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**MEMORANDUM TO**  
**The Arizona Navigable Stream Adjudication Commission (ANSAC)**  
**Regarding The Arizona Court Of Appeals Decision**  
**In The Lower Salt River Case That Resulted**  
**In The October 2011 Remand Of the Case To The Commission**

This Memorandum is submitted by Maricopa County and the Flood Control District of Maricopa County ("County and FCD") by undersigned counsel to the Arizona Navigable Stream Adjudication Commission ("ANSAC" or "Commission"). The Commission has asked parties to submit memorandum describing what they believe the Commission should do to comply with the Court of Appeals' opinion in State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("Opinion"). This Memorandum covers three areas. First, the County and FCD provide their view of what the Opinion means for the Commission. Second, the County and FCD offer their view on how the Commission should proceed. Third, the County and FCD request the Commission's hearing schedule take into consideration the pending opinion from the United States Supreme Court on matters relevant to the Commission's ultimate decision.

**I. What the Opinion Requires**

The County and FCD believe the Opinion sets out guideposts for the Commission to follow. Below is language from the Opinion in italics followed by the County and FCD's view as to what the language means. References to the Opinion shall be cited by paragraph number, ¶.

*What is clear and what we stress, however, is that ANSAC may not begin its determination with any presumption against navigability. Instead, ANSAC's approach and analysis must be wholly impartial and objective, while utilizing the proper legal test. See generally A.R.S. § 37-1121(B) (requiring that members of ANSAC be unbiased and not have interests affected by the Commission's determination. Opinion at ¶18.*

**This means that the Commissioners must remain unbiased and cannot go into the hearings with any preconceived ideas.**

*Thus, ANSAC clearly made an effort to consider the effect of Roosevelt Dam on the character of the River. However, conspicuously absent from that statement and from ANSAC's analysis is any evaluation of the effect of the numerous other dams, canals, and man-made diversions identified in its report as existing as of February 14, 1912. Opinion at ¶22. Although the Commission stated specifically that it considered only "the absence of Roosevelt Dam and reservoir" in determining the River's ordinary and natural condition, it made no mention of those other dams and diversions, and the only logical inference is that ANSAC did not evaluate their effect in determining the River's ordinary and natural condition. Id.*

**This means the Commission must begin by considering the effect of all the dams, including Roosevelt Dam, and all canals and other man-made diversions.**

*Giving meaning, as we must, to all words within the phrase "ordinary and natural condition," we conclude that the River must be evaluated in both its "ordinary" and "natural" condition. Opinion at ¶25. By treating the word "natural" as interchangeable with the word "ordinary," ANSAC made the word "natural" superfluous, thereby contravening a basic tenet of statutory construction. Opinion at ¶28. ANSAC should have considered both the River's ordinary condition and its natural condition in determining its navigability. Id.*

**This means the words "natural" and "ordinary" do not mean the same thing. The Commission needs to determine both the natural condition of the river (i.e., without man-made dams, canals, etc.) and the ordinary condition of the river (i.e., not during extreme flooding or drought—what is usual).**

*Because dams and canals that cause low flow or a dry bed are man-made diversions, they are not part of the natural condition of the River. Opinion at ¶27.*

**What this means is the "natural" condition of the Lower Salt does not include man-made diversions like canals and dams.**

*Applying these definitions, we conclude that ANSAC was required to determine what the*

*River would have looked like on February 14, 1912, in its ordinary (i.e., usual, absent major flooding or drought) and natural (i.e., without man-made dams, canals, or other diversions) condition.* Opinion at ¶28.

**The legal test set out in the Opinion. The Commission needs to consider both the natural and the ordinary condition of the Lower Salt River.**

The Opinion's guideposts lead to one conclusion. The Commission needs to hold another hearing to consider existing evidence and new evidence as to the "natural" condition and "ordinary" condition of the Lower Salt as separate issues. The natural and ordinary conditions will be determined by looking at the River before the modern era of settlement in the Salt River Valley (prior to 1865-1870), but after the Hohokam Indians disappeared (after 1450 A.D.).

## **II. What the Commission Should Do to Comply with the Opinion**

The Commission does not have to start all over at square one. The Commission can start with evidence already submitted. By exercising its powers under A.R.S. § 37-1122A(4), the Commission may want to provide that evidence submitted at the Lower Salt hearing in 2003 does not have to be resubmitted. Under Arizona Administrative Code, R12-17-105, evidence submitted prior to August 9, 2002, does not have to be resubmitted. Existing Commission members may be tempted not to review previously entered evidence again. This evidence, however, needs to be reviewed in light of the new legal test enunciated by State v. ANSAC.<sup>1</sup> In addition, the statutes creating ANSAC also require that all evidence be reviewed again after the hearing but before a determination is made. A.R.S. § 37-1128(A). While reviewing the evidence, the Commission will want to review the initial classification of the Lower Salt River on November 10, 1993. The Court of Appeals stated that this initial finding of the

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<sup>1</sup> The Commission is "required to determine what the River would have looked like on February 14, 1912, in its ordinary (i.e., usual, absent major flooding or drought) and natural (i.e., without man-made dams, canals, or other diversions) condition." Opinion at ¶28.

