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10 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
11 **ADJUDICATION COMMISSION**

12 IN THE MATTER OF THE  
13 NAVIGABILITY OF THE SALT RIVER  
14 FROM GRANITE REEF DAM TO THE  
15 GILA RIVER CONFLUENCE, MARICOPA  
16 COUNTY, ARIZONA

No. 03-005-NAV (Lower Salt)

No. 03-007-NAV (Gila)

**GILA RIVER INDIAN COMMUNITY'S  
MEMORANDUM ON THE EFFECT OF *PPL  
MONTANA, LLC v. MONTANA* ON  
PROCEEDINGS BEFORE THE COMMISSION**

17 IN THE MATTER OF THE  
18 NAVIGABILITY OF THE GILA RIVER  
19 FROM THE NEW MEXICO BORDER TO  
20 THE COLORADO RIVER, GREENELEE,  
21 GILA, PINAL, MARICOPA AND YUMA  
22 COUNTIES, ARIZONA

23 **I. INTRODUCTION**

24 Pursuant to the February 27, 2012 request of the Arizona Navigable  
25 Stream Adjudication Commission ("ANSAC"), the Gila River Indian Community  
26 ("Community") files this legal memorandum explaining steps ANSAC must now  
take in the wake of *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215 (2012), ("*PPL  
Montana*"), decided unanimously by the Supreme Court of the United States on  
February 22, 2012. The Community files this legal memorandum with regard to

1 the Lower Salt River from the Granite Reef Dam to the Gila River Confluence, and  
2 the Gila River.

3  
4 **II. BACKGROUND**

5  
6 In *State ex rel. Winkleman v. ANSAC*, 229 P.3d 242 (2010), the Arizona  
7 Court of Appeals vacated ANSAC's determination that "the Lower Salt River from  
8 Granite Reef Dam to its confluence with the Gila River was not used or  
9 susceptible of use for commercial trade or travel as of February 12, 1912 and  
10 was therefore not navigable as of that date nor was it susceptible to navigation."  
11 ANSAC "Report, Findings and Determination Regarding the Navigability of the  
12 Salt River from Granite Reef Dam to the Gila River Confluence," No. 03-005-NAV,  
13 September 21, 2005, ("Lower Salt River Report"), at 46. The standard instead set  
14 out by the Court of Appeals is to consider the river's characteristics between the  
15 ending time of Hohokam activity and the completion of a new set of diversions  
16 by other human settlers in the area, without regard to its actual condition on the  
17 date of Arizona's statehood. 229 P.3d at 253-254. The case received no U.S.  
18 Supreme Court review, but the Supreme Court nevertheless shortly thereafter  
19 issued its decision in *PPL Montana*, pending for consideration when the instant  
20 matters were on remand.

21  
22 *PPL Montana* reaffirms the U.S. Supreme Court's prior holdings regarding  
23 navigability under the equal footing doctrine and restates the finding that  
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25  
26

1 navigability determinations be made in relation to river conditions and reliant  
2 commercial activity occurring at the time of statehood.

3 ANSAC responded by seeking party comment on the decision's impacts on  
4 the present proceedings.

5  
6 **III. PPL MONTANA DETERMINES ANSAC NEXT STEPS, NOT STATE *ex rel.***  
7 ***WINKLEMAN v. ANSAC***

8 The *PPL Montana* holding must be considered procedurally and  
9 substantively determinative in the instant cases. *PPL Montana* is on point with  
10 respect to matters still to be decided on remand. Also, ANSAC must defer to the  
11 Supreme Court's decision as establishing, without question, the correct test for  
12 navigability to be applied and also as determining the scope of relevant evidence  
13 to be considered in making such a finding. To ignore the finding would only  
14 propagate what *PPL Montana* now establishes as an erroneous holding in *State*  
15 *ex rel. Winkleman v. ANSAC*.

16  
17 *PPL Montana* reaffirms the holding that "navigability" with respect to state  
18 title under the equal footing doctrine as asserted in the instant cases is a federal  
19 question tied to interstate commerce, accordingly not established by state  
20 authority.

