

1 John B. Weldon, Jr., 003701  
2 Mark A. McGinnis, 013958  
3 Scott M. Deeny, 021049  
4 **SALMON, LEWIS & WELDON, P.L.C.**  
5 2850 East Camelback Road, Suite 200  
6 Phoenix, Arizona 85016  
7 (602) 801-9060  
8 [jbw@slwplc.com](mailto:jbw@slwplc.com)  
9 [mam@slwplc.com](mailto:mam@slwplc.com)  
10 [smd@slwplc.com](mailto:smd@slwplc.com)

11 *Attorneys for Salt River Project Agricultural*  
12 *Improvement and Power District and Salt*  
13 *River Valley Water Users' Association*

**received**

9/2/12



14 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
15 **ADJUDICATION COMMISSION**

16 In re Determination of Navigability of  
17 the San Pedro River

No. 03-004-NAV

**SALT RIVER PROJECT'S  
MEMORANDUM REGARDING  
WHETHER SAN PEDRO RIVER  
WAS NAVIGABLE IN ITS  
"ORDINARY AND NATURAL  
CONDITION"**

18 Pursuant to the Commission's order at its meeting held on June 29, 2012, the Salt  
19 River Project Agricultural Improvement and Power District and Salt River Valley Water  
20 Users' Association (collectively, "SRP") submit their memorandum regarding whether the  
21 San Pedro River ("San Pedro") was navigable in its "ordinary and natural condition." *See*  
22 *State v. Arizona Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App.  
23 2010) ("*State v. ANSAC*"). The San Pedro was not navigable in its "ordinary and natural  
24 condition," or in any other condition.

25 **I. The Proponents of Navigability Bear the Burden of Proving that the San Pedro is**  
26 **Navigable.**

27 In prior decisions, the Arizona courts have held the proponents of navigability bear the  
burden of proving that a river is navigable. *See Arizona Ctr. for Law in the Public Interest v.*

1 *Hassell*, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165 n.10 (App. 1991); *Land Dep't v.*  
2 *O'Toole*, 154 Ariz. 43, 46 n.2, 739 P.2d 1360, 1363 n.2 (App. 1987); *Defenders of Wildlife v.*  
3 *Hull*, 199 Ariz. 411, 420, 18 P.2d 722, 731 (App. 2001). The Arizona statutes further support  
4 this allocation of the burden. In order for the Commission to determine that a particular  
5 watercourse is "navigable," the proponents of navigability must establish that fact by a  
6 "preponderance of the evidence." See A.R.S. § 37-1128(A). If sufficient evidence is not  
7 presented to show navigability for a particular watercourse, the Commission must find the  
8 watercourse non-navigable. *Id.*

9  
10 **II. The Court of Appeals' Decision Likely Requires the Commission to Consider the**  
11 **San Pedro in Its "Ordinary and Natural Condition."**

12 At least for purposes of the present phase of this proceeding, the Arizona Court of  
13 Appeals' decision in *State v. ANSAC* likely is controlling law that the Commission must  
14 follow. 224 Ariz. at 230, 229 P.3d at 242.<sup>1</sup> Relying in large part upon the dictionary  
15 definition of "natural," the court found that the Lower Salt River must be considered as if it  
16 were "untouched by civilization." *Id.* at 241, 229 P.3d at 253. The court stated: "[W]e  
17 conclude that ANSAC was required to determine what the River would have looked like on  
18 February 14, 1912, in its ordinary (i.e., usual, absent major flooding or drought) and natural  
19 (i.e., without man-made dams, canals, or other diversions) condition." *Id.* Although the court  
20 correctly determined that ANSAC (in its September 2005 final report) had taken into  
21 consideration the impact of Roosevelt Dam on the character of the Lower Salt, *id.* at 240, 229  
22 P.3d at 253, the court found insufficient evidence in the report to conclude that the  
23 Commission also had considered the impact of other man-made dams and diversions. *Id.*

24 In addressing what constituted the "ordinary and natural condition" of the Lower Salt,  
25 the Court of Appeals first started with the time "before the Hohokam people arrived many

26 <sup>1</sup> The Arizona Supreme Court has not yet addressed the "ordinary and natural" issue. The Court  
27 denied discretionary review of the Court of Appeals' decision in *State v. ANSAC*, and the case was  
remanded to the superior court and then to the Commission for further proceedings. 224 Ariz. at 245,  
229 P.3d at 257.

