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14 **BEFORE THE ARIZONA NAVIGABLE STREAM**
15 **ADJUDICATION COMMISSION**

16 In re Determination of Navigability of
17 the Lower Salt River, from Granite Reef
18 Dam to the Gila River Confluence

No. 03-005-NAV

19 **SALT RIVER PROJECT'S**
20 **MEMORANDUM REGARDING**
21 **EFFECT OF SUPREME COURT'S**
22 **OPINION IN *PPL MONTANA* ON**
23 **LOWER SALT RIVER CASE**

24 Pursuant to the Commission's order at its meeting held on February 27, 2012, the Salt
25 River Project Agricultural Improvement and Power District and Salt River Valley Water
26 Users' Association (collectively, "SRP") submit their memorandum regarding the recent
27 opinion of the United States Supreme Court in the case of *PPL Montana LLC v. Montana*,
Supreme Court Case No. 10-218 ("*PPL Montana*").¹ This memorandum discusses the United
States Supreme Court's decision in *PPL Montana* and the applicability of that decision to the
facts of the Lower Salt River case.

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¹ SRP submitted a copy of the United States Supreme Court's slip opinion with its Notice of Decision in Related Case and Request for Supplemental Briefing filed with the Commission on February 23, 2012. That slip opinion is referred to herein as "*Opinion*."

1 **I. The PPL Montana Decision**

2 The United States Supreme Court’s February 22, 2012 opinion in *PPL Montana* arose
3 from a dispute regarding the navigability of three rivers: The Missouri River, the Madison
4 River, and the Clark Fork River, all of which are located wholly or partially in Montana. *See*
5 *Opinion*, at 1-2.

6 **A. Proceedings in the Montana courts**

7 The *PPL Montana* case originated as an action in the Montana district court by
8 parents of Montana schoolchildren, who sued PPL Montana, LLC (“PPL”) on the grounds
9 that PPL’s dams were built on riverbeds owned by the State of Montana and, thus, PPL owed
10 money for back royalties to the Montana “school trust.” *Opinion*, at 8. The State of Montana
11 intervened and asserted a similar claim on different legal grounds, i.e., that the riverbeds were
12 owned by Montana under the “public trust” and “equal footing” doctrines. *Id.* On a motion
13 for summary judgment, the Montana district court decided that the State owned the riverbeds
14 under the public trust and equal footing doctrines. *Id.*

15 The Montana Supreme Court affirmed the district court’s decision in favor of the State,
16 upholding the award of more than \$40 million in past damages against PPL for prior use of
17 the streambeds. *See PPL Montana v. State*, 355 Mont. 402, 229 P.3d 421, 431-36 (2010),
18 *rev’d, Opinion* (February 23, 2012). In affirming the finding of navigability, the Montana
19 Supreme Court relied heavily upon modern-day recreational boating on the rivers. The
20 Montana court also rejected PPL’s arguments that the rivers should be viewed on a segment-
21 by-segment basis, examining whether each particular stretch of each river was navigated or
22 subject to navigation at statehood. 229 P.3d at 449-50.

23 In affirming the district court’s decision, the Montana Supreme Court stated:

24 . . . The key inquiry here is whether the District Court’s interpretation and
25 application of the navigability for title test was correct, since this test sets forth
26 the legal standard the State must meet for summary judgment and also indicates
27 the type and quantum of evidence PPL must present in order to raise a genuine
issue of material fact. . . . Broadly speaking, the District Court perceived the
navigability for title test as somewhat “fluid.” . . . Our independent review of

1 the caselaw in this area establishes unequivocally that the District Court's
2 understanding of the navigability for title test was correct. The concept of
3 navigability for title purposes is very liberally construed by the United States
Supreme Court. . . .

4 229 P.3d at 446. The Montana Supreme Court applied that "very liberal" interpretation of the
5 navigability test, *id.*, in much the same way that the proponents of navigability have promoted
6 the test in the present case.²

7 In addition to the applying the "very liberal" test for navigability itself, the Montana
8 Supreme Court adopted a similarly broad definition of "commerce." 229 P.3d at 446. The
9 Montana court stated:

10 Additionally, the term "commerce" in the navigability for title context is
11 very broadly construed. For instance, in [*United States v. Utah*, 283 U.S. 64
12 (1931)], the United States Supreme Court explicitly embraced the notion that
13 emerging and newly-discovered forms of commerce can be retroactively
14 applied to considerations of navigability. . . . Because navigability is based
15 upon a broad definition of commerce combined with an "actual" or "susceptible
of use" standard, present-day usage of a river may be probative of its status as a
navigable river at the time of statehood. . . .

