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

16 In re Determination of Navigability of
17 the Verde River, from its Headwaters to
18 the Confluence with the Salt River

No. 04-009-NAV

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

22 Pursuant to the Commission's notice dated December 14, 2011, the Salt River Project
23 Agricultural Improvement and Power District and Salt River Valley Water Users' Association
24 (collectively, "SRP") submit their memorandum regarding what the Commission should do to
25 comply with the Court of Appeals' opinion, *State v. Arizona Navigable Stream Adjudication*
26 *Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v. ANSAC*"), as it relates to the
27 Verde 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 Verde River non-navigable in its 2008
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 September 24, 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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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 Verde River from its
Headwaters to the Confluence with the Salt River (March 24, 2008) ("2008 Report").

1 Having participated in the extensive proceedings leading up to the 2008 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 Verde 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 2008 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 Verde River navigable in its "ordinary and natural
26 condition" on the date of statehood? Those briefs, if deemed necessary by the Commission,
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1 could be submitted before or after the public hearing and could be in addition to or in lieu of
2 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 Verde
6 River. That case was argued on December 7, 2011, and it is expected that the Court will issue
7 a decision sometime this spring. Given the time required for the Commission to issue public
8 notice, hold a hearing, and render a decision in the Verde River case, it is likely that the
9 Commission could have the benefit of this additional guidance from the United States
10 Supreme Court before its Verde 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 2008
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 Verde River does
18 not suffer a similar fate.

19 **II. The Verde 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 Verde
23 River . . . was not used or susceptible of use as a highway for commerce over which trade and
24 travel was or may be conducted in the ordinary modes of travel on water as of February 14,
25 1912.” 2008 Report, at 53-54. The Commission made this conclusion after specifically
26 considering the flow of the Verde River at the time of statehood after adding in the estimated

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

1 amount of man-made diversions for irrigation. *See* 2008 Report, at 52.⁵ Accordingly, the
2 Commission’s findings regarding the “ordinary and natural condition” of the Verde River
3 should remain undisturbed under the test delineated in *State v. ANSAC*.

4 **A. The Verde River was not actually used as a “highway for commerce.”**

5 Based on the evidence presented to the Commission, it is beyond reasonable dispute
6 that the Verde River has never been actually used as a “highway for commerce.” For
7 example, no evidence exists of any prehistoric boating or flotation of logs on the river. *See*
8 *Fuller, et. al., Arizona Stream Navigability Study for the Verde River, Salt River Confluence*
9 *to Sullivan Lake* (June 2003) (“Fuller Report”), at 2-14.⁶ Although numerous Native
10 American tribes, such as the Northeastern and Southeastern Yavapai, Pima, and Apache,
11 occupied the Verde River Valley, no evidence was presented to the Commission that these
12 tribes utilized water from the Verde River for anything other than simple ditch irrigation. *See*
13 *id.* at 3-1.

14 Likewise, no evidence exists that the early explorers or soldiers in the area near the
15 river, who traveled through the area on several occasions, ever used the river—for
16 “commerce” or otherwise. *See id.* at 3-2, 3-9; *see also Lykes Bros., Inc. v. Corps of Eng’rs*,
17 821 F. Supp. 1457, 1459 (M.D. Fla. 1993), *aff’d* 64 F.3d 630 (11th Cir. 1995) (court found
18 that had river been navigable, it would seem obvious that military and settlers would have
19 used the river to transport men and supplies rather than carrying them overland).

20 Additional evidence in support of a finding of non-navigability comes from the
21 accounts of the Verde River in the decades prior to statehood, including the early accounts of
22 attempts by an ambitious few to actually float boats on the river. The evidence shows a
23 sparse record of a few who actually did attempt to navigate the river between 1873 and 1903.

24 _____
25 ⁵ The 2008 Report states that “[t]here is evidence, somewhat questionable, that the average annual
26 flow of the Verde river adding in the estimated amount diverted for irrigation was between 758 cfs
27 and 901 cfs near its confluence with the Salt River. Even taking the higher figure of 901 cfs, it is
below the floor of any river found navigable by any court. . . .”

⁶ The Fuller Report is listed in the Evidence Log as Item #31.

1 The Fuller Report discusses at least eight accounts of attempts to boat the river before
2 statehood. This scattered collection of boating expeditions on the river does not provide
3 evidence that the Verde River is “navigable” as defined in A.R.S. § 37-1101(5). To the
4 contrary, these eight accounts not only are insufficient to satisfy the navigability proponents’
5 burden of proof under A.R.S. § 37-1128(A), they are persuasive evidence that the river was
6 non-navigable, for several reasons.

