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**BEFORE THE ARIZONA NAVIGABLE
STREAM ADUDICATION COMMISSION**

In re Determination of Navigability of the) No. 03-005-NAV
Lower Salt River, from Granite Reef Dam to)
the Gila River Confluence) **CITIES OF MESA, PHOENIX AND**
) **TEMPE'S JOINT LEGAL**
) **MEMORANDUM**
)
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1 **I. Introduction**

2 In accordance with the December 14, 2011, request of the Arizona Navigable Stream
3 Adjudication Commission (“Commission”), the Cities of Mesa, Phoenix and Tempe (“Cities”)
4 file this Legal Memorandum explaining what the Commission should do to satisfy the issues
5 raised in the recent Court of Appeals decision in the Lower Salt River case, *State v. Arizona*
6 *Navigable Stream Adjudication Commission*, 224 Ariz. 230, 229 P.3d 242 (App. 2010)
7 (“Opinion”). The Cities submit this Legal Memorandum with regard to the Lower Salt River,
8 Case No. 03-005-NAV.

9 **II. Background**

10 In 1992, the Commission was created to determine whether, under the Equal Footing
11 Doctrine, the State could claim ownership of certain streambeds in Arizona based on
12 navigability. This action followed nearly a century during which the Territory and then State of
13 Arizona had stated explicitly that no river or stream in Arizona was navigable other than the
14 Colorado River. *Opinion*, 224 Ariz. at 234, 229 P.3d at 246.

15 During the intervening one hundred years, property owners acted in reliance on the
16 State’s disclaimer of ownership of those streambeds and, in some instances, made substantial
17 investments in improvements and infrastructure within the streambeds, assuming that the owners
18 held clear title to the real property.
19

20 For example, the City of Mesa owns and operates the Northwest Wastewater
21 Reclamation Plant (“NWWRP”) in the immediate vicinity of the Lower Salt River. The City
22 acquired this land to construct a wastewater treatment plant, which commenced operation in
23 approximately 1948 with a capacity of four million gallons per day (“MGD”). The NWWRP
24 currently has a treatment capacity of eighteen MGD, and outfalls and other infrastructure
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1 associated with the plant are located within the bed and banks of the Salt River. The City and its
2 residents have made capital investments in excess of fifty million dollars in the facility. Actual
3 sewage flow at the plant averages nine MGD and currently includes wastewater generated in the
4 Salt River Pima Maricopa Indian Reservation in addition to the City of Mesa. The NWWRP is
5 and has been a critical resource for the City and its citizens for over sixty years, and throughout
6 the time period in which Mesa made its investments, it had no reason to suspect that there would
7 be any issues with respect to the title of the land.

8
9 For over 75 years, the City of Phoenix has relied upon the Lower Salt River for projects
10 vital to the City. Sky Harbor Airport was constructed on the bank of the Salt River over 75 years
11 ago and is now one the busiest airports in the United States. Air traffic utilizes most of the
12 airspace over the Lower Salt River as part of Sky Harbor's flight patterns.

13 Another example of the Cities' investment in the Lower Salt River is the 91st Avenue
14 Wastewater Treatment Facility, which was built on the banks of the Lower Salt River in 1958 by
15 the Cities of Phoenix and Glendale. Today, the 91st Avenue Wastewater Treatment Plant treats
16 wastewater from the three Cities, as well as Glendale and Scottsdale and is the largest
17 wastewater treatment plant in the metropolitan area. The Cities, Glendale and Scottsdale co-own
18 the facility as part of a multi-city partnership. Reclaimed water from 91st Avenue provides a
19 wildlife refuge within the Salt River, known as the Tres Rios Demonstration Wetlands Project.

20
21 The City of Tempe has constructed Tempe Town Lake, originally named the Rio Salado
22 Project, in the Lower Salt River as it passes through Tempe. Evidence presented to the
23 Commission in 2003 demonstrated that total project costs through the end of 2002 equaled
24 \$183,310,468. Obviously, in the past nine years, those costs have gone up significantly and
25

1 continue to accrue. This project, which is now the second most visited attraction in the State
2 after the Grand Canyon, will be greatly impacted by the final decision on the navigability and
3 ownership of the Lower Salt River streambed.

