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

12 In re Determination of Navigability of  
13 the Upper Salt River; Verde River; Gila  
14 River; San Pedro River; and Santa Cruz  
15 River

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

16 **SALT RIVER PROJECT'S**  
17 **MEMORANDUM REGARDING**  
18 **EFFECT OF SUPREME COURT'S**  
19 **OPINION IN *PPL MONTANA* ON**  
20 **REMANDED CASES OTHER THAN**  
21 **LOWER SALT RIVER**

22 On this date, the Salt River Project Agricultural Improvement and Power District and  
23 Salt River Valley Water Users' Association (collectively, "SRP") have filed a "Memorandum  
24 Regarding Effect of Supreme Court's Opinion in *PPL Montana* on Lower Salt River Case"  
25 (No. 03-005-NAV) ("Lower Salt Memorandum"). Rather than repeat the discussion of the  
26 United States Supreme Court's opinion in *PPP Montana, LLC v. Montana* (Supreme Court  
27 Case No. 10-218) ("*Opinion*") from that memorandum, this memorandum (filed with respect  
to the five remanded cases other than the Lower Salt) hereby incorporates that discussion by  
reference. See Lower Salt River Memorandum § I, at 2-5. This memorandum addresses how  
the *Opinion* affects the proceedings for the five remanded cases other than the Lower Salt.

1 **I. Effect of the *Opinion* on the Upper Salt River Case**

2 Of the six watercourses now before the Commission on remand, the Upper Salt River  
3 likely shares the most physical characteristics with the rivers at issue in *PPL Montana*. The  
4 Upper Salt River became the site of four large dams and reservoirs, similar to the dams that  
5 were built on the rivers in *PPL Montana*.<sup>1</sup> Like those Montana rivers, the Upper Salt was a  
6 good site for building dams because of its steep gradient, which caused a large vertical drop in  
7 the water that made it suitable for hydropower production.<sup>2</sup> Also like the rivers in Montana,  
8 the presence of steep, narrow canyons made the Upper Salt a good location for dam  
9 construction, because it allowed for the building of relatively narrow dams across the river.<sup>3</sup>

10 Those same physical characteristics that make a river a good place for building a dam  
11 are characteristics that make the river not particularly susceptible to navigation. Steep,  
12 narrow canyons with a river having a large drop in elevation are significant impediments to  
13 moving commerce on the water. See Notes 2 and 3, *supra*. For example, Charles Hayden  
14 organized an expedition on the Upper Salt in 1873 in an attempt to determine whether logs  
15 could be floated down the river from the mountains to Tempe. See Fuller/Upper Salt, at 2-1.  
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17  
18 <sup>1</sup> See ANSAC, *Report, Findings and Determination Regarding the Navigability of the Upper Salt*  
19 *River from the Confluence of the White and Black Rivers to Granite Reef Dam*, at 5-6, 37 (December  
20 13, 2007).

21 <sup>2</sup> See Schumm, *Geomorphic Character of the Upper Salt River 2* (January 2005) (EI 28)  
22 (“Schumm/Upper Salt”) (on the Upper Salt River, there are “many bedrock controls, including 18  
23 rapids and steep gradients ranging from 17 to 31 feet per mile”); *id.* at 12 (the river is “very steep and  
24 rapids are frequent”). “Evidence Items” already in the record before the Commission are referred to  
25 herein as “EI” for each particular watercourse.

26 <sup>3</sup> See JE Fuller/Hydrology & Geomorphology, Inc., *Arizona Stream Navigability Study for the Salt*  
27 *River: Granite Reef Dam to the Confluence with the White and Black Rivers* 4-15 (revised June  
2003) (EI 27) (“Fuller/Upper Salt”) (“Bedrock outcrops in the channel created waterfalls, rapids, and  
narrow canyons that would have been potential impediments to navigation for some types of boats  
such as keel boats, steamboats and powered barges.”); *id.* at 4-10, 5-6 (discussing the waterfalls,  
rapids, and canyons on the river); *id.* at 4-10 (“Historical accounts of boating the Upper Salt River  
describe the waterfalls and rapids, and sheer canyon reaches that lacked beaches or bars on which to  
land.”); *id.* at 5-6 (“Within the Upper Salt River study reach, the river is located almost entirely in  
steep bedrock canyons.”).

