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Central Arizona

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

10 In re Determination of Navigability of the  
11 Lower Salt River, from Granite Reef Dam to  
the Gila River Confluence Interest.

No. 03-005-NAV

**POST HEARING MEMORANDUM BY  
HOME BUILDERS ASSOCIATION OF  
CENTRAL ARIZONA**

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15 Home Builders Association of Central Arizona herewith files its post hearing  
16 memorandum in support of a finding of non-navigability of the Lower Salt River.

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**TABLE OF AUTHORITIES**

**Cases**

Defenders of Wildlife v. Hull, 199 Ariz. 411, 18 P.3d 722, (App. 2001)

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870)

**Statutes and Other Authorities**

A.R.S. § 37-1101(5).

1 **I. INTRODUCTION.**

2 The Home Builders Association of Central Arizona (“Home Builders”) is a non-profit  
3 corporation organized under the laws of the State of Arizona in 1951. Home Builders currently  
4 has over 900 members including home builders, suppliers and subcontractors, banks, power and  
5 communications utilities, title and mortgage insurance companies, real estate developers and  
6 other businesses in central Arizona involved in and dependent upon the home building industry.

7 Home Builders has an interest in the outcome of the navigability determination for the  
8 Lower Salt River currently under consideration by the Arizona Navigable Stream Adjudication  
9 Commission because a determination of navigability at statehood may result in claims of  
10 divestiture of private title to large quantities of land in the floodplain of the Lower Salt and  
11 extensive litigation concerning those claims. This will disrupt industry and civic functions in the  
12 Phoenix metropolitan area, and undoubtedly end up harming the state’s economy by casting  
13 doubt not only on land title, but also by raising new issues concerning the validity of our state  
14 water laws. Disruption of the economy adversely affects the Home Builders’ industry, an  
15 industry that is, at the present time, one of the most healthy and vital industries in the State.

16 **II. THE NAVIGABILITY OF THE LOWER SALT RIVER IS TO BE DETERMINED**  
17 **BY THE STANDARDS SET FORTH IN A.R.S. § 37-1101(5).**

18 According to the Arizona statutes, a “navigable watercourse” means a water course that  
19 was in existence on February 14, 1912, and at that time was used or was susceptible to being  
20 used, in its ordinary and natural condition, as a highway for commerce, over which trade and  
21 travel were or could have been conducted in the customary modes of trade and travel on water.”  
22 A.R.S. § 37-1101(5). *See Defenders of Wildlife v. Hull*, 199 Ariz. 411, 417-18, 18 P.3d 722, 728-  
23 29 (App. 2001) (adopting this standard, originating from the case of *The Daniel Ball*, 77 U.S. (10  
24 Wall.) 557 (1870), as the appropriate standard for the Arizona Navigable Stream Adjudication  
25 Commission).

26 Home Builders believes that this statute should be given a plain and reasonable meaning.

1 First, the navigability of the Lower Salt River should be determined as of February 14, 1912, after  
2 the construction of Roosevelt Dam and Granite Reef Diversion Dam. Any other reading would  
3 make the date of February 14, 1912 meaningless. Second, the navigability of the Lower Salt  
4 River should be determined in its ordinary and natural condition as of that date, meaning without  
5 the benefit of a modified channel to enhance navigation, or a change in the status quo of the  
6 operating regime to enhance flow for the benefit of navigation. Any other reading would require  
7 the Commission to speculate on the legal and physical possibilities of enhancing either the  
8 channel or the flow regimen to support navigation where none currently existed.

9 **III. APPLYING THESE STANDARDS, THE LOWER SALT RIVER WAS NOT**  
10 **NAVIGABLE ON FEBRUARY 14, 1912.**

11 It is historic fact, amply supported by the record in these proceedings, that the Salt River  
12 more of a detriment to commerce than a benefit in its pre-development state. The decision to  
13 create storage dams and reservoirs on the Upper Salt River and to create a permanent diversion  
14 dam at Granite Reef, so that controlled releases of water could be made for agricultural economic  
15 development, permanently changed the nature of the river. This was a deliberate decision, made  
16 by the citizens of the Territory with the support of the United States Reclamation Service. This  
17 decision was made and implemented before statehood, thereby eliminating any feasible use of the  
18 Lower Salt River as a "highway for commerce" on the date of statehood. *See* A.R.S. § 37-  
19 1101(5).

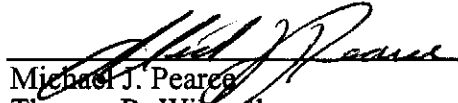
20 Once this decision had been made and implemented, particularly with the assistance of the  
21 United States Reclamation Service, the Lower Salt River in its "ordinary and natural" condition  
22 as of February 14, 1912 was a river dedicated to storage and release of water for diversion and  
23 beneficial use out of the channel. The water had been validly appropriated for use under  
24 Territorial law, and could not be returned to the channel for navigation use without adversely  
25 affecting those appropriative rights. It was obvious at the time that the Lower Salt River was not  
26 being used as a highway for commerce, over which trade and travel were or could have been

1 conducted in the customary modes of trade and travel on water, without substantial modification  
2 to both the river channel and the regulatory flow regime. Therefore, the Lower Salt River was not  
3 “navigable” at statehood.

4 **IV. CONCLUSION.**

5 Based upon the overwhelming evidence adduced at the hearing in this matter, and upon  
6 the plain interpretation of the statutory definition of navigability, the Commission should  
7 determine that the Lower Salt River was not “navigable” on February 14, 1912, the day of  
8 Arizona statehood.

9 RESPECTFULLY SUBMITTED this 9th day of June, 2003.  
10 FENNEMORE CRAIG

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