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

11 IN THE MATTER OF THE  
12 NAVIGABILITY OF THE SALT  
13 RIVER FROM GRANITE REEF DAM  
14 TO THE GILA RIVER CONFLUENCE,  
15 MARICOPA COUNTY, ARIZONA

No. 03-005-NAV

**GILA RIVER INDIAN COMMUNITY'S  
MEMORANDUM ON REMAND**

16 Pursuant to the notice from ANSAC dated December 14, 2011, the Gila River  
17 Indian Community ("Community") hereby submits the following memorandum  
18 regarding what the Commission should do to satisfy the Arizona Court of Appeals  
19 decision regarding the Lower Salt River. In *State v. Ariz. Navigable Stream Comm'n*,  
20 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v. ANSAC*"), the Court of Appeals of  
21 Arizona vacated the Commission's determination that "the Lower Salt River from  
22 Granite Reef Dam to its confluence with the Gila River was not used or susceptible of  
23 use for commercial trade or travel as of February 14, 1912, and was therefore not  
24 navigable as of that date nor was it susceptible to navigation."<sup>1</sup> The Court of Appeals  
25 vacated and remanded the determination "for ANSAC to consider whether the River

26 <sup>1</sup> Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence 46 (ANSAC Sept. 21, 2005) ("Report").

1 would have been navigable had it been it is ordinary and natural condition on  
2 February 14, 1912.” 229 P.3d at 254.

3 Little guidance on remand was provided by the Court of Appeals; while  
4 asserting that it agreed substantial evidence exists from which a fact finder “might  
5 conclude that [the River] met the applicable standard of navigability at the time that  
6 Arizona became a state,” 229 P.3d at 254, it did not identify any evidence in the  
7 record supporting such a finding; the Community contends there is none. Not only did  
8 ANSAC find that the Lower Salt River was non-navigable, it found that it was *non-*  
9 *navigable* by a *preponderance* of the evidence. Given that the standard of proof is that  
10 “the burden of proof rests on the party asserting navigability,” 229 P.3d at 250  
11 (citations omitted), a finding that the Lower Salt River is non-navigable by a  
12 preponderance of evidence is seemingly 180 degrees from a finding of navigability by  
13 the same standard, confounding the evidence in the record and the Commission's  
14 careful evaluation of the evidence.

15 For this reason, the Commission should provide some consideration to the  
16 issue of how the standard of proof should be applied on remand and how it may  
17 impact additional proceedings before the Commission.

### 18 **1. *State v. ANSAC* and the Standard of Proof**

19 The Court of Appeals provided a somewhat confusing explanation of the  
20 burden of proof and presumption in these proceedings. Initially, the court rejected the  
21 appellants' contention that presumption lies against defeat of state's title, 229 P.3d at  
22 250; however, in the same section of its opinion, the court stressed that “ANSAC may  
23 not begin its determination with any presumption against navigability.” 229 P.3d at  
24 251 (citations omitted; emphasis in original). The court was clear on one point—“this  
25 court has previously recognized that the burden of proof rests on the party asserting  
26 navigability.” 229 P.3d at 250 (citations omitted). “Consequently, the burden of proof

1 lies with Appellants, as the proponents of navigability, who must prove navigability  
2 by a preponderance of the evidence.” 229 P.3d at 251.

3 A.R.S. § 37-1128 likewise allocates the burden of proof to the parties asserting  
4 the navigability of the Lower Salt River:

5 If the preponderance of the evidence establishes that the watercourse was  
6 navigable, the commission shall issue its determination confirming that the  
7 watercourse was navigable. If the preponderance of the evidence fails to  
8 establish that the watercourse was navigable, the commission shall issue its  
9 determination confirming that the watercourse was nonnavigable.

9 A.R.S. § 37-1128(A). The second sentence of the quoted portion of the statute is  
10 unnecessary; if the proponents of navigability fail to establish the facts supporting  
11 navigability by a preponderance of the evidence, the Commission would be compelled  
12 to find the watercourse was non-navigable, even in the absence of any contrary  
13 evidence.

