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16 **BEFORE THE ARIZONA NAVIGABLE**

17 **STREAM ADJUDICATION COMMISSION**

18  
19  
20 In re: Determination of Navigability of the  
Lower Salt River, from Granite Reef Dam to the  
21 Gila River Confluence

No. 03-005-NAV

**CITIES OF MESA, PHOENIX AND  
TEMPE'S JOINT  
SUPPLEMENTAL LEGAL  
MEMORANDUM REGARDING  
PPL MONTANA**

1 The Cities of Phoenix, Mesa and Tempe (“Cities”) submit this supplemental  
2 memorandum as requested by the Arizona Navigable Stream Adjudication Commission  
3 (“ANSAC”), to comment on the impacts of the United States Supreme Court’s decision in  
4 *PPL Montana, LLC v. Montana*, 565 U.S. \_\_\_, 132 S.Ct. 1215 (2012). The Cities will not  
5 repeat the comments contained in their March 23, 2012 memorandum submitted in this case  
6 but will limit this memorandum to the specific issue of whether it is necessary to reopen the  
7 record in this matter to deal with the “segmentation issue” discussed in the *PPL Montana*  
8 decision.

9 **I. ANSAC SHOULD NOT ADDRESS THE ISSUE OF SEGMENTATION**  
10 **AT THIS STAGE OF THE PROCEEDINGS.**

11 **A. The Court of Appeals Remanded this Case on the Limited Issue of**  
12 **the “Natural” State of the Lower Salt River at Statehood.**

13 The Arizona Court of Appeals’ Opinion vacating ANSAC’s decision of non-  
14 navigability of the Lower Salt River (“Lower Salt”) did not direct ANSAC to examine any  
15 legal standard other than a consideration of the “natural” state of the Lower Salt. *State ex.*  
16 *rel. Winkleman v. Arizona Navigable Stream Adjudication Commission (ANSAC)*, 224 Ariz.  
17 230, 229 P.3d 242 (App. 2010). The Court of Appeals narrowly held that ANSAC applied  
18 an incomplete legal standard specifically because it failed to consider the “natural” state of  
19 the Lower Salt on the date of statehood as required by Arizona law. *Id.*

20 The Court of Appeals directed ANSAC only to review of the “natural” condition of  
21 the Lower Salt on the date of statehood:

22 Because the proper legal test was not applied, we must vacate the superior  
court's judgment and remand for ANSAC to consider whether the River would  
have been navigable had it been in its ordinary and natural condition on  
February 14, 1912.

1 *Id.* at 242. The scope of the Court of Appeals’ remand to ANSAC did not extend to any  
2 other issues.

3 **B. *PPL Montana* Reaffirmed Existing Law Regarding Navigability  
4 Determinations by River Segments.**

5 The Supreme Court in *PPL Montana* reaffirmed that navigability determinations are  
6 based on the natural and ordinary condition of the riverbed at the time of statehood. In that  
7 case, however, the Court emphasized that the Montana Supreme Court had erred in  
8 discounting long-established jurisprudence regarding a segment-by-segment approach to  
9 navigability for title. The Court noted that if a riverbed segment was in dispute, a court must  
10 determine that river segment’s navigability: “The segment-by-segment approach to  
11 navigability for title is well settled, and it should not be disregarded.” *PPL Montana* 565  
12 U.S. \_\_\_, 132 S.Ct. at 1229.

13 This is not a new or novel concept in navigability for title decisions. *See e.g., United*  
14 *States v. Utah*, 283 U.S. 64, 51 S.Ct. 438 (1931)(“Even where the navigability of a river,  
15 speaking generally, is a matter of common knowledge . . . it may yet be a question, to be  
16 determined upon evidence, how far navigability extends.”) At this stage of these  
17 proceedings, no parties can reasonably assert that the segmentation issue is a new rule of law  
18 given that the United States Supreme Court describes the issue as “well settled,” citing  
19 precedent dating back to the 1920s and 1930s as establishing this rule.

20 Even though, as a matter of law, a party is entitled to dispute the navigability of a  
21 specific segment of a stream, none of the parties before the Court of Appeals claimed that  
22 ANSAC erred in failing to consider a discrete portion of the Lower Salt navigable. Thus,  
any such argument has been waived and cannot be raised as a new legal issue on remand

1 when there has been no ruling that ANSAC made a legal error in failing to determine  
2 navigability for discrete segments of the Lower Salt.

