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**BEFORE THE  
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION**

IN RE DETERMINATION OF  
NAVIGABILITY OF THE LOWER SALT  
RIVER; UPPER SALT RIVER; GILA  
RIVER; VERDE RIVER; SAN PEDRO  
RIVER; AND SANTA CRUZ RIVER

No. 03-005-NAV (Lower Salt)  
No. 04-008-NAV (Upper Salt)  
No. 03-007-NAV (Gila)  
No. 04-009-NAV (Verde)  
No. 03-004-NAV (San Pedro)  
No. 03-002-NAV (Santa Cruz)

**ARIZONA STATE LAND  
DEPARTMENT'S MEMORANDUM  
REGARDING EFFECT OF UNITED  
STATES SUPREME COURT'S PPL  
MONTANA DECISION AND  
SEGMENTATION OF REMANDED  
CASES**

The Arizona State Land Department ("ASLD" or the "Department") submits the following memorandum in response to the Arizona Navigable Stream Adjudication Commission's ("ANSAC" or "Commission") request for memoranda addressing how the United States Supreme Court's decision in *PPL Montana, LLC v. Montana*, 565 U.S. \_\_\_, 132 S.Ct. 1215 (2012) ("*PPL Montana*") impacts ANSAC's proceedings and determinations. This Memorandum identifies the main issues addressed in *PPL Montana*, and the applicability of that

decision to the Commission's proceedings and determinations. Further, the ASLD addresses ANSAC's request for an analysis of the segmentation issue presented in *PPL Montana*.

On February 22, 2012, the U.S. Supreme Court issued a decision in *PPL Montana*, reversing the Montana Supreme Court's ruling that required PPL Montana to pay rent for the use of Montana's riverbeds covered by its hydroelectric dams. The Court's decision addressed discrete segments of otherwise navigable rivers in Montana. The Court ultimately found that the reach of the Missouri River on which the Great Falls and five privately owned hydroelectric dams are located was not navigable for title purposes at Montana's statehood. *PPL Montana*, 132 S.Ct. at 1232. However, the Court did not decide the navigability of the remainder of the Missouri River, or the Madison and Clark Fork Rivers, but left that determination to the Montana Supreme Court. 132 S.Ct. at 1233.

#### **I. NAVIGABILITY MUST BE DETERMINED SEGMENT-BY-SEGMENT**

The main holding of the U.S. Supreme Court's *PPL Montana* decision is that a river's navigability must be determined on a segment-by-segment basis.<sup>1</sup> *PPL Montana*, 132 S.Ct. at 1229. The *PPL Montana* Court noted that "practical considerations" supported segmentation of watercourses, and that "[p]hysical conditions that affect navigability often vary significantly over the length of a river." *PPL Montana*, 132 S.Ct. at 1230. The Court noted that "[t]his is particularly true with longer rivers" – like the ones found in Arizona – that traverse through different terrain and climates. *Id.* Changes in a river's physical conditions assist in determining start and end points for segmentation. *Id.* The Court also noted that topographical and geographical features also may assist in identifying appropriate start and end points for

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<sup>1</sup> ANSAC's statutes allow ANSAC to examine watercourses in reaches or portions. A.R.S. § 37-1101(11) (definition of "watercourse" is the "main body or a portion or reach" of a river). However, ANSAC's determinations thus far have addressed the rivers as a whole with the exception of the Salt River that was divided into upper and lower reaches.

segmentation. *Id.* The segments at issue in *PPL Montana* were both discrete, as defined by physical features, and substantial. *Id.* at 1231. The Court focused on the Great Falls reach which is not only 17 miles long, but contains distinct drops that include five waterfalls and continuous rapids. *Id.*

The *PPL Montana* Court further acknowledged that there could be a “de minimis exception” to the segmentation approach. *Id.* at 1230. The Court stated that some nonnavigable segments may be “so minimal that they merit treatment as part of a longer, navigable reach for purposes of title under the equal footing doctrine . . . .” *Id.* at 1230. The Court identified considerations related to ownership and title of property “such as inadministrability of parcels of exceedingly small size, or worthlessness of the parcels due to overdivision” as de minimis exceptions. *Id.* at 1231.

