

Charles L. Cahoy
City Attorney's Office
City of Tempe
21 East Sixth Street, Suite 201
P.O. Box 5002
Tempe, Arizona 85280
Arizona Bar No. 010801
480/350-8227
chuck_cahoy@tempe.gov
Attorneys for the City of Tempe

William H. Anger
Engelman Berger, P.C.
3636 North Central Avenue, Suite 700
Phoenix, Arizona 85012
Arizona Bar No. 007333
602/271-9090
wha@eblawyers.com
Attorneys for the City of Mesa

Cynthia S. Campbell
Law Department
City of Phoenix
200 W. Washington Street, Suite 1300
Phoenix, Arizona 85003-1611
Arizona Bar No. 016874
602/262-6761
cynthia.campbell@phoenix.gov
Attorneys for the City of Phoenix

**BEFORE THE ARIZONA NAVIGABLE
STREAM ADJUDICATION COMMISSION**

In re Determination of Navigability of the) No. 03-005-NAV
Lower Salt River, from Granite Reef Dam to)
the Gila River Confluence) **CITIES OF MESA, PHOENIX AND**
) **TEMPE'S JOINT LEGAL**
) **MEMORANDUM REGARDING PPL**
) **MONTANA**
)
)
)

1 **I. Introduction**

2 In accordance with the February 27, 2012, request of the Arizona Navigable Stream
3 Adjudication Commission (“Commission”), the Cities of Mesa, Phoenix and Tempe (“Cities”)
4 file this Legal Memorandum regarding how the recent United States Supreme Court opinion,
5 *PPL Montana LLC v. Montana*, Supreme Court Case No. 10-218 (“*PPL Montana*”)¹
6 impacts the work of the Commission. The Cities submit this Legal Memorandum with regard
7 to the Lower Salt River, Case No. 03-005-NAV.
8

9 **II. Summary of PPL Montana**

10 In *PPL Montana*, the United States Supreme Court unanimously overturned a Montana
11 Supreme Court decision that had found that three river segments in Montana were navigable and
12 thus subject to ownership by the State of Montana under the equal footing doctrine. The *PPL*
13 *Montana* Court took note of the Montana court’s statement in its opinion that “navigability for
14 title purposes is very liberally construed.” *Opinion*, p. 9. Throughout its *Opinion*, the Court then
15 clearly rejected a liberal construction approach for navigability for streambed title.

16 The *PPL Montana* Court reviewed the history of navigability for title under the equal
17 footing doctrine. Stating that federal law governs navigability questions for determining
18 riverbed title, *Opinion*, p. 12, the Court cautioned that navigability of water is used in the context
19 of other distinct types of cases that do not involve title to streambeds. The Court went on to
20 explain that the test for navigability in those cases is not applied in the same way as in the
21 navigability for title cases. *Opinion*, p. 13.

22 According to the Court, for navigability of title:
23

24 _____
25 ¹ Page references within this Legal Memorandum are to the United States Supreme Court’s slip opinion, which has
been submitted to the Commission by the Salt River Project on February 23, 2012. The slip opinion is referred to as
“*Opinion*.”

1 A key justification for sovereign ownership of navigable riverbeds is that
2 a contrary rule would allow private riverbed owners to erect improvements on the
3 riverbeds that could interfere with the public's right to use the waters as a
4 highway of commerce. . . . [S]egments that are nonnavigable at the time of
5 statehood are those over which commerce could not then occur. Thus, there is no
6 reason that these segments also should be deemed owned by the State under the
7 equal-footing doctrine.

8 *Opinion*, pp. 15-16.

9 Thus, unlike the Montana Supreme Court, the *PPL Montana* Court did not adopt a
10 "liberal construction" standard for navigability and reaffirmed that "all waters are deemed
11 navigable which are really so." *Opinion*, p. 11. It found that the Montana Supreme Court erred
12 by ignoring evidence that parts of the river segments addressed in *PPL Montana* were clearly not
13 passable and required portage. The Court further found error in the Montana Supreme Court's
14 determination that "short interruptions of navigability" in segments under consideration were
15 irrelevant. Quite to the contrary, the Court found that such an interruption "demonstrates the
16 need to bypass the river segment, all because that part of the river is nonnavigable." *Opinion*, p.
17 18.

18 Similarly, the Court found that temporal interruptions in navigability can also defeat a
19 determination of navigability: "While the Montana court was correct that the river need not be
20 susceptible of navigation at every point during the year, neither can that susceptibility be so brief
21 that it is not a commercial reality." *Opinion*, p. 24.

22 In a final point regarding the Montana Supreme Court's "infirm legal understanding of
23 this [U.S. Supreme] Court's rules of navigability for title under the equal footing doctrine," the
24 Court noted that the reliance by the non-State parties "upon the State's long failure to assert title
25 is some evidence to support the conclusion that the river segments were nonnavigable for
purposes of the equal-footing doctrine." *Opinion*, p. 26.