7 First, two of the eight accounts relate to supposed reports of log flotation. One story
8 reveals that no logs were ever floated down the Verde River, even though Charles Hayden
9 thought he could. *See Fuller Report*, at 3-20. The fact that Hayden failed to float logs down
10 the Verde in 1873 does not represent a historic boating incident; instead, it reveals the lack
11 thereof. The other tale of log flotation is based entirely on one person’s recollection of seeing
12 a newspaper article about floating logs or timber down the Verde River. *See id.* at 3-21.
13 However, that article has never been found and there is no other corroborating source.
14 Moreover, even if this event did occur in 1890 or 1891, there is no evidence to indicate that it
15 did not occur during the 1891 flood event. *See id.*

16 Second, the accounts of attempted boating on the river do not prove that the river was
17 used or susceptible to being used as a “highway for commerce.” Two of the historic accounts
18 relate to reports of soldiers using boats to cross the river. *See id.* at 3-20, 8-3. These two
19 accounts indicate, however, that the boats or rafts were used only during times of high stream
20 flow. *See id.* Furthermore, the boats were not used to travel upstream or downstream the
21 Verde River. *Id.* Two other stories of boating on the Verde River relate to recreational trips.
22 One account reveals that two men went duck hunting while traveling in a steel boat in early
23 1903. *See id.* at 3-21. This single trip occurred during a time of year when higher stream
24 flows are typical on the Verde River. *Id.* In the one other story of a recreational trip on the
25 Verde and Salt Rivers, one of the participants died when his shotgun discharged. *See id.* at 3-
26 20 through 3-21.

1 In sum, although there have been isolated boating events on the Verde River, the
2 overwhelming weight of the evidence suggests that the river is not navigable and has not been
3 utilized as a “highway for commerce.” The Fuller Report concluded that: “Historical
4 accounts of boating on the Verde River do exist, though the vast majority of transportation in
5 the region [was] by horses, mule trains, wagons, and railroad.” *Id.* at 3-22. A handful of
6 intermittent boating accounts over the course of thirty years does not make it more likely than
7 not that the Verde River was navigable or susceptible to navigation in its ordinary and natural
8 condition on February 14, 1912.

9 **B. The Verde was never susceptible to being used as a “highway for**
10 **commerce.”**

11 Because the river was never actually used as a “highway for commerce,” the only way
12 it can be considered navigable is if it was “susceptible” to such use. No evidence exists in the
13 record to show that the river, in any condition at any time, was capable of acting as “a
14 corridor or conduit within which the exchange of goods, commodities or property or the
15 transportation of persons may be conducted.” A.R.S § 37-1101(3) (defining “highway for
16 commerce”).

17 *1. If the Verde River had been “susceptible” to navigation, people would*
18 *have navigated it.*

19 In order for the Commission to determine that the river was “susceptible to being used
20 . . . as a highway for commerce,” it must necessarily find that the prehistoric inhabitants, the
21 early explorers, the Yavapai, Pima, and Apache, and thousands of citizens who resided along
22 the river and in the general area prior to statehood simply failed to comprehend the potential
23 usefulness of the river as an avenue for navigation. No evidence exists to support such a
24 finding. Occasional use in exceptional times does not support a finding of navigability.⁷

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26 ⁷ “The mere fact that a river will occasionally float logs, poles, and rafts downstream in times of high
27 water does not make the river navigable.” *United States v. Crow, Pope & Land*, 340 F. Supp. 25, 32
(N.D. Ga. 1972) (citing *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1898)). “The
waterway must be susceptible for use as a channel of useful commerce and not merely capable of

1 Additionally, no government agency, including federal land surveyors, ever indicated
2 that the Verde River was navigable. *See* Littlefield, Assessment of the Verde River's
3 Navigability Prior to and on the Date of Arizona's Statehood, February 14, 1912 (July 7,
4 2005) ("Littlefield Report"), at 11-13, 37-45;⁸ *see also United States v. Oregon*, 295 U.S. at
5 23 (courts should consider government's treatment of watercourse as non-navigable in their
6 analysis of navigability); *see also Washington Water Power Co. v. Federal Energy*
7 *Regulatory Comm'n*, 775 F.2d 305, 332 (D.C. Cir. 1985) (government's, including Army
8 Corps of Engineers', description and treatment of river is relevant to determination of river
9 navigability). Likewise, no federal or state land patent indicated that the Verde River was
10 navigable. *See* Littlefield Report, at 11-13, 37-45.; *see also Lykes Bros.*, 821 F. Supp. at 1460
11 (court found actions by State show that, for many years, it considered river non-navigable,
12 e.g., land bordering river had been deeded to private ownership and owners paid taxes).

13 2. *Modern boating does not support a finding that the Verde River was ever*
14 *"susceptible" to navigation.*

15 Although the Commission received written evidence and testimony regarding modern
16 recreational boating on the Verde River, this evidence of both guided and private recreational
17 boating does not support a finding that the river was "susceptible" to navigation; rather, the
18 evidence points to the opposite conclusion for several reasons.

