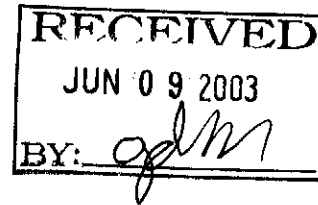


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9  
10 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
11 **ADJUDICATION COMMISSION**

12 In re Determination of Navigability of the  
13 Lower Salt River, from Granite Reef Dam  
14 to the Gila River Confluence

No. 03-005-NAV

CITY OF TEMPE POST-HEARING  
OPENING MEMORANDUM

15 Pursuant to Rules of the Commission (R12-17-108.01), the City of Tempe files its post-  
16 hearing opening memorandum in the determination whether the Lower Salt River was navigable  
17 at Arizona statehood on February 14, 1912. The evidence before the Commission compels a  
18 determination that the Lower Salt River was not navigable at statehood.  
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1 **I. STANDARD FOR DETERMINING NAVIGABILITY FOR TITLE PURPOSES**

2 The Arizona Navigable Stream Adjudication Commission (Commission) is required to  
3 determine whether watercourses in Arizona were navigable as of February 14, 1912. A.R.S.  
4 §37-1128(A). "Navigable" means "a watercourse that was in existence on February 14, 1912,  
5 and at that time was used or was susceptible to being used, in its ordinary and natural condition,  
6 as a highway for commerce, over which trade and travel were or could have been conducted in  
7 the customary modes of trade and travel on water." A.R.S. §37-1101(5).

8  
9 The Commission determines whether a stream was navigable by a preponderance of the  
10 evidence. "If the preponderance of the evidence fails to establish that the watercourse was  
11 navigable, the commission shall issue its determination confirming that the watercourse was  
12 nonnavigable." A.R.S. §37-1128(A). Because the evidence before the Commission in the case  
13 of the Lower Salt River does not establish that the watercourse was navigable, the Commission  
14 must find that the Lower Salt River was not navigable as of February 14, 1912.

15  
16 The Arizona Court of Appeals has ruled that the Commission must use the federal test of  
17 navigability for title purposes originally stated in The Daniel Ball, 77 U.S. (10 Wall.) 557, 19  
18 L.Ed. 999 (1870). Defenders of Wildlife v. Hull, 199 Ariz. 411, 417, 418, 18 P.2d 722, 728, 729  
19 (App. 2001). That standard was expressed as follows. "Those rivers must be regarded as public  
20 navigable rivers in law which are navigable in fact. And they are navigable in fact when they are  
21 used, or are susceptible of being used, in their ordinary condition, as highways for commerce,  
22 over which trade and travel are or may be conducted in the customary modes of trade and travel  
23 on water." Hull at 417-418 (citing cases); The Daniel Ball at 560.

24  
25 The Commission has asked whether the "ordinary and natural condition" language in the  
26 statutory definition of "navigable" means the pre-statehood condition of the Lower Salt River  
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1 before the Upper Salt River was impounded behind Roosevelt Dam. Transcript (Tr.) at 8:13-14.  
2 Roosevelt Dam was completed and had stored water before statehood in 1910; Granite Reef  
3 Dam, a permanent diversion dam, had been completed in 1908. Tr. at 7:235 (Roberts). Because  
4 the language of The Daniel Ball was adopted, almost verbatim, by the Arizona legislature in  
5 A.R.S. §37-1101(5), the way courts using that standard have construed the language may be  
6 instructive.

7  
8 The “ordinary condition” language of The Daniel Ball test has been considered to mean  
9 “the ordinary conditions prevailing throughout the greater part of the year.” Oklahoma v. Texas,  
10 258 U.S. 574, 579 (1922). The “natural condition” language added by courts using The Daniel  
11 Ball test may refer to the river’s condition before being straightened, dredged, or otherwise  
12 altered to accommodate trade and travel. See, e.g., Brewer-Elliott Oil & Gas Co. v. U.S., 260  
13 U.S. 77, 80 (1922) (citing cases) (“in its natural state”).

14  
15 Several courts using The Daniel Ball standard have decided that evidence for uses of a  
16 river in times of temporary high water do not prove a river was navigable. United States v. Utah,  
17 283 U.S. 64, 72 (1931); Oklahoma v. Texas, 258 U.S. 574, 580 (1922); United States v. Rio  
18 Grande Dam & Irrigation Co., 174 U.S. 690, 694 (1899); United States v. Harrell, 926 F.2d  
19 1036, 1039 (1991).

