

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*

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION**

In re Determination of Navigability of  
the San Pedro River, from the Mexican  
Border to the Confluence with the Gila  
River

No. 03-004-NAV

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

Pursuant to the Commission's notice dated December 14, 2011, the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (collectively, "SRP") submit their memorandum regarding what the Commission should do to comply with the Court of Appeals' opinion, *State v. Arizona Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v. ANSAC*"), as it relates to the San Pedro River. Because the notice did not specify whether the Commission was requesting comments on procedural or substantive matters, SRP presents its initial comments on both 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 San Pedro River non-navigable in its 2006  
14 Report.<sup>3</sup> However, the Commission must recognize that this case was remanded by the Pima  
15 County Superior Court “for all further proceedings consistent with [*State v. ANSAC*].” *See*  
16 Order Re Remand to Arizona Navigable Stream Adjudication Commission dated October 31,  
17 2011. Accordingly, the Commission now should take special care to ensure that it follows the  
18 proper procedures to comply with the court’s order.

19  
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 San Pedro river from the  
Mexican Border to the Confluence with the Gila River (October 18, 2006) (“2006 Report”).

1           Having participated in the extensive proceedings leading up to the 2006 Report and  
2 being aware of the large amount of information that was submitted to the Commission at that  
3 time, SRP believes it is likely that little or no additional evidence exists that a party might  
4 offer to show that the San Pedro River was or was not navigable in its ordinary and natural  
5 condition as of February 14, 1912. In an abundance of caution, however, and to ensure that  
6 each party has a full opportunity to submit its evidence, SRP requests that the Commission  
7 issue public notice and reopen the evidentiary record in this matter for a limited period of time  
8 to give parties a chance to submit any new or additional evidence if they choose to do so.  
9 Section 37-1123 of the Arizona Revised Statutes sets forth the procedures for receiving,  
10 reviewing, and considering evidence of navigability, and the Commission has in the past been  
11 steadfast in following those procedures. *See* A.R.S. § 37-1123. Thus, SRP submits that the  
12 Commission should reopen the evidentiary record, as provided in that statute, and allow  
13 parties to submit any new or additional evidence based upon the Court of Appeals' opinion.  
14 *See id.* §§ 37-1123(A), (B). The period during which the record is reopened also would allow  
15 the Arizona State Land Department ("ASLD") to submit any new evidence it possesses,  
16 pursuant to A.R.S. § 37-1124.

17           The Commission should notice and hold one public hearing, to allow parties a final  
18 opportunity to submit evidence and, if the Commission desires, to hear arguments regarding  
19 the Court of Appeals' opinion and whether and how the Commission's 2006 Report should be  
20 revised based upon that opinion. At the conclusion of the hearing or soon thereafter, the  
21 Commission can issue its new report and the matter will be subject to the statutory appellate  
22 procedures.

23           Because the present issues relate primarily to legal matters associated with the Court of  
24 Appeals' opinion, the Commission might desire to receive legal briefs from the parties on the  
25 substantive legal questions—*e.g.*, was the San Pedro River navigable in its "ordinary and  
26 natural condition" on the date of statehood? Those briefs, if deemed necessary by the  
27

1 Commission, could be submitted before or after the public hearing and could be in addition to  
2 or in lieu of oral arguments at the hearing itself.

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

11 The procedures outlined in the statute and advocated by SRP herein are time-  
12 consuming, relatively costly, and arguably unnecessary, especially in view of the limited  
13 nature of the Superior Court’s remand and the comprehensive findings contained in the 2006  
14 Report. However, given that the process with respect to the Lower Salt River has been  
15 attempted and repeated so many times, SRP believes that all reasonable efforts to comply  
16 with the statutory requirements and the Superior Court’s mandate are warranted in this  
17 instance, to help ensure that the Commission’s final decision regarding the San Pedro River  
18 does not suffer a similar fate.

19 **II. The San Pedro River is Not Navigable in its “Ordinary and Natural” Condition.**

20 Based upon the evidence in the record, the facts of this case show that the proponents  
21 of navigability (who have the burden of proof<sup>4</sup>) failed to prove navigability by a  
22 preponderance of the evidence, and that the Commission properly determined that “the San  
23 Pedro River was not used, or susceptible to being used, in its ordinary and natural condition,  
24 as a highway for commerce, over which trade and travel were or could have been conducted  
25 in the customary modes of trade and travel of water as of February 14, 1912.” 2006 Report,  
26 at 27. It should be noted that although there is some historical evidence of sporadic irrigation

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

1 associated with the San Pedro River, there is no evidence that “dams, canals, and man-made  
2 diversions” of the types constructed on the Lower Salt River existed on the San Pedro River  
3 prior to statehood. Accordingly, the Commission’s findings regarding the “ordinary and  
4 natural condition” of the San Pedro River should remain undisturbed under the test delineated  
5 in *State v. ANSAC*.