1 centuries ago and developed canals and other diversions that actively diverted the River.”  
2 *State v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254. Recognizing that “little if any historical  
3 data exists from that period” and that the Lower Salt “largely returned to its natural state”  
4 after the Hohokam disappeared, the court found that “the River could be considered to be in  
5 its natural condition after many of the Hohokam’s diversions had ceased to affect the River,  
6 but before the commencement of modern-era settlement and farming in the Salt River Valley.  
7 . . .” *Id.*

8 Although the Court of Appeals determined that “evidence from that early period  
9 should be considered by ANSAC as the best evidence of the River’s natural condition,” 224  
10 Ariz. at 242, 229 P.3d at 254, the court also recognized that evidence from later (or earlier)  
11 periods could have probative value. *Id.* at 243, 229 P.3d at 255. ANSAC has authority to  
12 consider such evidence and to give it the appropriate weight. *Id.* The court rejected  
13 arguments by the proponents of navigability that any evidence dated after the commencement  
14 of man-made diversions should be thrown out and disregarded. “Even if evidence of the  
15 River’s condition after man-made diversions is not dispositive, it may nonetheless be  
16 informative and relevant.” *Id.*

### 17 **III. Evidence in the Record**

18 The Arizona State Land Department (“SLD”) hired technical consultants to perform a  
19 detailed and comprehensive study of the San Pedro River.<sup>2</sup> This study focused on two  
20 questions: (1) Was the San Pedro River ever used for navigation? and (2) Was the river  
21 susceptible to being used for navigation? *Id.* Executive Summary, at ii. As discussed below,  
22 both questions must be answered in the negative—i.e., the San Pedro River neither was  
23 actually used nor was susceptible to being used as a “highway” for commerce, in its “ordinary  
24 and natural condition” or otherwise.

25 . . .

26 \_\_\_\_\_  
27 <sup>2</sup> See JE Fuller Hydrology & Geomorphology, Inc., *Arizona Stream Navigability Study for the San  
Pedro River: Gila River Confluence to the Mexican Border* (revised September 1997) (“Fuller”).

1           **A.     History of the San Pedro**

2           None of the historical evidence supports a finding of navigability. To the contrary, all  
3 of the evidence weighs in favor of non-navigability.

4                     **1.     The San Pedro during prehistoric times**

5           The report submitted by the SLD consultant details archaeological evidence regarding  
6 occupation near the San Pedro in the period before settlement by non-natives. There is  
7 documented evidence of inhabitation in the San Pedro Valley dating back to approximately  
8 9,550 B.C., over 11,000 years ago. *See Fuller, supra*, at 2-5. Early inhabitants along the river  
9 utilized its water for agricultural purposes, such as floodwater farming in the low areas. *Id.* at  
10 2-6, 2-9. There is also limited evidence of prehistoric irrigation practices. *Id.* at 2-9.

11           Early populations settled in the San Pedro River Valley using river water as their  
12 lifeline. The SLD consultant concluded, however, that “[n]o evidence of prehistoric boating  
13 on the San Pedro River, or of river conditions that would support navigation, was identified  
14 during the archaeological investigation and literature search.” *Id.* at 2-9. Thus, despite  
15 human presence in the San Pedro River Valley and along the river for thousands of years, no  
16 evidence exists that any of those communities ever used or even tried to use the San Pedro  
17 River as a “highway for commerce.”

18                     **2.     Early exploration and settlement of the San Pedro River Valley**

19           Under the Court of Appeals’ standard, evidence of the time when early explorers  
20 ventured into the area is perhaps “the best evidence of the River’s natural condition.” *See*  
21 *State v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254. Indians, Spanish explorers and  
22 missionaries, and American trappers and travelers flocked to the San Pedro River Valley and  
23 traveled along the river, yet none used the San Pedro as a means of transportation or  
24 commerce.

