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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of
the San Pedro River

No. 03-004-NAV

**SALT RIVER PROJECT'S
RESPONSIVE POST-HEARING
MEMORANDUM**

16 The Salt River Project Agricultural Improvement and Power District and Salt River
17 Valley Water Users' Association (collectively, "SRP") submit their responsive post-hearing
18 memorandum on the navigability of the San Pedro River ("San Pedro") in its ordinary and
19 natural condition as of February 14, 1912. For the reasons set forth herein and in SRP's
20 opening memorandum,¹ SRP requests that the Commission find the San Pedro non-navigable.

21 The only opening memorandum filed by a party contending that the San Pedro is
22 navigable was submitted by the Defenders of Wildlife, et al. ("DOW").² SRP herein responds
23 to the DOW memorandum. Virtually all of the evidence cited and arguments made in the
24 DOW memorandum already were discussed at length in SRP's opening memorandum. SRP

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26 ¹ See Salt River Project's Opening Post-Hearing Memorandum (September 13, 2013) ("SRP
Opening").

27 ² See Memorandum Regarding Navigability of San Pedro River (September 13, 2013) ("DOW
Opening").

1 thus has addressed only a few additional points in this responsive memorandum. The short
2 answer to the underlying question is that DOW (the lone proponent of navigability) simply
3 has not presented sufficient evidence to show, by a preponderance of the evidence, that the
4 San Pedro was “navigable” in its ordinary and natural condition when Arizona became a state
5 on February 14, 1912.

6
7 **I. The San Pedro was in Its Ordinary and Natural Condition from the 1840s until**
8 **the 1870s.**

9 Numerous individuals who were present along the San Pedro in the mid-1800s
10 observed a small and insignificant river. FF#24-47.³ In an attempt to overcome those facts,
11 DOW contends that the river had been affected by human activity by that time and, thus, was
12 not in its “ordinary and natural condition.” See DOW Opening, at 13-15. DOW refers
13 extensively to the Arizona Court of Appeals opinion in *State v. ANSAC*, 224 Ariz. 230, 229
14 P.3d 242 (App. 2010), but then ignores the most pertinent portions of that opinion for
15 purposes of the question at hand.

16 As DOW correctly recites, the court in *State v. ANSAC* found that the Commission
17 must examine watercourses in their “ordinary (i.e., usual, absent major flooding or drought)
18 and natural (i.e., without man-made dams, canals, or other diversions) condition.” See DOW
19 Opening, at 13 (quoting *State v. ANSAC*, 224 Ariz. at 241, 229 P.3d at 253). What DOW then
20 ignores, however, is that, in applying that standard to the Lower Salt, the appellate court first
21 started with the time “before the Hohokam people arrived many centuries ago and developed
22 canals and other diversions that actively diverted the River.” *State v. ANSAC*, 224 Ariz. at
23 242, 229 P.3d at 254. Recognizing that “little if any historical data exists from that period”

24 ³ As it did in its opening memorandum, SRP refers herein to its September 13, 2103 proposed
25 findings of fact as “FF#__” and its proposed conclusions of law as “CL#__.” For purposes of
26 attempting to provide the Commission with a single consolidated set of findings and conclusions,
27 Freeport-McMoRan Corporation and SRP are submitting a supplemented and revised joint set of
findings and conclusions concurrently with their responsive memoranda. Except as otherwise noted,
citations herein are to SRP’s September 13 proposed findings and conclusions, for consistency with
SRP’s opening memorandum.

1 and that the Lower Salt “largely returned to its natural state” after the Hohokam disappeared,
2 the court found that “the [Lower Salt] River could be considered to be in its natural condition
3 after many of the Hohokam’s diversions had ceased to affect the River, but before the
4 commencement of modern-era settlement and farming in the Salt River Valley. . . .” *Id.*

5 The evidence shows that a similar situation took place on the San Pedro. As with the
6 Hohokam on the Lower Salt, some amount of human activity occurred on the San Pedro in
7 early times. *Compare State v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254, with FF#20-23.

8 The Hohokam inhabited the Lower Salt “many centuries ago,” and the Sobaipuri Indians and
9 Spaniards inhabited the San Pedro from the 1500s until the early 1800s. *Compare State v.*
10 *ANSAC*, 224 Ariz. at 242, 229 P.3d at 254, with FF#21-23. The Hohokam vanished from the
11 Salt River Valley, and the Sobaipuri and Spaniards largely abandoned the San Pedro in the
12 early 1800s. *Compare State v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254, with Tr. at
13 8/1/13:134-36, 174-79. Significant irrigation did not begin again in the San Pedro until the
14 1870s. *See* FF#124.⁴

15 Thus, for the San Pedro, the period from the 1840s until the 1870s is analogous to the
16 period of time for the Lower Salt that the *State v. ANSAC* court characterized as “after many
17 of the Hohokam’s diversions had ceased to affect the River, but before the commencement of
18 modern-era settlement and farming in the Salt River Valley.” 224 Ariz. at 242, 229 P.3d at
19 254. Consistent with the court’s holding in *State v. ANSAC*, that is a time when San Pedro
20 should be considered to have been in its ordinary and natural condition. *Id.* It is fortuitous
21 that significant direct historical evidence exists from that period in the form of recorded
22 observations by explorers, military personnel, and others who traveled through the San Pedro
23 area. *See* FF#24-47.