There are a number of differences between the rivers in *PPL Montana* and the rivers currently under consideration by ANSAC. For example, the Montana and Arizona rivers have differences in seasonality, e.g., the Montana rivers may freeze in the winter while the Arizona rivers do not. More importantly, there are no waterfalls on any of the Arizona rivers that are of the size found along the Great Falls reach of the Missouri River. Finally, the Supreme Court noted that PPL Montana’s expert claimed that man-made dams had made the Montana rivers more navigable compared to their ordinary and natural condition, because the dams tend to reduce flood peaks and moderate seasonal low flows. *PPL Montana*, 132 S.Ct. at 1234. In Arizona, the presence of dams has made the rivers less navigable because the dams tend to remove all or most of the natural river flow.

The Department’s reports previously provided to ANSAC for each of these rivers included discussions that divided the rivers into separate reaches. These reach divisions were based on a variety of physiographic, hydrologic, geologic, and geographic factors. Each report

was divided into reaches with similar characteristics. The reach designations in the previous ALSD reports were defined based on criteria related to, but somewhat different from, the issues raised in the Montana case. The *PPL Montana* Court’s decision outlined several specific navigability criteria that may not have been directly addressed in the previous ALSD reports.

Based on the *PPL Montana* Court’s decision and the existing record, ANSAC should consider the following factors in determining segmentation: whether the river is located in a canyon or runs through flats or wide river valleys; the river’s flow rate (including tributary inflow and watershed size); the classification of rapids by degree of difficulty; whether the river is a gaining or losing stream; and the river’s slope or steepness. Based on those factors, ALSD recommends that ANSAC consider the following river segments.

<b>River</b>	<b>Segment Boundaries (Approximate)</b>	<b>Segment Description</b>
Gila	1 – New Mexico to Gila Box	Extends from New Mexico border through a broad alluvial valley with irrigated farm land. Includes the Town of Duncan and the communities of Sheldon, Apache Grove, York and Guthrie.
	2 – Gila Box	Deep canyon reach that includes the BLM National Conservation Area and is a popular recreational boating route. Significant tributaries (San Francisco, Eagle, Bonita) add flow.
	3 – Gila Box to San Carlos Reservoir	River flows through broad alluvial valley with irrigated farm land. Includes the Towns of Safford, Thatcher, Pima and Fort Thomas, and portions of the San Carlos Indian Reservation. Includes San Carlos Lake.
	4 – San Carlos Canyon	Narrow bedrock canyon located downstream of Coolidge Dam in the Needles Eye Wilderness on the San Carlos Indian Reservation. Extends downstream to near SR77.
	5 – San Carlos Canyon to Ashurst-Hayden Dam	River flows in shallow, moderately wide bedrock canyon past the communities of Winkelman, Hayden, Kearny, and Kelvin, and through the Tortilla Mountains. Significant tributary is the San Pedro River. Segment is used for seasonal recreational boating.

**Table 1. Recommended Stream Segmentation**

River	Segment Boundaries (Approximate)	Segment Description
	6 – Ashurst-Hayden Dam to Salt River Confluence	Extends from the Ashurst-Hayden Dam through the extensively irrigated alluvial valley that includes the Cities of Florence and Coolidge, as well as the Gila River Indian Community. Significant tributary includes the Santa Cruz River (dry).
	7 – Salt River Confluence to Dome	River flows through the western portion of the Salt River Valley and the Phoenix metropolitan area, and is similar in character to the lower Salt River (Segment 5). Some modern recreational boating between Salt River confluence and Gillespie Dam. Significant tributary includes the Hassayampa River. Historical accounts of boating.
	8 – Dome to Colorado	River passes through broad gap in Gila Mountains into Colorado River Valley. Some early records of historical boating upstream to Dome from Colorado River.
Salt	1 – White/Black River Confluence to Apache Falls	Narrow, deep bedrock canyon with remote access, and located within the Fort Apache Indian Reservation. Modern boating is not permitted by the tribe upstream of Apache Falls, but would likely include numerous rapids. Significant tributaries include Carrizo Creek.
	2 – Apache Falls to Sleeper Rapid - Gleason Flat	Segment includes the one of the most frequently boated river segments in Arizona, and is home to several seasonal commercial boating operations. River is located in deep bedrock canyon and includes many named and unnamed rapids. Gleason is largest of "flats" reaches with wide canyon, few rapids and easier access. Significant tributaries include Cibique and Canyon Creek. Located within the Tonto National Forest, Salt River Canyon Wilderness, and the Fort Apache and San Carlos Indian Communities.
	3 – Sleeper Rapid to Roosevelt Dam - Roosevelt Flat	River continues in deep bedrock canyon, but with fewer and smaller rapids. Located primarily within the Salt River Canyon Wilderness. Includes the large flats area now inundated by Roosevelt Lake. Significant tributaries include Pinal and Cherry Creeks.
	4 – Roosevelt Dam to Stewart Mountain Dam	River in deep bedrock canyon now inundated by backwater from SRP dams. Modern recreational boating on man-made lakes. Records of historical boating pre-date reservoirs.