16 *Id.* at 446-47 (citations omitted).

17 **B. The United States Supreme Court opinion**

18 PPL filed a petition for certiorari to the United States Supreme Court, which was
19 granted. The Court received briefing; heard argument on December 7, 2011; and issued its
20 opinion on February 22, 2012. *See Opinion*. In that opinion, the United States Supreme
21 Court reversed the Montana Supreme Court's decision and soundly rejected its reasoning. *Id.*
22 at 9.

23 In reaching its decision, the United States Supreme Court took the opportunity to
24 clarify and restate the federal law of navigability from its prior decisions and to rein in the

25 ² *See, e.g., generally* Defenders of Wildlife, et al., Opening Memorandum, at 6-8 (June 6, 2003)
26 ("Generally speaking, the federal test for navigability for title (under the Equal Footing Doctrine) is a
liberal one."); State Land Department's Opening Post-Hearing Brief, at 4-5 (June 9, 2003) ("The
27 *Daniel Ball* test is a flexible one that is "apt to uncover variations and refinements which require
further elaboration.") (citation omitted).

1 more “liberal” and expansive constructions of that law proffered by some state courts and
2 lower federal courts in recent years:

3 1. The Court reaffirmed that the navigability for title test is applied as of the date
4 of statehood. *Opinion*, at 12. “Upon statehood, the State gains title within its borders to the
5 beds of watercourses then navigable. . . .” *Id.*

6 2. The Court reiterated that the specific requirements of the test for navigability
7 depend upon the context in which the question is posed and that admiralty and Commerce
8 Clause cases are not particularly persuasive on navigability-for-title issues. *Id.* at 13 (“the test
9 for navigability is not applied in the same way in these distinct types of cases”). “For state
10 title purposes under the equal-footing doctrine, navigability is determined at the time of
11 statehood . . . and based on the ‘natural and ordinary condition’ of the water.” *Id.*

12 3. The Court corrected the error by the Montana Supreme Court and reaffirmed
13 that the navigability of each watercourse must be considered on a “segment-by-segment basis,
14 to assess whether the segment of the river, under which the riverbed in dispute lies, is
15 navigable or not.” *Id.* at 14. “The segment-by-segment approach to navigability for title is
16 well settled, and it should not be disregarded.” *Id.* at 15.

17 4. As part of its discussion on the “segment-by-segment” issue, the Court
18 reiterated that the basis for a determination of navigability is use or susceptibility for use of
19 the watercourse as highway for commerce. *Id.* at 16. “By contrast, segments that are
20 nonnavigable at the time of statehood are those over which commerce could not then occur.
21 Thus, there is no reason that these segments also should be deemed owned by the State under
22 the equal-footing doctrine.” *Id.*

23 5. In rejecting the Montana Supreme Court’s analysis of modern-day recreational
24 boating, the Court confirmed its prior pronouncements that the test relates to use or
25 susceptibility to use for commerce as of the date of statehood. *Id.* at 21. “Navigability must
26 be assessed as of the time of statehood, and it concerns the river’s usefulness for ‘trade and
27 travel,’ rather than for other purposes.” *Id.* “Mere use by initial explorers or trappers who

1 may have dragged their boats in or alongside the river despite its nonnavigability in order to
2 avoid getting lost, or to provide water for their horses or themselves, is not enough.” *Id.*

3 6. The Court clarified that post-statehood use of the river can be considered only if
4 that use involves the same river conditions and the same types of boats that existed at
5 statehood. *Id.* at 22-23. The party seeking to prove navigability must show that “ the
6 watercraft are meaningfully similar to those in customary use for trade and travel at the time
7 of statehood.” *Id.* at 23. “If modern watercraft permit navigability where the historical
8 watercraft would not, . . . then the evidence of present-day use has limited or no bearing on
9 navigability at statehood.” *Id.*