25           Historic accounts demonstrate an increase in traveling and settling along the San Pedro  
26 River Valley beginning in the sixteenth century, yet no evidence exists that any of these  
27 people ever boated upon the river. In the 1500s, there were explorers in the area, such as

1 Spanish explorer Fray Marcos de Niza. *See Fuller, supra*, at 3-7. The Sobaipuri Indians, an  
2 agricultural tribe, occupied the area until warfare with the Apaches in 1763 forced them to the  
3 Santa Cruz River. *Id.* The Sobaipuri had villages along the river with as many as 500 people  
4 each. *Id.* Spanish missionaries, such as Father Eusebio Kino, established missions in the area  
5 in 1691. *Id.* Trapper James Ohio Pattie made two expeditions along the San Pedro between  
6 1824 and 1828, referring to it as “Beaver River” due to the abundance of beaver. *Id.* at 3-10.

7 There is also evidence of stage transportation companies operating along the San Pedro  
8 in 1880. *See Fuller, supra*, at 3-23. There is no evidence in the record, however, of anyone  
9 using the San Pedro for commerce. *Id.* Surely, if the San Pedro were navigable, an  
10 entrepreneurial individual would have capitalized on the market of water transportation for  
11 recreation or commerce, just as was done with stagecoach (and, later, railroad) transportation.  
12 Indeed, the San Pedro was an important transportation route through southern Arizona, but  
13 travel was alongside the river via foot or horseback. *Id.*

14 The early descriptions of the San Pedro by explorers, trappers, and travelers also  
15 support a finding that the river was not navigable. In 1846, during the Mexican War, military  
16 expedition teams led by Stephen Watts Kearny crossed the river, describing it as “an  
17 insignificant stream a few yards wide and only a foot deep.” *See Fuller, supra*, at 3-13.  
18 Another member of the group reported that the San Pedro was called “Hog River” due to the  
19 amount of wild hogs found on it. *Id.* Philip St. George Cooke, commander of the Mormon  
20 Battalion, also traveled alongside the San Pedro during the mid-nineteenth century for more  
21 than fifty miles. *Id.* Despite his boating attempts on other rivers, no evidence exists that he  
22 ever made any attempts to boat upon the San Pedro. *Id.* Engineers surveying a wagon road in  
23 1858 commented that the San Pedro “is not continuous all the year, but in the months of  
24 August and September disappears in several places, rising again, however, clear and limpid.”  
25 *Id.* at 3-18.

26 The evidence shows that the San Pedro was not susceptible to being used as a  
27 “highway for commerce.” Studies indicate that, prior to 1890, the river was “an irregularly

1 flowing stream, marshy in places, free-flowing in other places, entrenched or subsurface in  
2 still other places.” Fuller, *supra*, at 3-1. The SLD’s consultant concluded that “there is no  
3 documentation of boating of any kind on the San Pedro River.” *Id.* at 3-21.

4           3.     **Boating attempts on the San Pedro**

5           There are no published accounts of boating on the San Pedro prior to statehood. *See*  
6 Fuller, *supra*, at G-4. There is, however, one unconfirmed anecdotal story of a ferry service  
7 on the river. Dora Ohnesorgen and Nedra Sunderland recalled that Ohnesorgen’s grandfather  
8 had a ferry operation on the San Pedro near Pomerene. *Id.* at 4-3. This supposed operation  
9 was not documented in any newspaper article or any other source, nor was there a timeframe  
10 of when this business was thought to have operated or any other shred of evidence confirming  
11 this story. *Id.* at 8-3. Regardless, one account based entirely on anecdotal evidence is not  
12 sufficient to satisfy the burden of proof for navigability. In fact, during interviews with local  
13 residents, there was not one account of commercial or recreational boating (other than the  
14 unverified story above) on the San Pedro. *Id.* at 4-3. Further, the Winkelman National  
15 Resource Conservation District reported to the Commission, “It is the overwhelming  
16 consensus that the San Pedro River has never been a ‘navigable’ waterway.”<sup>3</sup> The Chairman  
17 of the district reported his family came to the area in the 1880s and, with part of family ranch  
18 on the San Pedro, there were no stories of boating on it. *Id.* The overwhelming weight of the  
19 evidence shows that the river is not and was never navigable.