6 **A. The San Pedro River was not actually used as a “highway for commerce.”**

7 There are no indications that the San Pedro River was ever used as a “highway for  
8 commerce.” Prehistoric research found evidence of human populations in the area for over  
9 11,000 years, yet no evidence of boating on the San Pedro River during the history of  
10 inhabitation of the area. *See* JE Fuller Hydrology & Geomorphology, Inc., *Arizona Stream*  
11 *Navigability Study for the San Pedro River: Gila River Confluence to the Mexican Border*  
12 (revised September 1997) (“Fuller Report”), at 2-9. Likewise, none of the historical research  
13 revealed that early explorers, missionaries, trappers, or travelers in the San Pedro Valley ever  
14 used the river for boating or for commerce. *See id.* at 3-10. There was also no evidence that  
15 logs had been floated down the river. *See id.*

16 Although there is limited evidence of fishing on the San Pedro River prior to  
17 statehood, no evidence in the record supports a finding that boats were used. *See id.* at 3-14.  
18 For example, evidence of fishing came from journal entries of men on military expeditions  
19 with Philip St. George Cooke, the commander of the Mormon Battalion, who traveled by  
20 horseback along the San Pedro River and wrote of catching fish in the San Pedro River. *See*  
21 *id.* In addition, the Fuller Report briefly mentions that, from 1870 through 1910, a  
22 commercial business harvested razorback suckers near Tombstone. *Id.* However, there is no  
23 further evidence on how the fish were caught or whether the business was seasonal due to the  
24 variable streamflow of the river. The consultant for ASLD noted, “. . . the presence of fish in  
25 a river does not necessarily indicate that boatable conditions exist . . .” *Id.* at G-5.

26 There are no published accounts of boating on the San Pedro River prior to statehood.  
27 *See id.* at G-4. There is, however, one unconfirmed anecdotal story of a ferry service on the

1 river. Dora Ohnesorgen and Nedra Sunderland recalled that Ohnesorgen's grandfather had a  
2 ferry operation on the San Pedro River near Pomerene. *See id.* at 4-3. This supposed  
3 operation was not documented in any newspaper article or any other source, nor was there a  
4 timeframe of when this business was thought to have operated or any other shred of evidence  
5 confirming this story. *See id.* at 8-3. Regardless, one account based entirely on anecdotal  
6 evidence is not sufficient to satisfy the burden of proof for navigability. In fact, during  
7 interviews with local residents, there was not one account of commercial or recreational  
8 boating (other than the unverified story above) on the San Pedro River.

9 Modern records and stories indicate that there has been infrequent recreational boating  
10 on the San Pedro River. *See id.* at 8-4. A survey by the Central Arizona Paddlers Club found  
11 six reported accounts of boating on the San Pedro River from 1973-1992. *See id.* at G-7. The  
12 majority of the trips occurred during August, when monsoon season brings rain to Southern  
13 Arizona. *See id.* at 8-4. The ASLD consultant referred to these boating trips as "very  
14 opportunistic," describing that "boaters drive to a launching point on likely rain days, and 'put  
15 in' the water if rain conditions favor runoff." *Id.* at 8-5. However, despite these sporadic  
16 events, the Arizona State Parks Department classified the San Pedro River not as a boating  
17 stream, but as a hiking or general recreation area. *Id.*

18 Isolated accounts of boating via low-draft boats, such as kayaks and rafts, do not  
19 indicate that the San Pedro River is navigable. Occasional use during exceptional times does  
20 not support a finding of navigability. *United States v. Crow, Pope & Land Ents., Inc.*, 340 F.  
21 Supp. 25, 32 (N.D. Ga. 1972) ("The waterway must be susceptible for use as a channel of  
22 useful commerce and not merely capable of exceptional transportation during periods of high  
23 water.") (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922)). Most of  
24 the six reports of boating from the 1970s-1990s occurred during the month of August, when  
25 monsoon season hits and streamflows are typically higher due to the precipitation.

