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

16 In re Determination of Navigability of  
17 the Gila River, from the New Mexico  
18 Border to the Confluence with the  
19 Colorado River

No. 03-007-NAV

**SALT RIVER PROJECT'S  
MEMORANDUM REGARDING  
PROCEEDINGS ON REMAND**

20 Pursuant to the Commission's notice dated December 14, 2011, the Salt River Project  
21 Agricultural Improvement and Power District and Salt River Valley Water Users' Association  
22 (collectively, "SRP") submit their memorandum regarding what the Commission should do to  
23 comply with the Court of Appeals' opinion, *State v. Arizona Navigable Stream Adjudication*  
24 *Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v. ANSAC*"), as it relates to the  
25 Gila River. Because the notice did not specify whether the Commission was requesting  
26 comments on procedural or substantive matters, SRP presents its initial comments on both  
27 issues (*i.e.*, how ANSAC should proceed and also what its final decision should be on the  
merits). To the extent that the Commission allows parties an additional opportunity to file  
more complete briefs on the merits, SRP reserves its right to do so at the time and in the  
manner requested by the Commission.

1 **I. The Commission Should Reopen the Evidentiary Record, Hold a Public Hearing,**  
2 **and Provide an Opportunity for the Parties to Submit Briefs on the Merits.**

3 In *State v. ANSAC*, the Court of Appeals overturned the Commission's decision of  
4 non-navigability regarding the Lower Salt River in its 2005 Report.<sup>1</sup> The court held that the  
5 Commission applied an incorrect legal standard, holding that the Commission "should have  
6 considered *both* the River's ordinary condition *and* its natural condition in determining its  
7 navigability." *Id.* at 242, 229 P.3d at 254 (emphasis in original).<sup>2</sup> In reaching this conclusion,  
8 the court stated that, aside from consideration of the effects of Roosevelt Dam, the  
9 Commission did not explicitly evaluate "the effect of numerous other dams, canals, and man-  
10 made diversions identified in its report as existing on February 14, 1912." *Id.* at 240, 229  
11 P.3d at 252.

12 For the reasons set forth below, SRP believes that the Commission applied the standard  
13 identified in *State v. ANSAC* in determining the Gila River non-navigable in its 2009 Report.<sup>3</sup>  
14 However, the Commission must recognize that this case was remanded by the Maricopa  
15 County Superior Court "for all further proceedings consistent with [*State v. ANSAC*]." *See*  
16 Minute Entry dated September 21, 2011. Accordingly, the Commission now should take  
17 special care to ensure that it follows the proper procedures to comply with the court's order.

18 Having participated in the extensive proceedings leading up to the 2009 Report and  
19 being aware of the large amount of information that was submitted to the Commission at that

20 \_\_\_\_\_  
21 <sup>1</sup> Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef  
Dam to the Gila River Confluence (September 21, 2005).

22 <sup>2</sup> SRP believes that the Commission did in fact apply the correct legal standard and that the  
23 Commission correctly determined that the Lower Salt River is non-navigable. *See* Salt River  
24 Project's Memorandum Regarding Proceedings on Remand, dated January 13, 2012. Nonetheless,  
25 for the same reasons set forth herein, SRP suggested in its memorandum that the Commission should  
26 reopen the evidentiary record, allow parties to submit any new or additional evidence regarding  
navigability, and hold a single public hearing prior to issuing a revised (if necessary) final  
determination.

27 <sup>3</sup> Report, Findings and Determination Regarding the Navigability of the Gila River from the New  
Mexico order to the Confluence with the Colorado River (January 27, 2009) ("2009 Report").

1 time, SRP believes it is likely that little or no additional evidence exists that a party might  
2 offer to show that the Gila River was or was not navigable in its ordinary and natural  
3 condition as of February 14, 1912. In an abundance of caution, however, and to ensure that  
4 each party has a full opportunity to submit its evidence, SRP requests that the Commission  
5 issue public notice and reopen the evidentiary record in this matter for a limited period of time  
6 to give parties a chance to submit any new or additional evidence if they choose to do so.  
7 Section 37-1123 of the Arizona Revised Statutes sets forth the procedures for receiving,  
8 reviewing, and considering evidence of navigability, and the Commission has in the past been  
9 steadfast in following those procedures. *See* A.R.S. § 37-1123. Thus, SRP submits that the  
10 Commission should reopen the evidentiary record, as provided in that statute, and allow  
11 parties to submit any new or additional evidence based upon the Court of Appeals' opinion.  
12 *See id.* §§ 37-1123(A), (B). The period during which the record is reopened also would allow  
13 the Arizona State Land Department ("ASLD") to submit any new evidence it possesses,  
14 pursuant to A.R.S. § 37-1124.

