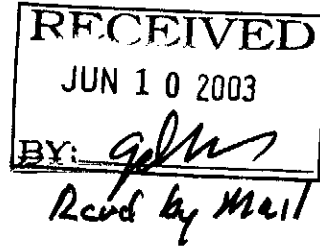


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8 **BEFORE THE ARIZONA NAVIGABLE STREAM**
9 **ADJUDICATION COMMISSION**

10 In re Determination of) No. 03-005-NAV
11 Navigability of the Lower Salt River)
12 In Maricopa County)
13) MARICOPA COUNTY'S
14) OPENING POST-HEARING
15) MEMORANDUM
16)
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23 Maricopa County, submits its Opening Post-Hearing Memorandum on the Navigability
24 of the Lower Salt River in Maricopa County, Arizona. The Memorandum is based upon the
25 evidence submitted prior to, at and after the hearings held on April 7 and April 8, 2003 in
26 Phoenix, Arizona, and on the testimony from those hearings. Maricopa County takes no
27 position on the navigability of the Lower Salt River in Maricopa County, but files the
28 Memorandum for the purpose of ensuring that correct standards are used by the Commission in
evaluating the testimony and evidence to protect the integrity of the process.

29 Background

30 The State of Arizona has been dealing with the public trust doctrine since the mid-1980s.
31 The process has involved lawsuits and appeals to the appellate courts and several versions of
32 legislation. The Commission is charged with following the legal precedents determined by case
33 law and the current statutes, A.R.S. §37-1101 et. seq. , which were promulgated in 2001, chiefly
34 as a result of the Defenders of Wildlife vs. Hull, 199 Ariz. 411, 18 P.3d 722 (App. 2001)

1 decision.

2 On April 7th and 8th of this year the Commission held hearings on the navigability of the
3 Lower Salt River in Maricopa County, (from the Granite Reef Diversion Dam to the Gila River
4 Confluence). Evidence was submitted prior to, during and after the hearing, and testimony or
5 statements were heard from more than a dozen people.
6

7 Because of this State's somewhat tortured history with the public trust doctrine,
8 Maricopa County is concerned that the correct legal standards for navigability be used by the
9 Commission in evaluating and weighing the evidence and testimony presented to promote
10 judicial and administrative economy and arrive at a decision that is defensible. These hearings,
11 for example, are the second time the Commission has undertaken the process to study the
12 navigability of the Lower Salt River. In 1994, the hearing process was stopped before being
13 completed. The County believes it is in everyone's best interest to use the correct legal
14 standards so that history of lawsuits, appeals and legislation does not have to be repeated again
15 and again in the future.
16
17

18 Legal Standards for Determining Navigability

19 The standard for determining navigability under equal footing claims is established by
20 federal law. Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 362, 837
21 P.2d. 158, 164 (App. 1991). The standard routinely cited by cases is found in an admiralty case,
22 The Daniel Ball, 77 U.S. (10 Wall.) 557 19 L.Ed. 999 (1870). The criteria in that case is:
23

24 Those rivers must be regarded as public navigable rivers in law which are
25 navigable in fact. And they are navigable in fact when they are used, or are susceptible
26 of being used, in their ordinary condition, as highways for commerce, over which trade
27 and travel are or may be conducted in the customary modes of trade and travel on water.
28 Id. at 563.

1 This standard has been adopted in Arizona in Defenders, 199 Ariz. at 419. The Defenders
2 opinion makes repeated reference to the fact that the correct legal and most accurately stated
3 standard is the federal Daniel Ball standard. For example, the court states, “The standard of
4 navigability for equal footing claims is established by federal law.” (citing Hassell, 172 Ariz. at
5 362.) Id. The court goes on to state, “navigability, when asserted as the basis of a right arising
6 under the Constitution of the United States, is necessarily a question of federal law...” (citing
7 State of North Dakota ex. rel. Bd. Of Univ. and Sch. Lands v. U.S. 972 F.2d 235, 237 (8th Cir.
8 1992). Id. Specifically referring to The Daniel Ball, the court states, “however, no authority
9 disputes the fact that it is the most accurately stated navigability-for-title test.” Defenders, 199
10 Ariz. at 419, footnote 10.

13 Navigable & Natural and Ordinary

14 The term “navigable” has been defined by our legislature to mean “a watercourse that
15 was in existence on February 14, 1912, and at that time was used or was susceptible of being
16 used, in its ordinary and natural condition, as a highway for commerce over which trade and
17 travel were or could have been conducted in the customary modes of trade and travel on water.”
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19 A.R.S. §37-1101 (5). This definition is taken almost verbatim from the Defenders opinion
20 which holds that, “We hold that, to prove navigability of an Arizona watercourse under the
21 federal standard for title purposes, one must merely demonstrate the following: On February
22 14, 1912, the watercourse, in its natural and ordinary condition, either was used for susceptible
23 to being used for travel or trade in any customary mode used on water.” 199 Ariz. at 426,
24 (citing The Daniel Ball, 77 U.S. at 563.
25

26 The Defenders case answers the question of what is “natural and ordinary.” The case
27

1 cites a much earlier U.S. Supreme Court case, Economy Light & Power Co. v. United States,
2 256 U.S. 113, 118, 41 S. Ct. 409, 65 L.Ed. 847 (1921) for the proposition that the existence of
3 manmade impediments to travel clearly does not create a presumption of non-navigability under
4 the federal test, which looks at the river's conditions, and that it is necessary to look at the
5 condition of the river in its natural state. 199 Ariz. at 424. "Natural and ordinary condition"
6 has also been said to refer to the volume of water, the gradients and the regularity of flow. U.S.
7 v. Appalachian Electric Power Co., 311 U.S. 377, 408, 61 S.Ct. 291, 85 L.Ed. 243 (1940).
8 (citing U.S. v. Oregon, 295 U.S. 1, 15, 55 S.Ct. 610, 79 L.Ed. 1267 (1935)). Our statutes must
9 be construed as establishing the federal standard. If the statutes are not so applied, the door is
10 opened for more rounds of lawsuits and appeals. What this means to the Commission is that in
11 order to make a decision regarding the natural and ordinary condition of the river, it must restore
12 the water diverted in any manner from the stream prior to statehood by Settlers.