19 First, the evidence of modern recreational boating trips presented to the Commission
20 reveals that numerous natural impediments serve as Mother Nature's obstacle to navigation
21 on the Verde River. Jim Slingluff detailed some of the boating trips he has taken on the
22 Verde River. *See* Hearing Transcript ("Tr."), at 101-131 (Slingluff). His stories indicated
23 that, at various points along its course, the river has natural impediments that would have
24 prevented navigation. *See id.* at 106-113. He indicated that there are at least 130 rapids along
25

26 exceptional transportation during periods of high water." *Id.* (citing *Brewer-Elliott Oil & Gas Co. v.*
27 *United States*, 260 U.S. 77 (1922)).

⁸ The Littlefield Report is listed in the Evidence Log as Item #32.

1 the river, and although he stated that there is no “death count” for the Verde River, there are
2 still hazardous stretches of the river. He admitted that there were two times where he “was at
3 immediate risk of dying” while boating on the Verde River due to high velocity falls. *See id.*
4 at 112-13, 125.

5 Second, most modern recreational boating does not take place along the entire course
6 of the river, nor does it occur year round. As Mr. John Colby of the Cimarron River
7 Company testified, its guided boating trips have been conducted from Childs to the Horseshoe
8 Reservoir and from the Bartlett Reservoir to the confluence with the Salt River. Tr. at 55-56
9 (Colby). Its multi-day trips are only conducted once or twice per year, and only in certain
10 seasons. *See id.* at 57. One author, who has written extensively on the history of the Verde
11 River, stated that the river is not navigable even though he was aware of recreational boating
12 on the river. *See Fuller Report*, at 4-2. Mr. Byrkit noted that such boating is normally
13 possible only in February and March, and that in other mother months, “the Verde River
14 cannot be run because it dries up or because it is dangerous, and that a lot of people have died
15 in the Verde River because they enter the river during flooding.” *Id.*

16 The evidence of modern recreational boating does not demonstrate that the Verde
17 River was susceptible to use as a “highway for commerce” in its ordinary and natural
18 condition, and it does not meet the federal test for navigability.⁹ The characteristics that may
19 make the river fun for recreational outings do not make the river navigable, and a river is not

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21 ⁹ *See generally George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968) (under admiralty jurisdiction,
22 river was non-navigable where only use was for float fishing because “[s]uch pastime, however,
23 standing alone is too fragile a basis to support a holding of legal navigability, absent any evidence of
24 a channel of useful purpose to trade or commerce.”); *Hanigan v. New York*, 629 N.Y.S.2d 509, 512
25 (N.Y. App. Div. 1995) (evidence of boating on lake was “for purely recreational purposes” and was
26 “insufficient to demonstrate that the pond has any capacity or suitability for commercial
27 transportation.”); *Elder v. Delcour*, 263 S.W.2d 221, 226 (Mo. App. 1953) (“As a general rule, the
character of the commerce essential to navigability is that which is useful and has practical utility to
the public. It is generally held that the stream must be navigable for some useful purpose, such as
trade or agriculture, rather than for mere pleasure, and that the mere fact that waters have been used,
or are capable of being used, by small boats or pleasure craft, such as canoes, rowboats, small skiffs,
or launches, does not of itself render them navigable.”) (citing 65 C.J.S., *Navigable Waters*, § 6, p.
54).

1 navigable simply because there is some evidence that modern boats are able to float on it.
2 See, e.g., *United States v. Oregon*, 295 U.S. 1, 22-23 (1935) (“At most the evidence shows
3 such an occasional use of boats, sporadic and ineffective, as has been observed on lakes,
4 streams, or ponds large enough to float a boat, but which nevertheless were held to lack
5 navigable capacity.”); *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690, 698 (1898)
6 (the “mere fact that logs, poles and rafts are floated down a stream occasionally and in times
7 of high water does not make it a navigable river.”). Rather, the evidence of modern
8 recreational boating demonstrate that the Verde River was not susceptible to being used as a
9 “highway for commerce” in its ordinary and natural condition.

10 **III. Summary and Requested Action**

11 The evidence presented in this case supports a finding that the Verde River is non-
12 navigable in its ordinary and natural condition as delineated by the Court of Appeals in *State*
13 *v. ANSAC*. Based on the experience with the Lower Salt River, however, the prudent
14 approach is to reopen the record, hold a public hearing, and reconsider the evidence and the
15 legal standard to ensure that the Commission’s 2008 Report complies with *State v. ANSAC*.
16 SRP submits that, upon reviewing the evidence and applying the Court of Appeals’ legal test,
17 the Commission should confirm its finding that the Verde River is non-navigable in its
18 ordinary and natural condition.

19 DATED this 27th day of January, 2012.

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

21
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