21  
22 **IV. ANSAC SHOULD REAPPLY ITS METHODOLOGY ORIGINALLY IMPOSED**  
23 **IN THE INSTANT CASES**

24 The Court's finding in *PPL Montana* affirms ANSAC's own original  
25 methodology applied to determine navigability in both cases at issue. In that  
26 finding the Court quoted *The Daniel Ball* in restating that:

1 "Those rivers must be regarded as public navigable rivers in law which are  
2 navigable in fact. And they are navigable in fact when they are used or are  
3 susceptible of being used, in their ordinary condition, as highways for  
4 commerce, over which trade and travel are or may be conducted in the  
5 customary modes of trade and travel on water." 132 S.Ct. at 1228, citing  
6 10 Wall. 557 (1871), at 563.  
7

8 The Court also clarified that, for purposes of state title under the equal  
9 footing doctrine, the correct time point for assessment purposes is "statehood."  
10 132 S.Ct. at 1228.  
11

12 The Court further cited its prior holding in *Oklahoma v. Texas* as  
13 establishing that navigability at statehood must rely on the "natural and ordinary  
14 condition" of the watercourse at issue. 132 S.Ct. at 1228, citing 258 U.S. 574, at  
15 591.  
16

17 As such, and just as the *PPL Montana* Court held the State of Montana's  
18 navigability decision to be "infirm," the Court of Appeals finding and resulting  
19 remand instructions to ANSAC dictating a different assessment methodology in  
20 the instant cases must be considered erroneous. 132 S.Ct. at 1235. With respect  
21 to the Lower Salt River, on remand the Arizona Court of Appeals directed ANSAC  
22 to assess navigability only by examining river condition and activity between the  
23 date of the Hohokam's departure from the river area and the date of new  
24 diversion activity there by subsequent area inhabitants--both prior to statehood--  
25  
26

1 -accordingly giving no relevance whatsoever to the river condition and use at the  
2 time of Arizona statehood.

3         The U.S. Supreme Court has never, in any decision addressing navigability,  
4 described any circumstances prior to statehood that must be considered in order  
5 to properly determine navigability as of statehood; the Arizona Court of Appeals  
6 notes the same in its remand directive to ANSAC, describing the issue as one of  
7 "first impression." 229 P.3d at 252. In addition, *PPL Montana* fails again to even  
8 suggest such reasoning as appropriate, only instead restating that conditions at  
9 statehood be determinative. 132 S.Ct. at 1228.  
10

11  
12         In emphasizing this finding the Supreme Court states that "the test for  
13 navigability is not applied in the same way in [different] types of cases"  
14 [distinguishing tests under the equal footing doctrine from those confined to  
15 admiralty or federal regulatory matters]. 132 S.Ct. at 1228. The Court specifies  
16 that "federal regulatory authority encompasses waters that were once navigable  
17 but are no longer." *Ibid*, citing *Economy Light & Power Co. v. United States*, 256  
18 U.S. 113 (1921) at 123-124.  
19

20  
21         Furthermore, the Court of Appeals' remand reference to *Northwest*  
22 *Steelheaders Association, Inc. v. Simantel* ("*Steelheaders*"), 112 P.3d 383 (2005),  
23 as support for its referral to river conditions prior to statehood is not supported  
24 by the facts of that case. In *Steelheaders*, the Oregon Court of Appeals examined  
25 changes between the time of statehood and river conditions that occurred  
26

1 thereafter, reducing the useful navigability of the watercourse at issue; in its  
2 consideration of the two sets of conditions, the Oregon court held the evidence  
3 “compelling” that the watercourse had been susceptible to means “common[ly]”  
4 used for navigation at the time of Oregon statehood. 112 P.3d at 391.

5  
6 Any doubts about the time period in relation to river conditions for ANSAC  
7 to consider with regard to determination of navigability were laid to rest in the  
8 portion of the Supreme Court’s opinion regarding the use of present-day  
9 evidence. In holding that evidence of present-day use may be considered “to the  
10 extent it informs the historical determination whether the river segment was  
11 susceptible of use for commercial navigation at the time of statehood,” the Court  
12 was clear that the party seeking to use such evidence must show that (1) the  
13 present-day watercraft are meaningfully similar to those in customary use for  
14 trade and travel at the time of statehood and that (2) the river’s post-statehood  
15 condition “is not materially different from its **physical condition at statehood.**”  
16  
17 132 S.Ct. at 1233 (emphasis added). As such, *PPL Montana* soundly rejects the  
18 notion that a river’s condition sometime prior to statehood should be  
19 considered.  
20  
21

22 ANSAC originally applied the “at the time of statehood” standard in issuing  
23 its own navigability finding in the instant cases and, with respect to the Salt  
24 River, considered river conditions from at or around 1860 to dates beyond  
25 statehood in 1912. ANSAC Lower Salt River Report at 30–39. The Hohokam are  
26

