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7 Improvement and Power District and Salt  
8 River Valley Water Users' Association

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

10 In re Determination of Navigability of the } No. 03-004-NAV  
11 San Pedro River }  
12 } **SALT RIVER PROJECT'S**  
13 } **OPENING POST-HEARING**  
14 } **MEMORANDUM**

15 The Salt River Project Agricultural Improvement and Power District and Salt River  
16 Valley Water Users' Association (collectively, "SRP") submit their opening post-hearing  
17 memorandum on the navigability of the San Pedro River from the Gila River confluence to the  
18 Mexican border, based upon the evidence submitted to the Commission at the public hearings  
19 held on March 12, 2003, and January 22 and March 9, 2004. For the reasons set forth herein,  
20 SRP requests that the Commission find that the San Pedro River was non-navigable when  
21 Arizona became a state on February 14, 1912.

22 **I. Navigability and the Public Trust Doctrine**

23 Under the "public trust doctrine," the sovereign is generally considered to hold the beds  
24 of "navigable" watercourses in trust for the benefit of the public. See Arizona Center for Law  
25 in the Public Interest v. Hassell, 172 Ariz. 356, 359, 837 P.2d 158, 161 (App. 1991)  
26 ("Hassell"). This doctrine has origins in English common law, and when the original thirteen  
27 states gained their independence from England, they succeeded to this sovereign public trust

1 boundaries. Id. The United States Supreme Court has also held, under the “equal footing  
2 doctrine,” that as new states were admitted to the Union, they took title to the beds of  
3 navigable watercourses within their boundaries to the same extent as the original thirteen  
4 states. Id. (citing Pollard’s Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845)).

5 In 1865, the Arizona Territorial Legislature declared the Colorado River to be  
6 “navigable.” See Memorial of the Legislature of Arizona, 38<sup>th</sup> Cong. 2<sup>nd</sup> Sess., Mis. Doc. No.  
7 17 (January 25, 1865). The Territorial Legislature, in its first session, expressly held that “the  
8 Colorado river is the only navigable water in this Territory . . . .” Id. (emphasis added). For  
9 the next 120 years, the public trust and equal footing doctrines were neither discussed nor  
10 asserted in Arizona. Then, in 1985, the State Attorney General’s Office, in litigation  
11 concerning a stretch of the Verde River, asserted an equal footing ownership claim to the bed  
12 of a watercourse other than the Colorado. Land Dep’t v. O’Toole, 154 Ariz. 43, 46, 739 P.2d  
13 1360, 1363 (App. 1987). Subsequently, various State officials alleged that the State might  
14 hold title to certain lands in or near other watercourses as well. Id. at 44, 739 P.2d at 1361.  
15 The State’s assertion of these claims had the predictable impact of upsetting long-held  
16 assumptions concerning private ownership of lands in or near other watercourses and cast into  
17 doubt the title to more than 40,000 separate parcels of property. Hassell, 172 Ariz. at 359,  
18 362, 837 P.2d at 161, 164. In Maricopa County alone, the property in question was estimated  
19 to be worth “hundreds of millions, if not billions of dollars . . . .” O’Toole, 154 Ariz. at 45,  
20 739 P.2d at 1362.

21 In response to the widespread uncertainty caused by the State’s assertion of “public  
22 trust” claims, the Legislature enacted House Bill 2017 in 1987. 1987 Ariz. Sess. Laws, ch.  
23 127 (“1987 Act”). Under the 1987 Act, the State issued a blanket quitclaim of any public trust  
24 interest it might have to lands in the beds of all watercourses in the state other than the  
25 Colorado, Gila, Salt, and Verde Rivers. The 1987 Act also provided a process by which the  
26 record title holders of lands in the beds of the Gila, Salt, and Verde Rivers could obtain  
27 quitclaim deeds for these lands upon payment of a small fee. See Hassell, 172 Ariz. at 360,

1 837 P.2d at 162.

