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6 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
7 **ADJUDICATION COMMISSION**

9 IN RE DETERMINATION OF ) No. 04-009-NAV  
10 NAVIGABILITY OF THE VERDE RIVER )  
11 )  
12 ) **THE YAVAPAI-APACHE NATION'S**  
13 ) **JOINDER IN SALT RIVER PROJECT'S**  
14 ) **MEMORANDUM REGARDING EFFECT**  
15 ) **OF SUPREME COURT'S OPINION IN**  
16 ) **PPL MONTANA CASE AND**  
17 ) **SUPPLEMENTAL BRIEFING**  
18 ) **PURSUANT TO THE COMMISSION'S**  
19 ) **APRIL 6, 2012 ORDER**

17 In conformance with the order of the Arizona Navigable Stream Adjudication  
18 Commission ("Commission") issued during its meeting held on April 6, 2012, the Yavapai-  
19 Apache Nation ("Nation") respectfully submits this memorandum regarding the effect of the  
20 United States Supreme Court's Opinion in the recent case of *PPL Montana LLC v. Montana*, 132  
21 S. Ct. 1215 (2012) (*PPL Montana*).

22 The Yavapai-Apache Nation is a federally recognized Indian Tribe, pursuant to the  
23 Apache Treaty of 1852 and Section 16 of the Indian Reorganization Act of 1934. As the Nation  
24 has explained in greater detail in earlier filings before the Commission, the Nation's Reservation  
25

1 is located within the Middle Verde River Valley in Central Arizona, on lands located near  
2 Clarkdale, Middle Verde, Camp Verde, Rimrock and at the 1-17 interchange for the Montezuma  
3 Castle National Monument.

4 In the interest of economy and to avoid redundant filings before the Commission, the  
5 Nation joins in and incorporates here by reference Salt River Project's<sup>1</sup> March 23, 2012,  
6 memoranda addressing the effect of *PPL Montana* on the six remanded cases, including the  
7 Verde River. The Nation concurs in Salt River Project's analysis of *PPL Montana* and its  
8 application to this proceeding. *PPL Montana* has plainly brought the state of the law regarding  
9 navigability for title back to the fundamental considerations of "navigability in fact" and  
10 "commercial reality." Thus, the correct question to ask has and continues to be whether the  
11 Verde River was, on the date of Arizona statehood, used or susceptible to being used, in its  
12 ordinary and natural condition, as a highway for commerce over which trade and travel was or  
13 could have been conducted in the customary mode of trade and travel on water. This is and has  
14 always been the test of navigability for title in federal law and it remains the statutory test under  
15 A.R.S. § 37-1101(5). Pursuant to this test, the Commission correctly determined before and  
16 should once again determine that the Verde River, from its headwaters in the Big Chino Sub-  
17 basin to its confluence with the Salt River, is non-navigable.

18  
19 In addition, the Nation writes separately here to briefly address the Commission's request  
20 that the parties analyze "whether it is necessary for the Commission to reopen the record and  
21 take testimony for each remanded case related to the segmentation issue that the U.S. Supreme  
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24 <sup>1</sup> "Salt River Project" collectively refers to the Salt River Project Agricultural Improvement and  
25 Power District and the Salt River Valley Water Users' Association.

1 Court focused on in its decision in *PPL Montana, LLC v. Montana*.<sup>2</sup>

2 The Commission need not and should not reopen the record in this case. The record  
3 already has been painstakingly compiled by the Commission and it contains ample information  
4 pertaining to the navigability of the Verde River as a whole and with regard to each of its  
5 "segments" as provided for in *PPL Montana*. At the outset of this proceeding, the Commission  
6 provided the public notice required by A.R.S. § 1123(B) and it solicited, compiled and  
7 considered an unprecedented amount of relevant historical and scientific data and information, as  
8 well as documents and other evidence submitted from interested parties, all of which pertained to  
9 the potential navigability of the Verde River and each of its segments at the time of statehood.  
10 This includes historical and scientific evidence describing the Verde River and its susceptibility  
11 to navigability for purposes of commerce in the segment that encompasses the Yavapai-Apache  
12 Reservation, which the Commission refers to as the "Middle Verde River Valley."<sup>3</sup>

13  
14 The Commission has also held hearings throughout the Verde Watershed and in Phoenix,  
15 Arizona. All parties that desired to appear and give testimony at the public hearings were  
16 permitted to do so, and such testimony was given due consideration by the Commission. The  
17 Commission also provided for the submission of post-hearing memoranda and oral argument.

18 Having solicited, compiled and considered the scientific and historical record of the  
19 Verde relative to its potential for navigability at the time of statehood, the Commission correctly  
20 determined, by unanimous vote and in conformance with A.R.S. § 37-1128, that the Verde River  
21 (from its headwaters to its confluence with the Salt River) was non-navigable as of February 14,

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23 <sup>2</sup> <http://azstreambeds.com/> "Request for Memorandums."