**Table 1. Recommended Stream Segmentation**

River	Segment Boundaries (Approximate)	Segment Description
	5 – Stewart Mountain Dam to Verde River Confluence	River in moderately deep and wide canyon with few small rapids. Includes the most well used recreational boating reach in Arizona. Located within the Tonto National Forest. Records of historical boating.
	6 – Verde River Confluence to Gila River Confluence	River flows through wide alluvial valley with no natural rapids or obstructions. Includes many of the communities in metropolitan Phoenix, as well as portions of the Salt River Pima Maricopa, Fort McDowell, and Gila River Indian Communities. Records of historical boating and modern boating upstream of Granite Reef Dam and on effluent dominated reaches west of downtown Phoenix.
Verde	1 – Headwaters to Sycamore Creek	Extends from Paulden Dam through steep, rugged canyons with limited but reliable flow. Few instances of modern boating.
	2 – Sycamore Creek to Beasley Flat	River flows through shallow canyons and wide alluvial valleys through Verde Valley, including communities of Perkinsville, Clarkdale, Cottonwood, and Camp Verde. Major tributaries include Oak, Beaver, and West Clear Creeks. Records of historical boating. Extensive modern recreational boating, including annual canoe and kayak race. Some minor rapids.
	3 – Beasley Flat to Verde Hot Springs	River enters deep, narrow bedrock canyon with Wild and Scenic designation. Known as the whitewater reach of the Verde River and is popular modern recreational boating reach, with limited commercial boating. Records of historical boating.
	4 – Verde Hot Springs to Horseshoe Reservoir	River located within several US National Forests and two Wilderness areas. Major tributaries include Fossil Creek and East Verde River. River flows through shallow canyons and narrow alluvial valleys, with small rapids. Popular, but very remote, modern recreational boating reach. Records of historical boating.
	5 – Horseshoe Reservoir to Salt River Confluence	River flows through broader alluvial valleys with some short canyon reaches and few small rapids. Major tributary is Sycamore Creek. Modern recreational boating and historical boating records.

<b>Table 1. Recommended Stream Segmentation</b>		
<b>River</b>	<b>Segment Boundaries (Approximate)</b>	<b>Segment Description</b>
San Pedro	1 – Mexican Border to Gila River Confluence	River flows in alluvial valley. Flows intermittent or interrupted perennial with very low flow rates. No historical boating record. Modern recreational boating only during floods.
Santa Cruz	1 – Headwaters to Mexican Border	The river is a relatively small stream flowing in broad alluvial valleys, and flows into Mexico. Very low flow rates. No record of historical or modern boating.
	2 – Mexican Border to Marana	Normally dry river in broad alluvial river. Some possibility that some segments had very shallow perennial or intermittent flow. No record of historical or modern boating, except during floods or on effluent discharges from wastewater treatment plants.
	3 – Marana to Gila River Confluence	Historically dry river in broad alluvial valley with no historical or modern boating record.

ASLD recommends that ANSAC reopen the record to allow interested parties to submit evidence on the appropriate segmentation of the Salt, Verde, Gila, San Pedro and Santa Cruz Rivers.

**A. Sufficiently Obstructed River Segments That Require Travelers To Portage May Be Nonnavigable**

The need to portage may defeat navigability for purposes of establishing state title to a particular segment because it requires transportation over land, not water. *PPL Montana*, 132 S.Ct. at 1231. Portages generally demonstrate “the need to bypass the river segment.” *Id.* The Great Falls reach in *PPL Montana* was an undisputed interruption to navigability in that it required overland portage, and the falls had never been navigated. *Id.* at 1232. In *PPL Montana*, Lewis and Clark transported supplies and small canoes approximately 18 miles over land for 11 days or more. *Id.* at 1231. Although there are no portages of similar scale recorded on Arizona rivers, ANSAC must evaluate whether there are stretches of the remanded rivers that consistently

required portages, and whether those portages were so minimal that they did not interrupt an otherwise navigable segment of that river.