2 The Arizona Center for Law in the Public Interest (“ACLPI”) commenced an action  
3 challenging the constitutionality of the 1987 Act. After the trial court entered summary  
4 judgment in favor of the defendants, the Arizona Court of Appeals held that the 1987 Act  
5 violated the public trust doctrine and the Gift Clause of the Arizona Constitution. *Id.* at 361,  
6 837 P.2d at 163; Ariz. Const. art. 9, § 7. The court held that the Gift Clause required a two-  
7 part test to determine whether the Legislature had acted properly in passing the 1987 Act. 172  
8 Ariz. at 367, 837 P.2d at 169. The court stated that, to uphold the disclaimer of a potential  
9 claim by the State against a Gift Clause challenge, the reviewing court must determine: (1)  
10 that the disclaimer was designed to serve a “public purpose”; and (2) that the State has  
11 received “consideration” that is not “so inequitable and unreasonable that it amounts to an  
12 abuse of discretion, thus providing a subsidy to the private entity” that benefits from the  
13 disclaimer. *Id.*

14 The Hassell court found that the 1987 Act satisfied the first part of the test, i.e., that the  
15 enactment served a valid public purpose. Specifically, the court noted that the 1987 Act was  
16 “enacted in response to a valid legislative concern with the unsettling of record title to  
17 extensive landholdings throughout the state.” *Id.* at 369, 837 P.2d at 171. The court found,  
18 however, that the 1987 Act failed the second part of the test because “the legislature acted  
19 without particularized information, and established no mechanism to provide particularized  
20 information, to support even an estimate of the value of those claims.” *Id.* On this point, the  
21 court stated:

22 We do not suggest that a full-blown judicial determination of historical  
23 navigability and present value must precede the relinquishment of any state  
24 claim to a particular parcel of riverbed land. An administrative process might  
25 reasonably permit the systematic investigation and evaluation of each of the  
state’s claims. Under the present act [HB 2017], however, we cannot find that  
the gift clause requirement of equitable and reasonable consideration has been  
met.

26 *Id.* at 370, 837 P.2d at 172.

27 Following Hassell, the Legislature again addressed this issue. 1992 Ariz. Sess. Laws,

1 ch. 297 (“1992 Act”). Among other things, the 1992 Act established this Commission, a five-  
2 member commission appointed by the Governor. See former A.R.S. § 37-1121. The charge  
3 given to the Commission by the 1992 Act was to conduct full evidentiary public hearings  
4 across the state and to adjudicate the State’s claims to ownership of lands in the beds of  
5 watercourses. See generally former A.R.S. §§ 37-1122 to -1128.

6 The 1992 Act provided that the Commission would make findings of navigability or  
7 non-navigability for each watercourse. See former A.R.S. § 37-1128(A). Those findings  
8 were to be based upon the “federal test” of navigability in A.R.S. § 37-1101(6). The  
9 Commission would examine the “public trust values” associated with a particular watercourse  
10 only if and when it determined that the watercourse was navigable. See former A.R.S. §§ 37-  
11 1123(A)(3), -1128(A).

12 The Commission began to take evidence on certain watercourses during the fall of  
13 1993 and spring of 1994. In light of perceived difficulties with the 1992 Act, the Legislature  
14 revisited this issue during the 1994 session and amended the underlying legislation. See 1994  
15 Ariz. Sess. Laws, ch. 278 (“1994 Act”). Among other things, the 1994 Act provided that the  
16 Commission would make a recommendation to the Legislature, which would then hold  
17 additional hearings and make a final determination of navigability by passing a statute with  
18 respect to each watercourse. See id. The 1994 Act also established certain presumptions of  
19 non-navigability and exclusions of some types of evidence. See id.

20 Based upon the 1994 Act, the Commission went forward with its job of compiling  
21 evidence and making a determination of whether each watercourse in the state was navigable  
22 as of February 14, 1912. The Arizona State Land Department (“SLD”) issued technical  
23 reports on each watercourse, and numerous private parties and public agencies submitted  
24 additional evidence in favor of or opposed to navigability for particular watercourses. See  
25 Defenders of Wildlife v. Hull, 199 Ariz. 411, 416, 18 P.3d 722, 727 (App. 2001). The  
26 Commission reviewed the evidence and issued reports on each watercourse, which were  
27 transmitted to the Legislature. The Legislature then enacted legislation relating to the

1 navigability of each specific watercourse. See id. The Court of Appeals struck down that  
2 legislation in its Hull decision, finding that the Legislature had not applied the proper  
3 standards of navigability. Id. at 427-28, 18 P.3d at 738-39.

4 In 2001, the Legislature again amended the underlying statute in another attempt to  
5 comply with the court's pronouncements in Hassell and Hull. See 2001 Ariz. Sess. Laws, ch.  
6 166, § 1. The 2001 legislation now governs the Commission in making its findings with  
7 respect to the San Pedro River.

