

*1072 WHO OWNS THE LAND BENEATH THE VERDE RIVER?

INTRODUCTION

On December 15, 2015, the Arizona Navigable Streams Adjudication Commission (ANSAC) will hold a public hearing to determine whether the Verde River was a navigable river when Arizona became a state on February 14, 1912.¹ If a watercourse was navigable at statehood the land beneath it became state land; otherwise the owners of the riparian land adjacent to the watercourse hold title to its banks and bed.² In 2008, ANSAC determined that the Verde River was not navigable at statehood.³ The upcoming hearing follows a remand of this decision by the Superior Court of Maricopa, Arizona.⁴ The Superior Court cited the Court of Appeals decision in *Winkleman* to remand ANSAC's finding that the Salt River was not navigable.⁵

Proponents of navigability bear the burden of proof⁶ and include the Arizona Attorney General, representing the Arizona State Lands Department and the State Land Commissioner as an advocate for the Public Trust; Arizona Center for Law in the Public Interest, attorneys for Defenders of Wildlife; and Maricopa County.⁷ Parties arguing against a finding of navigability are riparian land owners, including: Freeport Minerals Corporation, the Salt River Project, the Yavapai-Apache Nation, the Fort-McDowell Yavapai Nation, and the Salt River Pima-Maricopa Indian Community.⁸ This comment discusses the test that ANSAC must apply to determine navigability for title.

*1073 I. NAVIGABILITY FOR TITLE

ANSAC is charged with determining which, if any, of Arizona's 39,039 rivers and streams were navigable at statehood.⁹ At statehood, under the Equal Footing Doctrine, title to the beds and banks of navigable rivers passed from the United States to the States to be held in public trust.¹⁰

II. THE DANIEL BALL TEST

Because title to navigable waters and their beds was constitutionally reserved to the states, "questions of navigability for determining state riverbed title are governed by federal law."¹¹ The test for navigability for title was first stated by the United States Supreme Court in *The Daniel Ball*.¹² The *Daniel Ball* test is a disjunctive two-pronged test that determines navigability from evidence that a waterway was either actually used, or susceptible to use, for trade and travel.¹³ An argument for susceptibility for trade and travel fails when the inference is not supported by either historical or present day evidence of actual use.¹⁴

While the Supreme Court emphasized in *The Daniel Ball* that navigability must be determined when a river is in its "ordinary condition,"¹⁵ in *The Montello*, the Court explained that the river must be in its "natural" state.¹⁶ The Court emphasized the

importance of susceptibility to navigation even when natural barriers posed some difficulties:

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway ... If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.¹⁷

*1074 The Ninth Circuit has held that it is well established that short stretches requiring portage around barriers to navigation do not preclude a finding of navigability: “navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages.”¹⁸

The Court has clarified that the *Daniel Ball* test must be applied at the time of statehood when the river was in its natural state and ordinary condition. For example, in *United States v. Utah*, the Court stated: “the title to the beds of rivers ... passed to that state when it was admitted to the Union, if the rivers were then navigable.”¹⁹ Likewise, in *Alaska v. Ahtna, Inc.*, the Ninth Circuit Court held that “[t]he test is whether the river was susceptible of being used as a highway for commerce at statehood, not whether it was actually so used.”²⁰

Arizona courts have also addressed The *Daniel Ball* test and Arizona has codified it in the Arizona Revised Statutes:

“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.²¹

In its most recent decision on navigability for title, the Arizona Court of Appeals focused on the meaning of the terms “ordinary” and “natural.”²² The Court defined “ordinary” as “usual, absent major flooding or drought,” and “natural” as “without man-made dams, canals, or other diversions.”²³ Therefore, when determining navigability for purposes of title in Arizona, courts must consider “whether the river would have been navigable had it been in its ordinary and natural condition on February 14, 1912.”²⁴

***1075 III. USING MODERN DAY BOATING AS EVIDENCE OF NAVIGABILITY**

In its most recent decision on navigability for title, the United States Supreme Court has confirmed its previous decisions and clarified that the susceptibility prong of the *Daniel Ball* test may be satisfied by evidence of present day boating, but only when the evidence is of boating by watercraft ““meaningfully similar” to those in use at statehood and on a river in a physical condition “not materially different” from its condition at statehood.”²⁵ Arizona and Ninth Circuit courts have recognized recreational use that generates revenue as “travel for profit” and therefore commerce.²⁶