1 thought to have left the river area around 1430 A.D. and subsequent diversion  
2 activity dates to 1870. ANSAC Lower Salt River Report at 25. It is also important  
3 to note that irrigation agriculture along the Lower Salt River is argued as having  
4 occurred as early as 300 B.C.; as such, the natural course of the river outside all  
5 human modification may not be possible to determine. ANSAC Lower Salt River  
6 Report at 24. Regardless, such an enormous span of time must be considered to  
7 satisfy the Court of Appeals instruction, assuming it remains in effect.  
8

9         With respect to the Gila River proceeding, ANSAC again considered  
10 evidence back to the earliest human activity until the point of statehood,  
11 concluding that “. . . there is significant evidence of prehistoric irrigation,” that  
12 “modern irrigation” began at or around 1867 with the restoration of certain  
13 prehistoric irrigation canals and that a flood event significantly rechanneled the  
14 river’s course, leaving it “with very little depth” at the time of statehood. ANSAC  
15 “Report, Findings and Determination Regarding the Navigability of the Gila River  
16 from the New Mexico border to the Confluence with the Colorado River,” No. 03-  
17 007-NAV, January 27, 2009, (“Gila River Report”), at pp. 27, 35 and 68  
18 respectively.  
19  
20  
21

22         Irrespective of the historic extent considered prior to statehood, ANSAC  
23 has applied the proper standard in both cases addressed here. On this basis, the  
24 procedurally correct next step is for ANSAC to reissue its original decisions  
25  
26

1 restating its navigability methodology, allowing any objecting parties to file new  
2 appeals.

3 **V. ANSAC SHOULD REISSUE ITS ORIGINAL DECISIONS OF NON-**  
4 **NAVIGABILITY**

5 The Supreme Court's unanimous decision in *PPL Montana* affirms that  
6 ANSAC's original findings defining the Lower Salt and Gila Rivers as non-  
7 navigable are the correct result. ANSAC's decisions are based on the evidence  
8 available and result from ANSAC's proper application of the correct legal  
9 standard, analyzing the river's "natural and ordinary condition."  
10

11 The issues addressed by the Court in *PPL Montana* are on point with the  
12 matter addressed by ANSAC in its prior holdings. In *PPL Montana*, the Court  
13 considered the navigability determination made by the Montana Supreme Court  
14 that "short interruptions" in an otherwise navigable watercourse did not dictate  
15 a non-navigable finding due to a history of portage by commercial users in those  
16 stretches. 132 S.Ct. at 1231, citing 229 P.3d at 447 and 449. In so finding, the  
17 Montana State Supreme Court held that the defendant utility company operating  
18 along the watercourse at issue owed the state \$41 million as rent for its use. 132  
19 S.Ct. at 1231. The U.S. Supreme Court reversed, holding that the Montana  
20 Supreme Court's decision was "infirm" and that the navigability analysis had to  
21 consider river segmentation. 132 S.Ct. at 1235.  
22  
23  
24

25 With respect to the Lower Salt River, petitioners have argued that  
26 navigability should be found despite only incidental instances of water depths



1 sufficient to be and actually used for any type of commercial activity. In so  
2 arguing they also invoke examples of commercial river use not along the  
3 segment actually at issue.

4 Navigability proponents have shown only isolated, media-highlighted  
5 instances of Lower Salt River use by boaters, which, by itself, is insufficient to  
6 support a finding of navigability at Arizona statehood. Such apparently  
7 newsworthy exclamations only underscore the unique nature of the occurrences,  
8 contradicting any element of regular commercial use or "susceptibility" to the  
9 same. Instead these references are only illustrative of an "exceptional condition  
10 or short period of high water," a factor set out by the U.S. Supreme Court in  
11 *United States v. Utah*, 283 U.S. 64 (1931), a case again relied upon by the Court in  
12 *PPL Montana*. 283 U.S. at 87.

