

1 Thomas L. Murphy (State Bar No. 022953)  
Office of the General Counsel  
2 Gila River Indian Community  
Post Office Box 97  
3 Sacaton, Arizona 85147  
Telephone: (520) 562-9760  
4 Facsimile: (520) 562-9769

5 *Attorneys for the Gila River Indian Community*

6 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
7 **ADJUDICATION COMMISSION**

9 IN THE MATTER OF THE  
10 NAVIGABILITY OF THE GILA  
RIVER FROM THE NEW MEXICO  
11 BORDER TO THE CONFLUENCE  
WITH THE COLORADO RIVER,  
12 GREENLEE, GRAHAM, GILA, PINAL,  
MARICOPA AND YUMA COUNTIES,  
13 ARIZONA

No. 03-007-NAV

**GILA RIVER INDIAN COMMUNITY'S  
MEMORANDUM ON REMAND**

14 Pursuant to the notice from ANSAC dated December 14, 2011, the Gila River  
15 Indian Community ("Community") hereby submits the following memorandum  
16 regarding what the Commission should do in this matter to satisfy the Arizona Court  
17 of Appeals decision involving the Lower Salt River. In *State v. Ariz. Navigable*  
18 *Stream Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v. ANSAC*"), the  
19 Court of Appeals of Arizona vacated the Commission's determination that "the Lower  
20 Salt River from Granite Reef Dam to its confluence with the Gila River was not used  
21 or susceptible of use for commercial trade or travel as of February 14, 1912, and was  
22 therefore not navigable as of that date nor was it susceptible to navigation."<sup>1</sup> The  
23 Court of Appeals vacated and remanded "for ANSAC to consider whether the [Lower  
24

25 \_\_\_\_\_  
26 <sup>1</sup> Report in ANSAC No. 03-005, Findings and Determination Regarding the Navigability of  
the Salt River from Granite Reef Dam to the Gila River Confluence 46 (ANSAC Sept. 21,  
2005).

1 Salt] River would have been navigable had it been in its ordinary and natural  
2 condition on February 14, 1912.” 229 P.3d at 254. Little guidance on remand was  
3 provided by the Court of Appeals; while asserting that it agreed substantial evidence  
4 exists from which a fact finder “might conclude that [the Lower Salt River] met the  
5 applicable standard of navigability at the time that Arizona became a state,” 229 P.3d  
6 at 254, it did not identify any evidence in the record supporting such a finding that  
7 would guide the Commission in its proceedings.

### 8 **1. *State v. ANSAC* and the Standard of Proof**

9 The Court of Appeals provided a somewhat confusing explanation of the  
10 burden of proof and presumption in these proceedings. Initially, the court rejected the  
11 appellants' contention that presumption lies against defeat of state's title, 229 P.3d at  
12 250; however, in the same section of its opinion, the court stressed that “ANSAC may  
13 not begin its determination with any presumption against navigability.” 229 P.3d at  
14 251 (citations omitted; emphasis in original). The court was clear on one point—“this  
15 court has previously recognized that the burden of proof rests on the party asserting  
16 navigability.” 229 P.3d at 250 (citations omitted). “Consequently, the burden of proof  
17 lies with Appellants, as the proponents of navigability, who must prove navigability  
18 by a preponderance of the evidence.” 229 P.3d at 251.

19 A.R.S. § 37-1128 likewise allocates the burden of proof to the parties asserting  
20 the navigability of the Gila River:

21 If the preponderance of the evidence establishes that the watercourse was  
22 navigable, the commission shall issue its determination confirming that the  
23 watercourse was navigable. If the preponderance of the evidence fails to  
24 establish that the watercourse was navigable, the commission shall issue its  
25 determination confirming that the watercourse was nonnavigable.

26 A.R.S. § 37-1128(A). The second sentence of the quoted portion of the statute is  
unnecessary; if the proponents of navigability fail to establish the facts supporting  
navigability by a preponderance of the evidence, the Commission would be compelled

1 to find the watercourse was non-navigable, even in the absence of any contrary  
2 evidence.

3 For that reason, the notion that there is not a presumption against navigability  
4 is very hard to explain, because the primary nature of a true presumption is to  
5 establish a burden of proof.<sup>2</sup> To the extent the applicable statute and *State v. ANSAC*  
6 establish that the burden of proof is to establish navigability by a preponderance of the  
7 evidence, in the absence of such evidence the Gila River would necessarily be  
8 *presumed* to be non-navigable. The Commission may want to take this analysis into  
9 account when determining how additional briefing or hearings in this matter will be  
10 conducted.

11 Thus, under the standard enunciated in *State v. ANSAC*, and A.R.S. § 37-1128,  
12 the proponents of navigability, as the parties with the burden of proof, must come  
13 forward with evidence establishing a *prima facie* case of navigability; that it is “was  
14 used or was susceptible to being used, in its ordinary and natural condition, as a  
15 highway for commerce, over which trade and travel were or could have been  
16 conducted in the customary modes of trade and travel on water.” A.R.S. § 37-1101(5).  
17 This includes proof of: (1) the use of or susceptibility of use of the Gila River as a  
18 highway for commerce; (2) the ordinary and natural condition of the Lower Salt River  
19 as of February 14, 1912; (3) that trade and travel were or could have been conducted  
20 in customary modes on the Gila River.

21 **2. To Comply With *State v. ANSAC*, ANSAC Should Reopen Evidence, Hold**  
22 **a Public Hearing, and Permit Additional Briefing by the Parties**

23  
24 <sup>2</sup> “It is the generally accepted view of courts and textbook writers that the presumption places  
25 upon the party against whom it operates the burden of producing evidence. Moreover, they  
26 usually state that this is its sole effect.” Roy Robert Ray, *Burden of Proof and Presumptions*,  
13 Tex. L. Rev. 33, 55 (1934).

