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

12 In re Determination of Navigability of
13 the Santa Cruz River From the Mexican
14 Border to the Confluence with the Gila
River

No. 03-002-NAV

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

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

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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.¹ 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).² 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 Santa Cruz River non-navigable in its 2006
14 Report.³ 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.

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21 ¹ Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef
Dam to the Gila River Confluence (September 21, 2005).

22 ² 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 ³ Report, Findings and Determination Regarding the Navigability of the Santa Cruz 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 Santa Cruz 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 Santa Cruz River navigable in its "ordinary and
26 natural condition" on the date of statehood? Those briefs, if deemed necessary by the
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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 Santa
6 Cruz River. That case was argued on December 7, 2011, and it is expected that the Court will
7 issue a decision sometime this spring. Given the time required for the Commission to issue
8 public notice, hold a hearing, and render a decision in the Santa Cruz River case, it is likely
9 that the Commission could have the benefit of this additional guidance from the United States
10 Supreme Court before its Santa Cruz 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 Santa Cruz River
18 does not suffer a similar fate.

19 **II. The Santa Cruz 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 proof⁴) failed to prove navigability by a
22 preponderance of the evidence, and that the Commission properly determined that “the Santa
23 Cruz River was not used, or susceptible to being used, in its ordinary and natural condition, as
24 a highway for commerce, over which trade and travel were or could have been conducted in
25 the customary modes of trade and travel of water as of February 14, 1912.” 2006 Report, at
26 27. It should be noted that there is no evidence that “dams, canals, and man-made diversions”

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

1 of the types constructed on the Lower Salt River ever existed on the Santa Cruz River prior to
2 statehood.⁵ Accordingly, the Commission's findings regarding the "ordinary and natural
3 condition" of the Santa Cruz River should remain undisturbed under the test delineated in
4 *State v. ANSAC*.

5 **A. The Santa Cruz River was not actually used as a "highway for commerce."**

6 There are no indications that the Santa Cruz River was ever used as a "highway for
7 commerce." Prehistoric research found evidence of human populations in the area for over
8 11,000 years, yet no evidence of boating on the Santa Cruz River during the early history of
9 inhabitation of the area. *See SFC Engineering Company, Arizona Stream Navigability Study*
10 *for the Santa Cruz River: Gila River Confluence to the Headwaters* (November 1996) ("SFC
11 Report") § 2, at 10, 12 & Executive Summary, at 3. Likewise, none of the historical research
12 revealed that missionaries, farmers, or travelers in the Santa Cruz River Valley ever used the
13 river for boating or for commerce. *See id.* § 3, at 23-23, 28. Although there is limited
14 evidence of fishing on the river during prehistoric times, there is no evidence that documents
15 the use of boats. *See id.* § 2, at 10, 12 & Executive Summary, at 3.

16 The only evidence in the SFC Report regarding boating of any kind on the Santa Cruz
17 River prior to statehood does not establish that the river was used for any regular trade or
18 travel. Two accounts about boating on the Santa Cruz River were based entirely on
19 unsubstantiated stories. In 1878, steamboats were pictured on the river in a pamphlet that was
20 immediately and widely recognized as a misrepresentation of the area by a developer. *See id.*
21 § 3, at 36. The ASLD consultant dismissed the portrayal as an entirely fictional description.
22 *See Id.* Executive Summary, at 5. Another story of boating was based wholly on an anecdotal
23 tale about a Mexican settler who had a boat that he used to cross the river during flooding.
24 *See id.* § 3, at 32. The tale was not supported by any other record in the report and,
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27 ⁵ The 2006 Report states that "[p]robably due to lack of water there is not much evidence of irrigated
farming, although in the middle and lower Santa Cruz River valley some canals have been found, but
not nearly to the extent of their usage in the Gila and Salt River Valley." *See* 2006 Report, at 20.

1 furthermore, even the legend does not involve the man traveling up or down the river—just
2 across it. *Id.*

3 Other evidence of boating on the Santa Cruz River before statehood relates to two
4 lakes (Warner and Silver Lakes) that were created by damming the river for industrial
5 purposes. *See id.* § 3, at 39. The lakes were short-lived because the dams were washed out
6 by a flood in 1890 and never rebuilt. *See id.* § 3, at 43. This evidence of occasional boating
7 on Warner and Silver Lakes does not adequately demonstrate the Santa Cruz River was a
8 “highway for commerce.” Most of the evidence in the SFC Report focuses on Warner and
9 Silver Lakes as recreational gathering places where nineteenth century residents swam and
10 picnicked. *See id.* § 3, at 39. Further, sporadic evidence of boating on a lake is not enough to
11 support a finding of navigability. *See United States v. Oregon*, 295 U.S. 1, 23 (1935) (“At
12 most, the evidence shows such an occasional use of boats, sporadic and ineffective, as has
13 been observed on lakes, streams, or ponds large enough to float a boat, but which nevertheless
14 were held to lack navigable capacity.”). Although there were some accounts of boating on
15 these temporary, man-made lakes, that evidence does not make it more likely that the Santa
16 Cruz River itself was navigable at statehood.