10 7. The Court reiterated and clarified its prior opinions regarding seasonal use and
11 its ability to prove navigability. *Id.* at 24. Focusing on the commercial aspects of the
12 transportation, the Court stated: “While the Montana court was correct that a river need not
13 be susceptible of navigation at every point during the year, neither can that susceptibility be
14 so brief that it is not a commercial reality.” *Id.*

15 8. The Court addressed the often-ignored distinction between the public trust and
16 equal footing doctrines. As the Court stated, the equal footing doctrine is a constitutional rule
17 and applies federal law to determine whether title passes to the State for a particular
18 watercourse on the date of statehood. *Id.* at 25. The public trust doctrine is a matter of state
19 law and affects the permitted use and disposition of lands owned by the State under navigable
20 watercourses. *Id.*

21 Based upon these conclusions, the United States Supreme Court, in a unanimous
22 opinion, reversed the judgment of the Montana Supreme Court and remanded the case back to
23 the Montana courts for further proceedings. *Opinion*, at 26.

24 **II. Impact of the *Opinion* on the Lower Salt River Case**

25 The primary effect of the United States Supreme Court’s *Opinion* is that the Court
26 acted to rein in an overly expansive and liberal application of the federal test of navigability
27 for title that had been applied by various state and lower federal courts in recent years. The

1 extremely broad interpretation of prior law undertaken by the Montana Supreme Court, which
2 the United States Supreme Court expressly rejected, is similar to the approach long advocated
3 by the proponents of navigability in this case. The proponents' continued assertions of a
4 "liberal" test are overblown. *See* Note 2, *supra*. The navigability for title test is one of
5 "navigability in fact," based upon "commercial reality." *Opinion*, at 11.

6 The three rivers at issue in *PPL Montana*, which the United States Supreme Court
7 found were nonnavigable under a proper application of the federal test, bear some strong
8 similarities to the Lower Salt River. With regard to the Missouri River, for instance, the
9 Court stated that, "[a]s a historical matter, the river shifted and flooded often, and contained
10 many sandbars, islands, and unstable banks." *Opinion*, at 2. The evidence presented to the
11 Commission revealed that the Lower Salt River "was a braided river, and the pattern of bars,
12 islands, and low-water channels changed through time."³ The Lower Salt "was a wide,
13 sandy-gravelly channel." *Id.* ¶ 86.

14 The proponents of navigability in the present case have often tried to downplay the
15 natural obstructions and other impediments to navigation on the Lower Salt River, contending
16 that, under the liberal interpretation of the federal test, the river was navigable in its ordinary
17 and natural condition.⁴ The *PPL Montana* opinion makes clear, however, that natural
18 obstructions to navigation that would require portages can and often do make the river
19 nonnavigable:

20 . . . Even if portage were to take travelers only one day, its significance is the
21 same; it demonstrates the need to bypass the river segment, all because that part
22 of the river is nonnavigable. Thus, the Montana Supreme Court was wrong to
23 state, with respect to the Great Falls reach and other stretches of the rivers in

24 ³ *See* Defendants' Statement of Facts on Appeal and Response to Plaintiffs' Joint Statement of Facts
25 in Support of Their Opening Briefs ¶ 85, *State v. Arizona Navigable Stream Adjudication Comm'n*,
26 Maricopa County Superior Court No. LC2006-000413-0001 DT (November 23, 2006) (copy attached
as Exhibit 4 to Salt River Project's Memorandum Regarding Proceedings on Remand (January 13,
2012)) (hereinafter, "Statement of Facts").

27 ⁴ *See, e.g., generally* Arizona State Land Department's Memorandum, at 5 & n.5 (January 13, 2012);
see also Note 2, *supra*.

1 question, that portages “are not sufficient to defeat a finding of navigability.”
2 355 Mont., at 438, 229 P.3d, at 446. In most cases, they are, because they
3 require transportation over land rather than over the water. . . .

4 *Opinion*, at 18-19.

5 The United States Supreme Court in *PPL Montana* relied upon some of the same
6 evidence to find the Montana rivers nonnavigable as SRP and others have presented to oppose
7 a finding of navigability on the Lower Salt. For instance, one of the primary experts
8 presented by PPL, fluvial geomorphologist Dr. Stanley Schumm, is the same witness who
9 testified on behalf of SRP at the Lower Salt River hearing and upon whom this Commission
10 significantly relied in its 2005 report. See *Opinion*, at 23-24; *PPL Montana*, 229 P.3d at 447-
11 49 (Montana Supreme Court’s discussion of Dr. Schumm’s testimony). Dr. Schumm’s
12 testimony supports a finding of nonnavigabilty on the Lower Salt River, as it did in *PPL*
13 *Montana*.