1 The evidence before the Commission regarding that 1873 trip contains descriptions of “rapids  
2 and boulders in the river” and “a can[y]on so narrow as to not admit the passage of a log.” *Id.*

3 Also like the rivers in *PPL Montana*, virtually all of the travel along the Upper Salt in  
4 pre-statehood days was by foot or on horseback and not in boats on the water. The Supreme  
5 Court in *PPL Montana* found that persons traveling in or along the river to avoid getting lost  
6 or to secure a supply of water for themselves or their horses did not prove navigability. *See*  
7 *Opinion*, at 21. Trappers such as James Ohio Pattie and Ewing Young are reported to have  
8 traveled along the Upper Salt, but all indications are that they did not do so in boats or canoes,  
9 even though those same trappers are known to have used canoes on the navigable Colorado  
10 River during these same trips.<sup>4</sup> In 1849, Lt. Beckwith reportedly passed along the Upper Salt,  
11 but his travels also were by foot or on horseback. *See Fuller/Upper Salt*, at 3-9; *Upper Salt*  
12 *Tr.* at 29-30 (Gilpin). Federal workers who built Roosevelt Dam also went up and down  
13 along the river during construction, but no evidence exists that any of them used boats on the  
14 river. *See Fuller/Upper Salt*, at 3-33; *Upper Salt Tr.* at 35-36 (Gilpin). All of this evidence  
15 weighs in favor of nonnavigability, as it did in *PPL Montana*.

16 Furthermore, the evidence presented to the Commission indicated that King Woolsey  
17 operated a salt works on the banks of the Upper Salt in the 1870s. *See Fuller/Upper Salt*, at 3-  
18 15; *Upper Salt Tr.* at 30-31 (Gilpin). The river would have been a direct water route to  
19 Phoenix if it had been navigable, but all evidence indicated that Mr. Woolsey had to pack the  
20 loads of heavy salt out of the Salt River Canyon by land, not by boat. *See Fuller/Upper Salt*,  
21 at 3-15; *Upper Salt Tr.* at 30-31 (Gilpin). If navigation on the Upper Salt River had been a  
22 “commercial reality” at or before statehood, *see Opinion*, at 24, Mr. Woolsey surely would  
23 have used that much easier and more economical means of transportation for his product.<sup>5</sup>

24 \_\_\_\_\_  
25 <sup>4</sup> *See Fuller/Upper Salt*, at 3-6; Reporter’s Transcript of Proceedings, Upper Salt River, at 29-30  
(October 20, 2005) (“Upper Salt Tr.”) (testimony by Dennis Gilpin, witness for the Arizona State  
26 Land Department).

27 <sup>5</sup> *See also Fuller/Upper Salt*, at 3-33 (discussing the fact that the completion of the Apache Trail in  
1906 gave the residents of the “Globe Mining District” a “much shorter wagon route to Phoenix than  
the existing road over the Pinal Mountains”).

1           The Supreme Court’s discussion of modern-day recreational boating and its effect on a  
2 determination of navigability is also instructive on the Upper Salt. The Court stated that the  
3 evidence necessary to show susceptibility to navigation must be consistent with “commercial  
4 reality.” *Opinion*, at 24. The Court also noted that, in order for modern-day boating to be  
5 persuasive, the watercraft must be “meaningfully similar to those in customary use for trade  
6 and travel at the time of statehood.” *Id.* at 23. The United States Forest Service submitted a  
7 report during the Upper Salt proceedings regarding recreational boating on the river.<sup>6</sup> The  
8 USFS Report shows that the watercraft used in modern times are not similar to those used in  
9 Arizona in 1912. “River-runners today, with their high-tech equipment and improved  
10 techniques, simply cannot be compared to the situation in 1912; to do so would be like  
11 comparing a delicate, bruise-prone apple with a thick-skinned, practically indestructible  
12 orange.” *Id.* at 7.