IV. NAVIGABILITY IS DETERMINED SEPARATELY FOR EACH SEGMENT OF A RIVER

Recognizing that variations in physical and climatic conditions between a river’s headwaters and its mouth produce corresponding variations in susceptibility to navigation, the Supreme Court divides rivers into segments. “The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded.”²⁷ Geologic features can be useful landmarks for demarcation of segments and identification of changes in navigability.²⁸ The navigability of each segment is a separate question of fact.²⁹ For example, in *Utah*, the court found some segments of the Colorado River navigable and others nonnavigable.³⁰ The Verde River has been divided into five segments to satisfy this requirement.³¹

V. CONCLUSION

For each of the five segments of the Verde River, ANSAC must determine whether the evidence presented meets either prong of the *Daniel Ball* test.³² Under the first prong of the *Daniel Ball* test, ANSAC must consider whether historical evidence of boating on the Verde River before statehood meets the burden of proof for navigability.³³ If not, ANSAC must make two

determinations to consider whether the evidence presented satisfies the second prong of the *Daniel Ball* test.³⁴ First, based on evidence from geological and hydrological *1076 studies of the river, ANSAC must determine the natural and ordinary condition of the river at statehood.³⁵ Second, ANSAC must determine whether the river was then navigable, or susceptible to navigation, based on evidence of present day navigation in boats “meaningfully similar” to boats in use at statehood navigating the river in a condition “not materially different” to that at statehood.³⁶

Regardless of ANSAC’s decision and whether or not it is appealed, legal questions will remain regarding the exercise of property rights by titleholders to the beds and banks of the Verde River. Future litigation on behalf of mining companies, Indian Nations, farmers, developers, recreational boaters, tour operators, and other interest groups is likely. All of these stakeholders have established interests based on their understanding of who holds title to the land between the normal high-water marks of the Verde River--an understanding that, for some stakeholders, will conflict with ANSAC’s decision.

Footnotes

^{a1} Simon is a second-year law student at the James E. Rogers College of Law, where he serves as an Associate Editor on the Arizona Journal of Environmental Law & Policy. He graduated from the University of Tennessee at Chattanooga in 2014 with a Bachelor of Science degree in Environmental Science.

¹ ANSAC, GENERAL INFORMATION, COMMISSION/ANSAC HEARINGS, [HTTP://WWW.ANSAC.AZ.GOV](http://www.ansac.az.gov) (Oct. 16, 2015).

² State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm’n, 224 Ariz. 230, 234, 229 P.3d 242, 246 (Ct. App. 2010).

³ ANSAC REPORT, FINDINGS AND DETERMINATION REGARDING THE NAVIGABILITY OF THE VERDE RIVER FROM ITS HEADWATERS TO THE CONFLUENCE WITH THE SALT RIVER, 3, 53-54 <http://www.ansac.az.gov/UserFiles/File/pdf/finalreports/Verde%20River.pdf>

⁴ MARICOPA COUNTY AND THE FLOOD CONTROL DISTRICT OF MARICOPA COUNTY, POST-HEARING OPENING BRIEF REGARDING NAVIGABILITY OF VERDE RIVER, 1, <http://www.ansac.az.gov/UserFiles/PDF/10012015/VerdeOpeningMaricopaCounty.pdf>.

⁵ See *Winkleman*, 229 P.3d 242 at 246.

⁶ See A.R.S. § 37-1128(A).

⁷ ANSAC, NEW CASE LEGAL MEMOS, <http://www.ansac.az.gov/RemandCaseLegalMems.asp>.

⁸ *Id.*

⁹ ANSAC, [HTTP://WWW.ANSAC.AZ.GOV](http://www.ansac.az.gov) (OCT. 16, 2015); A.R.S. §§ 37-1121 (Supp. 2009), -1123(A), - 1128(A); See also State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm’n, 224 Ariz. 230, 234, 229 P.3d 242, 246 (Ct. App. 2010).