## 8 **II. This Commission's Role in Determining Navigability and Public Trust Values**

9 This Commission has an important job to do. Under the applicable statutes, the  
10 Commission has the exclusive jurisdiction to determine which, if any, Arizona watercourses  
11 were "navigable" on February 14, 1912 and, for any watercourses deemed navigable, to  
12 identify "public trust" values. See A.R.S. § 37-1123(G). The statutes direct the Commission  
13 to make a finding of navigability or non-navigability for each watercourse "[b]ased only on  
14 evidence of navigability or non-navigability." Id. § 37-1123(A).

15 This Commission's decision is no longer subject to review by the Legislature. Instead,  
16 the Commission's decision will be final, subject only to appeal to the courts. Id. § 37-1129.  
17 Thus, it is especially important that the Commission carefully examine all of the evidence  
18 presented on each watercourse, consider the weight of the evidence and the legal precedent,  
19 and come to a well-reasoned decision on each issue. To further this goal, the statutes provide  
20 for extensive public input and opportunity to submit evidence. See id. §§ 37-1123(A),  
21 -1123(D), -1126, -1128(D).

## 22 **III. Standard for Determining Navigability: The "Federal Test"**

23 The Commission's statutory obligation for determining navigability, as amended in  
24 2001, is relatively succinct:

25 If the preponderance of the evidence establishes that the watercourse was  
26 navigable, the commission shall issue its determination confirming that the  
27 watercourse was navigable. If the preponderance of the evidence fails to  
establish that the watercourse was navigable, the commission shall issue its  
determination confirming that the watercourse in question was nonnavigable.

1  
2 A.R.S. § 37-1128(A). The statute defines “navigable” or “navigable watercourse” as:

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

7 Id. § 37-1101(5). “Highway for commerce” is defined as “a corridor or conduit within which  
8 the exchange of goods, commodities or property or the transportation of persons may be  
9 conducted.” Id. § 37-1101(3).

10           The Arizona statutory definition is a codification of the “federal test” of  
11 navigability first articulated by the United States Supreme Court in 1870 and applied by  
12 over one hundred courts in the last 130 years:

13           Those rivers must be regarded as public navigable rivers in law which are  
14 navigable in fact. And they are navigable in fact when they are used, or are  
15 susceptible of being used, in their ordinary condition, as highways for  
16 commerce, over which trade and travel are or may be conducted in the  
17 customary modes of trade and travel on water.

18 The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870).

19           **A. Burden of proof: “Preponderance of the evidence”**

20           The statute establishes the burden of proof as the “preponderance of the evidence” and  
21 puts that burden on the proponents of navigability. See A.R.S. § 37-1128(A). This allocation  
22 of the burden of proof is consistent with the pronouncements of the Arizona courts. See  
23 Hassell, 156 Ariz. at 363 n. 10, 837 P.2d at 165 n.10; O’Toole, 154 Ariz. at 46 n.2, 739 P.2d  
24 at 1363 n.2; Hull, 199 Ariz. at 420, 18 P.2d at 731.

25           Thus, if sufficient evidence is not presented to show navigability for a particular  
26 watercourse, the Commission must find the watercourse non-navigable. The “preponderance  
27 of the evidence” standard is commonly used in Arizona civil litigation, as opposed to the  
higher burdens of proof imposed on the prosecution in criminal cases. The Revised Arizona  
Jury Instructions (Civil), for example, contain a suggested statement to jurors regarding how  
they should view this standard:

1 Burden of proof means burden of persuasion. On any claim, a party who  
2 has the burden of proof must persuade you, by the evidence, that the claim is  
3 probably more true than not true. This means that the evidence that favors that  
4 party outweighs the opposing evidence. In determining whether a party has met  
5 this burden, consider all the evidence that bears on that claim, regardless of  
6 which party produced it.

7 RAJI (Civil) Standard 9 (1997).

8 The most commonly used legal dictionary contains the following definition of  
9 “preponderance of the evidence”:

10 Evidence which is of greater weight or more convincing than the  
11 evidence which is offered in opposition to it; that is, evidence which as a whole  
12 shows that the fact sought to be proven is more probable than not. *Braud v.*  
13 *Kinchen, La. App., 310 So.2d 657, 659.* With respect to burden of proof in civil  
14 actions, means greater weight of evidence, or evidence which is more credible  
15 and convincing to the mind. That which best accords with reason and  
16 probability. The word “preponderance” means something more than “weight”;  
17 it denotes a superiority of weight, or outweighing. The words are not  
18 synonymous, but substantially different. There is generally a “weight” of  
19 evidence on each side in case of contested facts. But juries cannot properly act  
20 upon the weight of evidence, in favor of the one having the *onus*, unless it  
21 overbear, in some degree, the weight upon the other side.