3 Furthermore, no party has ever requested that ANSAC consider a segment of the Salt  
4 River Valley separate from the remainder of the Lower Salt and in need of a separate  
5 analysis for navigability, because long before the date of statehood the Salt River Valley was  
6 itself considered to be a single, distinct and separate segment of the Salt River:

7 The Salt River Valley, so-called, is an alluvial plain, nearly level, lying in the  
8 central portion of the Territory of Arizona, the soil of which, when supplied  
9 with sufficient water, is extremely fertile. Its approximate length from east to  
10 west as far as the Agua Fria River is thirty-five miles; its average width fifteen  
11 miles. The climate is arid with but a slight rainfall, and artificial application of  
12 water to the land is necessary in order for a successful growth of agricultural  
13 products. Entering the valley from the northeast is the Salt River, a non-  
14 navigable stream. Into the Salt River and just before its entrance into the  
15 valley, flows the Verde River; the Salt River, after such conflux, empties into  
16 the Gila River in the southwestern part of the valley.

17 *Patrick T. Hurley v. Charles F. Abbott, et al.*, No. 4564, page 3, District Court, 3<sup>rd</sup> Judicial  
18 District, Territory of Arizona in and for the County of Maricopa, filed March 1, 1910 (Chief  
19 Justice Kent sitting as District Judge)(“Kent Decree”). The parties in this case disputed the  
20 navigability of the Lower Salt as a **single segment** because its condition was similar  
21 throughout its 37 mile stretch.

22 The riverbeds in the *PPL Montana* case are dramatically different from the Lower  
Salt, both in length and description, justifying segmentation:

Practical considerations also support segmentation. Physical conditions that  
affect navigability often vary significantly over the length of a river. This is  
particularly true with longer rivers, which can traverse vastly different terrain  
and the flow of which can be affected by varying local climates. The Missouri  
River provides an excellent example: Between its headwaters and mouth, it  
runs for over 2,000 miles out of steep mountains, through canyons and upon

1 rocky beds, over waterfalls and rapids, and across sandy plains, capturing  
2 runoff from snow melt and farmland rains alike. These shifts in physical  
3 conditions provide a means to determine appropriate start points and end points  
4 for the segment in question. Topographical and geographical indicators may  
5 assist.

6 *PPL Montana*, 565 U.S. \_\_\_, 132 S.Ct. at 1230 (citing *Utah*, at 77-80, 51 S.Ct. 438 (gradient  
7 changes)) and *Oklahoma v. Texas*, 258 U.S. 574, 591, 42 S.Ct. 406 (1922)(location of  
8 tributary providing additional flow)). The description of the Missouri River in the *PPL*  
9 *Montana* case more closely resembles the entire reach of the Salt River and not just the  
10 Lower Salt. The *PPL Montana* Court's segmentation analysis provides a practical  
11 navigability analysis to account for the variability in the riverbeds in that case. *PPL*  
12 *Montana*, 565 U.S. at \_\_\_, 132 S.Ct. at 1233. Here, the Lower Salt lacks variability and  
13 further segmenting is not a practical endeavor.

14 The record reflects that the parties in this matter have disputed the navigability of the  
15 entire Lower Salt as a segment of the Salt River. The *PPL Montana*, Court held that a court  
16 or a fact finder (such as ANSAC) only must consider the navigability of the particular  
17 segment of a riverbed if the parties are in dispute about that particular segment. *PPL*  
18 *Montana*, 565 U.S. at \_\_\_, 132 S.Ct. at 1229 ("To determine title to a riverbed under the  
19 equal-footing doctrine, this Court considers the river on a segment-by-segment basis to  
20 assess whether the segment of the river, *under which the riverbed in dispute lies*, is navigable  
21 or not.")(italics added).

