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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 effect of the U.S.
Supreme Court's Opinion in *PPL
Montana LLC v. Montana***

The Arizona Navigable Stream Adjudication Commission ("ANSAC" or "Commission") asked interested parties to submit memoranda describing what they believe is the effect on the Commission's work of the U.S. Supreme Court's opinion in *PPL Montana, LLC v. Montana*, No. 10-218 (U.S. Feb. 22, 2012) ("PPL Montana" or "the Opinion"). Undersigned counsel submits this Memorandum in response to that request on

behalf of Maricopa County and the Flood Control District of Maricopa County ("County and FCD"). The County and FCD also contemporaneously submitted a memorandum to ANSAC on this issue with respect to the Gila River. To avoid unnecessary repetition, that Memorandum is hereby incorporated into this document.

Segment-by-segment

The primary impact of *PPL Montana* on the Commission is that it must re-evaluate the Lower Salt River in segments. The *PPL Montana* Court found that the Montana Supreme Court had erroneously failed to use a segment-by-segment approach to determine navigability of the three rivers at issue when it found the three rivers entirely navigable. *PPL Montana*, slip op. at 15. Citing a line of cases that date back nearly one hundred years, the U.S. Supreme Court stated emphatically that it is well settled that navigability for title is determined on a segment-by-segment basis. *Id.* "To determine title to a riverbed under the equal-footing doctrine, this Court considers the river on a segment-by-segment basis to assess whether the segment of the river, under which the riverbed in dispute lies, is navigable or not." *Id.* at 14.

The obvious question is how should appropriate river segments be determined? The Opinion lists several criteria that should be helpful to the Commission. The segments should be "discrete and identifiable" *Id.* at 1. Using topography, geography and other physical features will assist in drawing the boundaries of each segment. *Id.* at 16. For example, a river 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 the Tempe Buttes.

Finally, in addition to being discrete and identifiable, administration of the segments must be possible. *Id.* at 18. The *PPL Montana* Court 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.

What is *de minimis* or to put it another way – how far is too long to portage?

The U. S. Supreme Court also faulted the Montana Supreme Court’s analysis of the effect of a portage on the navigability of a particular river segment. *Id.* at 18. When does an interruption to navigation become so significant that it destroys navigability for title purposes? *PPL Montana* does not provide a bright line test thus the parameters must be gleaned from the facts of the case and the language used by the Court in interpreting those facts. The Montana Supreme Court had applied a “short interruptions” approach, and determined that the Great Falls reach was navigable because it could be managed by way of land route portage, *id.* at 17, and that portages “are not sufficient to defeat a finding of navigability.” *Id.* at 18. The U.S Supreme Court stated in a factually specific decision that this analysis was wrong, for the river segments at issue. Regarding portages destroying navigability of a river segment, the Court stated, “In most cases, they are, because they require transportation over land rather than over the water.” *Id.* at 19. The obvious

conclusion to draw from this language is that while portages may destroy the navigability of the segment of the river requiring the portage, portages do not necessarily destroy navigability for those portions of a river that meet all of the other tests for navigability and do not require any significant portage. This is the natural outcome of a segmentation approach. It is helpful for the Commission to know that the portage in the Lewis and Clark expedition took 11 days and covered some 18 miles on land to get around the five falls of the Great Falls reach. *Id.* at 18. The falls ranged in size from 7 feet (Colter Falls) to Great Falls 87 feet. *Id.* at 4. Although it would be dicta, the U. S. Supreme Court surmises that even a portage taking one day would be too long, "Even if portage were to take travelers only one day, its significance is the same: it demonstrates the need to bypass the river segment, all because that part of the river is nonnavigable." *Id.* at 18. The section of the river requiring portage may be non-navigable. However, nothing in *PPL Montana* can be read to mean that every portage renders a segment of watercourse non-navigable. Assuming the portage took a short period of time, say, a few hours, or the obstruction was merely a succession of sandbars, those facts alone would not render the section in question non-navigable. The Supreme Court did not declare the entire river non-navigable, just the Great Falls section. *Id.* at 20. The Commission should keep in mind that the Supreme Court found that an 18-mile long segment of a river qualified as an identifiable segment for which navigability should be determined in the appropriate case. After the Commission reviews the evidence and assuming it finds evidence of navigability, then, it should determine the parameters of the segment using the criteria mentioned previously, keeping in mind that a

de minimis interruption in navigation does not destroy navigability. In order to comply with *PPL Montana*, the Commission should adopt a procedure to allow participants to identify what they believe are appropriate segments to be considered. Because the Commission has never embarked on such an approach, this may require giving notice to all potentially effected landowners so they can make such claims similar to the procedure the Commission followed when they first began its determinations. Failure to follow such procedure could result in the Commission's decisions not being binding on landowners who were not given an opportunity to argue for a segmented approach different from the one ultimately adopted by the Commission.

Evidence of Modern Boating—Does the Commission Consider or Ignore?