Commission contradicts the findings made on January 27, 2004: *ANSAC itself has made contradictory findings as to the ultimate question of fact, compare supra ¶ 6 with supra ¶9, albeit most recently while applying the incorrect standard for determination.* Because the Court of Appeals has hinted twice, in Hassell and again in State ex rel. Winkleman v. ANSAC that there is likely “substantial evidence” “from which a fact finder might conclude that [the River] met the applicable standard of navigability at the time that Arizona became a state,” Hassell, 172 Ariz. at 363, 837 P.2d at 165, it seems wise to review the 1993 finding to determine what were the characteristics of the River that led to an initial conclusion of navigability.

The County and FCD think the legal process would best be served by the Commission allowing new evidence, testimony, and cross-examination on new evidence and testimony. The new evidence should be relevant to the natural or ordinary condition of the River during the period identified by the Court of Appeals. The County and FCD’s believe that new evidence is important because both the Commission and the interested parties were operating under the wrong definition of “natural” in 2003. Constitutional considerations require an opportunity to present new evidence. Hassell, 172 Ariz. at 369. ANSAC must still determine whether the River would have been navigable in its ordinary and natural condition on February 14, 1912. Opinion at ¶30, n. 17. Because the Commission previously conflated the definitions of “ordinary” and “natural,” it must now review evidence of the “natural” condition of the River and adjust its treatment of the “ordinary” condition determination to take into consideration that it may not combine the two determinations into one. The Court of Appeals defined the time period for the natural and ordinary conditions of the River to be after the Hohokam’s diversions had ceased but before the beginning of modern era settlement. Opinion at ¶30. The Commission’s Lower Salt Report states the Hohokam were nearly extinct by 1450 A.D. (p. 25) and estimates modern (i.e., European) settlement as beginning around 1865-1870. (p. 25).

As the members of the Commission are well aware, evidence may be presented up to the day of the hearing. Arizona Administrative Code R12-17-105. The County and FCD perceive this process has a flaw. An opposing party cannot meaningfully cross-examination such evidence if it is surprised by the presentation of new evidence at the last minute. An opposing party's cross-examination of witnesses assists the Commission in determining the proper weight to give to evidence. When evidence is provided on the day of the hearing, the Commission is not likely to benefit from careful cross-examination. The Post Hearing Opening and Response Memoranda (Arizona Administrative Code R12-17-108) do provide parties an opportunity to summarize and evaluate pertinent evidence and legal argument. Because of the page limit on those memoranda, however, the Commission may want to consider providing an opportunity for the parties to submit rebuttal evidence by affidavit to evidence provided on the day of the hearing to eliminate the problem caused by the presentation of last minute evidence.

While reviewing the evidence, the Commission may want to consider questions such as: What is the ordinary condition of the Lower Salt River? ; What was the natural condition?; In each condition (natural and ordinary) was the river a single channel or a braided channel?; How wide was the low flow channel?; What was the base flow in cubic feet per second (cfs)?; Did the river flow year round?; What type of fish and wildlife were native to the Lower Salt?; What conditions had to be present for native fish and wildlife to exist?; and, Were beaver dams present? These types of questions may help the Commission draw their conclusions.

After reviewing the evidence, the Commission then will need to weigh and analyze the evidence reviewed. The Court of Appeals' Opinion is helpful here. The Court stated, the "best evidence" of the natural condition of the River is that which relates to the period prior to the commencement of modern-era settlement and farming in the Salt River Valley, but after the demise of the Hohokam. Opinion at ¶30. The

Commission may look at evidence post-dating this period, or even after the date of statehood. However, the Commission should keep in mind the lesser weight to be given such evidence and that it is not the “best evidence” to make a determination. Post statehood evidence is not dispositive, but it may be informative and relevant. Opinion at ¶31. After the weighing and analyzing of evidence, the Commission may reach its conclusion as to navigability.

In order to draft a report to comply with State ex rel. Winkleman v. ANSAC, the Commission should detail the evidence (with citations to the source) they are relying upon to make the determination of navigability or non-navigability. In other words, the facts the Commission is relying on to reach its conclusion should be listed. The specific facts will be answers to the questions the Commission considers during its review of the evidence. For example: In its ordinary condition the Lower Salt River does or does not flow year round; The River has a single or a braided channel in its natural condition; and, The base flow is X cubic feet per second. Once these facts are identified, the next step is to write a new report.

