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9/7/12
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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of
the Upper Salt River

No. 04-008-NAV (Upper Salt)

**THE SAN CARLOS APACHE
TRIBE'S MEMORANDUM
REGARDING THE NAVIGABILITY
OF THE UPPER SALT RIVER AT
THE TIME OF STATEHOOD**

Introduction:

The San Carlos Apache Tribe ("Apache Tribe" or "Tribe") submits this memorandum pursuant to the Commission's June 29, 2012, request for memoranda addressing the question of whether any of the pending watercourses were navigable on February 14, 1912, in accordance with the Court of Appeals' decision in *Arizona v. Arizona Navigable Stream Adjudication Commission*, 224 Ariz. 230, 229 P.3d 242 (2010).

Discussion:

All of the evidence submitted and relied upon by the Arizona Navigable Stream Adjudication Commission (the "Commission") for its Report, Findings and Determination Regarding the Navigability of the Upper Salt River from the Confluence of the White and

1 Black Rivers to Granite Reef Dam (December 13, 2007) ("ANSAC 2007 Report"), supports
2 the Tribes position that the Upper Salt River was not navigable on February 14, 1912.

3
4 The record contains plentiful evidence showing that the Upper Salt River was not
5 navigable in its natural and ordinary condition, on the date of Arizona statehood, February
6 14, 1912.¹

7 At the time of the ANSAC 2007 Report, the Commission made clear in that it lacked
8 the subject matter jurisdiction to determine the navigability of the Upper Salt River in its
9 natural and ordinary condition. See ANSAC 2007 Report, at 51 ("Jurisdiction does not exist
10 in the Commission to consider the ordinary and natural condition of the portion of the Upper
11 Salt Riveer as it existed on February 14, 1912..."). However, the ANSAC 2007 Report had
12 ample evidence in the record for the Commission to make the determination that the Upper
13 Salt River was navigability on February 14, 1912. The Commission easily assessed the
14 evidence that painted the Upper Salt River as wholly nonnavigable due to extremely steep
15 gradients, multiple rapids, bedrock, and historical evidence that showed not one successful
16 navigation had ever taken place on the Upper Salt River.

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20 1. Gradient:

21 Evidence in the record shows that the Geology, Geomorphology and Hydrology of the
22 Upper Salt River made the Upper Salt River nonnavigable at the time of Arizona Statehood,
23 February 14, 1912. The Commission relied on the U.S. Forest Service's report *Evaluation of*
24

25 ¹ These documents and other evidence in the record are referred to in the ANSAC 2007
26 Report, at 17-18, See *Id.*, Exhibit F, Evidence Log 1-28 (herein all evidence in Exhibit F will
27 be identified as ["EI"], See *Id.*, Testimony given at a hearing will be designated as, witness
name (date) T.R. (Transcript of Record) followed by the page number.

1 *the Navigability at the Time of Statehood of the Salt River from Roosevelt Dam Upstream to*
2 *the Eastern Boundary of the Tonto National Forest ("Tonto") (E8)* when making the
3 determination that "Due to mountainous country, steep canyons, rapids, exposed boulders and
4 other obstacles and other evidence and considerations set forth in this report." ANSAC 2007
5 Report, at 49, ("the river can go from less than a few hundred cubic feet per second to over
6 100,000 cubic feet per seconding a few short hours, which makes white water rafting
7 dangerous and attempting to use the river as a highway of commerce would be disastrous.")
8

9
10 The Commission had evidence in the record the Upper Salt River was not susceptible
11 to navigation on February 14, 1912 due to its steep gradient. See ANSAC 2007 Report at,
12 53. "... at 14.7 miles, the river drops 17 feet per miles. At 20.8 miles, the river drops 16 feet
13 per mile We're dealing with a relatively steep portioj of the channel with numerous
14 rapids. Schumm T.R. Oct 20: 2005:

15
16 2. Rapids:

17 Evidence in the record show other impediments to navigation all along the Upper Salt
18 River. One report stated that "the bedrock geology of the Upper Salt River area made access
19 to the river difficult during the period around statehood....Bedrock outcroppings in the channel
20 created waterfalls, rapids and narrow canyons..." JE Fuller Hydrogeology & Geomorphology,
21 Inc., *Arizona Navigable Study for the Salt River: Granite Reef Dam to the Confluence of the*
22 *White and Black Rivers.* (Upper Salt Report) (E27). There was evidence that this "bedrock
23 controls, including 18 rapids and steep gradients ranging from 17-31 feet per mile."
24
25 *Geomorphic Character of the Upper Salt River* (2009) By Dr. Stanley Schumm ("Schumm")
26 (E28)
27

1 3. Bedrock:

2 Areas of the Upper Salt River that are not confined by bedrock, are confined by
3 alluvial terraces, modified by major floods, this part of the river is spread out over the flood
4 plain and "has a braided pattern with multiple channels and sand and gravel bars, which shift
5 with floods and high flows.... The river in this reach is dynamic and constantly changing and,
6 thus, not suitable for navigation." ANSAC 2007 Report, at 57. *See* Schumm T.R. Oct 20,
7 2005: 87 and 88.
8

9 4. Historically Nonnavigable:

10 The Commission cited numerous instances where evidence in the record made clear
11 that the geomorphic makeup of the Upper Salt River, the water flow in this reach of the river
12 and the bedrock geology made the river impossible to navigate on February 14, 1912. *See*
13 Upper Salt Report, at Section 1, p.3. *See Id.*, at Section 5, Table 7, p.10; Table 12, p.17. *See*
14 Schumm T.R. November 2005:87-88 (regarding the gradient of one section of the Upper Salt
15 River "not suitable for any sort of navigation. *See* Schumm T.R. Oct 20 2005: 97 (explaining
16 that one section of the Upper Salt River is braided with multiple channels, sand bars and
17 gravel bars which when flooded can cause the pattern and characteristics o of the riverbed to
18 change preventing navigation)
19

20 The Upper Salt River was not navigable before statehood, or on the date of statehood
21 or in the hundred years since. "[N]o water craft capable of being used for sustainable trade
22 and/or travel at the time of statehood could have gone upstream through the Salt River
23 Canyon. The cliffs at water's edge, the swift currents, and numerous rapids would have even
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1 precluded pulling an empty watercraft back upstream. Even now, no watercraft has ever gone
2 up the 48 miles of this section of the river." Tonto, at 5.


3
4 In support of this memorandum, the Tribe incorporates by reference, The San Carlos
5 Apache Memorandum Regarding the Record as to Segmentation and its Notice that It joins in
6 Salt River Projects Memorandum Regarding the Effect of the Supreme Court's Opinion in
7 *PPL Montana v. Montana*. Dated June 8, 2012.

8
9 Conclusion:

10 Although the Commission deemed that it was not charged with the duty of determine
11 whether or not the Upper Salt River was navigable on February 14, 1912, and had no
12 jurisdiction to do so, the ANSAC 2007 Report that the Commission was justified when it
13 concluded that the evidence in the record showed that the Upper Salt River's steep gradient,
14 incredible rapids, bedrock, and a history of never being susceptible for navigation was enough
15 to make the ultimate finding that the Upper Salt River was not navigable on February 14,
16 1912.
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22 7th day of September 2012.

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3

4 ORIGINAL AND SIX COPIES of the foregoing
5 mailed for filing this ~~24~~ day of September, 2012 to:

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A handwritten signature in cursive script is written over a horizontal line. The signature is dark and appears to be a name, possibly 'John Helm' or similar, based on the context of the document.