13           If anything, the evidence of modern-day boating attempts on the Upper Salt supports a  
14 finding of nonnavigability under the *PPL Montana* rule. The USFS Report stated: “The  
15 gradient of the river is one of the reasons for the wild ride encountered by today’s boaters.”  
16 *Id.* at 2-3. Even this recreational activity occurs only in limited circumstances, when flows  
17 are sufficient during wet periods. *See* Upper Salt Tr. at 19, 21 (Fuller). Mr. Fuller also  
18 reported and testified about the 1993 conviction of eight men who used explosives to alter the  
19 rapids at Quartzsite Falls on the Upper Salt, because “[t]hey were frustrated with the tie-ups at  
20 this point.” Upper Salt Tr. at 50 (Fuller); *see also* Fuller/Upper Salt, at 3-40. Prior to the  
21 destruction of Quartzsite Falls, for instance, “[e]ven with modern technology, boaters  
22 routinely portaged around this rapid.” USFS Report, at 3-4.

23           The limited accounts of boating attempts on the Upper Salt at, near, or before  
24 statehood were not consistent with “commercial reality.” *Opinion*, at 24. The types of boats  
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27 <sup>6</sup> *See* U.S. Forest Service, *Evaluation of Navigability at the Time of Statehood: Salt River* (January 1998) (EI 8) (“USFS Report”).

1 used in modern times are not the same as those available at statehood. *Se id.* at 23. The Upper  
2 Salt is not navigable.

3 **II. Effect of the *Opinion* on the Verde River Case**

4 The *Opinion* also supports a finding of nonnavigability on the Verde River, for many  
5 of the same reasons it supports a similar finding on the Upper Salt. Two large storage dams  
6 were built on the Verde, at locations with steep gradients and narrow channel widths, both of  
7 which make the river good sites for dam construction but poor streams for navigation.<sup>7</sup> With  
8 respect to the Verde River, the Commission itself made a factual determination that the river  
9 contains “steep canyons, rapids, exposed waterfalls, exposed boulders and other obstacles.”  
10 *Id.* at 48. The Commission also found: “In the area above Bartlett Dam, excluding the Verde  
11 Valley, the Verde River flows through some of the most rugged country in Arizona.” *Id.* at  
12 42.

13 In addition to these physical impairments to navigation at the dam sites and throughout  
14 much of its upper stretches, the Verde in its extreme lower portion and in the reach through  
15 the Verde Valley is a braided and highly variable stream, more like the Lower Salt.<sup>8</sup> Dr.  
16 Schumm opined that “the numerous rapids and bedrock impact on the river prevent  
17 navigation, but even more important are the very steep gradients ranging from 12 to 25  
18 ft/mile.”<sup>9</sup>

19 Also like the rivers at issue in *PPL Montana*, virtually all of the early exploration and  
20 travel on the Verde River was done along or in the river by foot or on horseback and not in  
21 boats. James Ohio Pattie and Ewing Young are reported to have traveled along the river, but  
22

23 <sup>7</sup> See ANSAC, Report, Findings and Determination Regarding the Navigability of the Verde River  
24 from Its Headwaters to the Confluence with the Salt River, at 6, 47 (March 24, 2008)  
25 (“ANSAC/Verde”).

26 <sup>8</sup> See Schumm, *Geomorphic Character of the Verde River*, at 2, 8, 14 (December 2004) (EI 30).

27 <sup>9</sup> *Id.* at 2, 14; see also Fuller, et al., *Arizona Stream Navigability Study for the Verde River, Salt River  
Confluence to the Sullivan Lake*, at 5-26 (June 2003) (EI 31) (“Fuller/Verde”); Reporter’s Transcript  
of Proceedings, at 18-19, 26-27 (January 18, 2006) (Pearthree); ANSAC/Verde, at 42-43.