14 For that reason, the notion that there is not a presumption against navigability  
15 is very hard to explain, because the primary nature of a true presumption is to  
16 establish a burden of proof.<sup>2</sup> To the extent the applicable statute and *State v. ANSAC*  
17 establish that the burden of proof is to establish navigability by a preponderance of the  
18 evidence, in the absence of such evidence the Lower Salt River would necessarily be  
19 *presumed* to be non-navigable. The Commission may want to take this analysis into  
20 account when determining how additional briefing or hearings in this matter will be  
21 conducted.

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23  
24 <sup>2</sup> “It is the generally accepted view of courts and textbook writers that the presumption places  
25 upon the party against whom it operates the burden of producing evidence. Moreover, they  
26 usually state that this is its sole effect.” Roy Robert Ray, *Burden of Proof and Presumptions*,  
13 Tex. L. Rev. 33, 55 (1934).

1           Thus, under the standard enunciated in *State v. ANSAC*, and A.R.S. § 37-1128,  
2 the proponents of navigability, as the parties with the burden of proof, must come  
3 forward with evidence establishing a *prima facie* case of navigability; that it is “was  
4 used or was susceptible to being used, in its ordinary and natural condition, as a  
5 highway for commerce, over which trade and travel were or could have been  
6 conducted in the customary modes of trade and travel on water.” A.R.S. § 37-1101(5).  
7 This includes proof of: (1) the use of or susceptibility of use of the Lower Salt River  
8 as a highway for commerce; (2) the ordinary and natural condition of the Lower Salt  
9 River as of February 14, 1912; (3) that trade and travel were or could have been  
10 conducted in customary modes on the Lower Salt River.

11           **2. ANSAC Should Reopen Evidence, Hold a Public Hearing, and Permit**  
12           **Additional Briefing by the Parties**

13           The Community agrees with the position of the Salt River Project as to the  
14 necessity of reopening the evidentiary record for a limited period of time; however,  
15 the Community believes that, as to any briefing following the submission of  
16 additional evidence, that the Commission should require the proponents of  
17 navigability to submit initial briefs and specifically identify any evidence they  
18 contend meets their burden of proving navigability, followed by briefs from any  
19 parties opposing navigability.

20           **3. On the Record Before ANSAC, the Lower Salt River is Non-Navigable in**  
21           **its Ordinary and Natural Condition**

22           In making its determination, the Commission received and evaluated a  
23 substantial amount of evidence, described as “three feet thick,” and including reports  
24 and studies conducted by geomorphologists, hydrologists and historians. *See Report,*  
25 *at 22-23. Twenty witnesses appeared for a hearing in Phoenix in April of 2003. Id. at*  
26

1 23. In *State v. ANSAC*, the Court of Appeals identified the following time period to  
2 answer the question of when the river was in its natural condition:

3 . . .the River could be considered to be in its natural condition after many of  
4 the Hohokam's diversions had ceased to affect the River, but before the  
5 commencement of modern-era settlement and farming in the Salt River  
6 Valley, when some of the Hohokam's diversions were returned to use and  
other man-made diversions and obstructions began to affect the River.

7 229 P.3d at 254. In terms of the time periods covered by the evidence, the time  
8 periods established in *State v. ANSAC* were included in the evidence and considered  
9 by the Commission. Among the factual conclusions reached by the Commission were  
10 as follows:

- 11 • “There is no evidence other than speculation that the Hohokam utilized the Salt  
12 River for commerce or travel. There is no evidence of boating by the  
13 Hohokam. *Their use of the river was strictly to divert water from the river for*  
14 *use in irrigation.*” Report, at 23; emphasis added.
- 15 • “The decline in the Hohokam is an archaeological mystery. Some of the  
16 theories that have been advanced to explain it are an extended drought of over  
17 25 years, erratic flow of the river characterized by extreme floods followed by  
18 periods of drought, disease and alkalization of the soil, making it non-  
19 productive for farming.” *Id.* at 25.
- 20 • With regard to the activities of trappers in the 1820s, the Commission noted,  
21 “These trapping activities continued through the 1830s and early 1840s. *The*  
22 *trappers did not use boats for travel on the rivers or streams in this area,* but  
23 traveled by foot, horses or mules along the sides of the rivers or streams.” *Id.* at  
24  
25  
26

1 26; emphasis added.