1 **III. Based on the U.S. Supreme Court's Decision in PPL Montana, the**
2 **Proponents of Navigability Cannot Demonstrate that the Record before the**
3 **Commission Satisfies the Burden of Proof by a Preponderance of the Evidence that**
4 **the Lower Salt River Was Navigable.**

5 The Cities have previously filed a Legal Memorandum, dated January 13, 2012,
6 reviewing the factual findings already made by the Commission in its *Report, Findings and*
7 *Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila*
8 *River Confluence*, dated September 21, 2005 ("ANSAC Findings"). That review demonstrates
9 that the proponents of navigation cannot establish by a preponderance of the evidence that the
10 Lower Salt River was navigable in its ordinary, erratic, predevelopment condition.²

11 *PPL Montana* further clarifies that the proponents of navigability cannot meet the burden
12 of proof to support a determination of navigability. The *PPL Montana* opinion emphasized that
13 in order to establish navigability, the entirety of the river segment at issue must be "navigable in
14 fact" and that the river segment's navigability, or at least its susceptibility to navigability, must
15 be a "commercial reality." Therefore, a "snapshot" in time, provided by a singular or occasional
16 account or description is not adequate. Evidence must be provided that the Lower Salt River, in
17 its ordinary and natural condition at the time of statehood, was navigable throughout its length
18 and for substantial parts of the year, or at least long enough to make use of the river for
19 navigation a "commercial reality." *Opinion*, p. 24.

20 Given the U.S. Supreme Court's emphasis on a "highway of commerce" and
21 "commercial reality," the scarcity in the record before the Commission of documented use of the
22 Lower Salt River for navigability takes on even greater significance. The Commission has
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24 ² Although the legal test for navigability for title under the equal footing doctrine is based on the "ordinary and
25 natural condition" of the river at statehood, the Arizona Court of Appeals has determined that, to determine the
natural condition of the Lower Salt River, the river must be examined "before the commencement of modern-era
settlement and farming in the Salt River Valley," which pre-dates Arizona statehood. *State v. Arizona Navigable*
Stream Adjudication Commission, 224 Ariz. 230, 242, 229 P.3d 242, 254 (App. 2010)

1 already noted that fur trappers in the Lower Salt River Valley in the 1830s and 1840s “did not
2 use boats for travel on the rivers or streams in this area but traveled by foot, horses or mules
3 along the sides of the rivers or streams.” ANSAC Findings, p. 26. This statement is echoed by
4 the U.S. Supreme Court’s statement in *PPL Montana* that “[m]ere use by initial explorers or
5 trappers, who may have dragged their boats in or alongside the river despite its nonnavigability
6 in order to avoid getting lost, or to provide water for their horses and themselves, is not itself
7 enough [to establish navigability of the river].” *Opinion*, pp.21- 22.

8
9 The Court’s discussion of the importance of a river segment being navigable or
10 susceptible to navigation along its entire length and for significant periods during a year also
11 confirms the Commission’s view of the evidence in the record regarding ferry use along the
12 Lower Salt River. The Commission’s findings noted that, due to the river’s erratic nature, the
13 ferries operated only part of the year; the rest of the year, the river was crossed on foot or
14 horseback. On the other hand, at other times, the water was so high that the ferries were swept
15 downstream and had to be retrieved. Based on this information, the Commission noted that the
16 river was more of an “obstacle” to navigation than a highway. ANSAC Findings, p. 36.
17 Certainly, this evidence does not support the proposition that the Lower Salt River was, in
18 reality, a useful “highway of commerce” along its full length.

19 Finally, the Supreme Court in *PPL Montana* wisely endorsed the fact that a state’s
20 lengthy failure to assert title to the riverbeds provides “some evidence” to support a finding that
21 the riverbed was not navigable at the time of statehood. In Arizona, there is greater evidence
22 than mere silence or acquiescence. The Arizona Territorial Legislature, in its first meeting in
23 1865, specifically declared in a petition to Congress that the Colorado River is the only navigable
24 river in the territory. ANSAC Findings, p. 32. Perhaps because of this declaration and the
25

1 dearth of contrary opinions, “[u]ntil 1985, most Arizona residents assumed that all rivers and
2 watercourses in Arizona, except the Colorado River, were nonnavigable.” ANSAC Findings, pp.
3 9-10. The U.S. Supreme Court’s recognition of this type of evidence adds to the already
4 substantial weight of evidence supporting nonnavigability which the proponents of navigability
5 must overcome to meet their burden of establishing navigability by a preponderance of the
6 evidence.

7 **IV. Conclusion**

8 The United States Supreme Court unanimously held that the test for navigability of title
9 under the equal footing doctrine is whether the entirety of the river segment at issue is, in reality,
10 at least susceptible for use as a highway of commerce. If not, “there is no reason that these
11 segments also should be deemed owned by the State under the equal footing doctrine.” *Opinion*,
12 p. 16.

13 In the case of the Lower Salt River, the evidence shows that the river, in its ordinary and
14 natural conditions before modern development, was highly erratic, with significant times where
15 it could be crossed by foot and at other times subject to raging floods. As such, evidence of
16 “average flows” is all but meaningless.

