

# So, What Floats Your Boat?

An Overview of the Navigability  
Adjudication of the Verde River

July 15, 2015

# The Daniel Ball Test

- "Navigable" or "navigable watercourse" means 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.
  - A.R.S. 37-1101(5)
- Rooted in the Equal Footing Doctrine
- *ANSAC v. Winkleman* (AZ Ct. Appeals 2010)
- *PPL v. Montana* (U.S. Supreme Court 2012)
- Many other cases on navigability

# If a watercourse is navigable...

- The Arizona State Land Department owns the bed and banks to the high water mark.
- The land must be used consistent with the public trust values.
- The public trust values may include navigation, commerce, and fishing.

# If a watercourse is non-navigable...

- Private landowners alongside the watercourse own the banks and the bed to the center of the watercourse.
- Private landowners may utilize the bed and banks in whatever manner they choose, but are still required to follow any applicable laws such as the Clean Water Act.
- Private landowners may restrict access to the watercourse.

# Why might VRBP constituents care about navigability?

- If a watercourse is navigable, there is an argument that an amount of water must be maintained in the river to support navigation and the other public trust values.
- The adjudication has yet to reach this point.

# The AZ Process of Determining Navigability

- Arizona Navigable Stream Adjudication Commission (ANSAC)
  - Established in 1992 after AZ Appeals Court ruled it a violation for the Legislature to issue a blanket quitclaim.
  - 5 member Commission - 1 vacant position currently.
  - Has been disbanded and reformed over the years by the Legislature.
  - A.R.S. 37-1121 et. seq.

# Brief History of AZ Navigability

- 1985 - Governor Babbitt and ASLD Commissioner Lane proposed claiming public trust ownership of navigable watercourses.
  - 1985 - Cottonwood Verde case, eventually settles
- 1987 - Legislature responded by issuing blanket quitclaim.
- 1991 - AZ Ct. Appeals rules quitclaim violates gift clause and public trust doctrine. (*ACLPI v. Hassel*)
- 1992 - Legislature establishes ANSAC.
- 2001 - AZ Ct. Appeals rules ANSAC legislation still violates gift clause and public trust doctrine because of evidentiary limitations and presumptions for a determination. (*Defenders of Wildlife v. Hull*)
- 2001 - Legislature revises statutes.
- 2008-9 - ANSAC finds Gila, Verde, Salt and other rivers non-navigable.
- 2010 - AZ Ct. Appeals rules ANSAC did not consider natural and ordinary condition of the river and remands case. (*Winkleman v. ANSAC*)
- 2014-16 - ANSAC rehearing cases.

# What Happened at the Verde Hearing?

- ASLD (State) presented evidence of navigability.
  - ASLD commissioned navigability studies that incorporated history, hydrology, geomorphology, and modern evidence.
  - Experts advised that the Gila, Salt, Verde are navigable under Daniel Ball test.
  - State presented:
    - Chief Expert Jon Fuller: Geomorphologist/Hydrologist/Team Leader for Navigability Reports/Boater
    - Don Farmer: Verde Boater
    - Richard Lynch: Verde Commercial Operator
    - Brad Dimock: AZ Historic Boat Builder



# What Happened at the Verde Hearing?

- ACLPI presented evidence of navigability.
  - Win Hjalmarson
- Other parties presented evidence of non-navigability.
  - SRP, FMI, Fort McDowell Y-A Nation, Verde Y-A Nation
  - Historians
  - Hydrologist
  - Geomorphologist
  - Yavapai – Apache Elder

# What Happened at the Verde Hearing?

- Hearings lasted about 15 days over several months.
- Witnesses testified before ANSAC and were cross-examined.
- Interesting science and history about the Verde presented by both sides.

# So, where are we today?

- Currently in the written briefing period for Verde
- Final Closing Oral Argument Dec. 15 at 9 AM
  - AZ State Senate Hearing Room 1
  - Public may come and may comment
  - Evidence submission is now closed to the parties.
- ANSAC will most likely vote on navigability that day after the closing arguments.
- ANSAC Statutes: A.R.S. 37-1101 through 1156
- ANSAC Website: <http://www.ansac.az.gov/>
  - All evidence, all briefs (Verde opening briefs due Sept. 28)



Questions?