4 These are just a few examples of the importance and potential impacts of the
5 Commission's determination in this matter.

6 **III. The Commission should allow an opportunity for submission of additional**
7 **evidence, hold an additional hearing and provide opportunity for additional post-**
8 **hearing briefing.**

9 Although the Commission already has received a significant amount of evidence in this
10 matter over the course of two decades, the Cities urge the Commission to grant the opportunity
11 to all interested parties to submit additional evidence in light of the Opinion. The Opinion
12 clarifies the legal standard to be applied in this matter but specifically recognizes that, in
13 applying this standard, "the question whether the River is navigable is one of fact to be
14 determined by the Commission." Opinion, 224 Ariz. at 242, 229 P.3d at 254.

15 Therefore, the Commission should err on the side of caution to ensure that all possible
16 facts are before it. It should allow another opportunity to submit evidence in light of the clarified
17 legal standard by scheduling, noticing and holding another public hearing on the matter for the
18 purposes of receiving any additional evidence or testimony that any interested person wishes to
19 submit in accordance with A.R.S. § 37-1126.

20 The Cities also urge the Commission to allow any interested persons to submit briefing to
21 the Commission on the clarified legal standard and its application to all evidence in the record
22 following the reclosing of the evidentiary record. Again, the Commission should err on the side
23 of caution in giving all interested persons an opportunity to be heard on this important matter.
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1 Because it is not currently clear whether an additional opportunity will be provided to
2 interested parties to submit additional briefs to the Commission, the Cities submit the following
3 legal analysis of the Opinion and the evidence currently before the Commission, while reserving
4 their rights to submit additional briefing if later allowed by the Commission.

5 **IV. The Lower Salt River is not navigable or susceptible to navigation in its**
6 **ordinary and natural condition as that standard was set forth by the Court of**
7 **Appeals.**

8 A. *The proponents of navigability cannot meet the burden of proof and*
9 *cannot demonstrate that the record before the Commission contains a preponderance*
10 *of evidence that the Lower Salt River was navigable under the standard set forth by the*
11 *Court of Appeals.*

12 Both the Court of Appeals and the Superior Court remanded this matter for further
13 proceedings consistent with the Court of Appeals' Opinion. Opinion, 224 Ariz. at 245, 229 P.3d
14 at 257; *State ex rel. Winkleman v. ANSAC et al.*, LC 2006-000413, Minute Entry, dated October
15 21, 2011.

16 Significantly, the Opinion affirms the position that "the burden of proof rests on the party
17 asserting navigability" in a navigability determination. Opinion, 224 Ariz. at 238, 229 P.3d at
18 250. The Court also stated, "we have previously recognized that 'a "preponderance" of the
19 evidence appears to be the standard used by the courts' as the burden of proof." Opinion, 224
20 Ariz. at 239, 229 P.3d at 251. Therefore, consistent with the Court of Appeals' Opinion, the
21 parties asserting navigability must establish by a preponderance of the evidence that the evidence
22 before this Commission supports a finding that the Lower Salt River was navigable at the time of
23 statehood.

24 In addition to affirming that the burden of proof rests with the proponents of navigability,
25 the Court found that the Commission must "determine what the River would have looked like on
February 14, 1912 in its ordinary (i.e., usual, absent major flooding or drought) and natural (i.e.,

1 without man-made dams, canals, or other diversions) condition.” Opinion, 224 Ariz. at 241, 229
2 P.3d at 253.

3 The Court further specified that to look at the “natural condition” of the Lower Salt
4 River, the Commission must look to the period of time between cessation of the Hohokam’s
5 diversions but before the commencement of modern-era settlement and farming. Opinion, 224
6 Ariz. at 242, 229 P.3d at 254.