17 Boating on the Santa Cruz River following statehood does not offer any more proof
18 that the river was used as a “highway for commerce.” There were two utterly unsuccessful
19 boating attempts during the 1914 flood, just following statehood. *See* SFC Report § 3, at 20.
20 During the flood, the National Guard was called in to rescue a group of people stranded near
21 Sahuarita. *Id.* The National Guard first used a collapsible boat for the rescue, but failed in
22 that attempt because the flood current was too strong, and instead the stranded were rescued
23 by horseback. *Id.* The unsuccessful rescue by boat shows that during flooding, when there
24 was high streamflow on the river, it was not navigable due to the violent nature of the current.
25 Secondly, a group of daring adventurers attempted to boat the Santa Cruz River from Nogales
26 to Tucson during that same 1914 flood. *Id.* They used a small wooden boat that “went
27 aground south of Tubac, and the trip was never completed.” *Id.* Their boat was later found

1 buried in the mud. *Id.* The failure of the National Guard in its endeavor to rescue people via
2 inflatable boat on the river and a boat grounded by adventurers aiming to navigate the river
3 demonstrated that the river simply was not navigable.

4 These and other isolated accounts of boating since the 1970s do not indicate that the
5 Santa Cruz River is navigable. Occasional use during exceptional times does not support a
6 finding of navigability. *United States v. Crow, Pope & Land Ents., Inc.*, 340 F. Supp. 25, 32
7 (N.D. Ga. 1972) (“The water must be susceptible for use as a channel of useful commerce and
8 not merely capable of exceptional transportation during periods of high water.”) (citing
9 *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922)). Most of the modern
10 accounts of boating in the SFC Report occurred during flooding or summer monsoon season
11 when streamflows are typically higher due to the precipitation. *See* SFC Report § 3, at 62.

12 No evidence exists to show that the Santa Cruz River was ever used as a “highway for
13 commerce,” over which trade and travel were conducted in the customary mode of trade and
14 travel on the water. *See* A.R.S. § 37-1101(5). Thus, any determination of navigability would
15 need to be based upon a finding that the river was “susceptible” for such use.

16 **B. The Santa Cruz River was not susceptible to being used as a “highway for**
17 **commerce.”**

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

25 Historical descriptions and stream data lead to the conclusion that the Santa Cruz River
26 was not susceptible to navigation. On its lower, middle and upper reaches, streamflow in the
27 Santa Cruz River fluctuates greatly. *See* SFC Report § 4, at 20-21, 26, 28, 57-59. It could

1 hardly have been relied upon as a continuous source of travel or trade due to its variable
2 nature, from its mostly perennial section near the headwaters to going underground and
3 reappearing in its middle section in Pima County to finally going underground in the lower
4 section in Pinal County. *See id.* § 3, at 4-6. As stated above, for centuries, communities
5 developed along the Santa Cruz River, yet none took advantage of it as a source for travel or
6 trade. If the Santa Cruz River were boatable, surely some individual would have capitalized
7 on the nearby river. Close to the time of statehood, the Santa Cruz River had dry stretches
8 with no streamflow. *See id.* § 4, at 20. On average, at the time of statehood streamflow was
9 less than 15 cfs as measured at two stream gages on the river. *See id.* Modern
10 geomorphologic data indicate that the channel is entrenched in its upper reaches and braided
11 in its lower reaches. *See id.* § 4, at 20.

12 The Santa Cruz River's flow is not continuous on its reaches or reliable throughout the
13 year; thus, it is not "susceptible" to navigation. Given the weight of the data and evidence, it
14 does not support a finding that the Santa Cruz River was "susceptible" to being used as a
15 "highway for commerce" in its "ordinary and natural condition" on February 14, 1912.

16 **III. Summary and Requested Action**

17 The evidence presented in this case supports a finding that the Santa Cruz River is non-
18 navigable in its ordinary and natural condition as delineated by the Court of Appeals in *State*
19 *v. ANSAC*. Based on the experience with the Lower Salt River, however, the prudent
20 approach is to reopen the record, hold a public hearing, and reconsider the evidence and the
21 legal standard to ensure that the Commission's 2006 Report complies with *State v. ANSAC*.
22 SRP submits that, upon reviewing the evidence and applying the Court of Appeals' legal test,
23 the Commission should confirm its finding that the Santa Cruz River is non-navigable.

24 DATED this 27th day of January, 2012.

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hand-delivered for filing this 27th day of January,
10 2012 to:

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13
14 AND COPY mailed this 27th day of January, 2012 to:

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A handwritten signature in cursive script, appearing to read "Steve Wene", is written over a horizontal line.