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

11 IN RE DETERMINATION OF THE
12 NAVIGABILITY OF THE SAN
13 PEDRO RIVER

No. 03-004-NAV (San Pedro)

14 **GILA RIVER INDIAN COMMUNITY'S**
15 **OPENING POST-HEARING**
16 **MEMORANDUM**

17 The Arizona Navigable Stream Adjudication Commission (“ANSAC” or
18 “Commission”) has permitted briefing from the parties to this matter on two issues:
19 First, the “navigability or non-navigability of the San Pedro River in its “ordinary and
20 natural” condition as of the State of Arizona’s admission to the United States on
21 February 14, 1912, consistent with the Arizona Court of Appeals decision in *State v.*
22 *Arizona Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 229 P.3d 242 (App.
23 2010);” and second, “segmentation of the San Pedro River consistent with the United
24 States Supreme Court’s decision in *PPL Montana, LLC v. Montana*, 556 U.S. ____,
25 132 S.Ct. 1215 (2012).”¹ The Gila River Indian Community joins generally in the

26 ¹ ANSAC Information Bulletin (Aug. 7, 2013).

1 memorandum submitted by the Salt River Project Agricultural Improvement and
2 Power District ("SRP").

3 The Community also incorporates the legal arguments made in its
4 *Memorandum on the Effect of PPL Montana, LLC on Proceedings Before the*
5 *Commission*, filed in Nos. 03-005-NAV and 03-007-NAV (March 23, 2012) and its
6 *Memorandum on the Effect of PPL Montana, LLC v. Montana Regarding River*
7 *Segmentation on Proceedings Before the Commission*, filed in Nos. 03-005-NAV and
8 03-007-NAV (June 6, 2012).

9
10 Subsequent to the decision in *State ex rel. Winkleman v. Ariz. Navigable*
11 *Stream Adjudication Comm'n*, 224 Ariz. 230, 229 P.3d 242 (Ariz.App. 2010) ("*State*
12 *v. ANSAC*"), the Supreme Court of the United States decided *PPL Montana, LLC v.*
13 *Montana*, 132 S.Ct. 1215 (2012). In *State v. ANSAC*, the Court of Appeals held that
14 the Commission misapplied the pertinent test for determining navigability, and
15 remanded the matter for further proceedings. The Community contends that the
16 holding in *State v. ANSAC* must be viewed in light of the subsequent unanimous
17 decision of the Supreme Court in *PPL Montana*. Because navigability is an issue of
18 federal law, if there is any doubt, the Commission should follow *PPL Montana*.

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21 *PPL Montana* reaffirms the Supreme Court's prior holdings regarding
22 navigability under the equal footing doctrine and restates the principle that
23 navigability determinations be made in relation to river conditions and commercial
24 activity occurring at the time of statehood. Any questions regarding the time period in
25 relation to river conditions for ANSAC to consider with regard to determination of
26

1 navigability were laid to rest in the portion of the Supreme Court's opinion regarding
2 the use of present-day evidence of recreational use. In holding that evidence of
3 present-day use may be considered "to the extent it informs the historical
4 determination whether the river segment was susceptible of use for commercial
5 navigation at the time of statehood," the Court was clear that the party seeking to use
6 such evidence must show that (1) the present-day watercraft are meaningfully similar
7 to those in customary use for trade and travel at the time of statehood; and that (2) the
8 river's post-statehood condition "is not materially different from its *physical condition*
9 *at statehood.*" 132 S.Ct. at 1233 (emphasis added). As such, *PPL Montana* soundly
10 rejects the notion that a river's condition sometime prior to statehood should be
11 considered.²
12

14 In *State v. ANSAC*, the Court of Appeals did properly recognize that the
15 "burden of proof rests on the party asserting navigability." 229 P.3d at 250 (citations
16 omitted), and the proponents must prove navigability by a preponderance of evidence.
17 *Id.* at 251. Given that the *only* evidence submitted by the proponents of navigability
18 considers the sufficiency of hypothetical flow rates for modern-day recreational use,
19 the Commission should find that the proponents have failed to meet their burden
20 proof, which would result in a finding of non-navigability.
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25 ² The Court of Appeals also missed legislative direction on this issue in its analysis—
26 A.R.S. § 37-1124 charges the Commission with "collecting and documenting all
reasonably available evidence regarding *the condition and usage* of a watercourse *as*
of February 14, 1912." (emphasis added).

1 **FILED on the 13th day of September, 2013 with:**

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