1 not in boats.<sup>10</sup> Various military expeditions also traveled by foot or on horseback along the  
2 river. *See Fuller/Verde*, at 3-9. Under the Supreme Court’s ruling, this type of travel does not  
3 support a finding of navigability. *See Opinion*, at 21.

4       The *Opinion* is also instructive on the issue of present-day recreational boating on the  
5 Verde River. Jim Slingsluff, a white water boater, testified before the Commission regarding  
6 his exploits on the Verde. *See Verde Tr.* at 101-31; *see also ANSAC/Verde*, at 38. He  
7 showed slides from his trips, which depicted canoes and modern craft hung up on boulders,  
8 trapped in rocky areas, and overturned after encountering falls or rapids.<sup>11</sup> Mr. Slingsluff  
9 testified that there are at least 130 rapids along the river. *See Verde Tr.* at 125. In other  
10 publications, Mr. Slingsluff had noted that “aluminum, canvas, and wood boats are easily  
11 damaged and difficult to repair,” but modern “[p]lastic canoes are durable, slide easily over  
12 rocks, slip quietly through the water, and do not conduct heat or cold.”<sup>12</sup> Thus, although Mr.  
13 Slingsluff opined that the river can be traversed by experienced boaters in modern plastic  
14 boats, those boats are not “meaningfully similar to those in customary use for trade and travel  
15 at the time of statehood.” *Opinion*, at 23. “If modern watercraft permit navigability where  
16 the historical watercraft would not, . . . then the evidence of present-day boating has limited or  
17 no bearing on navigability at statehood.” *Id.*<sup>13</sup> The Verde is not navigable under the *PPL*  
18 *Montana* test.

### 19 **III. Effect of the *Opinion* on the Gila River Case**

20       The two primary witnesses in favor of navigability at the Gila River hearings were  
21 presented on behalf of Maricopa County, Donald Jackson and Hjalmar Hjalmarson. The

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22 <sup>10</sup> *See Verde Tr.* at 11 (Fuller); *Fuller/Verde*, at 3-2.

23 <sup>11</sup> *See Verde Tr.* at 106-13; *see also* Slingsluff, Power Point Presentation Slides (EI 34).

24 <sup>12</sup> *See* Slingsluff, “Shallow Streams: Liquid Paths into Wilderness,” *The Southwestern Sportsman*  
25 *National Magazine*, Winter 1990-91 (EI 34).

26 <sup>13</sup> *See also ANSAC/Verde*, at 37 (“Boat-making technology has improved since the time of statehood  
27 and . . . inflatable rubber or neoprene rafts and hard-shelled kayaks have become the more preferred  
modes of rafting.”). The Commission found that, even with these modern materials, “there is a  
requirement of portaging around certain rapids and falls” on the Verde. *Id.* at 39.

1 Supreme Court's clarification of the law in its *Opinion* relates directly to the testimony of  
2 both of those individuals and largely negates any effect of that testimony.

3 Dr. Jackson, for example, presented a Power Point presentation to the Commission that  
4 discussed the infamous "Yuma or Bust" expedition, when Buckey O'Neil and others  
5 unsuccessfully attempted to float a boat down the Gila River to Yuma in 1881.<sup>14</sup> In that  
6 report, Dr. Jackson acknowledged that "at times the boat had to be pushed by men wading in  
7 water 'up to their knees,'" but he insisted that this account was persuasive evidence of  
8 navigability at statehood. *Id.* In his oral testimony before the Commission, Dr. Jackson  
9 testified that he considered walking along while pushing a boat to be evidence of  
10 "navigation."<sup>15</sup> As discussed above and in the Lower Salt Memorandum, the Supreme Court  
11 thoroughly and expressly rejected such attempts to show navigability based upon someone  
12 dragging their boat in or alongside the river. *Opinion*, at 21.