26 No evidence exists to show that the San Pedro River was ever used as a "highway for  
27 commerce," over which trade and travel were conducted in the customary mode of trade and

1 travel on the water. *See* A.R.S. § 37-1101(5). Thus, any determination of navigability would  
2 need to be based upon a finding that the river was “susceptible” for such use. *See id.*

3 **B. The San Pedro was never susceptible to being used as a “highway for**  
4 **commerce.”**

5 Because insufficient evidence exists to show that the San Pedro River was actually  
6 used as a “highway for commerce,” any party seeking to argue that the San Pedro River was  
7 navigable at statehood will need to show by a preponderance of the evidence that the river  
8 was “susceptible” to such use. There is no evidence in the record to satisfy that standard.  
9 Evidence from the San Pedro River’s long history demonstrates it was not “a corridor or  
10 conduit within which the exchange of goods, commodities, or property or the transportation  
11 of persons may be conducted.” A.R.S. § 37-1103(3) (definition of “highway for commerce”).

12 Historical descriptions and modern stream data lead to the conclusion that the San  
13 Pedro River was not susceptible to navigation. During the nineteenth century, when  
14 explorers, missionaries, and travelers came to the San Pedro River Valley, the river was  
15 described as “insignificant” and “not continuous.” *See Fuller Report* at 3-13. There is  
16 evidence that the same early explorers in the San Pedro River Valley attempted to boat on  
17 rivers other than the San Pedro River. *See id.* Thus, the absence of any records of explorers,  
18 missionaries, or travelers boating on the San Pedro River leads one to believe that it simply  
19 was not boatable.

20 Near the time of statehood, the San Pedro River was dry in some parts and had low  
21 flows on average estimated to have been 28 cfs. *See id.* at 7-13. It had an estimated median  
22 depth of a ½ foot and a median width of 10 feet. *See id.* at 7-21. Modern accounts describe  
23 the San Pedro River as entrenched and widening, with a channel that is braided and has  
24 natural impediments to streamflow. *See id.* at 5-17, 7-21.

25 The San Pedro River’s flow is not continuous or reliable throughout the year; thus, it  
26 was not “susceptible” to navigation. Given the weight of the data and evidence, it does not  
27

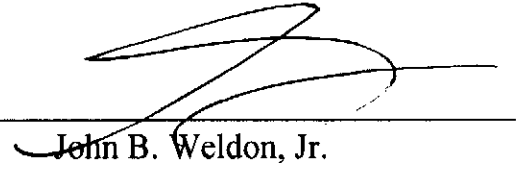
1 support a finding that the San Pedro River was “susceptible” to being used as a “highway for  
2 commerce” in its ordinary and natural condition.

3 **III. Summary and Requested Action**

4 The evidence presented in this case supports a finding that the San Pedro 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 approach  
7 is to reopen the record, hold a public hearing, and reconsider the evidence and the legal  
8 standard to ensure that the Commission’s 2006 Report complies with *State v. ANSAC*. SRP  
9 submits that, upon reviewing the evidence and applying the Court of Appeals’ legal test, the  
10 Commission should confirm its finding that the San Pedro River is non-navigable in its  
11 ordinary and natural condition.

12 DATED this 27th day of January, 2012.

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

14  
15 By 

16 John B. Weldon, Jr.  
17 Mark A. McGinnis  
18 Scott M. Deeny  
19 2850 East Camelback Road, Suite 200  
Phoenix, Arizona 85016  
Attorneys for SRP

20 ORIGINAL AND SIX COPIES of the foregoing  
21 hand-delivered for filing this 27th day of January,  
22 2012 to:

23 Arizona Navigable Stream Adjudication Commission  
24 1700 West Washington, Room B-54  
Phoenix, AZ 85007

25 AND COPY mailed this 27th day of January, 2012 to:

26 Laurie A. Hachtel  
27 Joy Hernbrode



1 Attorney General's Office  
2 Natural Resources Section  
3 1275 West Washington Street  
4 Phoenix, AZ 85007-2997  
*Attorneys for State of Arizona*

5 Joy E. Herr-Cardillo  
6 Timothy M. Hogan  
7 Arizona Center for Law in the Public Interest  
8 2205 E. Speedway Blvd.  
9 Tucson, AZ 85701  
*Attorneys for Defenders of Wildlife, et al.*

9 Cynthia M. Chandley, R. J. Pohlman, L. W.  
10 Staudenmaier, and C. W. Payne  
11 Snell & Wilmer, L.L.P.  
12 400 East Van Buren Street  
13 Phoenix AZ 85004-2202  
*Attorneys for Freeport-McMoRan Corporation*

14 Steve Wene  
15 Moyes Sellers & Sims  
16 1850 N. Central Avenue, Suite 1100  
17 Phoenix, AZ 85004-4527  
*Attorneys for Arizona State University*

18   
19  
20  
21  
22  
23  
24  
25  
26  
27