13  
14  
15  
16 With respect to the Gila proceeding, navigability proponents argue that  
17 the river's use for boating nine times during 66 years up to statehood and its  
18 present day use for adventure boating in a certain section meet the applicable  
19 standard. Defenders of Wildlife's Opening Post-Hearing Memorandum,  
20 February 6, 2006, at p. 10. ANSAC's report findings, consistent with the  
21 extensive record generated in the case, however, show that boating up to the  
22 time of statehood was only incidental, coincident with sporadic high water  
23 periods. ANSAC Lower Salt River Report at 35-36.  
24  
25  
26

1 In its decision on remand the Court of Appeals directs ANSAC to disregard  
2 "major flooding or drought" in determining the Lower Salt River's "natural and  
3 ordinary condition." 229 P.3d at 252. Yet this instruction contradicts the U.S.  
4 Supreme Court's own historical actions on point and again affirmed in *PPL*  
5 *Montana*.  
6

7 In *PPL Montana*, the Court cites its earlier decision in *Oklahoma v. Texas*  
8 as defining the proper use of the phrase "natural and ordinary condition" in  
9 assessing navigability. 132 S.Ct. at 1228, citing 258 U.S. 574 (1922), at 591. In  
10 that case, a rivercourse substantially parallel in description to the Lower Salt and  
11 Gila Rivers was determined by the Court to be non-navigable. In that instance,  
12 the Court described the river at issue as subject to boating "only during periods  
13 of high water," with high water noted as "intermittent, or irregular and short  
14 duration, and confined to a few months in a year." 258 U.S. at 589. In general,  
15 river depths supposedly varied between six inches and six feet. *Ibid*. And the  
16 Court held that river non-navigable despite the fact that it had, several decades  
17 prior to statehood, a 20-year long history of some commercial use. *Ibid*.  
18  
19

20 Finally, in *PPL Montana* the Supreme Court confirmed that consistent use  
21 for recreational boating after statehood, by itself, is not a sufficient basis on  
22 which to find navigability. Instead, such a demonstration is only meaningful in  
23 showing "susceptibility of commercial use at the time of statehood." 132 S.Ct. at  
24 1233, citing its earlier holding in *Appalachain Electric Power Co.*, 311 U.S. 377  
25  
26

1 (1940), at 416. And that showing requires something more than evidence of  
2 sporadic modern-day pleasure floating supports. Specifically, the Court in *PPL*  
3 *Montana* held that the Montana court “erred as a matter of law in its reliance  
4 upon the evidence of present-day primarily recreational use of the [river at issue  
5 in the case].” *Ibid.*  
6

7 In this way, *PPL Montana* dictates that segmentation and *regular*  
8 susceptibility of use for commercial purposes must be considered in any  
9 navigability analysis.  
10

11 ANSAC’s own relevant findings in this regard, not overturned by the Court  
12 of Appeals, support a reissuance of its original decisions of non-navigability.  
13 Specific such findings include:

14 - “During the historical period from 1867 to Statehood, there is no record  
15 of any sustained commerce, travel or fishing on the Lower Salt River” and  
16

17 -Commercial ferry service documented as active on the stretch of river at  
18 issue was used “merely to cross . . . during high water times” and that instances  
19 in which the water was “too high” would disrupt the ferry moorings, requiring  
20 that they be retrieved by horses. Lower Salt River Report at 36.  
21

22 -Other boating activity documented on the [Lower Salt] river “actually  
23 occurred on the [diversionary] canals” and accordingly cannot be considered  
24 “commercial transportation on the river itself” and  
25  
26

1 -That the [Salt] river segment being addressed "is an erratic, unstable and  
2 undependable stream characterized by period floods, sometimes extreme,  
3 followed by period of drought when there is little or no water in the riverbed."  
4 Lower Salt River Report at 45-46.

5  
6 -That the Gila River was never regularly used for any pleasure or  
7 commercial boating at or around the time of statehood and

8 -That the absence of the same was due to the significant and naturally-  
9 occurring limitations of the river at that time. Gila River Report at 85-86.  
10

11  
12 **VI. CONCLUSION**

13  
14 *PPL Montana* compels ANSAC to reissue its original findings at this next  
15 stage of the proceeding in the instant cases. All parties maintaining any  
16 objection can then appeal the determinations for a fresh review at the next state  
17 tribunal level.

18 DATED this 23rd day of March, 2012.

19  
20 GILA RIVER INDIAN COMMUNITY

21  
22 By 

23 Thomas L. Murphy  
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24 ORIGINAL AND SIX COPIES of the foregoing  
25 hand delivered for filing this 23rd day of  
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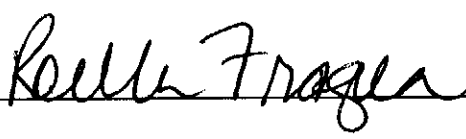
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