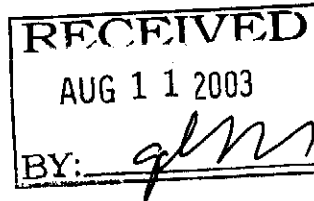


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8
9 **BEFORE THE ARIZONA NAVIGABLE STREAM**
10 **ADJUDICATION COMMISSION**
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IN RE THE DETERMINATION OF
NAVIGABILITY OF THE LOWER SALT
RIVER, FROM GRANITE REEF DAM TO
THE GILA RIVER CONFLUENCE

No. 03-005-NAV

**ARIZONA STATE UNIVERSITY'S
RESPONSE**

I. Introduction

“Most people have to deal with the reality that confronts them. They start with that reality and try to do the best they can within its limitations and within their own limitations. But there are large and growing numbers of people ... whose starting point is some abstraction that they wish to apply to reality.”¹ By urging the Commission to base its decision on unknown “natural conditions” and presumptions that such a stream was “susceptible to navigation”, the Proponents of navigability have firmly established themselves as people whose starting point is some unknown abstraction they want to apply to reality.² The Commission should not follow their lead.

¹ Sowell, Thomas, “Abstract People”, dated January 25, 2002.

² The term “Proponents” refers to Defenders of Wildlife, et al., and Arizona State Land Department.

1 The Commission may find an Arizona streambed navigable only if it was
2 navigable at statehood.³ The Proponents ask this Commission to find the Lower Salt
3 River navigable based on unknown “natural” flow volumes and channel conditions that
4 have not existed for 2,000 years. Factual evidence and expert opinions demonstrate,
5 however, that during the historical period the river was not navigable. Should the
6 Commission ignore this evidence and find the streambed navigable based on unknown
7 “natural” conditions? Arizona State University contends that the Commission should
8 focus on the evidence and find the river nonnavigable.
9

10 **II. The Commission Must Weigh Facts**

11 The Commission must base its findings on real facts rather than conjecture. As
12 the Supreme Court stated, “[t]hose rivers must be regarded as public navigable rivers is
13 law which are navigable in fact.”⁴ The standard expressed by Arizona courts mandates
14 that the Commission focus on stream flows and channel conditions during the historical
15 period – at statehood. This test mandates that the Lower Salt River is legally navigable
16 only if “[o]n February 14, 1912, the watercourse, in its natural and ordinary condition,
17 either was used or was susceptible to being used for travel or trade in any customary
18 mode used on water.”⁵ In 1912, the river conditions and attempts at navigation were
19 recorded. Relying on such records, ASU and others presented undisputed credible
20 evidence demonstrating that the river was not navigable at statehood.⁶
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24 ³ *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426, 18 P.3d 722, 737 (App. Div. I, 2001).

⁴ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

25 ⁵ *Defenders of Wildlife*, 199 Ariz. at 426, 18 P.3d at 737 (citing *The Daniel Ball*, 77 U.S. at 563) (emphasis added).

⁶ See, e.g., Transcript of Record of Hearing dated April 7-8, 2003, at pp. 127-29 (hereinafter “Tr. at p. ___”).

1 The Proponents want the Commission to speculate about “natural” stream flow
2 volume, characteristics of the streambed channel, and whether such conditions could
3 support navigation. They are asking the Commission to join them in an abstract realm
4 held together by series of assumptions. They urge the Commission to presume the
5 following:
6

- 7 • The watershed produced enough water to support navigation;
- 8 • The streambed channeled water throughout the Lower Salt;
- 9 • The channeled water could support navigation;
- 10 • Stream flows were consistent, rather than erratic;
- 11 • No water was diverted from the streambed; and
- 12 • Dams were not built in the streambed.

13 This abstract vision is a mirage fabricated to take land from its rightful owners. The
14 Commission must not follow the Proponents into this abstract realm.

15 There is virtually no factual basis in front of the Commission for making these
16 presumptions. For example, the Land Department admits “there are no direct
17 measurements of the River in its natural state”,⁷ so stream flow volume is unknown. As
18 to channel conditions, the only expert testified that the Lower Salt River is naturally a
19 nonnavigable braided channel.⁸ Yet, they still want the Commission to find that the
20 stream was navigable. Rather than guessing about virgin flows and prehistoric channel
21 conditions, the Commission must weigh the evidence to determine if the river was
22 navigable at statehood.
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25 ⁷ State Land Department’s Opening Post-Hearing Memorandum, No. 03-005 NAV, at p. 12 (dated June 9, 2003) (hereinafter “State’s Memorandum”).

⁸ See Tr. at pp. 196:21 – 199:24 (emphasis added).

1 **III. Expert Opinions Are Relevant Evidence**

2 It is entirely appropriate and necessary for the Commission to consider expert
3 opinions in this case. A witness “qualified by knowledge, skill, experience, training, or
4 education may testify thereto in the form of an opinion or otherwise” to aid the
5 Commission in its deliberations.⁹ ASU, City of Tempe, SRP, and others presented
6 historians, hydrologists, and a geomorphologist, all of whom agree that the Lower Salt
7 River was not navigable before, during, or after statehood.¹⁰ The experts explained the
8 reason there is so little evidence to support a finding of navigability is that the river was
9 not navigable.¹¹ Only a few adventurers even dared attempt to navigate these waters.
10

11 The Proponents, however, want the Commission to ignore the experts’ testimony.
12 The Land Department, for instance, makes the allegation that “[v]irtually every reported
13 story of boating on the Salt River includes an account of some unusual situation such as a
14 boating accident, or an amusing anecdote; a reasonable conclusion is that boats were so
15 commonly used that ordinary boating was not newsworthy”¹² Put another way, the
16 Land Department oddly claims that navigation was so common there is no evidence of it.
17 This is not a reasonable conclusion, especially when compared to the experts’ well-
18 informed opinions that realistic people understood the Lower Salt River was not
19 navigable before, during, or after statehood.
20

21 Proponents also argue that the Commission should ignore the expert testimony
22 because their opinions are based on the common understanding of navigability rather than
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24 ⁹ Ariz. R. Evid. 702; *Englehart v. Jeep Corp.*, 122 Ariz 256, 594 P.2d 510 (1979).

