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

12 **In re Determination of Navigability** )  
13 **of the Lower Salt River, from Granite** )  
14 **Reef Dam to the Gila River Confluence** )

No. 03-005-NAV

**CITY OF PHOENIX' OPENING**  
**POST-HEARING MEMORANDUM**

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15 The City of Phoenix ("Phoenix") submits its Opening Post-hearing Memorandum  
16 regarding this Commission's determination of whether the Lower Salt River (from Granite Reef  
17 Dam to the Gila River confluence) was "navigable" when Arizona became a state on February  
18 14, 1912.

19 **I. INTRODUCTION.**

20 Pursuant to Draft Rule R12-17-108.1 of the Rules of the Arizona Navigable Stream  
21 Adjudication Commission ("ANSAC") the City of Phoenix ("Phoenix") hereby submits its post-  
22 hearing memorandum for reference by the ANSAC in determining the navigability or non-  
23 navigability of the reach of the Lower Salt River from Granite Reef Dam to its confluence with  
24 the Gila River as of February 14, 1912. (Hereafter this proceeding shall simply be referred to as

1 the “Lower Salt.”) ANSAC conducted the hearing on April 7 and 8, 2003 prior to which  
2 Phoenix also filed a document entitled “Historical and Scientific Evidence Concerning  
3 Navigability of the Lower Salt River” (ANSAC Evidence Item #29)<sup>1</sup>. The ANSAC Lower Salt  
4 proceeding itself was commenced and conducted in accordance with Title 37, Chapter 7 of the  
5 Arizona Revised Statutes. Specifically, ANSAC has received and compiled evidence pursuant  
6 to A.R.S. §§ 37-1123 and 37-1124 and conducted the requisite hearing pursuant to A.R.S. § 37-  
7 1126. ANSAC must now make its determination of the navigability of the Lower Salt in  
8 accordance with the criteria set forth in A.R.S. § 37-1128.  
9

10 Rather than recite the tortuous history of the ANSAC, its enabling legislation and the  
11 court proceedings interpreting that legislation, Phoenix simply directs ANSAC’s attention to the  
12 preceding appellate opinions. Land Department v. O’Toole, 154 Ariz. 43, 739 P.2d 1360 (App.  
13 1987); Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158  
14 (App. 1991); and Defenders of Wildlife v. Hull, 199 Ariz. 411, 18 P.3d 722 (App. 2001).

15 Following the Hull decision the Arizona legislature again amended the ANSAC statutes in 2001  
16 and it is under the latter version of those statutes that ANSAC has conducted its hearing and will  
17 make its determination of the navigability of the Lower Salt River. See 2001 Ariz. Sess. Laws,  
18 ch. 166 § 1. The ANSAC statutes have again been amended in 2003, but in no manner bearing  
19 upon ANSAC’s conducting its hearings or its obligation for determining the navigability of a  
20 watercourse. See 2003 Ariz. Sess. Laws, ch. 53.

## 21 **II. ANSAC’S DETERMINATION.**

22 As previously noted, ANSAC must now review all the available evidence it has compiled  
23 and which has been presented to it both before and during the hearing on the Lower Salt. Based  
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<sup>1</sup> Wherever an item entered into evidence in the Lower Salt is referenced in this memorandum it shall be preceded by the

1 only upon this evidence, ANSAC must then determine whether the Lower Salt was navigable as  
2 of February 14, 1912. A.R.S. § 37-1128(A). In making its determination, ANSAC is strictly  
3 limited in how it assesses the evidence before it as follows:

4 . . . If the preponderance of the evidence establishes that the  
5 watercourse was navigable, the commission shall issue its  
6 determination confirming that the watercourse was navigable. If the  
7 preponderance of the evidence fails to establish that the watercourse  
8 was navigable, the commission shall issue its determination that the  
9 watercourse was non-navigable. A.R.S. § 27-1128(A). (Emphasis  
10 supplied)

11 The legislature's enumeration of the sufficiency of the evidence required to support a  
12 finding of navigability differs from the normal practice governing administrative agency  
13 proceedings where that sufficiency is set by a court conducting judicial review of the agency's  
14 decision. See, A.R.S. § 41-1062. Upon such review, the courts have established essentially two  
15 formulas, *i.e.*, the "substantial evidence in the record" test as noted in *Talley v. Paradise*  
16 *Memorial Gardens, Inc.*, 107 Ariz. 585, 588, 491 P.2d 439, 442 (1971), or whether the agency  
17 action is "arbitrary, capricious or an abuse of discretion" as set out in *Schade v. Arizona State*  
18 *Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973). By establishing the actual  
19 weight of the evidence necessary for the ANSAC to make a finding of navigability, the  
20 legislature has actually simplified the ANSAC's decision-making process and made it analogous  
21 to a civil trial court proceeding. The "preponderance of the evidence" standard has been  
22 variously described. American Jurisprudence 2<sup>nd</sup> states:

