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BY: *[Signature]*

11:50 a.m.

8 **BEFORE THE ARIZONA NAVIGABLE STREAM**
9 **ADJUDICATION COMMISSION**

10 In re Determination of Navigability of
11 the San Pedro River

No. 03-004-NAV

**SAN CARLOS APACHE TRIBE'S
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW &
NOTICE THAT THE TRIBE JOINS
IN THE SALT RIVER PROJECT
AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT AND SALT
RIVER VALLEY WATER USERS'
(collectively, "SRP") FINDINGS OF
FACT AND CONCLUSIONS OF
LAW.**

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18 The San Carlos Apache Tribe submits their proposed Findings of Fact and Conclusions
19 of Law in this matter regarding the San Pedro River ("San Pedro"). References here to the
20 reporter's transcript of the evidentiary hearing held in June and August, 2013 are set forth as
21 "Tr. at [date:page] (witness)." Proposed Findings of Fact begin on page 2. San Carlos
22 Apache Tribe's proposed Conclusions of Law begin on page 5.

23 In addition the Tribe joins in the Salt River Project Agricultural Improvement and
24 Power District and Salt River Valley Water Users' Association (collectively, "SRP")
25 Proposed Findings of Fact and Conclusions of Law.

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FINDINGS OF FACT

SUMMARY OF EVIDENCE SUBMITTED

1. Prior to the 2003-04 Hearings, the Arizona State Land Department (“SLD”) hired a technical consultant to perform a detailed and comprehensive study of the San Pedro. See JE Fuller Hydrology & Geomorphology, Inc., *Arizona Stream Navigability Study for the San Pedro River: Gila River Confluence to the Mexican Border* (revised September 1997) [included in EI 6] (“Fuller 1997”).¹ The Fuller 1997 report was submitted to the Commission in 1997.

2. Mr. Gookin submitted a Power Point presentation and associated exhibits entitled “*Navigability of the San Pedro River,*” dated August 1-2, 2013 Community (“Gookin 2013”) on behalf of the Gila River Indian Community. See Commission’s record as EI X008. Mr. Gookin stated his opinion that the San Pedro was not navigable in its ordinary and natural condition on February 14, 1912. See Tr. at 8/2/13:155-56 (Gookin).

3. The Commission held a hearing on June 7, 2013, in Bisbee, the county seat of Cochise County; and on August 1-2, 2013, in Phoenix. (“2013 San Pedro Hearings”)

4. The Commission received numerous additional documents during the 2013 San Pedro Hearing. All of those documents are included in the Commission’s record. (See A FF#5 for those documents discussed herein)

5. Mr. Hjalmarson presented a Power Point presentation and associated exhibits entitled “*Navigability along the Natural Channel of the San Pedro River, AZ, from Mexico to the Mouth at the Gila River at Winkleman, AZ,*” dated May 2013 on behalf of the Arizona Center for Law in the Public Interest. (“Hjalmarson 2013”). See Commission’s record as EI X004.

¹ “EI” refers to the Commission’s number system for evidence in the record.

1 6. Mr. Hjalmarson also submitted a written “executive summary” report to the
2 Commission. *See Navigability along the Natural Channel of the San Pedro River* (August 20,
3 2013) [part of EI X013] (“Hjalmarson 2013b”). That executive summary was not made as an
4 affidavit or under oath. It was filed after the hearing concluded, and none of the other parties
5 had an opportunity to cross examine him on it.