13 In his report and testimony, Dr. Jackson also entirely ignored evidence related to  
14 portages on any of the purported float trips on the lower Gila River.<sup>16</sup> As the Court in *PPL*  
15 *Montana* found, however, the need for portages is important evidence that the river is  
16 nonnavigable. *Opinion*, at 18-19. "In most cases, they are [sufficient to defeat a finding of  
17 navigability] because they require transportation over land rather than over water . . . ." *Id.*<sup>17</sup>

18 The Supreme Court's opinion also affects the viability of Mr. Hjalmarson's opinion  
19 because his testimony consisted entirely of derived flow rates based upon numerous  
20 assumptions.<sup>18</sup> The Supreme Court in *PPL Montana* clarified that the "navigability in fact"

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22 <sup>14</sup> See Jackson, *Lower Gila River Navigability*, at 12 (November 16, 2005) (EI 21).

23 <sup>15</sup> See Reporter's Transcript of Proceeding, at 17:25 (November 17, 2005) ("Gila Tr. at [date]:[page]).

24 <sup>16</sup> See, e.g., Gila Tr. at 17:208; see also Fuller, et al., *Arizona Stream Navigability Study for the Gila*  
*River: Colorado River Confluence to the Town of Safford*, at IV-2 (June 2003) (EI 4).

25 <sup>17</sup> See Salt River Project's Opening Post-Hearing Memorandum, Case No. 03-007-NAV, at 15-17  
26 (February 6, 2006), for a more complete discussion of the flaws in Dr. Jackson's opinion and  
testimony.

27 <sup>18</sup> See Hjalmarson, *Navigability Along the Natural Channel of the Gila River* (October 25, 2002) (EI  
23) ("Hjalmarson Report").

1 test must be consistent with “commercial reality.” *Opinion*, at 24. Nothing in Mr.  
2 Hjalmarson’s testimony was based upon “commercial reality.” In fact, in a case involving  
3 Gillespie Dam on the lower Gila, where Mr. Hjalmarson was deposed regarding his opinions  
4 on the navigability of the river, he was asked: “[I]n your opinion, was the Gila River  
5 predictable enough for someone who wanted to conduct commercial navigation on it in 1912  
6 to be able to do so on a regular basis.”<sup>19</sup> He answered: “I don’t know.” *Id.*

7 In his report to the Commission, Mr. Hjalmarson also conceded that “about 70% of the  
8 time the flow is less than the mean annual flow. In terms of using a vessel on the Gila River,  
9 the lower flows such as the base runoff, may limit navigability for at least part of a typical  
10 year.” Hjalmarson Report, at 16. His written presentation also acknowledged that any  
11 attempted navigation of the river would be subject to difficulties associated with “obstacles”  
12 such as sand bars and riffles. *Id.* at 24-25.

13 Mr. Hjalmarson’s acknowledgment of the physical difficulties associated with any  
14 attempted navigation of the Gila River, although understated, was consistent with the other  
15 evidence. In an 1854 account of the Gila River, for instance, John R. Bartlett of the U.S.  
16 Army Corps of Topographical Engineers concluded: “It is doubtful whether the [Gila] can  
17 ever be navigated, except at its floods, and these are by no means regular.”<sup>20</sup> The State Land  
18 Department’s own consultant also reported that there was “no doubt” that obstacles to  
19 navigation existed on the Gila, such as broad shallow areas, sand bars, and rapids. *Id.* at 5-45.  
20 “These conditions may, in some cases, preclude or at least hinder the use of any boat,  
21 especially for travel in the upstream direction.” *Id.*

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25 <sup>19</sup> See Deposition of Hjalmar Hjalmarson, at 20, *A-Tumbling-T v. Paloma Investment* (January 16,  
2003) (EI 24).

26 <sup>20</sup> See Fuller, et al., *Arizona Stream Navigability Study for the Upper Gila River, Safford to the State*  
27 *Boundary, and San Francisco River, Gila River Confluence to the State Boundary*, at 3-14 (June  
2003) (EI 2); see also *id.* at 5, 8-4.