14 The United States Supreme Court also cited and relied upon a 1910 federal district
15 court decree, which stated that a portion of one of the rivers in question “was and is a non-
16 navigable stream incapable of carrying the products of the country in the usual manner of
17 water transportation.” *Opinion*, at 21. On the Lower Salt River, the *Kibbey Decree*, a federal
18 district court decree issued in 1892, stated that the Lower Salt was a “natural unnavigable
19 stream.” See *Wormser v. Salt River Valley Canal Co.*, No. 708, Second Judicial District,
20 Territory of Arizona, County of Maricopa (March 31, 1892); Statement of Facts, *supra*, ¶¶
21 91-94. The 1910 *Kent Decree*, another federal district court decree, also stated that the Lower
22 Salt was “a nonnavigable stream.” See *Hurley v. Abbott*, No. 4564, Third Judicial District,
23 Territory of Arizona, County of Maricopa (March 1, 1910); Statement of Facts, *supra*, ¶¶ 95-
24 98. These prior federal decrees should be persuasive evidence of nonnavigability, as they
25 were in *PPL Montana*.

26 The three Montana rivers contain power generation dams that “have existed at their
27 locations for many decades, some for over a century.” *Opinion*, at 7. Federal Reclamation

1 dams and power facilities have existed on the Salt River, upstream from the reach at issue in
2 this case, for more than a century. In addressing the laches and estoppel arguments presented
3 by PPL, the United States Supreme Court noted that the mere existence of these dams was
4 evidence of the rivers' nonnavigability: "[T]he reliance by PPL and its predecessors in title
5 upon the State's long failure to assert title is some evidence to support the conclusion that the
6 river segments were nonnavigable for purposes of the equal-footing doctrine." *Id.* at 26.
7 Likewise, the fact that the United States Government and SRP constructed six large dams and
8 reservoirs (four on the Salt River, and two on the Verde River) upstream from the Lower Salt
9 River is evidence that the Lower Salt River was not considered susceptible to navigation,
10 particularly for commercial or trade purposes.

11 As with the Salt River, the State of Montana argued that the rivers in question in *PPL*
12 *Montana* were navigable based upon evidence of modern-day recreational boating. Present-
13 day boating has been cited as evidence that the Lower Salt River was navigable in 1912.⁵ The
14 Court in *PPL Montana* made clear, however, that such modern uses are not persuasive unless
15 "the watercraft are meaningfully similar to those in customary use for trade and travel at the
16 time of statehood." *Opinion*, at 23. SRP is aware of no evidence presented by the
17 proponents of navigability to show that any of the modern boating that sporadically occurs on
18 some limited portions of the Salt River is done in boats that are "meaningfully similar to those
19 in customary use for trade and travel" in 1912. Thus, any evidence of modern-day boating on
20 the Salt River is not relevant or persuasive under the test adopted by the United States
21 Supreme Court in *PPL Montana*.

22 **III. Summary and Requested Action**

23 The most important aspect of the *PPL Montana* decision for the Lower Salt River
24 proceedings is that the Court clearly brought the law regarding navigability for title purposes
25 back to considerations of "navigability in fact" and "commercial reality." *Opinion*, at 11, 24.
26

27 ⁵ See, e.g., Defenders of Wildlife, et al., Opening Post-Hearing Memorandum, at 18-19 (June 6, 2003).

1 Contrary to the "liberal" interpretation applied by some state courts and some lower federal
2 courts and promoted by the proponents of navigability in this case, the United States Supreme
3 Court reconfirmed that the test of navigability for title is a pragmatic one: Was the river, as of
4 February 14, 1912, used or susceptible to being used, in its ordinary and natural condition, as
5 a highway for commerce, over which trade and travel were or could have been conducted in
6 the customary mode of trade and travel on water? That is the Arizona statutory test in A.R.S.
7 § 37-1101(5), and that is and always has been the federal test of navigability for title
8 purposes.

9 Based upon that test and considering the evidence in the record, the Commission can
10 and should find that the Lower Salt River is nonnavigable.

11 DATED this 23rd day of March, 2012.

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