6 In his written presentations and in his oral testimony, Mr. Hjalmarson stated his
7 opinion that the San Pedro, from the Lewis Springs area to the mouth of the Gila River, was
8 susceptible to navigation at the time of Statehood, (February 14, 1912) in its ordinary and
9 natural condition using the federal standard. *See Hjalmarson 2013*, at 169; Hjalmarson
10 2103b, at 12. He concluded that, for about eighty percent of the time during a typical year,
11 the width, depth, and velocity were acceptable for use by small water craft such as canoes,
12 kayaks, drift boats, row boats, and rafts. *See Hjalmarson 2013*, at 169; Hjalmarson 2013b, at
13 12; Tr. at 6/7/13:27 (Hjalmarson). In essence, Mr. Hjalmarson testified that the San Pedro
14 can and should be segmented between (a) its non-navigable reach from the Mexican border up
15 to about Lewis Springs, and (b) the reach which he opined was navigable from Lewis Springs
16 to the Gila River confluence. *See Hjalmarson 2013*, at 169; Tr. at 6/7/13:25, 27 (Hjalmarson).

17 18 **HISTORY OF BOATING ON THE SAN PEDRO**

19 7. A survey by the Central Arizona Paddlers Club found six reported accounts of
20 boating on the San Pedro between 1973 and 1992. *See JE Fuller Hydrology &*
21 *Geomorphology, Inc., Arizona Stream Navigability Study for the San Pedro River: Gila River*
22 *Confluence to the Mexican Border* (revised September 1997) [included in EI 6] (“Fuller
23 1997”), at G-7. The Commission received no evidence as to the type of watercraft used in
24 these accounts, and whether those watercraft were substantially similar to watercraft available
25 at the time of Statehood or substantially similar to the type of water craft used for trade and
26 travel at the time of Statehood. *PPL Montana, LLC v Montana*, 132 S. Ct. 1215 (2012)
27

1 (“PPL Montana”) at 1221. The Commission received no evidence on the flow conditions of
2 the San Pedro, the location or the dates of the alleged boating.

3 8. Mr. Hjalmarson submitted multiple photographs of modern recreational kayaks
4 floating on the San Pedro. *See* Hjalmarson 2013. However there is nothing in the record that
5 shows the specifications of those watercraft, such as size, material, or draft. No evidence in
6 the record shows that the watercraft were of the type available at the time of Statehood, and
7 there is no evidence to show that the watercraft were of the type ordinarily used for trade and
8 travel at the time of Statehood. If the material and design of the boats in Mr. Hjalmarson’s
9 photos are more modern than boats available at the time of Statehood, enabling them to be
10 used for boating where the historical watercraft could not have been used, that evidence has
11 “little if no bearing on navigability at statehood...” *See* PPL Montana at 1233, 1234.
12

13 **BOATS AVAILABLE AT THE TIME OF STATEHOOD**

14 9. The Arizona Center for Law in the Public Interest (“ACLPI”) submitted excerpts
15 from a 1912 Sears & Roebuck catalog showing boats available for purchase. *See* Excerpts
16 from Sears, Roebuck and Co. Catalog (1912) [part of EI X002]. That catalog contains three
17 boats, including (a) a flat-bottom fishing boat made of oak and spruce and ranging between
18 thirteen and sixteen feet long and between forty and forty-four inches wide; (b) a fifteen-foot
19 “smooth silk double pointer boat” made of cedar or cypress that was forty-two inches wide;
20 and (c) a square-stern “clinker” row boat, also made of cedar or cypress, ranging in width
21 from forty-two to forty-four inches. *Id.* The evidence submitted does not specify the draft of
22 each boat, and no evidence was submitted showing that any of those boats were ever used on
23 the San Pedro, or that they were of the type commonly used in commerce, trade and travel in
24 February 1912.

25 10. Mr. Gookin stated that, in order to be deemed suitable for navigation, the draft of a
26 boat would need to be no more than seventy-five percent of the depth of the river. *See*
27 Gookin 2013, at 101 & Appendix A, at 23-24.

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11. Based upon the entirety of the evidence submitted, the Commission finds that the evidence is inadequate to prove that the flow of the San Pedro, in its ordinary and natural condition, was sufficient to support the use of the boats listed in the 1912 Sears & Roebuck catalog to traverse up or down any significant stretch of the San Pedro at the time of Statehood.