## **II. POST-STATEHOOD NAVIGATION EVIDENCE CAN DEMONSTRATE SUSCEPTIBILITY**

The U.S. Supreme Court stated that evidence of present-day, primarily recreational boating must be “confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood.” *PPL Montana*, 132 S.Ct. at 1233. Navigability at statehood concerns “the river’s usefulness for ‘trade and travel,’ not for other purposes.” *Id.* Evidence of present-day, primarily recreational use can be valid evidence of susceptibility for navigation at statehood. *Id.* The Court acknowledged that “[E]xtensive and continued [historical] use for commercial purposes’ may be the ‘most persuasive’ form of evidence, but the ‘crucial question’ is the potential for such use at the time of statehood, rather than ‘the mere manner or extent of actual use.’” *Id.* at 1234 quoting *United States v. Utah*, 283 U.S. 64, 82-83 (1931). To demonstrate susceptibility to navigation, a party seeking to use present-day boating evidence must show whether the watercraft are “meaningfully similar” to those customarily used for trade and travel at statehood; and that the post-statehood condition of the river is not materially different from its physical condition at statehood. *Id.* Thus, in order for evidence of present day use to be meaningful, a river’s physical condition could not have changed in ways that “substantially improve its navigability.” *Id.* at 1233-34. Dams and diversions on Arizona’s rivers made the rivers less susceptible to navigation, not more. Therefore, evidence of modern recreational boating on Arizona rivers may be more relevant to determining susceptibility to navigation than for the Montana rivers.

Based on the *PPL Montana* Court’s instruction, ASLD recommends that ANSAC reopen the record to allow interested parties to present evidence regarding the types of watercraft



customarily used at statehood and the types of watercraft in use today for recreational boating. ANSAC then must specifically determine the types of watercraft in use at statehood and how those watercraft vary from the watercraft in use today, if at all.

### **III. STATE TITLE TO RIVERBEDS MUST BE DETERMINED AT STATEHOOD IN THE RIVER'S ORDINARY AND NATURAL CONDITION**

The *PPL Montana* Court confirmed that title navigability must be determined at statehood in a watercourse's "natural and ordinary condition." *PPL Montana*, 132 S.Ct. at 1228. The Court pointed out that the "inquiry depends only on navigation and not on interstate travel." *Id.* at 1229, 1233 (for susceptibility analysis, not only trade and travel must be determined, but also the watercourse's natural and ordinary condition). In *State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Com'n*, 224 Ariz. 230, 240, 229 P.3d 242, 252 (App. 2010) ("*Winkleman*"), the court held that ANSAC failed to evaluate the Lower Salt River's ordinary and natural condition in light of the numerous dams, canals, and other diversions other than Roosevelt Dam. The Court of Appeals directed ANSAC 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." *Winkleman*, 224 Ariz. at 241, 229 P.3d at 253. The *Winkleman* decision is still valid and controlling on ANSAC's determinations and proceedings. Thus, ANSAC must evaluate Arizona's rivers at statehood as if there had been no dams and diversions, and without flood or drought conditions.

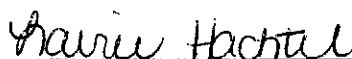
The U.S. Supreme Court's note that Montana's long failure to assert title navigability is some evidence supporting the conclusion that the river segments were nonnavigable is not only dicta, but also not persuasive to these proceedings. *PPL Montana*, 132 S.Ct. at 1235. Arizona Courts have long recognized Arizona's valid right and valuable claim to the streambeds beneath

its navigable rivers. *Winkleman*, 224 Ariz. at 234, ¶ 2, 229 P.3d 246, ¶ 2 (“In 1985, the State claimed title to the beds of all Arizona watercourses that were navigable when Arizona became a state.”).

In conclusion, the United States Supreme Court’s *PPL Montana* decision is relevant to the proceedings now before the Commission. ANSAC should examine each watercourse to determine how the watercourse should be segmented, and then whether each of the identified segments is navigable. As stated by the Court, “[a]n analysis of segmentation must be sensibly applied.” *PPL Montana*, 132 S.Ct. at 1231. Finally and most importantly, the navigability of each river must be determined based on its own facts. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404, 61 S.Ct. 291, 297 (1940) (there is no “formula which fits every type of stream under all circumstances and at all times.”). Based on the *PPL Montana* decision, the Department recommends that ANSAC reopen the record for parties to provide evidence and testimony for segmentation purposes and for present-day recreational use for susceptibility purposes.

DATED: June 8, 2012.

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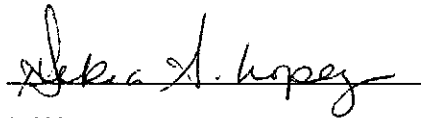
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