15         The Commission should notice and hold one public hearing, to allow parties a final  
16 opportunity to submit evidence and, if the Commission desires, to hear arguments regarding  
17 the Court of Appeals' opinion and whether and how the Commission's 2009 Report should be  
18 revised based upon that opinion. At the conclusion of the hearing or soon thereafter, the  
19 Commission can issue its new report and the matter will be subject to the statutory appellate  
20 procedures.

21         Because the present issues relate primarily to legal matters associated with the Court of  
22 Appeals' opinion, the Commission might desire to receive legal briefs from the parties on the  
23 substantive legal questions—*e.g.*, was the Gila River navigable in its "ordinary and natural  
24 condition" on the date of statehood? Those briefs, if deemed necessary by the Commission,  
25 could be submitted before or after the public hearing and could be in addition to or in lieu of  
26 oral arguments at the hearing itself.

27

1 Furthermore, the Commission should take notice that the United States Supreme Court,  
2 in the case of *PPL Montana, LLC v. Montana* (Case No. 10-218), currently has before it  
3 certain “navigability” issues that potentially could affect the analysis with regard to the Gila  
4 River. That case was argued on December 7, 2011, and it is expected that the Court will issue  
5 a decision sometime this spring. Given the time required for the Commission to issue public  
6 notice, hold a hearing, and render a decision in the Gila River case, it is likely that the  
7 Commission could have the benefit of this additional guidance from the United States  
8 Supreme Court before its Gila River decision is finalized.

9 The procedures outlined in the statute and advocated by SRP herein are time-  
10 consuming, relatively costly, and arguably unnecessary, especially in view of the limited  
11 nature of the Superior Court’s remand and the comprehensive findings contained in the 2009  
12 Report. However, given that the process with respect to the Lower Salt River has been  
13 attempted and repeated so many times, SRP believes that all reasonable efforts to comply  
14 with the statutory requirements and the Superior Court’s mandate are warranted in this  
15 instance, to help ensure that the Commission’s final decision regarding the Gila River does  
16 not suffer a similar fate.

17 **II. The Gila River is Not Navigable in its “Ordinary and Natural” Condition.**

18 Based upon the evidence in the record, the facts of this case show that the proponents  
19 of navigability (who have the burden of proof<sup>4</sup>) failed to prove navigability by a  
20 preponderance of the evidence, and that the Commission properly determined that “the Gila  
21 River, except for the end of the Gila River affected by the backwater of the Colorado River,  
22 was not navigable or susceptible of use as a highway for commerce over which trade and  
23 travel was or may be conducted in the customary modes of trade and travel on water as of  
24 February 14, 1912.” 2009 Report, at 88. As set forth below, SRP believes that the  
25 Commission’s finding that the Gila River was non-navigable should remain undisturbed  
26 under the test delineated in *State v. ANSAC*.

27 <sup>4</sup> See *State v. ANSAC*, 224 Ariz. at 228-29, 229 P.3d at 236-37.

1           **A. The Gila River was not actually used as a “highway for commerce.”**

2           It is beyond reasonable dispute that the Gila River has never been actually used as a  
3 “highway for commerce.” No evidence exists of any prehistoric boating or flotation of logs  
4 on the river. See Fuller, *et al.*, *Arizona Stream Navigability Study for the Upper Gila River,*  
5 *Safford to the State Boundary, and San Francisco River, Gila Confluence to the State*  
6 *Boundary* (June 2003) (“SLD/Upper”), at 2-3; Fuller, *et al.*, *Arizona Stream Navigability*  
7 *Study for the Gila River: Colorado River Confluence to the Town of Safford* (June 2003)  
8 (“SLD Lower”), at III-20.<sup>5</sup> Likewise, no evidence exists that the early explorers or soldiers in  
9 the area near the river, who traveled through the area on several occasions, ever used the  
10 river—for “commerce” or otherwise. See *id.*; see also *Lykes Bros., Inc. v. Corps of Eng’rs*,  
11 821 F. Supp. 1457, 1459 (M.D. Fla. 1993), *aff’d*, 64 F.3d 630 (11th Cir. 1995) (court found  
12 that had river been navigable, it would seem obvious that military and settlers would have  
13 used the river to transport men and supplies rather than carrying them overland).

14           Moreover, the fourteen isolated accounts of attempted boating on the river between  
15 1846 and 1909, does not establish that the river was used for any type of regular (or even  
16 periodic) trade or transportation during the period immediately before and at statehood.  
17 Rather, these fourteen accounts are persuasive evidence that the river was *non-navigable*, for  
18 several reasons.