22 Black’s Law Dictionary 1064 (5<sup>th</sup> ed. 1979).

23 The “preponderance of the evidence” standard is sometimes referred to as requiring  
24 “fifty percent plus one” in favor of the party with the burden of proof. One could imagine a  
25 set of scales. If the evidence on each side weighs exactly evenly, the party without the burden  
26 of proof must prevail. In order for the party with the burden to prevail, sufficient evidence  
27 must exist in order to tip the scales (even slightly) in its favor. See generally *United States v.*  
*Fatico*, 458 U.S. 388, 403-06 (E.D.N.Y. 1978), *aff’d*, 603 F.2d 1053 (2d Cir. 1979), *cert.*  
*denied*, 444 U.S. 1073 (1980); *United States v. Schipani*, 289 F. Supp. 43, 56 (E.D.N.Y.  
1968), *aff’d*, 414 F.2d 1262 (2d Cir. 1969).

28 Thus, the Commission should carefully weigh the evidence presented. If the evidence  
29 is of even weight or if the scales tip in favor of non-navigability, the Commission should find  
30 the watercourse non-navigable. If the scales tip in favor of navigability, the Commission  
31 should find the watercourse navigable.

1           **B.     Applying the “federal test” in A.R.S. § 37-1101(5)**

2           The Commission must examine all of the evidence submitted on a particular  
3 watercourse and determine, based upon the preponderance of the evidence: (1) Whether the  
4 watercourse was in existence on February 14, 1912; and (2) whether, as of February 14, 1912,  
5 the evidence establishes that the watercourse “was used or was susceptible to being used, in its  
6 ordinary and natural condition, as a highway for commerce, over which trade and travel were  
7 or could have been conducted in the customary mode of trade and travel on water.” A.R.S. §  
8 37-1101(5).

9           **IV.   Evidence in the Record**

10          The SLD hired technical consultants to perform a detailed and comprehensive study of  
11 the San Pedro River. See JE Fuller Hydrology & Geomorphology, Inc., Arizona Stream  
12 Navigability Study for the San Pedro River: Gila River Confluence to the Mexican Border  
13 (revised September 1997) (“Fuller Report”). This study focused on two questions: (1) Was  
14 the San Pedro River ever used for navigation? and (2) Was the river susceptible to being used  
15 for navigation? Id. Executive Summary, at ii. As discussed below, both questions must be  
16 answered in the negative—i.e., the San Pedro River neither was actually used nor was  
17 susceptible to being used as a “highway” for commerce on February 14, 1912.

18           **A.     History of the San Pedro River**

19          None of the historical evidence supports a finding of navigability. To the contrary, all  
20 of the evidence weighs in favor of non-navigability.

21           1.   The San Pedro River during prehistoric times

22          The report submitted by the SLD consultant details archaeological evidence regarding  
23 occupation near the San Pedro River in the period before settlement by non-natives. There is  
24 documented evidence of inhabitation in the San Pedro Valley dating back to approximately  
25 9,550 B.C., over 11,000 years ago. Fuller Report, supra, at 2-5. Early inhabitants along the  
26 river utilized its water for agricultural purposes, such as floodwater farming in the low areas.  
27 Id. at 2-6, 2-9. There is also limited evidence of prehistoric irrigation practices. Id. at 2-9.

1           Clearly, early populations settled in the San Pedro River Valley using river water as  
2 their lifeline. However, the SLD consultant concluded, “No evidence of prehistoric boating  
3 on the San Pedro River, or of river conditions that would support navigation, was identified  
4 during the archaeological investigation and literature search.” Id. at 2-9. Thus, despite human  
5 presence in the San Pedro River Valley and along the river for thousands of years, no evidence  
6 exists that any of those communities ever used or even tried to use the San Pedro River as a  
7 “highway for commerce.”

## 8                           2. Early exploration and settlement of the San Pedro River Valley

9           Indians, Spanish explorers and missionaries, and American trappers and travelers  
10 flocked to the San Pedro River Valley and traveled along the river, yet none used the San  
11 Pedro River as a means of transportation or commerce.