23 Generally the party with the burden of persuasion must establish the  
24 elements of its case by a preponderance of the evidence; that  
generally occurs when the fact finder is satisfied that the fact is more  
likely true than not true. Jury instructions defining preponderance of  
the evidence usually include language directing the jury to find

1 against the party with the burden if it is unable to decide whether a  
2 preponderance has been shown. 29 Am.Jur.2d, Evidence § 157.

3 Black's Law Dictionary defines this concept as:

4 The greater the weight of the evidence; superior evidentiary weight  
5 that, though not sufficient to free the mind wholly from all  
6 reasonable doubt, is still sufficient to incline a fair and impartial  
7 mind to one side of the issue rather than the other. This is the  
8 burden of proof in a civil trial, in which the jury is instructed to find  
9 for the party that, on the whole, has the stronger evidence, however  
10 slight the edge may be. Black's Law Dictionary, 1201 (7<sup>th</sup> Edition  
11 1999).

12 In Arizona, this standard has been captured in Recommended Arizona Jury Instruction  
13 (Civil) Standard 9 (1997) by the following language:

14 Burden of proof means burden of persuasion. On any claim, the  
15 party who has the burden of proof must persuade you, by the  
16 evidence, that the claim is more probably true than not true. This  
17 means that the evidence that favors that party outweighs the  
18 opposing evidence. In determining whether a party has met this  
19 burden, consider all the evidence that bears on that claim, regardless  
20 of which party produced it.

21 Having a clear understanding of the "preponderance of the evidence" standard will easily  
22 allow ANSAC to determine that the Lower Salt was nonnavigable as of February 14, 1912.  
23 With no exception, the evidence submitted at the Lower Salt hearing on April 7-8, 2003 and  
24 prior thereto supports such a determination.

Under the provisions of A.R.S. § 37-1101(5):

"Navigable" or "navigable watercourse" means a watercourse that  
was in existence on February 14, 1912, and at that time was used or  
was susceptible to being used in its ordinary and natural condition,  
as a highway for commerce, over which trade and travel were or  
could have been conducted in the customary modes of trade and  
travel on water.

1 This statutory definition is in essence the “federal test” for determining navigability for title  
2 purposes enunciated by the U.S. Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557,  
3 563, 19 L. Ed. 999 (1870).

4 As noted by the Salt River Project’s “Review of the Evidence in the Record” in its  
5 Opening Post-Hearing Memorandum” and incorporated herein by reference, NONE of the  
6 evidence submitted in the Lower Salt proceeding supports a finding of navigability. Where, as  
7 here, there has been a complete absence of evidence that the Lower Salt was navigable as of  
8 February 14, 1912, the “preponderance of the evidence” test mandated by A.R.S. § 37-1128(A)  
9 becomes almost superfluous to ANSAC’s deliberation. Parties advocating a determination of  
10 the Lower Salt’s navigability who failed to submit evidence at or prior to the time of the Lower  
11 Salt hearing cannot meet their burden of proof by simply trying to diminish the quality of the  
12 evidence submitted by those seeking a determination of non-navigability.

13 While the Maricopa County Department of Transportation filed a single page document  
14 purporting to show the “estimated mean low” of the Salt River upstream of the Salt River Indian  
15 Reservation as well as a “base slow” figure, no attempt was made to show that such flows would  
16 have established the Lower Salt as a “highway for commerce” or that the Lower Salt was  
17 susceptible to being such a highway. See EI 22. Given the physical characteristics of the Lower  
18 Salt as of February 14, 1912, (See EI 29 at pp. 18-22) it is impossible to extrapolate the  
19 County’s flow number in any meaningful way.

20  
21 **III. CONCLUSION.**

22 The statutory directive that ANSAC base a determination of navigability on the  
23 preponderance of the evidence clearly establishes that no such burden of proof has been met as  
24 regards the Lower Salt. In point of fact, NO evidence has been submitted to support a finding



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