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

11 In re Determination of Navigability of
12 the Upper Salt River, from the
13 Confluence of the White and Black
14 Rivers to Granite Reef Dam

No. 04-008-NAV

**SAN CARLOS APACHE TRIBE'S
AND TONTO APACHE TRIBE'S
MEMORANDUM REGARDING
PROCEEDINGS ON REMAND, AND
NOTICE THAT THE TRIBES JOIN
IN POSITIONS PRESENTED BY
THE SALT RIVER PROJECT**

15 Pursuant to the Commission's notice dated December 14, 2011, the San Carlos Apache
16 Tribe and the Tonto Apache Tribe ("Tribes") submit their memorandum regarding what the
17 Commission should do to comply with the Court of Appeals' opinion, *State v. Arizona*
18 *Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v.*
19 *ANSAC*"), as it relates to the Gila River. Because the notice did not specify whether the
20 Commission was requesting comments on procedural or substantive matters, Tribes present
21 their initial comments on both issues (*i.e.*, how ANSAC should proceed and also what its final
22 decision should be on the merits). To the extent that the Commission allows parties an
23 additional opportunity to file more complete briefs on the merits, Tribes reserve their right to
24 do so at the time and in the manner requested by the Commission.
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1 I. The Tribes join in the Salt River Project's, et al ("SRP") Memorandum Regarding
2 Proceedings on Remand. In addition, the Tribes submit the following recommendations and
3 observations:

4 A. The Burden of Proof rests exclusively on the proponent of Navigability.

5 The opinion of the Court in State v. ANSAC may have created some confusion
6 between the evaluation of evidence, and the burden of proof concerning
7 navigability. The following points are offered for clarification:

- 8 1. The Commission has the responsibility and authority to make the
9 factual decision on all relevant evidence as to navigability. The
10 Commission must evaluate the evidence and determine whether the
11 River was navigable on the date of Statehood ("at Statehood").
- 12 2. There is no presumption favoring navigability.
- 13 3. The proponents of navigability must produce evidence that the
14 River was navigable at Statehood.
- 15 4. The burden of proof rests on the proponents of navigability to
16 provide evidence that proves navigable at Statehood by a
17 preponderance of the evidence.
- 18 5. The Commission's approach and analysis of the evidence must be
19 neutral. In other words, the Commissions approach and analysis of
20 the evidence must be impartial and objective, and the Commission
21 must apply the proper legal test to the evidence.
- 22 6. If the proponents fail to prove navigability at Statehood by the
23 preponderance of the evidence, the Commission must determine
24 that the River was not navigable at Statehood.

25 **II. There is no evidence that the River was used as a highway for commerce, over**
26 **which trade and travel were conducted in the customary modes of trade and travel on**
27 **water at Statehood.**

1 There is no evidence in the archeological or historical record that any Tribal,
2 European, or Mexican explorers or settlers used the River by canoe, raft, boat or barge, or
3 conveyed raw material such as logs, by flotation on the River prior to Statehood.

4 The second part of the factual question is whether the River was **susceptible to be**
5 **used**, in its ordinary and natural condition, as a highway for commerce, over which trade and
6 travel could be conducted in the customary modes of trade and travel on water at Statehood?

7 On this topic there are three kinds of proposed evidence offered:

- 8 1. One kind was a pre-statehood American story about unsuccessful efforts to float
9 logs downstream on the River at high flows or flood flows, told later by third
10 parties.
- 11 2. The Second kind consisted of two stories about unsuccessful pre-statehood
12 American attempts to travel by boat over unidentified stretches of the River,
13 told later by third parties.
- 14 3. The third kind was a group of stories about recent accounts of recreational use
15 of certain reaches of the River by kayak or inflatable boats during high flows or
16 flood flows. These stories were sometimes reported by persons who occupied
17 the kayak or inflatable boats.

18 The Commission must evaluate the evidence and determine whether it is relevant, and
19 if so, what weight to give it as evidence, if any. The stories concerning purported use of the
20 River during flood flows should not be considered relevant, because the River is not in its
21 “ordinary and natural condition” at flood stage.

22 The stories concerning recent recreational use of limited reaches of the River under
23 high flow conditions, should not be considered relevant, because that part of the statute was
24 amended in 2001 to delete the reference to “a portion or reach of a water course”.

25 In addition, recreational use by modern flotation devices should not be considered as
26 the use of the River as a highway for commerce, over which trade and travel was or could be
27 conducted in the customary modes of trade and travel on water at Statehood.

1 **III.** The Tribes are the original aboriginal occupants of the territory which includes the
2 River. They have lived, farmed and traveled along the River since time immemorial. If the
3 River had been susceptible to travel by boat, raft, or canoe, they certainly would have done so.
4 There is no evidence that they did so, and they do not claim to have done so.

5 **IV.** The Commission is authorized to decide the fact of whether the River was navigable
6 at Statehood. The Commission does not decide the viability of the State's claim to title to the
7 bed of the River to the high water mark.

8 The Tribes, however, cannot ignore the threat of the State's claim to title to vital
9 portions of their territory, as a potential consequence of the Commission's decision.

10 **V. Summary and Requested Action**

11 The Tribes believe that the evidence presented in this case supports a finding that the
12 River is non-navigable in its ordinary and natural condition as delineated by the Court of
13 Appeals in *State v. ANSAC*. However, based on the experience of the Commission with the
14 Lower Salt River, the prudent approach is to reopen the record, hold a public hearing, and
15 reconsider the evidence and the legal standard to ensure that the Commission's 2009 Report
16 complies with *State v. ANSAC*. The Tribes submit that, upon reviewing the evidence and
17 applying the Court of Appeals' legal test, the Commission should confirm its finding that the
18 River is non-navigable.

19 DATED this 27th day of January, 2012.

20 THE SPARKS LAW FIRM, P.C.

21
22 By



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1 ORIGINAL AND SIX COPIES of the foregoing
2 mailed for filing this 27th day of January, 2012 to:

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

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A handwritten signature in black ink, appearing to read "T. Murphy", is written over a horizontal line.