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14 **BEFORE THE ARIZONA NAVIGABLE STREAM
15 ADJUDICATION COMMISSION**

16 In re Determination of Navigability of
17 the Upper Salt River, from the
18 Confluence of the White and Black
19 Rivers to Granite Reef Dam

No. 04-008-NAV

20 **SALT RIVER PROJECT'S
21 MEMORANDUM REGARDING
22 PROCEEDINGS ON REMAND**

23 Pursuant to the Commission's notice dated December 14, 2011, the Salt River Project
24 Agricultural Improvement and Power District and Salt River Valley Water Users' Association
25 (collectively, "SRP") submit their memorandum regarding what the Commission should do to
26 comply with the Court of Appeals' opinion, *State v. Arizona Navigable Stream Adjudication
27 Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v. ANSAC*"), as it relates to the
Upper Salt 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.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 Upper Salt River non-navigable in its 2007
14 Report.³ However, the Commission must recognize that this case was remanded by the
15 Maricopa County Superior Court "for all further proceedings consistent with [*State v.*
16 *ANSAC*]." See Minute Entry dated October 21, 2011. Accordingly, the Commission now
17 should take special care to ensure that it follows the proper procedures to comply with the
18 court's order.

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¹ Report, Findings and Determination Regarding the Navigability of the Lower Salt River from
21 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 Upper Salt river from the
Confluence of the White and Black Rivers to Granite Reef Dam (December 13, 2007) ("2007
Report").

1 Having participated in the extensive proceedings leading up to the 2007 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 Upper Salt 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 2007 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 Upper Salt 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 Upper
6 Salt 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 Upper Salt 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 Upper Salt 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 2007
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 Upper Salt River
18 does not suffer a similar fate.

19 **II. The Upper Salt 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 Upper
23 Salt River . . . was not used or susceptible of use as a highway for commerce over which trade
24 and travel was or may be conducted in the ordinary modes of travel on water as of February
25 14, 1912.” 2007 Report, at 65.

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

1 Additionally, pursuant to a motion filed by SRP with the Commission on September
2 15, 2005, the Commission determined in the 2007 Report that it did not have subject matter
3 jurisdiction to determine the navigability of Roosevelt Lake and the stream beds which
4 formerly existed under the waters of the lake before inundation, due to the fact that “the dam
5 and lake were built before statehood and the streams did not exist on February 14, 1912. . . .”
6 See 2007 Report at 51. This fact, however, does not conflict with *State v. ANSAC* because
7 although the Commission did not determine the navigability of Roosevelt Lake, it did, as set
8 forth below, consider the entirety of the Upper Salt in its “ordinary and natural” condition on
9 the date of statehood.

10 This balance of this memorandum addresses first the evidence regarding the
11 navigability of the Upper Salt River in general, then turns to the reasons why the Commission
12 properly determined that it did not have jurisdiction to determine the navigability of
13 Roosevelt Lake (to the extent that it decides to reexamine that issue).

14 **A. Upper Salt River**

15 **1. The Upper Salt River was not actually used as a “highway for**
16 **commerce.”**

17 It is beyond reasonable dispute that the Upper Salt River has never been actually used
18 as a “highway for commerce.” No evidence exists of any prehistoric boating or flotation of
19 logs on the river. See JE Fuller/Hydrology & Geomorphology, Inc., *Arizona Stream*
20 *Navigability Study for the Salt River: Granite Reef Dam to the Confluence of the White and*
21 *Black Rivers* (revised June 2003) (“Fuller Report”), at 2-1.⁵ Likewise, no evidence exists that
22 the early explorers or soldiers in the Salt River Valley, who traveled through the area on
23 several occasions, ever used the river—for “commerce” or otherwise. See *id.*; see also
24 Hearing Transcript (“Tr.”) at 28-29 (Fuller). No credible evidence exists in the record that
25 any successful “tie drive” or any other effort to float logs or timber down the river was ever
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⁵ The Fuller Report is listed in the Evidence Log as Item # 27.

1 conducted on the Upper Salt River. See K. Smith, *The Magnificent Experiment: Building the*
2 *Salt River Reclamation Project, 1890-1917* (1986) (“Smith”), at 73-75; see also E. Zarbin,
3 *Roosevelt Dam: A History to 1911* (1984) (“Zarbin”), at 75-77.⁶ On the contrary, in the
4 effort to construct Roosevelt Dam (as well as the saw mill constructed upstream of the dam),
5 roads were constructed from Phoenix to move the workers and construction materials to the
6 dam site. See *id.* If the Upper Salt had been navigable, it would have been an easy task to
7 float barges or other vessels up the river to haul these workers and supplies. Instead the
8 Government constructed the Apache Trail (initially known as the Roosevelt Road), a remote,
9 twisting route from Mesa to Roosevelt, including a stretch of eleven miles “in a very rough
10 country known as Fish Creek Hill.” *Id.*

11 The evidence of the eight accounts of attempted boating on the river described in the
12 Fuller Report between 1873 and 1910 does not establish that the river was used for any type
13 of regular (or even periodic) trade or transportation during the period immediately before and
14 at statehood. See Fuller Report, at 3-34 to 3-40. To the contrary, these accounts are
15 persuasive evidence that the river was *non-navigable*, for several reasons.

