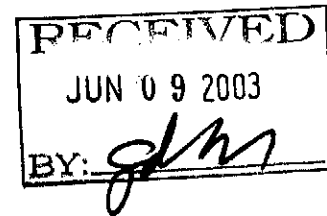


Cynthia M. Chandley-013315  
L. William Staudenmaier-012365  
Amy K. Langenfeld-020545  
Ryley Carlock & Applewhite  
One North Central Avenue  
Suite 1200  
Phoenix, Arizona 85004-4417  
602/258-7701  
Attorneys for Phelps Dodge Corporation



**BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION**

<b>In Re Determination of Navigability</b>	)	<b>No. 03-005-NAV</b>
<b>Of the Lower Salt River, from Granite</b>	)	
<b>Reef Dam to the Gila River Confluence</b>	)	<b>PHELPS DODGE CORPORATION'S</b>
	)	<b>OPENING MEMORANDUM</b>
	)	<b>FOLLOWING APRIL 7-8, 2003</b>
	)	<b>HEARINGS</b>

On April 7 and April 8, 2003, this Commission conducted public hearings and accepted evidence regarding the navigability of the Lower Salt River on February 14, 1912, in accordance with Arizona Revised Statutes Section 37-1123 (2001). The reports and testimony are summarized accurately in the Opening Post-Hearing Memorandum filed by Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (collectively "SRP"). Phelps Dodge concurs with SRP's recapitulation of the evidence before the Commission and joins in SRP's request that the Commission find the Lower Salt River non-navigable. Phelps Dodge considers the following three points worthy of particular emphasis as the Commission makes its determination.

First, the standard of proof is preponderance of the evidence. See A.R.S. § 37-1128(A) (2001). The legislature has required the Commission to find navigability only on the basis of that quantity of evidence, which the proponents of the Lower Salt River's navigability have not presented. Second, the timeframe under consideration is the date of Arizona's

statehood, February 14, 1912. Dams and extensive irrigation diversions already controlled the flow of the Lower Salt River on that date. However, even without those dams and diversions, the Lower Salt River was not navigable. Finally, the “trade and travel on water” that would support a finding of navigability simply never occurred, nor could it have occurred, on the Lower Salt River. A.R.S. § 37-1101(5) (2001). The Commission has received extensive evidence that the Lower Salt River was too unpredictable to have functioned as a “highway for commerce.” Id. § 37-1101(3). Although trade and travel may have taken place next to or near the Lower Salt River, those activities are relevant only in their tendency to prove that the river was not navigable. For these reasons, Phelps Dodge asserts that the Commission can find only that the Lower Salt River is not a navigable waterway.

#### I. Preponderance of the Evidence

The Commission must consider all of the evidence before it. See A.R.S. § 37-1123(A) (2001) (“The commission shall receive, review and consider all relevant historical and other evidence . . . .”); Defenders of Wildlife v. Hull, 199 Ariz. 411, 425, 18 P.3d 722, 736 (App. 2001) (“[N]o relevant facts should be excluded.”). Proponents of navigability must demonstrate navigability by a preponderance of the evidence. See A.R.S. § 37-1128(A) (2001); Defenders of Wildlife, 199 Ariz. at 420, 18 P.3d at 731; Arizona Ctr. for Law in the Public Interest v. Hassell, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165 n.10 (App. 1991) (“The burden of proof rests on the party asserting navigability . . . .”). This standard is satisfied only when the evidence presented makes it more probable than not that the river was navigable. See Ison v. Western Vegetable Distribs., 48 Ariz. 104, 111, 59 P.2d 649, 653 (1936) (defining preponderance of evidence as “such evidence as when weighed with that opposed to it has more convincing force”). In

previous proceedings, the Commission has used the metaphor of scales to define the preponderance of evidence standard:

If the evidence on each side weighs exactly evenly, the party without the burden of proof must prevail. In order for the party with the burden to prevail, sufficient evidence must exist in order to tip the scales (even slightly) in its favor.

Report, Findings and Determination Regarding the Navigability of Small and Minor Watercourses in Yuma County, Arizona (Feb. 20, 2003), at 17.

The proponents of navigability of the Lower Salt River have not tipped this metaphorical scale. The State Land Department has prepared, and twice revised, a report compiling historical and other evidence relating to navigability. See J.E. Fuller, Hydrology & Geomorphology, Inc., “Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila River Confluence (Draft Final Report)” (Apr. 2003) (revising 1993 and 1996 reports) [Evidence Item No. 30] (hereinafter “2003 Fuller Report”). SRP’s Opening Post-Hearing Memorandum summarizes the 2003 Fuller Report’s evidence and how even that archaeological, historical, and geomorphological evidence indicates that the Lower Salt River is not navigable. Even if there were no other evidence before the Commission, the 2003 Fuller Report would not support a finding of navigability.