19           First, the accounts of attempted boating consist mostly of anecdotal evidence from  
20 local newspaper articles, and do not provide a sufficient basis to support a finding of  
21 navigability. For example, one newspaper article was written the day before the supposed  
22 boating trip was to occur on the Salt and Gila Rivers, but there was no article or any other  
23 record corroborating that the trip actually occurred. See SLD/Lower, at IV-7. The only  
24 record of another boating account is based upon an unsigned letter to an out-of-state  
25 newspaper claiming that travelers along the Gila River used boats to reach the Colorado  
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27 <sup>5</sup> SLD/Upper is listed in the Evidence Log as Item # 2. The SLD/Lower is listed in the Evidence Log  
as Item # 4.

1 River, but it is unclear the time of year this took place or the distance that these travelers were  
2 from the Colorado River. *See id.* at IV-3. The evidentiary basis for each of the boating  
3 “attempts” reported only in newspaper articles is shaky, to say the least.

4 Second, and perhaps more important, the accounts of attempted boating on the river  
5 are so full of mishaps and misery that they themselves prove that the river was not used or  
6 susceptible to being used as a “highway for commerce.” On at least two occasions, the parties  
7 could not launch the boats on the Gila River. *See id.* at IV-13. During one account the boat  
8 capsized, losing much of its cargo. *Id.* In two other instances, the boats went aground or  
9 were badly damaged. *Id.* at IV-2, IV-8. A trip that occurred in November 1881 on a boat  
10 called “Yuma or Bust” appears to have “busted” as the participants were “wading in water up  
11 to their knees” and had to push their boat much of the time. *Id.* at IV-7.

12 Third, the only recorded opinions on navigability by the participants themselves show  
13 that the river was not suitable as a “highway for commerce.” For example, one adventurer  
14 called the trip along the Gila River “a torturous route” as he made his way through the rapids  
15 and falls of a canyon, and concluded that “I would not engage to make the trip down (the  
16 Gila’s) hazardous waters again.” *Id.* at IV-8.

17 Finally, the other boating accounts relate to ferries that are known to have operated at  
18 some times on the Gila River. The records of ferries provide evidence that ferries were used  
19 only to cross the river, as opposed to travel upstream and downstream. Beginning in 1867,  
20 Morgan’s Ferry operated near Maricopa Wells. *See SLD/Lower*, at IV-5. Later, in 1891, a  
21 ferry operated by the Straus, Dallman & Co. was used to cross the river. *Id.* at IV-8. In 1905,  
22 there were three other ferry boats that were also operated on the river. *Id.* at IV-13. All of the  
23 ferries were used to traverse the river, serving as the functional equivalent of a bridge. *See*,  
24 *e.g.*, *North Dakota v. United States*, 770 F. Supp. 506, 511 (D.N.D. 1991), *aff’d*, 972 F.2d 235  
25 (8th Cir. 1992) (evidence of ferries used to provide crossings on the river have the functional  
26 equivalent of bridge and do not establish the river as a channel for useful commerce; rather,  
27 they establish that the river is an obstruction to commerce which must be overcome).

1           The fourteen accounts of boating on the Gila River over the course of sixty-three years  
2 are not sufficient to satisfy the burden of proof for navigability and, in fact, they prove just the  
3 opposite. People generally met with disastrous consequences, with some people losing their  
4 supplies, damaging their craft, or never even launching the boat. These ill-fated attempts  
5 show that the Gila River is not and never has been “navigable.” Furthermore, the use of  
6 ferries to cross the river does not demonstrate that navigation along the stream occurred or  
7 could have occurred.

8           **B.    The Gila was never susceptible to being used as a “highway for commerce.”**

9           Because the river was never actually used as a “highway for commerce,” the only way  
10 it can be considered navigable is if it was “susceptible” to such use. No evidence exists in the  
11 record to show that the river, in any condition at any time, was capable of acting as “a  
12 corridor or conduit within which the exchange of goods, commodities or property or the  
13 transportation of persons may be conducted.” A.R.S § 37-1101(3) (defining “highway for  
14 commerce”).