NAVIGABILITY ON FEBRUARY 14, 1912

12. Mr. Hjalmarson presented evidence to the Commission explaining the lengths to which he went to in determine that the San Pedro, in its ordinary and natural condition was navigable at the time of Statehood, February 14, 1914. *See generally* Hjalmarson 2013, and Hjalmarson 2013b. Regardless of how Mr. Hjalmarson extrapolated his vision of the ordinary and natural condition of the San Pedro River, Mr. Hjalmarson testified that the San Pedro was not navigable on the date of Arizona Statehood February 14, 2012. *See Tr. At 6/1/13:64 and 65 (Hjalmarson).*

CONCLUSIONS OF LAW

ACTUAL NAVIGATION ON THE SAN PEDRO

1. The Commission finds as a matter of law and fact, that the isolated accounts of modern watercraft successfully floating on the San Pedro fails to establish by a preponderance of the evidence that the San Pedro was navigable at the time of Statehood. Reliance on evidence of modern recreational use of a watercourse is strictly limited, under the criteria set forth by the United States Supreme Court in *PPL Montana, LLC v. Montana*, 132 S. Ct 1215 (2012) (“*PPL Montana*”). None of the post-Statehood accounts of boating indicate whether those watercraft are of the type available or meaningfully similar to watercraft available at Statehood. *See A Findings of Fact Nos. 1-3 and 8.* Evidence of modern watercraft that permit navigability where historic watercraft would not “has little or no bearing on navigability at Statehood.” *PPL Montana*, 132 S. Ct. at 1234.

1 2. The Commission finds as a matter of law and fact that there is no evidence in
2 the record to show that any watercraft claiming to have floated the San Pedro was of the type
3 ordinarily used in trade and travel in Arizona at the time of Statehood. *See* A Findings of Fact
4 No. 7. The PPL Montana ruling requires a finding that evidence of navigability based on
5 watercraft on a river must show that the watercraft was of the type or substantially similar to
6 the type of watercraft used, for trade and travel at the time of Statehood:

7 At a minimum . . . the party seeking to use present-day evidence for title
8 purposes must show: (1) the watercraft are meaningfully similar to those
9 in customary use for trade and travel at the time of Statehood; and (2) the
10 river's post-Statehood condition is not materially different from its physical
11 condition.

12 PPL Montana, 132 S. Ct. at 1233 (emphasis added). Thus there is no evidence in the record
13 that any watercraft claiming to have traversed the San Pedro was substantially similar to those
14 ordinarily used for trade and travel at the time of Statehood.

15
16 **NAVIGABILITY ON THE DATE OF STATEHOOD, FEBRUARY 14, 1912**

17 3. Under the applicable Arizona statutes the Commission has the exclusive
18 jurisdiction to determine which, if any, Arizona watercourses were "navigable" on February
19 14, 1912. *See* A.R.S. § 37-1123(G).

20 The statute defines "navigable" or "navigable watercourse" as:

21 A watercourse that was in existence on February 14, 1912, *and at that*
22 *time* was used or was susceptible to being used, in its ordinary and natural
23 condition, as a highway for commerce, over which trade and travel were or
24 could have been conducted in the customary mode of trade and travel on water.

25 A.R.S. § 37-1101(5) (emphasis added). Even with this broad definition of navigability, the
26 evidence fails to show that the San Pedro was navigable on February 14, 1912. The
27 Commission finds that as a matter of law and fact, that proponents of navigability had failed
to provide non-conflicting evidence that shows that the San Pedro was navigable on the day

1 of Arizona Statehood, 1912 by a preponderance of the evidence. *See A Findings of Fact No.*
2 11.
3

4 4. Based upon the evidence submitted and its analysis and application of the
5 applicable law, the Commission finds that the San Pedro was neither used nor susceptible to
6 being used for navigation in its ordinary and natural condition on February 14, 1912. Thus, it
7 is not and was not "navigable" as defined by the Arizona statute and the federal case law.
8

9 DATED this 13th day of September, 2013.
10

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