However, the Commission has the benefit of additional evidence relevant to the Lower Salt River’s navigability, including no fewer than three experts’ reports. See Jack L. August, Jr., Ph.D., “The Lower Salt River: A Non-navigable Stream” (submitted April 7, 2003) [Evidence Item No. 31] (hereinafter “August Report”); Douglas E. Kupel, Ph.D. and Ellen G. Endebrook, P.E., “Historical and Scientific Evidence Concerning Navigability of the Lower Salt River” (April 2003) [Evidence Item No. 29] (hereinafter “Kupel/Endebrook Report”); Douglas

Littlefield, “Assessment of the Salt River’s Navigability Prior to and on the Date of Arizona’s Statehood, February 14, 1912” (Dec. 5, 1996) [Evidence Item No. 16] (hereinafter “Littlefield Report”). These reports include the following evidence of contemporary understandings that the Lower Salt River was not navigable.

- Senator Carl Hayden clearly believed the Lower Salt River was not navigable. See August Report, supra, at 4-5; Littlefield Report, supra, at 188-89.
- More than one judge presiding over cases in which navigability was at issue stated that the Lower Salt River was not navigable. See Kupel/Endebrock Report, supra, at 3-5 (listing 26 judicial decisions between 1890 and 1914 in which the Salt River was described as non-navigable).
- Decisions by local planning officials indicate that they similarly believed that the Lower Salt River was not navigable. See Kupel/Endebrock Report, supra, at 5-7 (describing efforts to fund and build bridges over the Lower Salt River, during the course of which Phoenix-area residents in their petitions to the Maricopa County Board of Supervisors and an attorney for Maricopa County characterized the river as non-navigable).
- Federal land surveyors, who had instructions and incentives to meander navigable waterways, never meandered the Lower Salt River in any of their surveys. See Littlefield Report, supra, at 51-52 (summarizing analysis of federal surveys over several decades that “consistently portrayed the Salt River as being a non-navigable stream”).

- Homestead patents were granted, and local residents bought land, located in the bed of the Lower Salt River without any portions of their homestead claims being reserved. See Littlefield Report, supra, at 113-14 (concluding that over 225 patents, as well as in lieu grants to the State of Arizona, show that homesteaders, and state and federal officials all considered the Salt River non-navigable); August Report, supra, at 8-10 (describing grant of an eighty-acre homestead patent for land located in the Salt River bed to Rawleigh C. Stanford without withdrawal of any acreage in the riverbed).

As the Commission considers all of the evidence presented, it cannot fail to be convinced that the proponents of navigability have presented barely any evidence that the Lower Salt River was navigable, and certainly have not proven navigability by a preponderance of the evidence.

## II. Lower Salt River Not Navigable Even Prior to Dams and Diversions that Existed on February 14, 1912

The Commission's analysis of the evidence must focus on the critical date of Arizona's statehood, February 14, 1912. The evidence before the Commission shows that as of that date, the flow of the Lower Salt River already was controlled by upstream diversions and impoundments. See Testimony of David Roberts (April 7, 2003) [Tr. at 237-38] (describing Granite Reef Dam's completion in 1908 and commencement of operations by 1910); id. (Tr. At 239) (describing dedication of Roosevelt Dam in 1911). Because these human engineered controls were in place by February 14, 1912, their impact on the condition of the Lower Salt River is relevant to the Commission's navigability determination. The Commission is not

required to engage in the fiction of pretending that these improvements or obstructions did not exist.

However, even without the upstream dams and diversions, the Lower Salt River was not navigable. There is ample evidence before the Commission showing that the Lower Salt River was not navigable long before dams and diversions managed its flows.

- Explorers and engineers for the United States government did not consider the Salt River to be navigable. See, e.g., Littlefield Report, supra, at 172-73 (describing 1872 expedition by U.S. Army Corps of Engineers, Lt. George M. Wheeler).
- Litigation among non-Indian settlers along the Salt River indicates that they never had sufficient water for irrigation. See Kupel/Endebrock Report, supra, at 15; Testimony of David Roberts (Apr. 7, 2003) [Tr. at 220-26] (describing numerous canal systems along Salt River).
- In 1873, more than thirty-five years before Granite Reef Dam and Roosevelt Dam were operational, Charles Hayden's log flotation effort was unsuccessful. See 2003 Fuller Report, supra, at 3-18 through 3-20; testimony of Jonathan E. Fuller (Apr. 7, 2003) [Tr. at 71].
- The Salt River always has been a braided, "highly dynamic" river that was not stable even before dams and diversions were in place. See Testimony of Stanley Schumm, Ph.D. (Apr. 7, 2003) [Tr. at 210-11].
- There is no evidence that attempts to boat the Lower Salt River were successful even prior to completion of the Granite Reef Dam and Roosevelt Dam. See 2003 Fuller Report, supra, at 3-18 through 3-24].