7 In applying this legal standard to the facts, however, the following factual findings
8 already made by the Commission in its *Report, Findings and Determination Regarding the*
9 *Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence*, dated
10 September 21, 2005 (“ANSAC Findings”) demonstrate that evidence has not been submitted
11 which meets the burden of proof born by the advocates of navigability. None of these factual
12 findings were refuted or rejected by the Court of Appeals:

13
14 1) There is no evidence other than speculation that the Hohokam utilized the Salt River
15 for commerce or travel. There is no evidence of boating by the Hohokam. ANSAC Findings, p.
16 25.

17 2) Fur trappers in the 1820s-1840s did not use boats for travel on the rivers or streams of
18 the Salt River but traveled by foot, horses or mules along the sides of the rivers or the streams.
19 ANSAC Findings, p. 26.

20 3) From 1867 to statehood, there is no record of any sustained commerce, travel or
21 fishing on the Lower Salt River. There are isolated instances of attempted boating or floating of
22 logs. All travel along the river during this period was by wagons, horses, mules or foot.
23 ANSAC Findings, p. 30.
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1 4) The Arizona Territorial legislature, in its first meeting in 1865, specifically declared in
2 a petition to Congress that the Colorado River is the only navigable River in the territory.
3 ANSAC Findings, p. 32.

4 5) There are only 16 accounts of boating or floating logs or otherwise attempting to use
5 the Salt River for commercial travel between 1873 and 1915. All of these attempts occurred
6 during a period of high water. ANSAC Findings, pp. 34-35

7 6) Because of the erratic nature of the Salt River, ferries operated only part of the time
8 during the year when the water was too high for people to ford the river on foot or by horseback.
9 ANSAC Findings, p. 36.

10 7) The river must be considered as an obstacle rather than a highway or avenue of
11 commerce. ANSAC Findings, p. 36.

12 8) Prior to statehood, constant dredging would have been necessary to keep a channel in
13 the River open for navigation, and this would not have been a "natural condition." ANSAC
14 Findings, p. 37.

15 9) The flow in the Salt River is characterized by periodic floods and droughts, and
16 "averages" are not particularly meaningful since they are skewed by heavy floods and periods of
17 drought. ANSAC Findings, p. 38.

18 10) The River has been described as extremely erratic in its disposition. ANSAC
19 Findings, p. 38.

20 11) The water flow in the Lower Salt River does not support a finding of navigability,
21 but in fact tends to support a finding of non-navigability. ANSAC Findings, p. 39
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1 12) No evidence was submitted to the Commission by any expert who opined that the
2 river was susceptible of navigability in its ordinary and natural condition. ANSAC Findings, pp.
3 41-42.

4 Against this convincing weight of evidence, the Cities anticipate that the proponents of
5 navigability will point to a few early descriptions of the Salt River in the record and the 16
6 alleged instances of navigation (or, more accurately, attempts at navigation) during the period
7 1873-1915 (a little more than one event every third year).

8 The United States Supreme Court, however, has at least twice addressed the issue of
9 limited instances of navigation on a stream and stated that there must be more than sporadic
10 instances of opportunities for navigation before a stream can be found to be used or susceptible
11 for use as a highway for commerce.

12 First, in *United States v. Rio Grande Dam & Irrigation Co.* 174 U.S. 690, 698-
13 699 (1899), the Court noted:

14 The mere fact that logs, poles, and rafts are floated down a stream occasionally
15 and in times of high water does not make it a navigable river. It was said in *The*
16 *Montello*, 20 Wall. 430, 439, "that those rivers must be regarded as public
17 navigable rivers in law which are navigable in fact; and they are navigable in fact
18 when they are used, or are susceptible of being used, in their ordinary condition,
19 as highways for commerce, over which trade and travel are or may be conducted
20 in the customary modes of trade and travel on water." And again: "It is not,
21 however, as Chief Justice Shaw said ([*Rowe v. Bridge Corp.*] 21 Pick. 344),
'every small creek in which a fishing skiff or gunning canoe can be made to float
22 at high water which is deemed navigable, but, in order to give it the character of a
23 navigable stream, it must be generally and commonly useful to some purpose of
24 trade or agriculture.'"