20           B.     **Climate, hydrology, and geomorphology**

21           The other evidence presented to the Commission is similarly insufficient to constitute a  
22 preponderance of the evidence in favor of navigability. This evidence is, like the evidence  
23 relating to early historical events, particularly persuasive under the Court of Appeals’  
24 standard because it clearly relates to the “ordinary and natural condition” of the river. *See*  
25 *State v. ANSAC*, 224 Ariz. at 241, 229 P.3d at 253. The climate of the San Pedro River

26 \_\_\_\_\_  
27 <sup>3</sup> Letter from Virgil E. Mercer, Chairman, Winkelman Natural Resource Conservation District, to  
Navigable Stream Adjudication Commission (July 17, 1996) [EI 4].

1 Valley is typical of a desert climate, with violent summer thunderstorms and sporadic rain in  
2 the winter, rather than the type of weather that would produce a regularly flowing stream.  
3 The hydrologic data demonstrates that the San Pedro could not be relied upon for regular  
4 streamflow to support a "highway for commerce." The geomorphologic evidence indicates  
5 that the river had a widening, entrenched channel with natural impediments that would have  
6 inhibited navigation.

7 The San Pedro River Valley is semi-arid. *See Fuller, supra*, at 5-4. Precipitation  
8 occurs mainly "during the summer when moisture entering Arizona from the south triggers  
9 convective thunderstorms." *Id.* at 5-5. During some years, intense rains hit the valley during  
10 September and October "that commonly result in heavy rain and flooding." *Id.*

11 The hydrologic character of the San Pedro precludes it from being susceptible to  
12 navigation. Prior to statehood, the average flow rates at the Charleston station from 1904-  
13 1906 varied from 3 cubic feet per second ("cfs") in June to 233 cfs in August, summarized on  
14 Table 7-6a. *Id.* at 7-13. This extreme variation in the monthly average demonstrates the  
15 volatility of the San Pedro.

16 There was limited hydrologic data at or before statehood. *See Fuller, supra*, at 7-5.  
17 Following statehood, streamflow data is more reliable and documented, as there are nine  
18 gaging stations on the San Pedro River. Table 7-5 of the Fuller Report summarizes monthly  
19 and average annual flow rates gathered from stream gage data. *Id.* at 7-9. For all stations  
20 documented, there is not one with an average annual flow of greater than 60 cfs. *Id.* The data  
21 demonstrates that higher flow rates (i.e., between 100-200 cfs) occur only during the monsoon  
22 season of July and August. *Id.* At some points in the year (during April and May), at least  
23 one of the gages had absolutely no streamflow. *Id.* The consultant concluded that the water  
24 flows are "highly variable, with the major component of flow resulting from direct response  
25 to precipitation." *Id.* at 7-10. Due to the radical changes in streamflow, no one could rely on  
26 the San Pedro as a daily source of transportation or commerce.

27

1 Floods also have affected the average of streamflow rates on the San Pedro.  
2 Historically, large floods began in the 1880s and 1890s and arroyo cutting began thereafter.<sup>4</sup>  
3 The 1890 flood, clearly a “natural” event, has been referred to as causing the “death of the  
4 San Pedro River” because it “removed or drained numerous swampland areas along its  
5 course.” See Fuller, *supra*, at 7-19. Floods prior to statehood largely contributed to the  
6 entrenchment of the San Pedro River. *Id.* at 5-11. Typically, the flood streamflow rates range  
7 from 31,000 cfs up to 135,000 cfs. *Id.* The influx of water due to flooding has likely skewed  
8 average flow rates upwards.

9 The geomorphologic data further indicates that the San Pedro River was not navigable,  
10 nor susceptible to navigability. Although the upper reach can be characterized as having a  
11 partly perennial and partly intermittent flow, the lower reach has an entrenched, broad, and  
12 braided channel with only isolated reaches of perennial flow. See Fuller, *supra*, at 7-1;  
13 Wood, *supra*, at 35. In 1854, a railroad surveyor commented that the San Pedro flows “at  
14 about twelve feet below the surface of its banks, which are nearly vertical, and of a  
15 treacherous miry soil, rendering it extremely difficult to approach the water, now muddy and  
16 forbidding.” Fuller, *supra*, at 3-16. Arroyo cutting “is thought to have been substantially  
17 complete before statehood.” *Id.* at F-7.