13 The Evidence and Testimony Presented

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16
17 Expert opinion not based upon the correct legal standard should be disregarded as
18 unreliable and not probative of navigability. In the instant case, that evidentiary standard is the
19 preponderance of the evidence, the federal standard. Defenders, 199 Ariz. at 420. (citing
20 North Dakota v. U.S., 972 F.2d 235, 237-38 (8th Cir. 1992). See also A.R.S. §37-1128. And
21 That standard is also based upon facts that constitute navigability under federal law. Time is not
22 a consideration. Economy Light & Power, 256 U.S. at 122. The County is concerned that the
23 proper weight be given to testimony and reports which are not based on the Defenders standard.

24
25 For example, Stanley Schumm, Ph.D., geomorphologist and expert witness for the Salt
26 River Project opined that the reach of the Lower Salt River in questions was "not suitable for
27

1 navigation.” (Transcript page 199, lines 23-25) (All citations to the Transcript are to the April
2 7, 2003 court reporter transcript). Schumm testified, under cross examination, that his opinions
3 are not based upon the standards in Defenders of Wildlife (Transcript page 207, lines 2-12.)
4

5 Another example is Douglas Littlefield, Ph.D., the Salt River Project’s historian expert
6 witness, who opined that there was virtually no contemporaneous evidence that the Salt River
7 was navigable at statehood. (Transcript page 162 lines 21 –24 and page 174 lines 24-25 to page
8 175 lines 1-2). Dr. Littlefield admitted during cross examination that his opinions in his report
9 disagreed with the standards set out in Defenders. Dr. Littlefield’s deposition in another case,
10 Flood Control District of Maricopa County v. Paloma Investment Limited Partnership CV 1997
11 –07081, was submitted as Exhibit #39. In that deposition, Dr. Littlefield admitted that a report
12 he prepared regarding the navigability of the Gila River was not “designed to apply to any
13 particular legal standard,” and that his opinion was an historical opinion based upon
14 observations of contemporaneous observers. (Exhibit #39, page 89 lines 3-21).¹ Dr. Littlefield
15 also testified that his opinions on the Lower Salt River were not based on the condition of the
16 Salt River in its normal and natural state prior to any diversions or man-made structures being
17 placed upon the river. (Transcript Page 180, line 18-22).
18
19

20 As a final example, Dr. Jack August, historian for the City of Tempe, testified in his
21 opinion that there were no navigation interests downstream from the Lower Salt River dams at
22 statehood. (Transcript page 124, lines 12-19). Dr. August, also admitted, however, that his
23 opinions were not premised on the Defenders case. (Transcript page 131 lines 18-24)
24

25 _____
26 1 Dr. Littlefield testified that he used the same methodology on his
27 report on the Lower Salt River as he did in his Gila River report, which
is the basis of the admission in his deposition. (Transcript page 177
lines 14-22)

1 None of these opinions meet the burden of proof or evidentiary requirements of federal
2 law and thus cannot be relied upon because they are not based on the federal standard. The
3 bottom line is the three examples are witnesses who tendered opinions on navigability that were
4 not based upon the federal test, thus they are not probative of navigability under the federal test
5 and are examples of opinion that should be disregarded.

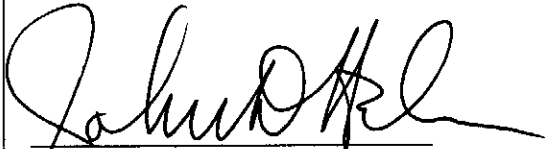
7 Summary

8 If the Commission does not utilize the correct legal standards in rendering its decisions
9 on the navigability of the Lower Salt River, there will be a waste of judicial and administrative
10 resources. This Commission must adhere to the federal standard for navigability; that is the law
11 in this state. Defenders, 199 Ariz. at 419. The evidence that is probative of this standard is
12 evidence or testimony that is based upon that standard. The Commission should disregard the
13 expert opinion that is not based upon that standard. In rendering your decision, the
14 Commission should keep foremost in your mind the requirements of federal law and in
15 construing the evidence and state statutes, in all cases where possible, construe it in accordance
16 with federal law. Any conduct that does not meet that standard will undoubtedly frustrate this
17 process.
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RESPECTFULLY SUBMITTED this 9th day of June, 2003.

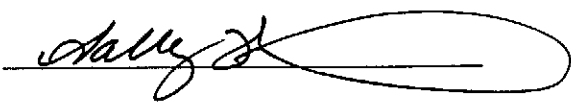
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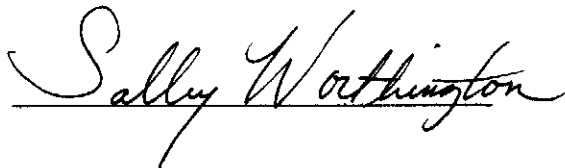
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