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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

<u>In re Determination of Navigability of the Lower Salt River</u>)))	Case No. 03-005-NAV
<u>In re Determination of Navigability of the Upper Salt River</u>)))	Case No. 04-008-NAV
<u>In re Determination of Navigability of the Gila River</u>)))	Case No. 03-007-NAV
<u>In re Determination of Navigability of the Verde River</u>)))	Case No. 04-009-NAV
<u>In re Determination of Navigability of the Santa Cruz River</u>)))	Case No. 03-002-NAV
<u>In re Determination of Navigability of the San Pedro River</u>)))	Case No. 03-004-NAV

CONSOLIDATED MEMORANDUM RE
PPL Montana LLC v. Montana

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler

(collectively, "Defenders") hereby submit their memorandum regarding the recent United

States Supreme Court case *PPL Montana v. Montana*, ___ U.S. ___. 2012 U. S. LEXIS 1686 (2012) (“*PPL Montana*”).

I. *PPL Montana LLC v. Montana* Decision.

In determining the impact that *PPL Montana* has on the proceedings before this Commission, it is important to first understand the nature of the issues before the Supreme Court and how those issues were decided. The case involved three rivers which flow through the State of Montana—the Missouri River, the Madison River, and the Clark Fork River. The State of Montana claimed title to the riverbeds of these three rivers under the equal footing doctrine. Based on these title claims, the State sought compensation from PPL Montana, LLC, (“PPL”) a power company, for its use of the riverbeds. PPL owns and operates hydroelectric facilities, ten of which are built upon the three rivers at issue. Five of those facilities are located along the Great Falls reach. *Id.* at **9-10.

The facilities had existed on the riverbeds for years and the state had never sought compensation from the power company until 2003. *Id.* at **19. The State first asserted the claim in the context of litigation brought by parents of schoolchildren against PPL in federal court. *Id.* The issue was ultimately resolved in state court when, in 2010, the Montana Supreme Court held that the State held title to the riverbeds and awarded it \$41 million in past due rent for the period from 2000 to 2007. *PPL Montana, LLC v. State* 355 Mont. 402, 229 P. 3d 410 (2010).

The United States Supreme Court accepted review to consider whether, in holding the entire river navigable at the time of statehood, including the disputed segments where

the facilities were located, the Montana Court had properly applied the rules of navigability for title under the Equal-Footing doctrine. In particular, the issue was whether the Montana Court had erred by refusing to make the navigability determination on a segment by segment basis. *Id.* at **9.

In reversing the Montana Court's decision, the United States Supreme Court first reviewed the law regarding navigability for title under the Equal-Footing doctrine. *Id.* at **23-29. Notably, the Court did not make any changes to the existing law. The Court simply held that when determining title to a riverbed under the Equal-Footing doctrine, it had historically considered 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 **31 ("The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded."). Because the Montana Court had refused to follow this approach, the Supreme Court held that it misapplied the federal test. *Id.* In remanding the case back to the Montana Court, the Supreme Court recognized that "the ultimate decision as to this and the other disputed river stretches is to be determined, in the first instance, by the Montana courts." *Id.* at **41. However, the Court noted that "[e]ven if the law might find some nonnavigable segments so minimal that they merit treatment as part of a longer, navigable reach for purposes of title under the equal footing doctrine, it is doubtful that any of the segments in this case would meet that standard, and one--the Great Falls reach--certainly would not." *Id.* at **34.

In its decision, the Supreme Court also addressed the Montana Court's reliance upon evidence of modern day use as support for its finding of navigability. The Court

held that the state court had erred in relying upon such evidence, but expressly recognized that “[e]vidence 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.” *Id.* at ** 43(emphasis added). As the Court further noted, “[f]or 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 segments ‘in [its] natural and ordinary condition.’” *Id.* Therefore, the Court reinforced that a party seeking to use present day evidence to prove navigability for title must first establish that, “(1) the modern 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.* The Court concluded, “[i]f modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has little or no bearing on navigability at statehood.” Because the Montana Court did not appear to have made these findings, the Court held that its reliance upon evidence of present-day use was error. *Id.* at **44-45.

II. The Impact of the *PPL Montana LLC v. Montana* Decision on the Navigability Determination Proceedings Before the ANSAC is Limited but Important.

Because the holding in *PPL Montana* was a narrow one, specific to the facts of the case, its impact on the proceedings before this Commission is fairly limited but potentially significant as ANSAC reconsiders the determinations remanded by the courts.

A. The Commission Must Use the Segment by Segment Approach

As noted above, the recent Supreme Court decision did not make new law regarding navigability for title under the equal footing doctrine. Rather, the Supreme Court simply emphasized the existing law's requirement that navigability determinations be made on a segment-by-segment basis. In fact, this need for a more particularized evaluation is something that Defenders has stressed in its post-hearing briefs. In *PPL Montana*, the problem was a determination that declared the entire river navigable despite reaches that were potentially nonnavigable. In the case of Arizona rivers, the concern is just the opposite.

With the exception of the Upper and Lower Salt, all of the rivers evaluated by the Commission have been declared nonnavigable in their entirety. The Commission has made no effort to address navigability on a segment by segment basis. As *PPL Montana* makes clear, that approach represents "an infirm legal understanding of [the] Court's rules of navigability for title under the equal footing doctrine." CITE Consequently, as it moves forward on the remanded cases, in addition to addressing the problems identified by the Arizona Court of Appeals in *Winkleman*, the Commission should also adopt the segment-by-segment approach in its navigability determinations.

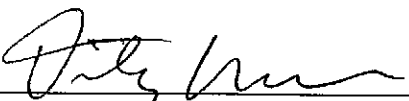
B. Evidence of Modern Use.

Just as the Court's discussion of the law regarding the navigability for title test under the Equal Footing Doctrine did not alter existing law, the discussion of the use of evidence of modern use to establish navigability did not break new ground. As the Court clarified in its Opinion, modern use can be evidence of navigability at the time of

statehood provided a proper foundation regarding the watercraft and the comparable condition of the river is first established. To the extent evidence of modern use has been introduced in these proceedings, those foundational requirements have been recognized and met.

Respectfully submitted this 23rd day of March 2012.

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A handwritten signature in black ink, appearing to read 'N. Konigsberg', written over a horizontal line.