1 The Community agrees with the general position of other parties as to the  
2 necessity of reopening the evidentiary record for a limited period of time; however,  
3 the Community believes that, as to any briefing following the submission of  
4 additional evidence, the Commission should require the proponents of navigability to  
5 submit initial briefs and specifically identify any evidence they contend meets their  
6 burden of proving navigability, followed by briefs from any parties opposing  
7 navigability.

8 **3. On the Record Before ANSAC, the Gila River Was Non-Navigable in its**  
9 **Ordinary and Natural Condition**

10 In making its determination, the Commission received and evaluated a  
11 substantial amount of evidence, described in detail in its Report.<sup>3</sup> In *State v. ANSAC*,  
12 the Court of Appeals identified the following time period to answer the question of  
13 when the Lower Salt River was in its natural condition:

14 . . .the River could be considered to be in its natural condition after many of  
15 the Hohokam's diversions had ceased to affect the River, but before the  
16 commencement of modern-era settlement and farming in the Salt River  
17 Valley, when some of the Hohokam's diversions were returned to use and  
18 other man-made diversions and obstructions began to affect the River.

19 229 P.3d at 254. In terms of the time periods covered by the evidence as it would  
20 apply to the Gila River in this matter, the time periods established in *State v. ANSAC*  
21 were clearly included in the evidence and considered by the Commission. Report, at  
22 23-35.<sup>4</sup>

23 <sup>3</sup> Report in ANSAC No. 03-007, Findings and Determination Regarding the Navigability of  
24 the Gila River from the New Mexico Border to the Confluence With the Colorado River, 21-  
25 23 46 (ANSAC Jan. 27, 2009).

26 <sup>4</sup> The only direct evidence of navigability was presented by Hjalmar W. Hjalmarson, P.E.,  
and was soundly rejected by the Commission. Report, at 73-76.

1 The Community incorporates and maintains its positions, as expressed in the  
2 *Gila River Indian Community's Opening Post-Hearing Memorandum*, filed February  
3 6, 2006, and the *Gila River Indian Community's Responsive Post-Hearing*  
4 *Memorandum*, filed February 26, 2006, which generally argue that (1) the lands  
5 beneath the high water mark of the Gila River, within or adjacent to the Gila River  
6 Indian Reservation, belong to the Gila River Indian Community without regard to  
7 whether the Gila River is navigable; and (2) that the lands beneath the high water  
8 mark of the Gila River in Maricopa County were not navigable as of February 14,  
9 1912.

#### 10 4. Conclusion

11 The decision in *State v. ANSAC*, while not providing clear guidance on remand,  
12 does place the Commission in the likely position of a “do-over,” at least to the extent  
13 that the prudent course of action would be to follow the process outlined in A.R.S. §§  
14 37-1123, 37-1126 and 37-1128, although the Commission should be able to  
15 accomplish the process on a shorter time schedule. The Community contends that,  
16 even after following this process, the Commission will reach the same  
17 determination—that the Gila River, in its ordinary and natural condition, was not used  
18 or susceptible to being used as a highway for commerce on February 14, 1912, and is  
19 therefore non-navigable.

20 DATED this 27<sup>th</sup> day of January, 2012.

21 GILA RIVER INDIAN COMMUNITY

22 By 

23 Thomas L. Murphy

24 ORIGINAL AND SIX COPIES of the foregoing  
25 hand-delivered for filing this 27th day of January,  
26 2012 to:

1 Arizona Navigable Stream Adjudication Commission  
2 1700 West Washington, Suite B-54  
3 Phoenix, Arizona 85007

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

5 John B. Weldon, Jr.  
6 Mark A. McGinnis  
7 2850 East Camelback Road, Suite 200  
8 Phoenix, Arizona 85016  
9 *Attorneys for Salt River Project*

10 Laurie A. Hachtel  
11 Attorney General's Office  
12 1275 West Washington Street  
13 Phoenix, Arizona 85007-2997  
14 *Attorneys for State of Arizona*

15 Joy E. Herr-Cardillo  
16 Arizona Center for Law in the Public Interest  
17 2205 E. Speedway Blvd.  
18 Tucson, Arizona 85719  
19 *Attorneys for Defenders of Wildlife, et al.*

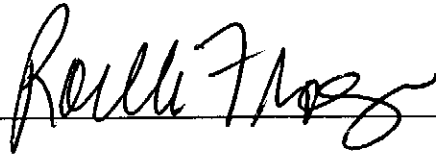
20 John Helm and Sally Worthington  
21 Helm, Livesay & Worthington  
22 1619 East Guadalupe #1  
23 Tempe, Arizona 85283  
24 *Attorneys for Maricopa County*

25 Julie Lemmon  
26 1095 W. Rio Salado Pkwy., Suite 102  
Tempe, Arizona 85281  
*Attorney for Flood Control District  
of Maricopa County*

Ed Gerak  
P.O. Box 1726  
Buckeye, AZ 85326

1 L. William Staudenmaier  
2 Snell & Wilmer LLP  
3 One Arizona Center  
4 400 East Van Buren  
5 Phoenix, Arizona 85004-2202  
6 *Attorneys for Freeport-McMoRan Corporation*

7 Joe P. Sparks  
8 The Sparks Law Firm, P.C.  
9 7503 First Street  
10 Scottsdale, AZ 85251

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