15           Although the river existed in close proximity to much of the exploration and settlement  
16 in early Arizona, it was never used for any type of regular trade or transportation. In order for  
17 the Commission to determine that the river was “susceptible to being used . . . as a highway  
18 for commerce,” it must find that the prehistoric inhabitants, the early explorers, the Pima-  
19 Maricopas and Chiricahua Apaches, and thousands of citizens who resided along the river and  
20 in the general area prior to statehood simply failed to comprehend the potential usefulness of  
21 the river as an avenue for navigation. No evidence exists to support such a finding. *See also,*  
22 *e.g., Webb v. Board of Comm'rs of Neosho County, 257 P. 966 (Kan. 1927)* (although  
23 evidence existed of log driving, ferry use, and light boats, some by motor power for transfer  
24 of passengers for pleasure and to limited extent for hire, the court nevertheless held that the  
25 river was not navigable because: (1) boats could not move any substantial distance up or  
26 down the river at ordinary times without being pushed or helped over riffles; and (2) the river  
27 had never been used for the transportation of products of the area along the river).

1           It might be theoretically possible that, on one or more occasions in particular years, it  
2 would have been feasible for a person to boat or float logs down some portion of the river.  
3 Occasional use in exceptional times does not, however, support a finding of navigability.<sup>6</sup>  
4 “The mere fact that a river will occasionally float logs, poles, and rafts downstream in times  
5 of high water does not make the river navigable.” *Crow, Pope & Land*, 340 F. Supp. at 32  
6 (citing *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1989)). “The waterway  
7 must be susceptible for use as a channel of useful commerce and not merely capable of  
8 exceptional transportation during periods of high water.” *Id.* (citing *Brewer-Elliott Oil & Gas*  
9 *Co. v. United States*, 260 U.S. 77 (1922)).

10           No government agency, including federal land surveyors, ever indicated that the Gila  
11 River was navigable. *See Littlefield, Assessment of the Navigability of the Gila River*  
12 *Between the Mouth of the Slat River and the Confluence with the Colorado River Prior to and*  
13 *on the Date of Arizona’s Statehood*, February 14, 1912 (November 3, 2005) at 10-20, 55;<sup>7</sup> *see*  
14 *also United States v. Oregon*, 295 U.S. at 23 (courts should consider government’s treatment  
15 of watercourse as non-navigable in their analysis of navigability); *see also Washington Water*  
16 *Power Co. v. Federal Energy Regulatory Comm’n*, 775 F.2d 305, 332 (D.C. Cir. 1985)  
17 (government’s, including Army Corps of Engineers’, description and treatment of river is  
18 relevant to determination of river navigability). Likewise, no federal or state land patent  
19 indicated that the Gila River was navigable. *See id.*; *see also Lykes Bros.*, 821 F. Supp. at  
20 1460 (court found actions by State show that, for many years, it considered river non-  
21 navigable, e.g., land bordering river had been deeded to private ownership and owners paid  
22 taxes); *Koch v. Department of Interior*, 47 F.3d 1015, 1019 (10th Cir. 1995) (because Federal  
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24 <sup>6</sup> *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 451 (6th Cir. 1982) (“limited,”  
25 “sporadic,” “minimal,” and “uniformly unsuccessful” evidence of boat use on creek does not establish  
26 navigability, without specific evidence of successful commercial navigation); *see also United States*  
*v. Oregon*, 295 U.S. 1, 23 (1935) (evidence of sporadic and ineffective use of boats was not enough to  
find water course navigable).

27 <sup>7</sup> Listed in the Evidence Log as Item # 12.



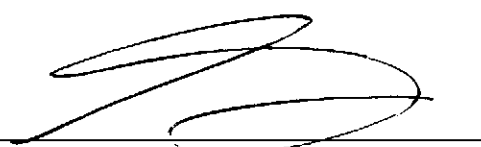
1 Government did not express intent to retain island in non-navigable river, title to island  
2 passed to patent holder).

3 **III. Summary and Requested Action**

4 The evidence presented in this case supports a finding that the Gila River is non-  
5 navigable in its ordinary and natural condition as delineated by the Court of Appeals in *State*  
6 *v. ANSAC*. Based on the experience with the Lower Salt River, however, the prudent  
7 approach is to reopen the record, hold a public hearing, and reconsider the evidence and the  
8 legal standard to ensure that the Commission's 2009 Report complies with *State v. ANSAC*.  
9 SRP submits that, upon reviewing the evidence and applying the Court of Appeals' legal test,  
10 the Commission should confirm its finding that the Gila River is non-navigable.

11 DATED this 27th day of January, 2012.

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

13  
14  
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24 2012 to:

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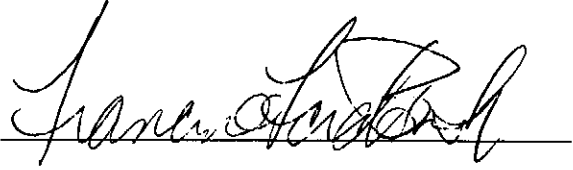
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