The Court of Appeals’ Opinion clearly requires the writing of a new report. An Addendum will not comply with the Opinion. Arizona law requires specific detail and analysis in the report. There must be a “particularized assessment” to determine whether the River was navigable, see Hassell, 172 Ariz. at 371, 837 P.2d at 173, which then must be set down “in writing with sufficient documentation and detail to confirm the rationale and basis for the determination.” A.R.S. § 37-1128(C). The Court of Appeals found that the Commission’s prior documentation, the 2005 report, was not legally sufficient because it “merely asserts that ANSAC considered all of the evidence before the Commission,” but did not demonstrate that it applied the proper legal test. Opinion at ¶21. A statement to the effect that all the evidence was considered does not establish what evidence the commission specifically relied on to make its determination. This must be stated in any report the Commission issues.

### III. Wait Until PPL Decision Handed Down

The County and FCD recommend that the Commission wait to hold any hearings until the United States Supreme Court rules in PPL Montana, L.L.C. v. State of Montana, No. 10-218. This case was argued before the Supreme Court on December 7, 2011. It is an appeal from the Montana Supreme Court, and concerns navigability issues, which could affect navigability determinations for rivers in Arizona.

The specific question presented to the Supreme Court was:

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by United States v. Utah, 283 U.S. 64, (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question “very liberally construed” in the State’s favor?

The U. S. Supreme Court is deciding whether an adjudicatory body like ANSAC may determine the entire river navigable based upon evidence of present day use, and whether the proper consideration should be a segment-by-segment approach. This question breaks down into three parts. First, what is the effect of evidence of present-day recreational use? Second, should the question of navigability be construed “very liberally” in the State’s favor? Finally, is evidence from one area of a river enough to deem the entire river navigable or should the court proceed with a segment-by-segment approach?

These issues are very important to the Commission. The Court of Appeals has already ruled upon two issues, and the third (segment-by-segment approach) is touched on by A.R.S. § 37-1101(5). The United States Supreme Court’s ruling could change the law on issues that are considered settled in Arizona. The most recent decision, State ex rel. Winkleman v. ANSAC, states that evidence of the River’s

condition after man-made diversions, including present day use, does not decide the issue of navigability, but that information may be informative and relevant to the decision making process. Opinion at ¶31. The Opinion clearly rules that the question of navigability is not to be very liberally construed in the State's favor. Opinion at ¶17 (proponents of navigability must prove navigability by the preponderance of evidence.) An Arizona statute appears to answer the issue as to whether a watercourse should be analyzed in segments or as a whole. See A.R.S. § 37-1101(5). The current definition of "navigable" refers to a watercourse as a whole, whereas the prior version looked at segments or portions of a watercourse. The 1993 version of A.R.S. § 37-1101(6) (1993) defined navigability as follows:

*"Navigable" or "navigable watercourse" means a watercourse, or a portion or reach of a watercourse, that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.*

(emphasis added) In 2001, this statute was renumbered as subsection (5), and the phrase "or a portion or reach of a watercourse" was deleted. 2001 Ariz. Sess. Laws, ch. 166, § 3 (1st Reg. Sess.); Opinion at ¶5, n. 6. Despite the current wording of A.R.S. § 37-1101(5), the Commission has already segmented the Salt River into a Lower Salt reach and an Upper Salt reach.

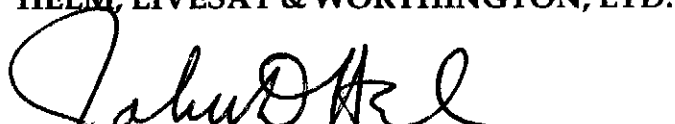
Other parties may argue that the Commission should not wait until PPL is decided, but that would be a mistake. As the Opinion makes clear, the issue of who owns the bed of navigable rivers in Arizona has been in the courts in one form or another since 1985 and is the subject of four sets of statutes. The Legislature enacted statutes in 1987 that provided a mechanism to quit claim streambed real estate. Such statutes were deemed unconstitutional in Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 172 Ariz. 356, 359, 837 P.2d 158 (App. 1991). The Legislature responded by



creating the Commission, which has operated under no less than three versions of statutes, (1992, 1994 Amendments and 2001). It seems self-evident the Commission should focus on applying the correct legal tests, and not on setting hearings as quickly as possible. As pointed out above, the PPL decision may change navigability for title law. If it does, the Commission will be wasting precious State funds on hearings that will need to be redone. Conversely, if the PPL decision does change existing law, it is highly unlikely any party will be harmed by waiting a few more months. These issues have been pending nearly 27 years. Making sure the Commission uses the proper legal test is far more economical than repeating hearings yet again.

RESPECTFULLY SUBMITTED this 13th day of January 2012.

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ORIGINAL of the foregoing HAND-DELIVERED  
this 13th day of January 2012, to:

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