25 Secondly, in *United States v. State of Utah*, 283 U.S. 64, 87 (1931), the Court addressed
the contention of the United States that the facts at issue were similar to the ones in the *Rio*
Grande case, quoted above, and that impediments to navigation should lead to a finding of non-
navigability. The Court rejected that argument and distinguished the *Rio Grande* case:

1 The government invites a comparison with the conditions found to exist on the
2 Rio Grande river in New Mexico, and the Red river and the Arkansas river, above
3 the mouth of the Grand river, in Oklahoma, which were held to be nonnavigable,
4 but the comparison does not aid the government's contention. Each determination
5 as to navigability must stand on its own facts. In each of the cases to which the
6 government refers, it was found that the use of the stream for purposes of
7 transportation was exceptional, being practicable only in times of temporary
8 highwater. In the present instance, with respect to each of the sections of the
9 rivers found to be navigable, the master has determined upon adequate evidence
10 that "its susceptibility of use as a highway for commerce was not confined to
11 exceptional conditions or short periods of temporary high water, but that during at
12 least nine months of each year the river ordinarily was susceptible of such use as a
13 highway for commerce."

14 The facts associated with the Lower Salt River are significantly more similar to those in
15 the *Rio Grande* case than the *Utah* case. The evidence before the Commission might at best
16 support a finding that navigation on the Lower Salt River is "confined to exceptional conditions
17 or short periods of high water" in its ordinary and natural condition in the mid-1800s. Certainly,
18 there is no preponderance of evidence before the Commission that establishes that the Lower Salt
19 River was ever susceptible for use as a "highway for commerce" for any more than brief and
20 sporadic instances.

21 There is no evidence refuting that the Lower Salt River throughout its history, including
22 the mid-1850s, has been highly erratic. In fact, the "ordinary condition" of the Salt is erratic,
23 subject to dramatic changes in its flows. Thus, under the standard clarified by the Court of
24 Appeals, the proponents of navigation cannot establish by a preponderance of evidence that the
25 Lower Salt River was navigable in its ordinary, erratic, condition in its natural state in the mid-
1800s.

The Lower Salt River is not and in fact has never been navigable or susceptible to
navigation, regardless of the time period at issue.

1 ***B. The Commission should clarify that it has not made contradictory***
2 ***findings as to the ultimate question of fact.***

3 The Court of Appeals apparently found significant its view that “ANSAC itself made
4 contradictory findings as to the ultimate question of fact,” mentioning it twice in the Opinion.
5 See ¶6 and ¶29.

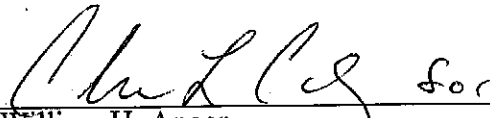
6 The Commission should clarify in its report on the Lower Salt River that it has made no
7 contradictory findings regarding the navigability of the Lower Salt River. The finding cited by
8 the Court in ¶6 of the Opinion was merely a finding in 1993 that the Lower Salt River had
9 characteristics of *possible* navigability at the time of statehood, as compared to having no such
10 characteristics. This preliminary finding was a prerequisite to the taking of additional evidence
11 by the Commission under the statutory structure in place at the time. See A.R.S. §§ 37-
12 1125(A)(1993) and 37-1126(1993).

13 Although the Opinion discusses this statutory structure in ¶6, somehow the Court
14 concluded that this finding in 1993 conflicts with the finding of non-navigability made in 2005.
15 See ¶29. The Commission’s forthcoming report should explain fully that the initial finding made
16 in 1993 was not a finding “as to the ultimate question of fact.” It is not contradictory for the
17 Commission to have found in 1993 that there are some characteristics of possible navigation of
18 the Lower Salt River but to have concluded ultimately, after a full examination of all evidence
19 submitted, that the proponents of navigation have not met the burden of establishing by a
20 preponderance of the evidence that the Lower Salt River was navigable or susceptible to
21 navigation in its natural and ordinary condition.
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23 The Commission’s report should explain fully that it has not made contradictory findings
24 regarding the ultimate question of fact in this matter.
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