Two such attempts may have succeeded only because they were made during floods. See id. at 3-22; Testimony of Jonathan E. Fuller (Apr. 7, 2003) [Tr. at 38-61].

Accordingly, the Lower Salt River's condition, even without the dams and diversions that actually existed on February 14, 1912, would not support a finding of navigability by a preponderance of the evidence.

### **III. The Lower Salt River Itself Was Not a Highway for Commerce**

The Commission may find the Lower Salt River navigable only if a preponderance of the evidence establishes that the river itself was a "highway for commerce." A.R.S. § 37-1101(5) (2001). Trade and travel must have actually or potentially taken place on the water. See id.

[T]he crux of the test is still the requirement that the body of water be susceptible of use as a highway or channel for commerce on water. This necessarily involves the utilization of the waterway as a path between two points. . . . [T]he central theme remains the movement of people or goods from point to point on the water.

Alaska v. United States, 754 F.2d 851, 854 (9th Cir. 1985) (citations omitted) (rejecting argument that lake was navigable because floatplanes land on it). The evidence before the Commission proves that the Lower Salt River itself was too unpredictable to support trade or travel on the water. This fact is only emphasized by evidence of trade and travel near the river rather than on the river.

Overland transportation always has been the primary method of trade and travel in the vicinity of the Lower Salt River. The Hohokam concentrated their activities close to the Salt River as a source of potable and irrigation water. See Testimony of Jonathan E. Fuller (Apr. 7,

2003) [Tr. at 12-13] (describing Hohokam people's use of Salt River for sustenance, "taking water and using it"). However, there is no evidence that they used the river itself for trade or travel. One source cited in the 2003 Fuller Report speculated that the Hohokam may have floated balsa rafts in their irrigation canals. See 2003 Fuller Report at 2-13; Testimony of Jonathan E. Fuller (Apr. 7, 2003) [Tr. at 27]. Assuming the speculation were correct, flotation in nearby canals has no relevance to the Lower Salt River's navigability.

Early explorers and settlers had difficulty traveling in the region, and relied upon mule teams and stagecoaches. See 2003 Fuller Report at 3-17 through 3-18; Testimony of Jonathan E. Fuller (Apr. 7, 2003) [Tr. at 28-29] (agreeing that "traveling up the Salt" meant walking next to it, and discussing Coronado's use of rafts, if at all, to cross river rather than go up or down it); id. [Tr. at 33] (agreeing that trappers traveled next to river, not on it by canoe or boat). If floating down the Lower Salt River had been feasible, surely these early arrivals would have done so. In later years, the costly Apache Trail was the primary means for moving people and materials to and from the Roosevelt Dam site. The Apache Trail itself, at estimated construction costs of \$25,000 per mile, would have been completely unnecessary if the Lower Salt River were a highway for commerce. See Kupel/Endebrock Report, supra, at 14-15.

Boating on the Lower Salt River reportedly was attempted. See Kupel/Endebrock Report, supra, at 7-11. Recreational boaters generated media curiosity but did not succeed in boating the river. See id.; see also 2003 Fuller Report, supra, at 3-18 through 3-24. In most cases, the boaters appear to have floated as far as they did only because the river was unusually swollen with floods. See 2003 Fuller Report, supra, at 9-2. Flows on the Lower Salt River simply were too variable: either there was no flow, or the river was inundated by wild torrents that "swept away everything." See Kupel/Endebrock Report, supra, at 12-14 ("[T]he Salt River



was an impediment to transportation, and not an avenue of commerce.”); Littlefield Report, supra, at 173-74.

Predictability of trade or travel on a river is key to its navigability. When transportation on a river is “exceptional” and limited to “short periods of temporary high water,” the river is not navigable. Oklahoma v. Texas, 258 U.S. 574, 591 (1922). “The condition of the watercourse should be such as to ordinarily assure regularity and predictability of usage.” Loving v. Alexander, 745 F.2d 861, 865 (4th Cir. 1984) (emphasis added). See also United States v. Harrell, 926 F.2d 1036, 1039-40 (11th Cir. 1991) (finding creek non-navigable when it flows only as a result of winter floods from nearby river backing up into creek’s banks); Lykes Bros., Inc. v. Corps of Eng’rs, 821 F. Supp. 1457, 1463 (M.D. Fla. 1993) (“The flow of this rapidly varying stream, in terms of its discharge and stage, cannot be reliably predicted.”). Like the rivers described in these opinions, the Lower Salt River was unreliable and irregular, and therefore not susceptible to use as a highway for commerce.