25 ¹⁰ See, e.g., Tr. at pp. 129:4-9, 142:8-10; 199:20-24.

¹¹ See, e.g., Tr. at p. 127:4-12.

¹² State’s Memorandum at p. 11.

1 a legal definition.¹³ This is nonsense. The Supreme Court held that rivers navigable in
2 fact are navigable in law.¹⁴ The experts presented evidence that the Lower Salt River
3 was not in fact navigable. Their opinions are relevant.

4 The Proponents further urge the Commission to disregard the experts' opinions
5 because they do not speculate about the impact of manmade barriers and diversions.
6 Again, the experts focused on facts, not speculation. Nevertheless, Dr. August points out
7 there was no evidence of navigation upstream from the dams before the water could be
8 diverted either.¹⁵ This casts serious doubt on the Proponents' position that the only
9 reason the Lower Salt River was nonnavigable at statehood was because the dams
10 diverted much of the water. In short, the dams did not affect navigation because nobody
11 traveled upstream or downstream on the Lower Salt River either before or after the dams
12 were built.

15 **IV. Historical Evidence Overwhelmingly Supports Finding of Nonnavigability**

16 Most of the reported attempts to navigate the Lower Salt River ended in failure.
17 Of the sixteen alleged accounts of navigability identified in the Land Department report
18 on navigability, almost all of the attempts failed miserably. Charles Trumbull Hayden's
19 disastrous log float in 1873,¹⁶ Bucky O'Neill's busted "Yuma or Bust" excursion,¹⁷ the
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22 ¹³ See Arizona Center for Law in the Public Interest Opening Post-Hearing Memorandum, No 03-005
23 NAV, at p. 12, n. 7 (dated June 6, 2003).

24 ¹⁴ *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.

25 ¹⁵ Tr. at p. 136:1-6.

¹⁶ CHM Hill, revised by JE Fuller, *Arizona Stream Navigability Study for the Salt River: Granite Reef
Dam to the Gila River Confluence*, Report at B-2; Tr. at p. 126:14-16 and 43:2-17 (Sept. 1996)
(hereinafter "*Hill Report*").

¹⁷ *Id.* at 3-20.

1 death of Major Spaulding,¹⁸ and drowning of John Tisler¹⁹ are all telling evidence of
2 nonnavigability.

3 Another of the Proponents' arguments is that the ferries running across the
4 Lower Salt River demonstrate navigability. But ferries that merely "functioned much
5 like bridges" do not establish navigability.²⁰ Nor does transportation "confined to the
6 irregular and short periods of temporary high water" establish navigability.²¹ The
7 evidence demonstrates that the Lower Salt River ferries functioned like bridges during
8 flood periods.²² The Land Department admits that "[t]he number of ferries eventually
9 diminished as the ordinary and natural flow in the River was impounded in reservoirs,
10 diverted to canals, and as bridges over the River were constructed."²³ Where the most-
11 celebrated Hayden's Ferry once ran now stands Mill Avenue Bridge.²⁴ This is
12 compelling evidence that Hayden's Ferry and other ferry operations actually served as a
13 bridge. Simply put, the Lower Salt River impeded travel and commerce during floods.
14 During these times, ferries operated like bridges to carry essentials across the dangerous
15 waters. This is not evidence of navigability.
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23 ¹⁸ *Id.* at 3-18.
24 ¹⁹ Tr. at p. 59:6-16; *Hill Report* at 3-23.
²⁰ *North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992).
²¹ *See Oklahoma v. Texas*, 258 U.S. 574, 591, 42 S. Ct. 406 (1922).
25 ²² Tr. at 113:21-22.
²³ State's Memorandum at p. 9 (emphasis added).
²⁴ Tr. at p. 145:1-9.

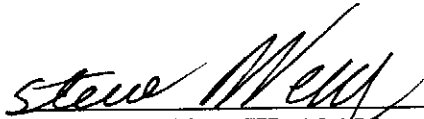
1 **V. Conclusion and Action Requested**

2 ASU continues to ask the Commission to keep in mind the general purpose of the
3 streambed litigation. As correctly stated by the Land Department, the rationale for the
4 state owning navigable streambeds is to prevent "private interests from interfering with
5 the use of navigable waters for transportation."²⁵ No private interest ever interfered
6 with navigation because navigation never occurred. Moreover, the Lower Salt River
7 streambed has been dry for a century. To take streambed land from its current owner
8 and give it to the State of Arizona to protect navigation that will never occur is
9 ridiculous.
10

11 The Lower Salt River was not navigable at statehood. There is no evidence that
12 even under natural conditions the river channeled sufficient water to float a boat. The
13 river naturally braids and the stream is turbulent, thereby preventing navigation.
14 Virtually all of the expert testimony submitted at the hearing confirmed the stream was
15 not navigable. Consequently, the Commission should find that the river was not
16 navigable in fact or in law.
17

18 DATED this 11th day of July, 2003

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²⁵ State's Memorandum at p. at 3.

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