20  
21 One court construed the “natural and ordinary condition” of the river to mean “volume of  
22 water, gradient, and regularity of flow.” United States v. Crow, Pope and Land Enterprises, 340  
23 F. Supp. 25, 34 (N.D. Ga. 1972). While these court opinions may help to answer the question  
24 when the ordinary and natural condition applies, it appears that the definitive answer may be  
25 found in the A.R.S. §37-1101(5) definition of “navigable.” The statute specifically focuses the  
26 determination temporally by defining a navigable watercourse as one “that was in existence on  
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1 February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and  
2 natural condition, as a highway for commerce..." (emphasis added). The Commission is thus  
3 directed to focus on characteristics of flow in the river at statehood.

4 If the Commission decides, however, to base its determination of navigability on pre-  
5 statehood river conditions, before Roosevelt Dam was constructed, the outcome would be the  
6 same. The record contains abundant evidence that the Lower Salt River was a highly volatile  
7 stream that was never susceptible to being used as a highway for commerce, even without the  
8 dams and diversions that affected the flow of the river at statehood. See Part III.A. below.

9 The evidence before the Commission demonstrates that under The Daniel Ball test, the  
10 Lower Salt River was not navigable in fact; the river was not used, and was not susceptible to  
11 being used, in its ordinary and natural condition, as a highway for commerce.

12  
13 **II. THE LOWER SALT RIVER WAS NOT USED AS A HIGHWAY FOR**  
14 **COMMERCE.**

15 **A. The Evidence of Recorded Boat Trips Does Not Demonstrate that the Lower**  
16 **Salt River was Used as a Highway For Commerce.**

17 The Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila  
18 River Confluence, prepared by J.E. Fuller for the Arizona State Land Department (September  
19 1996) (Evidence Item (EI) 7) lists sixteen accounts of boating on the Lower Salt River from 1873  
20 to 1910 in Table 6, pages 3-18 and 3-19, and describes them on pages 3-18 through 3-23. These  
21 16 isolated newspaper accounts of attempts to boat the river over 38 years do not provide  
22 evidence that the river was navigable as defined in A.R.S. §37-1101(5). In fact, their scarcity  
23 and lack of success demonstrate that the river was not navigable in those years immediately prior  
24 to statehood. "These repeated, unsuccessful attempts at trade and travel are strong evidence that  
25 the residents of the Salt River Valley tried to navigate the Salt River but were unable to do so."  
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1 D. Kupel and E. Endebrock, Historical and Scientific Evidence Concerning Navigability of the  
2 Lower Salt River, at 8 (April 2003) (EI 29).

3 The evidence presented about the boat trips can be briefly summarized. Two of the  
4 sixteen trips were flood rescues (#14 and #16); two may not have occurred at all (#3 reported  
5 someone "planning" a trip, and #10 is hearsay with no news article in evidence); 4 trips did not  
6 take place on the Lower Salt River, but on the Gila, Verde, or a canal (#8, 9, 13, 15); one was a  
7 trip by Reclamation engineers who pronounced the river a "poor stream for navigation" (#12),  
8 and one trip was an unsuccessful attempt to float logs downstream (#2). Ten of the trips took  
9 place between November and March, generally times of high flows in the river (#3, #4, #6, #8,  
10 #9, #11, #12, #13, #14, and #16). The months in which trips #5 and #10 were taken are  
11 unknown. See Fuller (EI 7) 3-18 through 3-23; Tr. at 7:39-61 (Fuller).

12  
13 One historian has concluded that "The boating attempts are in the nature of experiments  
14 during times of periodic high water." Kupel (EI 29) at 8. Courts have considered the evidence  
15 of boating attempts during periodic high water as insufficient to demonstrate that a river was  
16 navigable. United States v. Utah, 283 U.S. at 72; Oklahoma v. Texas, 258 U.S. at 580; United  
17 States v. Rio Grande Dam & Irrigation Co., 174 U.S. at 694; United States v. Harrell, 926 F.2d at  
18 1039.

19  
20 As stated by a federal court reviewing evidence of boating accounts on the Little  
21 Missouri River, "The evidence of isolated trips on the river from the 1880s to 1920s  
22 demonstrates that the river was used only occasionally and in times of high water. This evidence  
23 does not provide a sufficient basis for a finding of navigability." North Dakota v. United States,  
24 770 F. Supp. 506, 512 (1991). Similarly, the evidence of occasional boat trips on the Lower Salt  
25 River from the 1870s to 1910 is insufficient to support a finding of navigability.  
26  
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1           **B. The Evidence that Ferries were Used to Cross the River Does Not**  
2           **Demonstrate that the Lower Salt River Was Used as a Highway for**  
3           **Commerce.**

4           The Fuller report (EI 7) provides historical information on ferries used to cross the Lower  
5           Salt River (Table 7, page 3-24). After reviewing the evidence for ferries, the State's expert  
6           concluded, "Probably most of the ferries that operated on the Salt River were short-lived,  
7           expedient ventures that were mentioned in the papers only when they first went into service."  
8           Fuller (EI 7) at 3-26. Hayden's Ferry in Tempe, the best documented ferry on the Lower Salt  
9           River, "was used only when high water impeded fording the river." Fuller (EI 7) at 3-7.