12           Historic accounts demonstrate an increase in traveling and settling along the San Pedro  
13 River Valley beginning in the sixteenth century, yet none of these people ever boated upon the  
14 river. In the 1500s, there were explorers in the area, such as Spanish explorer Fray Marcos de  
15 Niza. Fuller Report, supra, at 3-7. The Sobaipuri Indians, an agricultural tribe, occupied the  
16 area until warfare with the Apaches in 1763 forced them to the Santa Cruz River. Id. The  
17 Sobaipuri had villages along the river with as many as 500 people each. Id. Spanish  
18 missionaries, such as Father Eusebio Kino, established missions in the area in 1691. Id.  
19 Trapper James Ohio Pattie made two expeditions along the San Pedro River between 1824  
20 and 1828, referring to it as “Beaver River” due to the abundance of beaver. Id. at 3-10.

21           There is also evidence of stage transportation companies operating along the San Pedro  
22 River in 1880. Id. at 3-23. However, there is no evidence of using the San Pedro River for  
23 commerce. Id. Surely, if the San Pedro River were navigable, an entrepreneurial individual  
24 would have capitalized on the market of water transportation for recreation or commerce just  
25 as was done with stagecoach transportation. Indeed, the San Pedro River was an important  
26 transportation route through southern Arizona, but travel was alongside the river via foot or  
27 horseback. Id.

1           The early descriptions of the San Pedro River by explorers, trappers, and travelers also  
2 support a finding that the river was not navigable. In 1846, during the Mexican War, military  
3 expedition teams led by Stephen Watts Kearny crossed the river, describing it as “an  
4 insignificant stream a few yards wide and only a foot deep.” Id. at 3-13. Another member of  
5 the group reported that the San Pedro River was called “Hog River” due to the amount of wild  
6 hogs found on it. Id. Philip St. George Cooke, commander of the Mormon Battalion, also  
7 traveled alongside the San Pedro River during the mid-nineteenth century for more than 50  
8 miles. Id. Despite his boating attempts on other rivers, he never made any attempts to boat  
9 upon the San Pedro River. Id. Engineers surveying a wagon road in 1858 commented that the  
10 San Pedro River “is not continuous all the year, but in the months of August and September  
11 disappears in several places, rising again, however, clear and limpid.” Id. at 3-18.

12           There is no evidence of actual boating on the San Pedro River, and further evidence  
13 suggests that it was not susceptible to being used as a “highway for commerce” during this  
14 time. Studies indicate that, prior to 1890, the river was “an irregularly flowing stream, marshy  
15 in places, free-flowing in other places, entrenched or subsurface in still other places.” Id. at 3-  
16 1. After 1890, arroyo cutting changed the character of the river, and it was a “highly variable  
17 stream, both seasonally and along its length.” Id. at 3-26. An additional limitation on any  
18 potential transportation or commerce in the river was a drought that lasted from 1885-1903,  
19 accompanied by periodic flash flooding. Id. Miners constructed bridges over the San Pedro  
20 River for shipments and also built dams across the river. Id. at 3-21. Those impediments  
21 would have halted any potential navigation along with river.

22           The SLD consultant also reasoned that uses made of the river during historic times  
23 possibly would have been precluded by statehood due to the channel changes. Id. What is  
24 established, though, is that during this time “there is no documentation of boating of any kind  
25 on the San Pedro River.” Id.

1  
2  
3           3. Fishing on the San Pedro River

4           There is documented evidence of fish, such as squawfish, razorback sucker, and  
5 flannelmouth sucker found in the river. Fuller Report, supra, at 3-21. The historical record is,  
6 however, devoid of any evidence that any person ever used a boat to fish on the river. For  
7 example, evidence of fishing came from journal entries of men on military expeditions with  
8 Cooke, the commander of the Mormon Battalion, who traveled by horseback along the San  
9 Pedro River and wrote of catching fish in the San Pedro River. Id. at 3-14. In addition, the  
10 Fuller Report briefly mentions that, from 1870 through 1910, a commercial business harvested  
11 razorback suckers near Tombstone. Id. However, there is no further evidence on how the fish  
12 were caught or whether the business was seasonal due to the variable streamflow of the river.

13           The SLD consultant stated, “. . . the presence of fish in a river does not necessarily  
14 indicate that boatable conditions exist . . . .” Id. at G-5. What evidence of fishing exists in the  
15 record in no way supports a finding of navigability. The evidence that fishing did occur from  
16 the banks of the San Pedro River does not make it likely the river was navigable.