18 Modern geomorphologic characteristics demonstrate that the San Pedro is not  
19 susceptible to navigability. The upper reach of the San Pedro is characterized by a “variably  
20 entrenched channel” and “coarse-grained point bars that deflect streamflow.” See Fuller,  
21 *supra*, at 5-7. The channel is additionally described as “both braided and meandering: the low  
22 flow channel is braided with several branching channels, but the high flow channel is  
23 sinuous.” *Id.* The lower reach has a wide, entrenched channel. *Id.* at 5-8. The  
24 geomorphologic descriptions of the river highlight characteristics not conducive to  
25 navigation.

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27 <sup>4</sup> See Fuller, *supra*, at 3-12; see Michelle Lee Wood, *Historical Channel Changes Along the Lower San Pedro River*, at 1 (August 1997) (“Wood”).



1 **IV. The San Pedro Was Not Navigable in Its “Ordinary and Natural Condition.”**

2 Upon reviewing the evidence and specifically considering the “ordinary and natural  
3 condition” of the San Pedro, the Commission should again find it non-navigable. “[A] river is  
4 navigable in law when it is navigable in fact.” *Muckleshoot Indian Tribe v. FERC*, 993 F.2d  
5 1428, 1431 (9th Cir. 1993). Thus, the Commission must consider all of the evidence in the  
6 record before it. When the Commission reviews the evidence submitted, and considers the  
7 totality of that evidence, it must again determine that the San Pedro never has been used as a  
8 “highway for commerce” and was not, in its “ordinary and natural condition” (or in any other  
9 condition), susceptible to being used as a highway for commerce.

10 **A. The San Pedro has never been used as a “highway for commerce.”**

11 A watercourse can meet the test for “navigability” under the Arizona statute and the  
12 case law if it satisfies either of two elements: (1) If it was actually used as a “highway for  
13 commerce,” or (2) if it, in its “ordinary and natural condition” at the time of statehood, was  
14 “susceptible to being used” as a “highway for commerce.” *See* A.R.S. § 37-1101(5).<sup>5</sup>  
15 There are no indications that the San Pedro was ever used as a “highway for commerce.”  
16 Prehistoric research found evidence of human populations in the area for over 11,000 years,  
17 yet no evidence of boating on the San Pedro during the history of inhabitation of the area. *See*  
18 Section III(A)(1), *supra*. Likewise, none of the historical research revealed that early  
19 explorers, missionaries, trappers, or travelers in the San Pedro Valley ever used the river for  
20 boating or for commerce. *See* Section III(A)(2), *supra*.

21 **B. The San Pedro was not, in its “ordinary and natural condition,”**  
22 **susceptible to being used” as a “highway for commerce.”**

23 Because the evidence shows that the San Pedro was never actually used as a “highway  
24 for commerce,” the only way it can be considered navigable is if it was “susceptible” to such  
25

26 <sup>5</sup> “For state title purposes under the equal-footing doctrine, navigability is determined at the time of  
27 statehood . . . and based on the ‘natural and ordinary condition’ of the water.” *PPL Montana*, 132 S.  
Ct. at 1228.

1 use. No evidence exists in the record to show that the San Pedro, in its “ordinary and natural  
2 condition” or in any other condition, was capable of acting as “a corridor or conduit within  
3 which the exchange of goods, commodities or property or the transportation of persons may  
4 be conducted.” A.R.S § 37-1101(3) (defining “highway for commerce”).

5 Historical descriptions and modern stream data lead to the conclusion that the San  
6 Pedro was not susceptible to navigation. During the nineteenth century, when explorers,  
7 missionaries, and travelers came to the San Pedro River Valley, the river was described as  
8 “insignificant” and “not continuous.” See Section III(A), *supra*. There is evidence that the  
9 same early explorers in the San Pedro River Valley attempted to boat on rivers other than the  
10 San Pedro. See *id*. Thus, the absence of any records of explorers, missionaries, or travelers  
11 boating on the San Pedro leads one to believe that it simply was not boatable.

12 The San Pedro’s flow is not continuous or reliable throughout the year; thus, it was not  
13 “susceptible” to navigation. Given the weight of the data and evidence, it does not support a  
14 finding that the San Pedro was “susceptible” to being used as a “highway for commerce” in  
15 its “ordinary and natural condition.”