24 <sup>3</sup> See Report, Findings and Determination Regarding the Navigability of the Verde River from Its  
25 Headwaters to the Confluence of the Salt River, dated March 24, 2008 ("ANSAC Verde Report") at 6.

1 1912.

2 Nothing in *PPL Montana* mandates that the Commission “reopen” the record to take  
3 additional testimony on this matter, nor is there any reason to think that such a tact would  
4 provide new and material information to the Commission. Indeed, it is clear from the ANSAC  
5 Verde Report, that the Commission has already considered the navigability of the Verde River in  
6 the context of its three different river segments, which the Commission refers to as the “Upper  
7 Verde River Valley” (encompassing the reach from the Verde headwaters to Sycamore Canyon);  
8 the “Middle Verde River Valley” (extending from Sycamore Canyon through Clarkdale,  
9 Cottonwood and Camp Verde); and the “Lower Verde River Valley” (running from Fossil Creek  
10 all the way to the Verde River’s confluence with the Salt River).<sup>4</sup> Further, the Commission’s  
11 Report is replete with discussions from the record specific to each of the three segments of the  
12 Verde River.<sup>5</sup> There is therefore no need to reopen the record to solicit additional historical,  
13 scientific or other information pertaining to the navigability of these segments. Certainly,  
14 additional information is not needed to inform the Commission as to *how* it should segment the  
15 Verde River for purposes of a navigability determination – the Commission has already  
16 completed this task.  
17

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18  
19 <sup>4</sup>See ANSAC Verde Report at 5-6. The Commission also makes clear in the ANSAC Verde  
20 Report that “[i]n order to consider the river in its ordinary and natural condition, the Commission  
21 considered its condition prior to 1860 and the initial diversion of water for irrigation by modern  
22 settlers.” *Id.* at 28. Also, because Horseshoe and Bartlett Dam were constructed after  
statehood, “their effect on the flow of the river was not considered by the Commission, and the  
fact that their construction was after statehood was not considered relevant to the issues before  
the Commission.” *Id.* at 6.

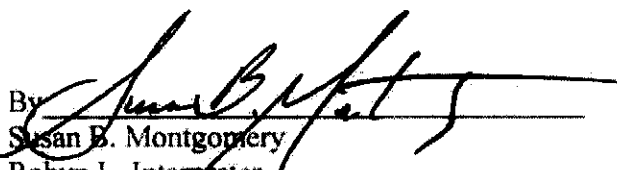
23 <sup>5</sup> See, e.g., ANSAC Verde Report at 20, 21, 38 (discussing the Upper Verde River Valley);  
24 Report at 21- 23, 25, 27-29, 36, 43, 45, 52 (discussing the Middle Verde River Valley (including  
25 Camp Verde & Clarkdale)); Report at 21-22, 24-25, 38, 47 (discussing the Lower Verde River  
Valley).

1 Finally, of particular note for the Nation, is the fact that the Middle Verde River Valley  
2 (which encompasses the Yavapai-Apache Reservation) contains the "richest historical record" of  
3 all of the segments.<sup>6</sup> This record demonstrates, among other things, that (a) the hydrology and  
4 geomorphology of the Verde River in the Middle Verde was insufficient to support sustained and  
5 beneficial navigation for commerce based on its ordinary condition at the time of statehood;<sup>7</sup> (b)  
6 there is no evidence of any significant use (or susceptibility to use) of the Middle Verde River  
7 for transportation or as a highway for commerce;<sup>8</sup> and (c) contemporary observers of the Verde  
8 River prior to and at the time of Arizona's statehood believed that the Verde River was non-  
9 navigable, including federal government surveyors, and federal government officials issuing  
10 patents to lands overlaying the Verde River.<sup>9</sup>

11  
12 The Nation urges the Commission to reject any request to reopen the record on the Verde  
13 River due to the U.S. Supreme Court's decision in *PPL Montana*. Rather, *PPL Montana*  
14 compels the Commission to reissue its original finding that the entire Verde River was non-  
15 navigable as of February 14, 2012.

16 Respectfully submitted this 8<sup>th</sup> day of June, 2012.

17 MONTGOMERY & INTERPRETER, PLC

18  
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22 <sup>6</sup> ANSAC Verde Report at 6.

23 <sup>7</sup> See, e.g., *id.* at 28-29, 22.

24 <sup>8</sup> *Id.* at 28.

25 <sup>9</sup> *Id.* at 31.

1 ORIGINAL AND SIX COPIES of the foregoing  
hand-delivered for filing this 8<sup>th</sup> day of June, 2012 to:

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13  
14  A handwritten signature in black ink, appearing to be 'L. Staudenmaier', is written over a horizontal line. The signature is cursive and somewhat stylized.  
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