1 The evidence presented by the proponents of navigability on the Gila River does not  
2 comport with “commercial reality.” The river is not navigable under the standard set forth by  
3 the United States Supreme Court in *PPL Montana*.

4 **IV. Effect of the *Opinion* on the San Pedro River Case**

5 The effect of the *Opinion* on the San Pedro River is perhaps less direct than for the  
6 watercourses discussed above, but that is only because the evidence presented in support of  
7 navigability for the San Pedro was so sparse as to make the determination not even a close  
8 call. There is no evidence of prehistoric boating on the San Pedro and no evidence of use of  
9 the river by trappers or early military expeditions.<sup>21</sup> Prior to 1890, the river was “an  
10 irregularly flowing stream marshy in places, free-flowing in other places, entrenched or  
11 subsurface in still other places.” *Id.* at 3-1. “[T]here is no documentation of boating of any  
12 kind on the San Pedro River.” *Id.* at 3-21.

13 Under the standard set forth by the Supreme Court in the *Opinion* and in other prior  
14 cases, the San Pedro is not navigable. Any argument that the river is or ever was “navigable  
15 in fact” lacks support and is not consistent with “commercial reality.”

16 **V. Effect of the *Opinion* on the Santa Cruz River Case**

17 The analysis of the *Opinion* with respect to the Santa Cruz River is similar to that for  
18 the San Pedro—i.e., the discussion in the *Opinion* about the legal standard for navigability is  
19 not particularly important because the evidence of navigability for the Santa Cruz is so sparse.  
20 “No evidence was found to suggest that the early inhabitants of the [Santa Cruz River] valley  
21 used boats on the river.”<sup>22</sup> Spanish missionaries such as Father Kino conducted much of their  
22 work along the Santa Cruz, but no evidence exists that they ever used the river for navigation  
23 or commerce. *Id.* §§ 2, 3, at 18, 23-24. Prior to statehood, the river disappeared and then

24 \_\_\_\_\_  
25 <sup>21</sup> See JE Fuller Hydrology & Geomorphology, Inc., *Arizona Stream Navigability Study for the San*  
26 *Pedro River; Gila River Confluence to the Mexican Border*, at 2-9, 3-7 to 3-18 (revised September  
1997).

27 <sup>22</sup> See SFC Engineering Company, *Arizona Stream Navigability Study for the Santa Cruz River: Gila*  
*River Confluence to the Headwaters*, Executive Summary, at 3 (November 1996).

1 reappeared up through Tucson, and finally went underground north of Tucson at the county  
2 line to its confluence with the Gila. *Id.* at 28. "Only in the rainy season [did] it enjoy a steady  
3 flow. During the rest of the year it [sunk] into the sand in many places."<sup>23</sup> The Santa Cruz is  
4 not and never has been a navigable watercourse.

5 **VI. Summary and Requested Action**

6 The Upper Salt, Verde, Gila, San Pedro, and Santa Cruz Rivers are not now and never  
7 have been navigable. The Supreme Court's *Opinion* in *PPL Montana* makes it clear that any  
8 finding of navigability must be based upon "navigability in fact" and must comport with  
9 "commercial reality." That *Opinion* supports the findings of nonnavigability previously made  
10 by the Commission on these five watercourses.

11 DATED this 23rd day of March, 2012.

12 SALMON, LEWIS & WELDON, P.L.C.

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27 <sup>23</sup> See Leonard C. Halpenny and Philip C. Halpenny, *Review of the Hydrology of the Santa Cruz Basin in the Vicinity of the Santa Cruz-Pima County Line*, at 3-1 (1997) (EI 7).

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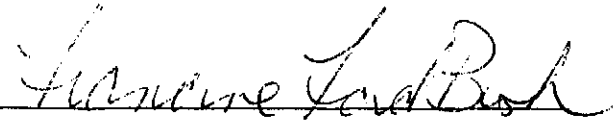
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