¹⁰ *Mumford v. Wardwell*, 73 U.S. 423, 436, 18 L. Ed. 756 (1867); *Pollard v. Hagan*, 44 U.S. 212, 11 L. Ed. 565 (1845); *Arizona Ctr. For Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 364-66, 837 P.2d 158, 166-68 (Ct. App. 1991).

¹¹ *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227, 182 L. Ed. 2d 77 (2012)(citing *United States v. Utah*, 283 U.S. 64, 75, 51 S.Ct. 438, 75 L.Ed. 844 (1931)); *United States v. Oregon*, 295 U.S. 1, 14, 55 S.Ct. 610, 79 L.Ed. 1267 (1935).

- 12 The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1871).
- 13 *Id.*
- 14 United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698, 19 S. Ct. 770, 773, 43 L. Ed. 1136 (1899) (“The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river.”).
- 15 *See The Daniel Ball*, 77 U.S. at 563.
- 16 The Montello, 87 U.S. 430, 441-43, 22 L. Ed. 391 (1874).
- 17 *Id.*
- 18 State of Alaska v. United States, 662 F. Supp. 455, 467 (D. Alaska 1987) *aff’d sub nom.* State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989)(citing Economy Light & Power Co. v. United States, 256 U.S. 113, 122, 41 S.Ct. 409, 412, 65 L.Ed. 847 (1921)); *accord* North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus, 671 F.2d 271, 277 (8th Cir.1982), *rev’d on other grounds sub nom.* Block v. North Dakota ex rel. Bd. of Univ. and School Lands, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983); *See* United States v. Utah, 283 U.S. 64, 86-87, 51 S.Ct. 438, 444-45 75 L.Ed. 844 (1931); United States v. Holt State Bank, 270 U.S. 49, 56-57, 46 S.Ct. 197, 199-200, 70 L.Ed. 465 (1925) (waterbody at issue found navigable despite difficulties to navigation posed by sand bars and vegetation); Oregon v. Riverfront Protection Ass’n., 672 F.2d 792, 795 (9th Cir.1982) (portion of McKenzie river found navigable as a matter of law despite fact that portion of river at issue at times had exposed gravel bars, boulders).
- 19 United States v. Utah, 283 U.S. 64, 75-76, 81, 51 S. Ct. 438, 440, 443, 75 L. Ed. 844 (1931), *see also* Oklahoma v. Texas, 258 U.S. 574, 586, 42 S. Ct. 406, 411, 66 L. Ed. 771 (1922); *see also* PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1228, 1233, 182 L. Ed. 2d 77 (2012); *see also* United States v. Holt State Bank, 270 U.S. 49, 56, 46 S. Ct. 197, 199, 70 L. Ed. 465 (1926).
- 20 Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989).
- 21 A.R.S. Ann. § 37-1101.
- 22 State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm’n, 224 Ariz. 230, 241, 229 P.3d 242, 253 (Ct. App. 2010).
- 23 *Id.*
- 24 *Id.* at 254.
- 25 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1228, 1233-34, 182 L. Ed. 2d 77 (2012).
- 26 Defenders of Wildlife v. Hull, 199 Ariz. 411, 424, 18 P.3d 722, 735 (Ct. App. 2001)(citing Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir.1989)).
- 27 *See PPL Montana*, 132 S. Ct. at 1229.

28 *Id.* at 1230.

29 *Id.*

30 United States v. Utah, 283 U.S. 64, 79-81, 51 S.Ct. 438, 442-43 75 L.Ed. 844 (1931).

31 ANSAC, ALL RIVERS SEGMENT MAP, REMAND CASE EVIDENCE -- VERDE RIVER,
http://www.ansac.az.gov/UserFiles/PDF/05082014/X001_SLD%20by%C20Attorney%20General/16%20-%20All%20Rivers%20Segment%20Map.pdf

32 The Daniel Ball, (10 Wall.) 557, 563, 19 L.Ed. 999 (1871).

33 A.R.S. § 37-1101.

34 *Id.*

35 *Id.*

36 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1228, 1233-34, 182 L. Ed. 2d 77 (2012).