17           4. Boating attempts on the San Pedro River

18           There are no published accounts of boating on the San Pedro River prior to statehood.  
19 Fuller Report, supra, at G-4. There is, however, one unconfirmed anecdotal story of a ferry  
20 service on the river. Dora Ohnesorgen and Nedra Sunderland recalled that Ohnesorgen’s  
21 grandfather had a ferry operation on the San Pedro River near Pomerene. Id. at 4-3. This  
22 supposed operation was not documented in any newspaper article or any other source, nor was  
23 there a timeframe of when this business was thought to have operated or any other shred of  
24 evidence confirming this story. Id. at 8-3. Regardless, one account based entirely on  
25 anecdotal evidence is not sufficient to satisfy the burden of proof for navigability. In fact,  
26 during interviews with local residents, there was not one account of commercial or  
27 recreational boating (other than the unverified story above) on the San Pedro River. Id. at 4-3.  
Further, the Winkelman National Resource Conservation District reported to the Commission,  
“It is the overwhelming consensus that the San Pedro River has never been a ‘navigable’

1 waterway.” Letter from Virgil E. Mercer, Chairman, Winkelman Natural Resource  
2 Conservation District, to Navigable Stream Adjudication Commission (July 17, 1996)  
3 [Evidence Item (“EI”) No. 4]. The Chairman of the district reported his family came to the  
4 area in the 1880s and, with part of family ranch on the San Pedro River, there were no stories  
5 of boating on it. Id.

6 Modern records and stories indicate that there has been infrequent recreational boating  
7 on the San Pedro River. Id. at 8-4. A survey by the Central Arizona Paddlers Club found six  
8 reported accounts of boating on the San Pedro River from 1973-1992. Id. at G-7. The  
9 majority of the trips occurred during August, when monsoon season brings rain to Southern  
10 Arizona. See id. at 8-4. The SLD consultant referred to these boating trips as “very  
11 opportunistic,” describing that “boaters drive to a launching point on likely rain days, and ‘put  
12 in’ the water if rain conditions favor runoff.” Id. at 8-5. However, despite these sporadic  
13 events, the Arizona State Parks Department classified the San Pedro River not as a boating  
14 stream, but as a hiking or general recreation area. Id.

15 Although there have been isolated boating events on the San Pedro River, the  
16 overwhelming weight of the evidence suggests that the river is not navigable. A handful of  
17 intermittent boating accounts in recent history during the monsoon season does not make it  
18 more likely than not that the San Pedro River was navigable or susceptible to navigation on  
19 February 14, 1912.

20 **B. Climate, hydrology, and geomorphology**

21 The other evidence presented to the Commission is similarly insufficient to constitute a  
22 preponderance of the evidence in favor of navigability. The climate of the San Pedro River  
23 Valley is typical of a desert climate, with violent summer thunderstorms and sporadic rain in  
24 the winter, rather than the type of weather that would produce a regularly flowing stream. The  
25 hydrologic data demonstrates that the San Pedro River could not be relied upon for regular  
26 streamflow to support a “highway for commerce.” Finally, the geomorphologic evidence  
27

1 indicates that the river had a widening, entrenched channel with natural impediments that  
2 would have inhibited navigation.

3 The San Pedro River valley is semi-arid. Fuller Report, supra, at 5-4. Precipitation  
4 occurs mainly “during the summer when moisture entering Arizona from the south triggers  
5 convective thunderstorms.” Id. at 5-5. During some years, intense rains hit the valley during  
6 September and October “that commonly result in heavy rain and flooding.” Id.

7 The hydrologic character of the San Pedro River precludes it from being susceptible to  
8 navigation. Prior to statehood, the average flow rates at the Charleston station from 1904-  
9 1906 varied from 3 cubic feet per second (“cfs”) in June to 233 cfs in August, summarized on  
10 Table 7-6a. Id. at 7-13. This extreme variation in the monthly average demonstrates the  
11 volatility of the San Pedro River. There was limited hydrologic data at or before statehood,  
12 and no streamflow measurements during February 1912. Id. at 7-5. Based upon estimates  
13 from one of four USGS stream gages at Charleston, the average flow rate of February 1912  
14 was 28 cfs. Id. At the time of statehood, the Upper San Pedro River at St. David had an  
15 estimated median depth of a ½ foot and median width of 10 feet. Id. at 7-21. Furthermore,  
16 “portions of the San Pedro River were periodically dry or experienced low flows due to  
17 irrigation diversions” when Arizona became a state in 1912. Id.