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26 ⁴ The irrigation that began in the 1870s was primarily around the town of St. David. For purposes of
27 the current analysis, the area upstream of St. David remains largely in its ordinary and natural
condition to the present day. *See* FF#123.

1 Because substantial evidence exists for the period from the 1840s until the 1870s when
2 the San Pedro was clearly in its “ordinary and natural condition,” the question of whether the
3 San Pedro was in its “ordinary and natural” condition from the 1500s until the early 1800s is
4 not particularly relevant. No stream flow records exist from that 1500s-early 1800s period,
5 and what historical evidence that does exist from that period is sparse. *See* FF#21-23. The
6 only way to address the 1500s-early 1800s period for which there is no documented evidence
7 might be to engage in theoretical gyrations of the type Mr. Hjalmarson attempted. *See*
8 Section II, *infra*. Those efforts were unnecessary and methodologically flawed, however. *Id.*;
9 *see also* SRP Opening, at 10-13; FF#105-112. This Commission need not grapple with the
10 speculative question of what the river looked like from the 1500s to the early 1800s, when the
11 few people who were there at the time to see it did not record their observations. The entire
12 San Pedro was in its “ordinary and natural condition” from the 1840s until the 1870s, and the
13 Commission should place the most significant weight on evidence from that period.⁵ That
14 evidence shows that the San Pedro was not and is not navigable.

15 **II. Mr. Hjalmarson’s Hypothetical Analysis is Unnecessary because Historical**
16 **Evidence Exists from a Time when the River was in its “Ordinary and Natural**
17 **Condition.”**

18 DOW relies primarily on the work of Mr. Hjalmarson, its own witness. *See generally*
19 DOW Opening, at 10-12. By DOW’s own admission, Mr. Hjalmarson’s work involved
20 taking data regarding the San Pedro and “**extrapolat[ing]** from that data to determine the flow
21 of the river in its natural condition.” *Id.* at 11 (emphasis added). For example, Mr.
22 Hjalmarson used water flow data to determine the shape of the river bed. *Id.* After using the
23 flow data to determine the shape, he applied the same flow data to that shape to determine the
24 depth of water. *Id.* at 12. Mr. Hjalmarson himself acknowledged that “fine precision is
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26

27 ⁵ *See* Salt River Project and Freeport-McMoRan Corporation’s Proposed Findings of Fact and
Conclusions of Law, Findings of Fact Nos. 122-124 (September 27, 2013).

1 unlikely” in his work and that it involved, among other things, estimation and extrapolation
2 from other data. *See* FF#106.

3 The parties perhaps could engage in an academic discussion to determine the technical
4 feasibility of Mr. Hjalmarson’s approach, and a portion of the hearing in this matter certainly
5 involved such a discussion. *See* FF#105-112. The important point is, however, that Mr.
6 Hjalmarson’s hypothetical work was unnecessary because first-hand historical observations of
7 the San Pedro’s flows and depths are available from a time when the river was in its ordinary
8 and natural condition. No need exists to “extrapolate” or hypothesize in order to make an
9 estimation of natural factors that were readily observed and recorded by credible individuals.

10 As set forth in SRP’s opening memorandum and in its proposed findings of fact and
11 conclusions of law, ample evidence exists of historical observations of the San Pedro from the
12 mid-1800s. *See* SRP Opening, at 2-5; FF##24-47. The entire San Pedro was in its “ordinary
13 and natural condition” at that time. *See* Section I, *supra*. Neither Mr. Hjalmarson’s testimony
14 nor DOW’s legal arguments based upon that testimony are sufficient to overcome what those
15 contemporaneous individuals observed on the river in the mid-1800s. DOW has not met its
16 burden of proof. *See* CL#30-33.

17
18 **III. Sporadic Modern-Day Recreational Boating Does Not Prove that the San Pedro
was Susceptible to Navigation in its Ordinary and Natural Condition in 1912.**

19 DOW largely concedes (as it must) that no commercial navigation has ever occurred
20 on the San Pedro, stating that “[e]vidence of historic navigation of the San Pedro is limited to
21 the possible use of a canoe by James O. Pattie.” *See* DOW Opening, at 10. No evidence
22 exists that such “possible” use of a canoe, even if it did occur during one of Pattie’s trips, was
23 on the San Pedro and not on one of the several other rivers on which his party traveled. *See*
24 FF#25.

25 Faced with those facts, DOW tries to latch on to a modern survey showing that, “at one
26 time or another” between 1973 and 1992, recreational users boated the San Pedro. *See* DOW
27 Opening, at 10; *see also* FF#81. DOW notes that the report by the Arizona State Land

1 Department's consultant observed that "modern use of a river reach by canoes probably
2 indicates that canoes could have been used at the time of statehood." See DOW Opening, at
3 10. DOW neglects to mention, however, that the same consultant also characterized the
4 modern-day trips discussed in the survey as "very opportunistic," such that "boaters drive to a
5 launching point on likely rain days and 'put in' the water if rain conditions favor runoff." See
6 FF#81.

