigable and other portions non-navigable. ANSAC, however, did not analyze whether any ordinary and natural discrete segment of the river was susceptible to navigation or not. Therefore, in accordance with the holding in *PPL Montana*, ANSAC should allow interested parties to present evidence of the natural and ordinary condition of the Salt River related to segmentation and then the Commission must reevaluate the river on a “natural and ordinary” segment-by-segment basis to evaluate that evidence and determine whether

any segment of the river was navigable, or susceptible to navigation, in its "natural and ordinary" condition.

Respectfully Submitted this 8th day of June 2012.

Helm, Livesay & Worthington, Ltd.



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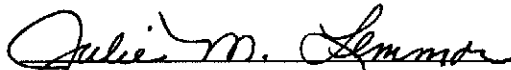
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ORIGINAL AND SIX COPIES of the foregoing **HAND-DELIVERED** this 8th day of June 2012, to:

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