10           All the historians who provided evidence of ferries on the Lower Salt River concluded  
11           that the use of ferries to cross the river during periodic high flows does not demonstrate that the  
12           river was navigable. Kupel (EI 29) at 7; Littlefield (EI 39) at 51; Tr. at 7:113 (August). Courts,  
13           in reviewing the historical evidence of ferries, have also concluded that ferries represent a means  
14           to avoid the river rather than use it for trade and travel. "The existence of ferries is no more an  
15           example of commercial use than the presence of a bridge or railroad trestle whose primary  
16           purpose is to avoid the river rather than to employ it as a means for trade and transportation."  
17           United States v. Crow, Pope & Land Enterprises, Inc., 340 F. Supp. 25, 34 (1972) (citing cases).

18           "Although the ferries operated on the water, they were the functional equivalent of  
19           bridges. The existence of a bridge on the river may establish that the bed of the river is covered  
20           at times by water too deep or too wide at a given point to be crossed by foot, by horse, or by  
21           automobile; however, it does not establish that the river is a channel for useful commerce. On  
22           the contrary, the existence of a bridge, or a ferry, establishes that the river is an obstruction to  
23           commerce which must be overcome." North Dakota v. United States, 770 F. Supp. at 511.  
24           Witnesses who presented evidence about the Lower Salt River ferries likewise concluded that the  
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ferries demonstrate that the river was a barrier to commerce rather than a corridor for commerce. Kupel (EI 29) at 7, 11; August (EI 31) at 10; Tr. at 7:113 (August); Tr. at 7:72 (Fuller).

In summary, the evidence in the record fails to demonstrate that the Lower Salt River was used as a highway for commerce. Instead, the evidence demonstrates overwhelmingly that the Lower Salt River was not used as a highway for commerce, and was not navigable at statehood.

**III. THE LOWER SALT RIVER WAS NOT SUSCEPTIBLE TO BEING USED AS A HIGHWAY FOR COMMERCE.**

**A. Geomorphic Evidence Demonstrates that the Lower Salt River was Not Susceptible To Being Used as a Highway for Commerce.**

All the evidence presented on the geomorphology of the Lower Salt River shows that the river was erratic and unstable, and not susceptible to being used as a highway for commerce. Renowned geomorphologist Stanley Schumm reported and testified that the geomorphic character of the Lower Salt River made it unsuitable for navigation. Geomorphic Character of the Lower Salt River (EI 26) at 4; Tr. at 7:199. Other witnesses reported and testified that the Lower Salt River was unstable, unpredictable, and subject to erratic flow and frequent channel changes. Kupel (EI 29) at 20; August (EI 31) at 5; Tr. at 7:163 (Littlefield); Tr. at 7:217, 220, 229, 241 (Roberts); Tr. at 8:7 (Bowers). This evidence of the ordinary and natural condition of the Lower Salt River stands uncontradicted in the record. These characteristics made the river not susceptible to being used as a highway for commerce.

**B. The Contemporary View at Statehood was that the Lower Salt River was Not Susceptible To Being Used as a Highway for Commerce.**

Substantial evidence that the Lower Salt River was not susceptible to being used as a highway for commerce was provided by the historical and ethnohistorical records of individuals who experienced the Lower Salt River firsthand around the time of statehood. Those records

1 include court opinions, federal government surveys, United States and State of Arizona land  
2 patents, and accounts of individuals.

3 **1. Court Opinions**

4 Twenty-six court decisions dating from 1890 to 1914 describe the Salt River as not  
5 navigable. Kupel (EI 29) at 2-4 (Table 1). The best known of these are the Kibbey Decree  
6 (Wormser v. Salt River Valley Canal Co., No. 708, Second Judicial District, Territory of  
7 Arizona, County of Maricopa (March 31, 1892)) and the Kent Decree (Hurley v. Abbott, No.  
8 4564, Third Judicial District, Territory of Arizona, County of Maricopa (March 1, 1910)). Both  
9 of these water rights determinations reflect the judges' views that the Lower Salt River was not  
10 navigable. Kibbey Decree at 4-5; Kent Decree at 3. Although these cases were not filed seeking  
11 a determination of navigability, both courts' views that the river was not navigable are integral to  
12 their water rights decisions. Because the river was not navigable and thus not controlled by the  
13 federal government, the courts used the territorial prior appropriation law to adjudicate the water  
14 rights at issue.  
15