7 The limited evidence of recreational boating on the San Pedro does not satisfy the
8 standard set forth by the United States Supreme Court in *PPL Montana, LLC v. Montana*, 132
9 S. Ct. 1215 (2012). In that case, the Court stated that evidence of navigation must be
10 sufficient to comport with "commercial reality." *Id.* at 1234. In its decision that the United
11 States Supreme Court overturned, the Montana Supreme Court relied heavily upon modern-
12 day recreational boating on the rivers. See *PPL Montana, LLC v. State*, 355 Mont. 402, 229
13 P.3d 421, 431-36 (2010), *rev'd*, 132 S. Ct. at 1215. In rejecting the Montana Supreme
14 Court's analysis, the United States Supreme Court confirmed its prior pronouncements that
15 the test for navigability relates to use or susceptibility to use for commerce as of the date of
16 statehood. 132 S. Ct. at 1221. "Navigability must be assessed as of the time of statehood,
17 and it concerns the river's usefulness for 'trade and travel,' rather than for other purposes."
18 *Id.* "Mere use by initial explorers or trappers who may have dragged their boats in or
19 alongside the river despite its nonnavigability in order to avoid getting lost, or to provide
20 water for their horses or themselves, is not enough." *Id.*

21 Furthermore, the United States Supreme Court in *PPL Montana* made clear that
22 evidence of modern-day recreational uses is not persuasive unless "the watercraft are
23 meaningfully similar to those in customary use for trade and travel at the time of statehood."
24 132 S. Ct. at 1233. Although DOW submitted documents to show the types of boats that
25 might have been available through mail-order in 1912, see FF#128-130, DOW presented no
26 testimony or other evidence that those were the same types of watercraft that were used by
27 recreational boaters in the 1970s, 1980s, or 1990s. In fact, it is unlikely that any modern-day

1 boaters were using canoes made of oak, spruce, cedar, or cypress, such as those described in
2 the 1912 Sears & Roebuck catalog submitted by DOW. *See* FF#128.

3 **IV. The San Pedro Is Not and Never Was Navigable.**

4 Aside from one citation regarding “segmentation” in its Section II(B), DOW’s opening
5 memorandum contains no reference to the United States Supreme Court’s 2012 opinion in
6 *PPL Montana*, that Court’s most recent pronouncement on navigability-for-title issues. *See*
7 *generally* DOW Opening. That lack of citation is perhaps not surprising, because the
8 Supreme Court’s opinion is the death knell for any argument DOW ever might have had that
9 the San Pedro was navigable. In addition to requiring that evidence of modern-day boating
10 must be linked to the type of boats used at statehood in order for that evidence to be
11 persuasive, *see* Section III, *supra*, the Court also:

12 1. Reaffirmed that the test is applied as of the date of statehood, *see* *PPL Montana*,
13 132 S. Ct. at 1227-28 (“Upon statehood, the State gains title within its borders to the beds of
14 watercourses then navigable. . . .”);

15 2. Reiterated that the specific requirements of the test for navigability depend upon
16 the context in which the question is posed and that admiralty and Commerce Clause cases are
17 not particularly persuasive on navigability-for-title issues, *id.* at 1228 (“the test for
18 navigability is not applied in the same way in these distinct types of cases. . . . For state title
19 purposes under the equal-footing doctrine, navigability is determined at the time of statehood
20 . . . and based on the ‘natural and ordinary condition’ of the water”);

21 3. Stated that the basis for a determination of navigability is use or susceptibility
22 for use of the watercourse as highway for commerce, *id.* at 1230 (“By contrast, segments that
23 are nonnavigable at the time of statehood are those over which commerce could not then
24 occur. Thus, there is no reason that these segments also should be deemed owned by the State
25 under the equal-footing doctrine.”); and

26 4. Confirmed its prior pronouncements that the test relates to use or susceptibility
27 to use for commerce and not for some other purpose, *id.* at 1233 (“Navigability must be

1 assessed as of the time of statehood, and it concerns the river's usefulness for 'trade and
2 travel,' rather than for other purposes.").

3 If and to the extent that DOW had any plausible argument before 2012 that the San
4 Pedro was navigable, that argument is now gone. Under the test clearly set forth in *PPL*
5 *Montana*, the San Pedro is not navigable. Any contention that river is or ever was susceptible
6 to navigation is a result of fantasy or wishful thinking, not "commercial reality." 132 S. Ct. at
7 1234. The Commission should find the San Pedro non-navigable.

8 DATED this 27th day of September, 2013.

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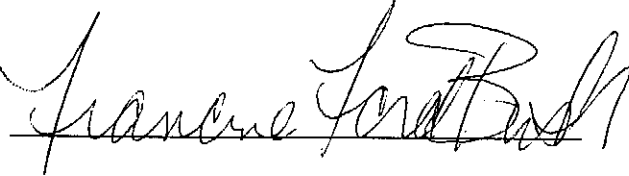
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