In *PPL Montana*, the Court stated that evidence of recreational (*i.e.*, non-commercial) boating should be considered as bearing on navigability for title purposes if it “shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood.” *Id.* at 21. “Navigability must be assessed as of the time of statehood, and it concerns the river’s usefulness for ‘trade and travel,’ rather than for other purposes.” *Id.* at 22. Susceptibility to navigation at the time of statehood is the applicable test, not whether actual commercial use occurred. *Id.* The Opinion points out that modern use may be evidence of susceptibility. The U.S. Supreme Court stated, “river segments are navigable not only if they ‘[were] used,’ but also if they ‘[were] susceptible of being used,’ as highways of commerce at the time of statehood.” *Id.* at 22 (insertion in original). The Court stated further, “Evidence of recreational use, depending on its nature,

may bear upon susceptibility of commercial use at the time of statehood." *Id.* at 22 (quoting *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 415 (1940) ("[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation"); *United States v. Utah*, 283 U.S. 64, 82 (1931) (fact that actual use has "been more of a private nature than of a public, commercial sort ... cannot be regarded as controlling"). Similarly, post statehood evidence, depending on its nature, may show susceptibility of use at the time of statehood. See *United States v. Utah*, 283 U.S. at 82-83 ("[E]xtensive and continued [historical] use for commercial purposes" may be the "most persuasive" form of evidence, but the "crucial question" is the potential for such use at the time of statehood, rather than "the mere manner or extent of actual use").

Present-day use evidence may be helpful if certain conditions exist. The United States Supreme Court stated:

Evidence of present-day use may be considered to the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood. For the susceptibility analysis, it must be determined whether trade and travel could have been conducted "in the customary modes of trade and travel on water," over the relevant river segment "in [its] natural and ordinary condition.

PPL Montana, slip op. at 22 (insertion in original, internal quotation marks and citation omitted). At a minimum, therefore, the party seeking to use present-day evidence for title purposes must show: (1) the watercraft are meaningfully similar to those in customary use for trade and travel at the time of statehood; and (2) the river's post-statehood condition is not materially different from its physical condition at statehood. *Id.* at 22-23. Thus when reviewing evidence, the Commission needs to analyze the watercraft used and compare

that with what was in “customary use for trade and travel” in 1912.

The County and the FCD believe the United States Supreme Court may have inadvertently created an equal protection argument when it ruled that watercraft must be “meaningfully similar to those in customary use for trade and travel at the time of statehood.” *Id.* at 23 (emphasis added). Arizona was the 48th state to enter the Union; Alaska and Hawaii were the 49th and 50th states in 1959. Delaware was the first in 1797. The type of boats in “customary use for trade and travel” vary greatly between 1797 and 1959. Indeed, the Supreme Court even suggests that modern fishing boats, inflatable rafts and lightweight canoes and kayaks, may be able to navigate shallower waters than boats in existence at the time of Montana’s statehood (1889). *Id.* Different types of watercraft evidence would be used to establish navigability for title, depending of course on a particular state’s date of admission. Accordingly, the County and FCD preserve this issue for the record in the event the Commission relies on boating evidence that is markedly different from that available for use by states that entered the Union before Arizona.

In *State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm’n*, the Arizona Court of Appeals gave the Commission direction on how to handle post-statehood evidence of the condition of a watercourse. The Court of Appeals stated that evidence of the river’s condition after man-made diversions is “informative and relevant to the decision making process,” but does not decide the issue of navigability. 224 Ariz. 230, 243, ¶ 31, 229 P.3d 242, 255 (App. 2010). This ruling is unchanged by *PPL Montana*.

“Natural and Ordinary” is still the law in Arizona

The *PPL Montana* Court points out that *The Daniel Ball* test is applied differently depending upon which type of federal jurisdiction is at issue. *Id.* at 13-14. For example, federal regulatory authority encompasses waters that only recently have become navigable, *see, e.g., Philadelphia Co. v. Stimson*, 223 U. S. 605, 634-635 (1912), or were once navigable but are no longer, *see, Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123-124 (1921). Most importantly to these proceedings, the U.S. Supreme Court reiterated that for title under the equal-footing doctrine, navigability is determined at the time of statehood, (*citing Utah*, 283 U.S. at 75) and is based on the “natural and ordinary condition” of the water. *PPL Montana*, slip op. at 13. Thus, the Court of Appeal’s analysis in *Winkleman* regarding the distinction between “natural” and “ordinary” and the need for the Commission to consider both conditions is still controlling law and must be followed. *Winkleman*, 224 Ariz. 241 at ¶ 25, 229 P.3d. at 253. Nothing in *PPL Montana* overruled this key ruling in *Winkleman*.

Hearings

The Commission will need to hold a hearing for each watercourse in the state to take additional evidence as required under *State ex rel. Winkleman* and *PPL Montana* decisions. During those hearings, the Commission may want to allow parties to re-emphasize certain evidence. For instance, if the Lower Salt River record contained evidence regarding recent boating excursions, under *PPL Montana*, knowledge about the type and dimensions of the modern watercraft would be needed before that evidence may be used to establish susceptibility of a watercourse for navigation. Although the Commission’s Lower Salt

Report contains ample information regarding topography of the Lower Salt, parties may wish to provide evidence as to where to locate segment boundaries. The County and FCD believe that the provisions of A.R.S. § 37-1126 apply to any new hearing before the Commission.

Respectfully submitted this 23rd day of March 2012.

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