16  
17 **2. Government Land Surveys and Patents**

18 Dr. Littlefield conducted an exhaustive study of surveyors' maps and notes, as well as  
19 surveying manuals issued by the federal government. Assessment of the Salt River's  
20 Navigability Prior to and On the Date of Arizona's Statehood (December 5, 1996) (EI 16). On  
21 the basis of his research Dr. Littlefield concluded that all the survey records he examined reflect  
22 the fact that the Lower Salt River was a non-navigable stream. Littlefield (EI 16) at 51.  
23

24 Dr. Littlefield also concluded that the patents issued to private individuals by the federal  
25 and state governments indicate the government officials' view that the river was not navigable.  
26 Littlefield (EI 16) at 114; Tr. at 7:173-174 (Littlefield).  
27  
28

1 In 1935 the State of Arizona issued a patent to the City of Tempe for land in T1N, R4E,  
2 section 16. This land is situated in the north half of section 16, through which the Lower Salt  
3 River flows. The State did not withhold any of the land in patent #1841 to the City of Tempe  
4 due to its location in the riverbed. See Littlefield (EI 16) at 112, 265. The fact that all the  
5 federal and state patents reviewed by Dr. Littlefield were deeded without government reservation  
6 of streambed lands indicates that the federal and state governments viewed the Lower Salt River  
7 as a non-navigable stream. Littlefield (EI 16) at 113-114.  
8

### 9 3. Individuals

10 Historians agree that Carl Hayden, who served the territory and state of Arizona as  
11 congressman and senator for 57 years, viewed the Lower Salt River as not navigable. Littlefield  
12 (EI 16) at 189; August (EI 31) at 5-7; Tr. at 7:120 (August). Historians also agree that the Lower  
13 Salt River was generally considered to be not navigable at Arizona statehood. Kupel (EI 29) at  
14 22; August (EI 31) at 9; Tr. at 7:121-122 (August). "Virtually no contemporaneous observer  
15 believed the Salt River was navigable around the time of Arizona statehood in 1912." Tr. at  
16 7:174-175 (Littlefield); See Tr. at 7:162 (Littlefield).  
17

18 Ethnohistorical evidence provided to the Commission also reflects the contemporaneous  
19 view that the Lower Salt River was not navigable. Tr. at 7:137-138 (Martin); Tr. at 8:11  
20 (Bowers). No contradictory evidence was introduced to suggest that anyone around the time of  
21 statehood viewed the river as susceptible to being used for commerce. In fact, the evidence  
22 shows that attempts to use the river for commercial enterprises were unsuccessful. Charles  
23 Trumbull Hayden had hoped the river was susceptible to being used for commerce, but found it  
24 was not when he attempted to float logs down to Tempe in 1873. August (EI 31) at 14; Tr. at  
25 7:114 (August). See Fuller (EI 7) at 3-18 and 3-19 ("Charles Hayden attempted to float logs  
26  
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1 down the Salt River and to establish a lumber mill in Tempe, but could not get the logs through  
2 the canyons upstream"). It is a matter of record that Charles Hayden never established a lumber  
3 mill in Tempe. Because the historical and ethnohistorical evidence demonstrates that the Lower  
4 Salt River was not susceptible to being used as a highway for commerce, it must be found non-  
5 navigable.

6 **C. The Evidence of Modern Boat Trips Does Not Demonstrate that the Lower**  
7 **Salt River was Susceptible to Being Used as a Highway for Commerce.**

8 The State's witness reported on modern boat use, commenting that "While modern boat  
9 use of a river does not provide proof of susceptibility of a stream to navigation at statehood, it is  
10 evidence that is readily available for consideration." Fuller (EI 7) at 8-4. In citing the available  
11 evidence for modern boating, Fuller explained that the Arizona State Parks Department does not  
12 classify the Lower Salt River as a boating stream, and that the boating guide he reviewed does  
13 not list the Lower Salt River. Fuller (EI 7) at 8-4 and 8-5. Thus the available evidence of  
14 modern boating does not demonstrate that the Lower Salt River was susceptible to being used as  
15 a highway for commerce, and does not support a finding of navigability.

17 **IV. THE LOWER SALT RIVER WAS NOT NAVIGABLE AT STATEHOOD.**

18 Based on the evidence before it, the Commission must find that the Lower Salt River was  
19 not navigable at statehood. The evidence unequivocally demonstrates that the river was not used  
20 as a highway for commerce and was not susceptible to being used as a highway for commerce.

22 The evidence submitted at the hearing does not support a finding of navigability, which  
23 proponents must prove by a preponderance of the evidence. A.R.S. §37-1128(A). Instead, the  
24 overwhelming weight of the evidence supports a finding that the Lower Salt River was not  
25 navigable at statehood. Based on the evidence before it, the Commission must issue a  
26 determination that the Lower Salt River was not navigable.  
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DATED this 6<sup>th</sup> day of June, 2003.

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