18 Following statehood, streamflow data is more reliable and documented, as there are  
19 nine gaging stations on the San Pedro River. Table 7-5 of the Fuller Report summarizes  
20 monthly and average annual flow rates gathered from stream gage data. Id. at 7-9. For all  
21 stations documented, there is not one with an average annual flow of greater than 60 cfs. Id.  
22 The data demonstrates that higher flow rates (i.e., between 100-200 cfs) occur only during the  
23 monsoon season of July and August. Id. At some points in the year (during April and May),  
24 at least one of the gages had absolutely no streamflow. Id. The consultant concluded that the  
25 water flows are “highly variable, with the major component of flow resulting from direct  
26 response to precipitation.” Id. at 7-10. Due to the radical changes in streamflow, no one  
27 could rely on the San Pedro River as a daily source of transportation or commerce.

1 Floods also have affected the average of streamflow rates on the San Pedro River.  
2 Historically, large floods began in the 1880s and 1890s and arroyo cutting began thereafter.  
3 Id. at 3-12; see Michelle Lee Wood, Historical Channel Changes Along the Lower San Pedro  
4 River (August 1997) (“Wood Report”), at 1. The 1890 flood has been referred to as causing  
5 the “death of the San Pedro River” because it “removed or drained numerous swampland  
6 areas along its course.” Id. at 7-19. Floods prior to statehood largely contributed to the  
7 entrenchment of the San Pedro River. Id. at 5-11. Typically, the flood streamflow rates range  
8 from 31,000 cfs up to 135,000 cfs. Id. Indeed, the influx of water due to flooding has likely  
9 skewed average flow rates upwards.

10 The geomorphologic data further indicates that the San Pedro River was not navigable,  
11 nor susceptible to navigability. While the upper reach can be characterized as having a partly  
12 perennial and partly intermittent flow, the lower reach has an entrenched, broad, and braided  
13 channel with only isolated reaches of perennial flow. Id. at 7-1, Wood Report, supra, at 35.  
14 Both the upper and lower channels experienced channel entrenchment and widening during  
15 exploration and settlement of the San Pedro Valley in last half of the 19<sup>th</sup> century. Fuller  
16 Report, supra, at 5-17. For example, in 1854, a railroad surveyor commented that the San  
17 Pedro River flows “at about twelve feet below the surface of its banks, which are nearly  
18 vertical, and of a treacherous miry soil, rendering it extremely difficult to approach the water,  
19 now muddy and forbidding.” Id. at 3-16. Arroyo cutting “is thought to have been  
20 substantially complete before statehood.” Id. at F-7. At the time of statehood, the upper reach  
21 could be described as a “braided channel [that] meandered within the confines of the arroyo  
22 banks.” Id. at 5-15.

23 Modern geomorphologic characteristics demonstrate that the San Pedro River is not  
24 susceptible to navigability. The upper reach of the San Pedro River is characterized by a  
25 “variably entrenched channel” and “coarse-grained point bars that deflect streamflow.” Id. at  
26 5-7. The channel is additionally described as “both braided and meandering: the low flow  
27 channel is braided with several branching channels, but the high flow channel is sinuous.” Id.

1 The lower reach has a wide, entrenched channel. Id. at 5-8. The geomorphologic descriptions  
2 of the river highlight characteristics not conducive to navigation.

3 **V. Legal Argument**

4 The Commission must review all of the evidence and determine whether the San Pedro  
5 River was “navigable” on February 14, 1912. Although the task of reviewing the evidence is  
6 perhaps time-consuming and tedious, making the actual decision should be easy. No evidence  
7 supports a finding that the San Pedro River is or ever was used or susceptible to being used as  
8 a “highway for commerce.”

9 **A. Based upon the evidence in the record, the San Pedro River is not “navigable”**  
10 **as defined in A.R.S. §37-1101(5).**

11 “[I]t is not . . . every small creek in which a fishing skiff or gunning canoe can be made  
12 to float at high water which is deemed navigable.” Hassell, 172 Ariz. at 363, 837 P.2d at 165  
13 (quoting The Montello, 87 U.S. (20 Wall.) 430, 22 L.Ed. 391 (1874)). “[T]he vital and  
14 essential point is whether the natural navigation of the river is such that it affords a channel  
15 for useful commerce.” Id. When the Commission reviews the evidence submitted, and  
16 considers the totality of the evidence, it must determine that the San Pedro River never was  
17 used or susceptible to being used as a “highway for commerce.”

18 1. The San Pedro River was not actually used as a “highway for commerce.”

19 There are no indications that the San Pedro River was ever used as a “highway for  
20 commerce.” Prehistoric research found evidence of human populations in the area for over  
21 11,000 years, yet no evidence of boating on the San Pedro River during the history of  
22 inhabitation of the area. See Section IV(A)(1), supra. Likewise, none of the historical  
23 research revealed that early explorers, missionaries, trappers, or travelers in the San Pedro  
24 Valley ever used the river for boating or for commerce. See Section IV(A)(2), supra. There  
25 was also no evidence that logs had been floated down the river. See id.