2 • The biggest problem in irrigation has been controlling the water in the river;  
3 “Archaeology shows us that the Hohokam culture had this problem, and the  
4 historical accounts from the time that Jack Swilling and his group built the first  
5 modern canal show that *this was a continuing problem*. The river is erratic,  
6 unpredictable, often flashy with lots of water in it, and at other times it's  
7 virtually dry. It doesn't have a steady flow; its flow is highly variable.” *Id.* at  
8 28; emphasis added.

10 • The individual accounts received by the Commission (Senator Hayden, Justice  
11 Kibbey, Justice Kent, Governor Stanford, Frank Harris, Arthur Powell Davis)  
12 indicated that the Lower Salt River was not navigable, but did support what  
13 appears to be clear and convincing evidence that the river was erratic and  
14 prone to flooding and prolonged periods of drought. *Id.* at 30-31.

17 • In describing the testimony of Dr. Douglas Littlefield, the Commission  
18 observed, “He stated that no contemporary observer thought that the Salt River  
19 was navigable *prior to* and around 1912.” *Id.* at 31-32; emphasis added.

20 • In evaluating the accounts of boating on the river, the Commission noted, “The  
21 16 accounts of boating on the Salt River are all separate incidents or  
22 occurrences, and it seems clear that there was no sustained operation of  
23 commercial boating or use of this river as a highway for commerce. For  
24 example, there were no docks or ship or boat unloading facilities anywhere  
25 along the river.” *Id.* at 34-35.  
26

1 • Supporting the erratic nature of the river, the Commission also pointed out that,  
2 “All of the 16 accounts of boating or floating logs on the Salt River occurred  
3 during periods of high water, either during the late fall or winter during periods  
4 of rainfall and storms or during the monsoon period of lighter summer storms  
5 and one occasion, during the spring and early summer runoff from snowfall.”

6 *Id.* at 35.

7  
8 • The Commission also noted that, prior to statehood, “Constant dredging would  
9 have been necessary to clear the sandbars and keep the channel open. This  
10 would not be in the ordinary and natural course of events and, accordingly, we  
11 must conclude that in the ordinary and natural course the river was not  
12 susceptible of navigability.” *Id.* at 37.

13  
14 • “With regard to the issue of fishing on the river, the record is devoid of any  
15 evidence that anyone ever used a boat to fish on the river and evidence of  
16 fishing, even from the banks of the river, is sparse.” *Id.* at 37.

17  
18 • That the river was erratic through the critical time period identified in *State v.*  
19 *ANSAC* is also supported by the record—the climatic conditions and weather  
20 in the southwest have been consistent for “the past few hundred years” and the  
21 patterns have been the same—occasional flooding and drought. *Id.* at 39.

22  
23 There are *no factual conclusions* in the Commission’s Report which would support  
24 the conclusion, by a preponderance of the evidence, that the Lower Salt River was  
25 navigable, even under the *State v. ANSAC* standard.  
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**4. Conclusion**

The decision in *State v. ANSAC*, while not providing clear guidance on remand, does place the Commission in the likely position of a “do-over,” at least to the extent that the prudent course of action would be to follow the process outlined in A.R.S. §§ 37-1123, 37-1126 and 37-1128, although the Commission should be able to accomplish the process on a shorter time schedule. The Community contends that, even after following this process, the Commission will reach the same determination—that the Lower Salt River, in its ordinary and natural condition, was not used or susceptible to being used as a highway for commerce on February 14, 1912, and is therefore non-navigable.

DATED this 13<sup>th</sup> day of January, 2012.

GILA RIVER INDIAN COMMUNITY

By   
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1 ORIGINAL AND SIX COPIES of the foregoing  
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2012 to:

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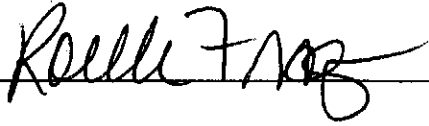
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