17 There is little evidence of any navigation up and down the length of the Lower Salt River
18 and no evidence of sustained commercial navigation. There is no record of any opinions or
19 historical accounts of the river as navigable or susceptible to navigation. Instead, there is a
20 declaration by the Territorial Legislature in 1865 that the Lower Salt River was not among the
21 navigable rivers in the Territory of Arizona. There is little if any evidence of any contrary
22 opinion until 1985.
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1 Under both the recent Arizona Court of Appeal's opinion in this case and the United
2 States Supreme Court's opinion in *PPL Montana*, it is clear that the proponents of navigability
3 have not met their burden by a preponderance of the evidence to establish that the Lower Salt
4 River was navigable at statehood. The Commission should find once again that the Lower Salt
5 River is not navigable.

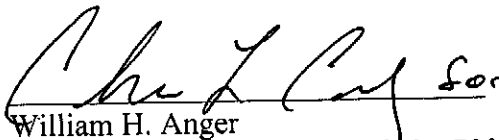
6 Dated this 23rd day of March, 2012

7
8 **TEMPE CITY ATTORNEY'S OFFICE**

9 

10 Charles L. Cahoy
11 21 E. Sixth Street, Suite 201
12 Tempe, Arizona 85280
13 Attorney for City of Tempe

14 **ENGELMAN BERGER, P.C.**

15 

16 William H. Anger
17 3636 North Central Avenue, Suite 700
18 Phoenix, Arizona 85012
19 Attorneys for City of Mesa

20 **GARY VERBURG, City Attorney**

21 By 

22 CYNTHIA S. CAMPBELL
23 Assistant City Attorney
24 200 W. Washington, Suite 1300
25 Phoenix, Arizona 85003-1611
Attorneys for City of Phoenix

1 ORIGINAL AND SIX COPIES of the foregoing
2 Hand-delivered for filing this 23rd day of March, 2012
3 to:

3 Arizona Navigable Stream Adjudication Commission
4 1700 W. Washington, Suite B-54
5 Phoenix, Arizona 85007

5 AND A COPY mailed this 23rd day of March, 2012, to:

6 Laurie A. Hachtel
7 Attorney General's Office
8 1275 West Washington Street
9 Phoenix, AZ 85007-2997
10 *Attorneys for State of Arizona*

9 Joy E. Herr-Cardillo
10 Timothy M. Hogan
11 Arizona Center for Law in the Public Interest
12 Arizona Center for Law in the Public Interest
13 2205 E. Speedway Blvd.
14 Tucson, AZ 85719
15 *Attorneys for Defenders of Wildlife, et al.*

14 Sally Worthington
15 John Helm
16 Helm & Kyle, Ltd.
17 1619 E. Guadalupe #1
18 Tempe, AZ 85283
19 *Attorneys for Maricopa County*

17 Sandy Bahr
18 202 E. McDowell Road, Ste. 277
19 Phoenix, AZ 85004
20 *Sierra Club*

20 Julie Lemmon
21 1095 W Rio Salado Pkwy, Ste. 102
22 Tempe, AZ 85281-2603
23 *Attorney for Flood Control District*
24 *of Maricopa County*

1 John B. Weldon, Jr.
Mark A. McGinnis
2 Scott M. Deeny
SALMON, LEWIS & WELDON, P.L.C.
3 2850 East Camelback Road, Suite 200
Phoenix, Arizona 85016
4 *Attorneys for Salt River Project Agricultural
Improvement and Power District and Salt
5 River Valley Water Users' Association*

6 Carla Consoli
Lewis and Roca
7 40 N. Central Avenue
Phoenix, AZ 85004
8 *Attorneys for Cemex*

9 L. William Staudenmaier
10 Snell & Wilmer LLP
One Arizona Center
11 400 E. Van Buren
Phoenix, AZ 85004-2202
12 *Attorneys for Freeport-McMoRan Corporation*

13 William Taebel
14 P.O. Box 1466
Mesa, AZ 85211-1466
15 *Attorney for City of Mesa*

16 Thomas L. Murphy
Gila River Indian Community Law Office
17 Post Office Box 97
Sacaton, AZ 85147
18 *Attorney for Gila River Indian Community*

19 Michael J. Pearce
20 Maguire & Pearce LLC
2999 N. 44th Street, Suite 630
21 Phoenix, AZ 85018-0001
*Attorneys for Chamber of Commerce and
22 Home Builders' Association*

23 James T. Braselton
Mariscal Weeks McIntyre & Friedlander PA
24 2901 N. Central Avenue, Suite 200
Phoenix, AZ 85012-2705
25 *Attorneys for Various Title Companies*

1 Steve Wene
Moyes Sellers & Associates
2 1850 N. Central Avenue, Suite 1100
Phoenix, AZ 85004-4527
3 *Attorneys for Arizona State University*

4 Erin Fillmore
5

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7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
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