26 Although there is limited evidence of fishing on the San Pedro River prior to statehood,  
27 no evidence in the record supports a finding that boats were used. See Section IV(A)(3),  
supra. The only evidence in the SLD’s report regarding any boating on the San Pedro River at

1 the time of statehood is based upon an unsubstantiated, anecdotal story about a ferry operation  
2 near Pomerene. See Section IV(A)(4), supra. Isolated accounts of boating via low-draft  
3 boats, such as kayaks and rafts, do not indicate that the San Pedro River is navigable.  
4 Occasional use during exceptional times does not support a finding of navigability. United  
5 States v. Crow, Pope & Land Ents., Inc., 340 F. Supp. 25, 32 (N.D. Ga. 1972) (“The waterway  
6 must be susceptible for use as a channel of useful commerce and not merely capable of  
7 exceptional transportation during periods of high water.”) (citing Brewer-Elliott Oil & Gas  
8 Co. v. United States, 260 U.S. 77 (1922)). Most of the six reports of boating from the 1970s-  
9 1990s occurred during the month of August, when monsoon season hits and streamflows are  
10 typically higher due to the precipitation.

11 No evidence exists to show that the San Pedro River was ever used as a “highway for  
12 commerce,” over which trade and travel were conducted in the customary mode of trade and  
13 travel on the water. See A.R.S. § 37-1101(5). Thus, any determination of navigability would  
14 need to be based upon a finding that the river was “susceptible” for such use. See id.

15 2. The San Pedro River was not susceptible to being used as a “highway for  
16 commerce.”

17 Because insufficient evidence exists to show that the San Pedro River was actually  
18 used as a “highway for commerce,” any party seeking to argue that the San Pedro River was  
19 navigable at statehood will need to show by a preponderance of the evidence that the river was  
20 “susceptible” to such use. There is no evidence in the record to satisfy that standard.  
21 Evidence from the San Pedro River’s long history demonstrates it was not “a corridor or  
22 conduit within which the exchange of goods, commodities, or property or the transportation of  
23 persons may be conducted.” A.R.S. § 37-1103(3) (definition of “highway for commerce”).

24 Historical descriptions and modern stream data lead to the conclusion that the San  
25 Pedro River was not susceptible to navigation. During the nineteenth century, when  
26 explorers, missionaries, and travelers came to the San Pedro River Valley, the river was  
27 described as “insignificant” and “not continuous.” See Section IV(A)(2), supra. There is

1 evidence that the same early explorers in the San Pedro River Valley attempted to boat on  
2 rivers other than the San Pedro River. See id. Thus, the absence of any records of explorers,  
3 missionaries, or travelers boating on the San Pedro River leads one to believe that it simply  
4 was not boatable.

5 Near the time of statehood, the San Pedro River was dry in some parts and had low  
6 flows due to irrigation diversions. See Section IV(B), supra. On average, flows during  
7 February 1912 are estimated to have been 28 cfs. Id. Modern accounts describe the San  
8 Pedro River as entrenched and widening, with a channel that is braided and has natural  
9 impediments to streamflow. Id.

10 The San Pedro River's flow is not continuous or reliable throughout the year; thus, it  
11 was not "susceptible" to navigation. Given the weight of the data and evidence, it does not  
12 support a finding that the San Pedro River was "susceptible" to being used as a "highway for  
13 commerce" on February 14, 1912.

14 **B. Summary of San Pedro River evidence**

15 In making its decision on the San Pedro River, the Commission should carefully  
16 consider the elements of the federal test. The burden of proof (by the preponderance of the  
17 evidence) is on those parties contending that any particular watercourse was navigable. The  
18 Commission must consider not only the actual uses at statehood, but also whether the  
19 watercourse was susceptible to being used as a "highway for commerce." Even so, however,  
20 no evidence exists in the record to support a finding that the San Pedro River, in its "ordinary  
21 and natural condition," was or could have been used as a "highway for commerce." The San  
22 Pedro River was not "navigable" on February 14, 1912.

23 **VI. Summary and Requested Action**

24 For the reasons set forth herein, and based upon the evidence introduced before and  
25 during the three hearings, SRP requests that the Commission find that San Pedro River was  
26 not "navigable" when Arizona became a state on February 14, 1912.

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DATED this 8<sup>th</sup> day of April, 2004.

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