22 In *PPL Montana*, the riverbed in dispute was not the entire Missouri, Madison and  
Clark Fork Rivers in Montana, but only those portions upon which PPL Montana owned and  
operated hydroelectric facilities. *Id.* at \_\_\_, 132 S.Ct. at 1222. This is consistent with other

1 cases cited by the Supreme Court in support of the segment-by-segment approach. *See e.g.*,  
2 *Utah*, 283 U.S. 64, 77, 51 S.Ct. 438 (distinguishing the navigability of the Colorado River  
3 through Utah on multiple mile stretches); *Brewer-Elliott Oil & Gas Co. v. United States*, 260  
4 U.S. 77, 85, 43 S.Ct. 60 (1922)(considering a segment of the Arkansas River along the  
5 Osage Indian Reservation); and *Oklahoma*, 258 U.S. at 591, 42 S.Ct. 406 (assessing  
6 segments of the Red River above and below its confluence with the Washita River in  
7 Oklahoma). In each of those cases, the parties disputed specific segments of a river as  
8 distinct from other portions, subject to different determinations of navigability. *Id.*

9 ANSAC appropriately applied the segment-by-segment approach to determine the  
10 navigability of the Lower Salt, because the *entire* Lower Salt as a segment of the Salt River  
11 was in dispute among the parties. The Court of Appeals reviewed ANSAC's navigability  
12 determination of the Lower Salt and only found fault with ANSAC's apparent failure to  
13 consider the "natural" condition of the *entire* Lower Salt, not a subset thereof. At this stage  
14 of the proceedings, the parties have waived any rights to propose, and are precluded from  
15 proposing, new factual or legal differences between segments of the Lower Salt. Thus, it  
16 would be inappropriate for ANSAC to conduct a *de novo* hearing to determine the  
17 navigability of subsets of the Lower Salt.

18 **II. There Is No Reason to Further Segment the Lower Salt River.**

19 It would be difficult, if not impossible, to find a portion of the Lower Salt which is  
20 distinguishable from any other portion from the standpoint of navigability. The factual  
21 record in this matter is replete with accounts of a river which is virtually the same over time.

22 Numerous descriptions by early settlers indicate that the river was an abraided  
stream having anywhere from two to four flow channels and that in normal

1 times the water was two or three feet deep. During flood times and periods of  
2 rain in the mountains on the watershed, the flow of the river became  
3 substantially greater.  
4 Report, Findings and Determination Regarding the Navigability of the Salt River from  
5 Granite Reef Dam to the Gila River Confluence, September 21, 2005 (“ANSAC Navigability  
6 Report”) at 33. Both before and after creation of man-made diversions and dams, no  
7 evidence exists that any distinct segment of the Lower Salt was more or less navigable than  
8 the remaining stretches. The flow of the Lower Salt was always impacted by flooding and  
9 variations in flow rates, but again, there is no evidence to suggest that one portion of the  
10 Lower Salt was so disproportionately affected as to distinguish its navigability from the  
11 remaining riverbed.

12 In a statement attributable to accounts from the time of construction of the first  
13 “modern” (post-Hohokam) diversion, “[I]t’s virtually dry. It doesn’t have a steady flow; its  
14 flow is highly variable.” *Id.* at 28. The Lower Salt was short (37 miles), had an elevation  
15 descent of less than 400 feet, was similar in terrain (fertile soil in an alluvial valley) and  
16 susceptible to large variations in flow due to floods and drought. *Id.* at 29. It shares none of  
17 the indicia of “segments” referenced in the caselaw applying segmentation as a method of  
18 determining navigability. *See supra.*

19 **III. CONCLUSION.**

20 The Court of Appeals’ decision does not allow ANSAC to review the facts of this  
21 case *de novo* to segment the Lower Salt. The remand is limited to a determination of the  
22 “natural” condition of the Lower Salt on the date of statehood. While the *PPL Montana*  
Court held that a segment-by-segment approach to navigability for title is well settled law,

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1 the issue was not raised until after the Court of Appeals remanded this case to ANSAC.  
2 Instead, the parties adopted an "all or nothing" approach to navigability of the Lower Salt. It  
3 is untimely for any party to dispute the navigability of a segment of the Lower Salt from the  
4 remainder of the riverbed.

5 Furthermore, ANSAC has no evidence to support the further segmentation of the  
6 Lower Salt. The record is replete with anecdotes and eye witness accounts of early  
7 explorers' and settlers' experiences with the river. It shows that the Lower Salt is non-  
8 navigable throughout its 37 mile stretch, both before and after the creation of man-made  
9 diversions. The proponents of navigability have not and cannot meet the burden of proving  
10 that any portion of the Lower Salt is navigable.

11 ANSAC should use the facts in evidence and, based on the Order of the Arizona  
12 Court of Appeals and the conclusions of law found in *PPL Montana*, find the Lower Salt not  
13 navigable.

14 RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of June, 2012.

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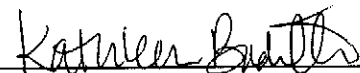
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