16 **V. Summary and Requested Action**

17 The proponents of navigability bear the burden of proof. The evidence in the record  
18 does not support a finding that the San Pedro ever was actually used as a “highway for  
19 commerce.” The record likewise does not support a finding that the San Pedro, in its  
20 “ordinary and natural condition” was susceptible to being used as a highway for commerce.  
21 The Commission should find the San Pedro “non-navigable.”

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27 ...

1 DATED this 7th day of September, 2012.

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

3 By Mark A. McGinnis

4 John B. Weldon, Jr.

5 Mark A. McGinnis

6 Scott M. Deeny

7 2850 East Camelback Road, Suite 200

8 Phoenix, Arizona 85016

9 Attorneys for SRP

10 ORIGINAL AND SIX COPIES of the foregoing  
11 hand-delivered for filing this 7th day of September,  
12 2012 to:

13 Arizona Navigable Stream Adjudication Commission  
14 1700 West Washington, Room B-54  
15 Phoenix, AZ 85007

16 AND COPY mailed this 7th day of September, 2012 to:

17 Fred E. Breedlove III  
18 Squire Sanders & Dempsey LLP  
19 1 East Washington Street, Suite 2700  
20 Phoenix, AZ 85004-2556  
21 *Attorney for the Commission*

22 Laurie A. Hachtel  
23 Attorney General's Office  
24 1275 West Washington Street  
25 Phoenix, AZ 85007-2997  
26 *Attorneys for State of Arizona*

27 Joy E. Herr-Cardillo  
Timothy M. Hogan  
Arizona Center for Law in the Public Interest  
2205 E. Speedway Blvd.  
Tucson, AZ 85719  
*Attorneys for Defenders of Wildlife, et al.*

...

1 Sally Worthington  
2 John Helm  
Helm & Kyle, Ltd.  
3 1619 E. Guadalupe #1  
4 Tempe, AZ 85283  
*Attorneys for Maricopa County*

5  
6 Sandy Bahr  
202 E. McDowell Road, Ste. 277  
7 Phoenix, AZ 85004  
*Sierra Club*

8  
9 Julie M. Lemmon  
1095 W. Rio Salado Parkway, Suite #102  
11 Tempe, AZ 85281  
*Attorney for Flood Control District  
of Maricopa County*

12  
13 Carla Consoli  
Lewis and Roca  
40 N. Central Avenue  
14 Phoenix, AZ 85004  
*Attorneys for Cemex*

15  
16 L. William Staudenmaier  
Snell & Wilmer LLP  
17 One Arizona Center  
400 E. Van Buren  
18 Phoenix, AZ 85004-2202  
*Attorneys for Freeport-McMoRan Corporation*

19  
20 Charles Cahoy  
P.O. Box 5002  
21 Tempe, AZ 85280  
*Attorney for City of Tempe*

22  
23 William Taebel  
P.O. Box 1466  
24 Mesa, AZ 85211-1466  
*Attorney for City of Mesa*

25  
26 ...  
27

1 Cynthia Campbell  
2 200 W. Washington, Suite 1300  
3 Phoenix, AZ 85003  
4 *Attorney for City of Phoenix*

5 Thomas L. Murphy  
6 Gila River Indian Community Law Office  
7 Post Office Box 97  
8 Sacaton, AZ 85147  
9 *Attorney for Gila River Indian Community*

10 Michael J. Pearce  
11 Maguire & Pearce LLC  
12 2999 N. 44th Street, Suite 630  
13 Phoenix, AZ 85018-0001  
14 *Attorneys for Chamber of Commerce and*  
15 *Home Builders' Association*

16 James T. Braselton  
17 Mariscal Weeks McIntyre & Friedlander PA  
18 2901 N. Central Avenue, Suite 200  
19 Phoenix, AZ 85012-2705  
20 *Attorneys for Various Title Companies*

21 Steve Wene  
22 Moyes Sellers & Associates  
23 1850 N. Central Avenue, Suite 1100  
24 Phoenix, AZ 85004-4527  
25 *Attorneys for Arizona State University*

26 