16 First, the accounts of attempted boating consist entirely of anecdotal evidence from
17 local newspaper articles, and do not provide a sufficient basis to support a finding of
18 navigability. For example, the only documentation for one trip, which purportedly occurred
19 sometime in 1883, is what appears to be an obituary of one of the participants written twenty-
20 six years later, in 1909. See *id.* at 3-35 to 3-36. Another attempt that is said to have occurred
21 in June 1885 is mentioned in several newspaper articles, one of which states that “the fish
22 were so thick that the boat floated on their backs.” *Id.* An alleged episode of floating some
23 form of timber down the river, which occurred in either 1890 or 1891, is based upon a
24 modern-day historian’s recollection of a newspaper article he *thinks he recalls seeing*, but no
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27 ⁶ Smith is listed in the Evidence Log as Item # 16 and Zarbin is listed as Item # 14.

1 such article has ever been located. *Id.* The evidentiary basis for each of these eight
2 “attempts” is shaky, to say the least.

3 Second, and perhaps more important, the eight accounts of attempted boating on the
4 river are so full of mishaps and misery that they themselves prove that the river was not used
5 or susceptible to being used as a “highway for commerce.” On at least two of the trips, the
6 boats were capsized and the parties lost all or nearly all of their supplies. *See id.* at 3-35, 3-
7 38. Two of the participants are known to have died as a result of their boating adventures. *Id.*
8 In other instances, the boats were destroyed or badly damaged. *Id.*

9 Third, the only recorded opinions on navigability by the participants themselves show
10 that the river was not suitable as a “highway for commerce.” Charles Hayden and other
11 participants in a June 1873 trip to float logs down the Salt River to Tempe, the only known
12 actual attempt to float logs on the river, “pronounce[d] the scheme a failure.” *Id.* Two men
13 who apparently managed to survive an adventurous trip from Roosevelt Dam to Granite Reef
14 Dam in 1910 concluded after the voyage that they had “no serious intention of attempting to
15 go into competition with the stage company.” *Id.*

16 These eight anecdotal accounts of boating on the river over the course of thirty-seven
17 years are not sufficient to satisfy the burden of proof for navigability and, in fact, they prove
18 just the opposite. People generally met with disastrous consequences, with some people
19 dying, others losing their supplies, and virtually all of them encountering steep narrow
20 canyons and dangerous rapids. These ill-fated attempts show that the Upper Salt River is not
21 and never has been “navigable.”

22 2. **The Upper Salt River was never susceptible to being used as a**
23 **“highway for commerce.”**

24 Because it is abundantly clear that the river was never actually used as a “highway for
25 commerce,” the only way it can be considered navigable is if it was “susceptible” to such use.
26 No evidence exists in the record to show that the river, in any condition at any time, was
27 capable of acting as “a corridor or conduit within which the exchange of goods, commodities

1 or property or the transportation of persons may be conducted.” A.R.S § 37-1101(3)
2 (defining “highway for commerce”).

3 Although the river existed in close proximity to much of the exploration and settlement
4 in early Arizona, it was never used for any type of trade or transportation. In order for the
5 Commission to determine that the river was “susceptible to being used . . . as a highway for
6 commerce,” it must find that the prehistoric inhabitants, the early explorers, soldiers, miners
7 and thousands of citizens who resided in the general area prior to statehood simply failed to
8 comprehend the potential usefulness of the river as an avenue for navigation. No evidence
9 exists to support such a finding.

10 It might be theoretically possible that, on one or more occasions in particular years, it
11 would have been feasible for a person to boat or float logs down some portion of the river.
12 Occasional use in exceptional times does not, however, support a finding of navigability.
13 “The mere fact that a river will occasionally float logs, poles, and rafts downstream in times
14 of high water does not make the river navigable.” *Crow, Pope & Land*, 340 F. Supp. at 32
15 (citing *Rio Grande Dam*, 174 U.S. at 690). “The waterway must be susceptible for use as a
16 channel of useful commerce and not merely capable of exceptional transportation during
17 periods of high water.” *Id.* (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77
18 (1922)).⁷

19 Perhaps the best evidence that the river was not “susceptible to being used” for
20 navigation at or before statehood are the accounts of those “daring adventurers” described
21 above who actually tried to use the river for that purpose. Those who actually tried to boat
22 the river “pronounce[d] the scheme a failure” and stated that they had “no serious intention of
23 attempting to go into competition with the stage company.” The Commission can be certain
24 that the river was not “susceptible to being used” for navigation because several individuals
25 tried it and failed.