Ferries operated on the Lower Salt River prior to 1912. See 2003 Fuller Report, supra, at 3-25 through 3-28. Hooked up to cables, the ferries clearly were part of the area’s overland transportation system, and bridges eventually made them obsolete. See id.; August Report, supra, at 10-11. None of these ferries was operating by the time of statehood. See Testimony of Jonathan E. Fuller (Apr. 7, 2003), [Tr. at 17] (“[T]he latest known instance was 1909 . . .”). During the time of the ferries’ operation, bridges built across the Lower Salt River repeatedly washed out. See 2003 Kupel Report, supra, at 12-14.

Clearly, these ferries were the “functional equivalent of bridges.” North Dakota v. United States, 770 F. Supp. 506, 511 (D.N.D. 1991); see also United States v. Crow, Pope & Land Enterps., Inc., 340 F. Supp. 25, 35 (N.D. Ga. 1972) (noting that both bridges and ferries are

means "to avoid the river rather than to employ it as a means for trade and transportation."). Accordingly, use of ferries on the Lower Salt River prior to statehood does not establish navigability.

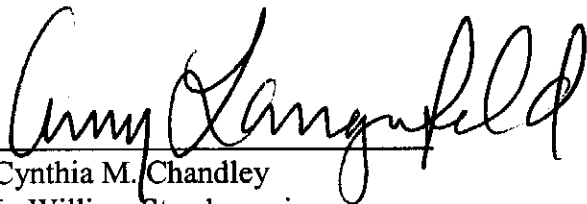
In essence, the Lower Salt River was a barrier to transportation rather than a highway that facilitated it. See Kupel/Endebrock Report, supra, at 11-14. There is no preponderance of evidence before the Commission to refute that conclusion. Too unpredictable for trade or travel on its waters, the Lower Salt River was not navigable.

**IV. Conclusion**

Proponents of navigability have not presented a preponderance of evidence proving that the Lower Salt River was navigable on February 14, 1912. Accordingly, Phelps Dodge asks the Commission to find that the Lower Salt River was not navigable on that date.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of June, 2003.

RYLEY CARLOCK & APPLEWHITE

By 

Cynthia M. Chandley

L. William Staudenmaier

Amy K. Langenfeld

One North Central Avenue, Suite 1200

Phoenix, Arizona 85004-4417

Attorneys for Phelps Dodge Corporation

Original and seven copies HAND DELIVERED  
this 9<sup>th</sup> day of June, 2003, to

Arizona Navigable Stream Adjudication Commission  
1700 West Washington  
Room 304  
Phoenix, Arizona 85007

...

AND one copy MAILED  
this 9<sup>th</sup> day of June, 2003, to

Curtis A. Jennings, Esq.  
Jennings, Haug & Cunningham  
2800 North Central Avenue  
Suite 1800  
Phoenix, Arizona 85004-1049

Laurie A. Hachtel  
Tom Shedden  
Arizona Attorney General's Office  
1275 West Washington Street  
Phoenix, Arizona 85007-2997

Vera Kornylak  
Joy E. Herr-Cardillo  
Timothy M. Hogan  
Arizona Center for Law in the Public Interest  
18 East Ochoa Street  
Tucson, Arizona 85701

Sally Worthington  
John Helm  
Helm & Kyle, Ltd.  
1619 East Guadalupe  
Suite No. 1  
Tempe, Arizona 85283

Sandy Bahr  
202 East McDowell Road  
Suite 277  
Phoenix, Arizona 85004

Julie Lemmon  
930 South Mill Avenue  
Tempe, Arizona 85281

Michael Dendy  
Lewis and Roca  
40 North Central Avenue  
Phoenix, Arizona 85004

...

M. Byron Lewis  
John B. Weldon, Jr.  
Mark A. McGinnis  
Salmon, Lewis & Weldon, P.L.C.  
2850 East Camelback Road  
Suite 200  
Phoenix, Arizona 85016

Charlotte Benson  
P.O. Box 5002  
Tempe, Arizona 85280

Charles Cahoy  
P.O. Box 1466  
Mesa, Arizona 85211-1466


Jim Callahan  
200 West Washington  
Suite 1300  
Phoenix, Arizona 85003

John Hestand  
5002 North Maricopa Road  
Chandler, Arizona 85226-5177

Michael J. Pearce  
Fennemore Craig  
3003 North Central Avenue  
Suite 2600  
Phoenix, Arizona 85012-2913

James T. Braselton  
Marical Weeks McIntyre & Friedlander PA  
2901 North Central Avenue  
Suite 200  
Phoenix, Arizona 85012-2705

Steve Wene  
Moyes Storey PA  
3003 North Central Avenue  
Suite 1250  
Phoenix Arizona 85012



A handwritten signature in cursive script, appearing to read "Tomi Spivak", is written over a horizontal line.