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27 ⁷ See also *United States v. Harrell*, 926 F.2d 1036, 1040 (11th Cir. 1991) (“susceptibility of use as a
highway for commerce should not be confined to ‘exceptional conditions or short periods of
temporary high water’”) (quoting *United States v. Utah*, 283 U.S. 64, 87 (1931)).

1 **B. Roosevelt Lake**

2 As noted above, SRP filed a motion with this Commission requesting that the
3 Commission find that it lacks statutory subject matter jurisdiction to determine the
4 navigability of Roosevelt Lake, or any of the former stream reaches lying thereunder, because
5 they had become part of a “man-made water conveyance system” prior to February 14, 1912.
6 The Commission subsequently endorsed SRP’s position in the 2007 Report. As set forth
7 herein, the Commission’s decision on that issue should remain undisturbed.

8 Roosevelt Lake is a man-made reservoir that was constructed by the United States
9 pursuant to the 1902 Reclamation Act. Prior to construction, the United States acquired title
10 to the land that would be inundated by the reservoir. *See* Various deeds and other documents
11 relating to the United States’ acquisition of the site for Roosevelt Lake in the early 1900s⁸; *see*
12 *also* Fuller Report, at 3-17 to 3-21 (discussing the Federal Government’s acquisition of the
13 community of Catalpa and other nearby farms and ranches). The express congressional
14 purpose of this acquisition and construction was to create a reservoir for water storage
15 purposes, not for navigation.

16 The lake is not a “navigable watercourse” as defined in A.R.S. § 37-1101(5). In
17 addition to not satisfying the definition of “watercourse” under Section 37-1101(11) as
18 discussed above, the lake does not meet the definition of “navigable” under Section 37-
19 1101(5) because, in its “ordinary and natural condition,” the lake does not exist. The lake is
20 not a “natural” feature; it is an artificial reservoir created by the efforts of the United States
21 Bureau of Reclamation.

22 Furthermore, the “federal test,” which is set forth in Section 37-1101(5), requires that
23 the watercourse be useful as a “highway for commerce.” In other words, the watercourse
24 must be capable of being used for getting goods or people from somewhere to somewhere
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27 ⁸ These documents are listed in the Evidence Log as Item # 30.

1 else.⁹ Roosevelt Lake is a man-made reservoir located in the middle of a national forest. If
2 someone were to traverse the entire lake in a boat, he would not be significantly closer to
3 getting to another location than he would have been by driving or walking around the outside
4 of the lake. Roosevelt Lake is not used or susceptible to being used as a “highway for
5 commerce,” so it is not “navigable” under the federal test or the Arizona statute.


6 **III. Summary and Requested Action**

7 The evidence presented in this case supports a finding that the Upper Salt River is non-
8 navigable in its ordinary and natural condition as delineated by the Court of Appeals in *State*
9 *v. ANSAC*. Based on the experience with the Lower Salt River, however, the prudent
10 approach is to reopen the record, hold a public hearing, and reconsider the evidence and the
11 legal standard to ensure that the Commission’s 2007 Report complies with *State v. ANSAC*.
12 SRP submits that, upon reviewing the evidence and applying the Court of Appeals’ legal test,
13 the Commission should confirm its finding that the Upper Salt River is non-navigable.
14 Additionally, the Commission should affirm its prior ruling that it does not have jurisdiction
15 to determine the navigability of Roosevelt Lake.

16 DATED this 27th day of January, 2012.

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

18
19 By _____


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23 ⁹ See *State v. Adams*, 89 N.W.2d 661, 676 (Minn. 1958), *cert. denied*, 358 U.S. 826 (1958) (“The
24 beginning and the end of a highway [for commerce] must be such that useful commerce would
25 naturally go between them.”); *Taylor Fishing Club*, 88 S.W.2d at 130 (“While Stanmire Lake is large
26 enough to float a boat, it is not wide enough or long enough to provide a practical route for the
27 transportation of commodities in any direction and does not connect any points between which it
would be useful as a practical route for navigation.”) (finding lake non-navigable); *cf. Lykes Bros.,*
Inc. v. Corps of Eng’rs, 821 F. Supp. 1457, 1463 (M.D. Fla. 1993), *aff’d*, 64 F.3d 630 (11th Cir.
1995) (to be considerable “navigable,” a waterway “must be able to sustain commercial navigation on
a predictable and reliable basis.”).

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2 ORIGINAL AND SIX COPIES of the foregoing
3 hand-delivered for filing this 27th day of January,
4 2012 to:

5 Arizona Navigable Stream Adjudication Commission
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8 AND COPY mailed this 27th day of January, 2012 to:

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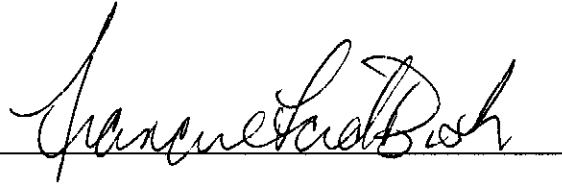
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