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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

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

No. 03-005-NAV

CITY OF TEMPE POST-HEARING
RESPONSE MEMORANDUM

Pursuant to Rules of the Commission R12-17-108.01(B), the City of Tempe files its post-hearing response memorandum in the determination whether the Lower Salt River was navigable at Arizona statehood on February 14, 1912. Despite the inventive legal arguments of Defenders of Wildlife and the State Land Department as proponents of navigability, the preponderance of the evidence before the Commission compels a determination that the Lower Salt River was not navigable at statehood.

This response addresses the proponents' arguments that the Lower Salt River was used or was susceptible to being used as a highway for commerce in its ordinary and natural condition, and the assertion that the contrary testimony of expert witnesses should be disregarded by the Commission.

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I. STANDARD FOR DETERMINING NAVIGABILITY

A.R.S. §37-1128(A) states the burden of proof for determining navigability:

After the commission completes the public hearing with respect to a watercourse, the commission shall again review all available evidence and render its determination as to whether the particular watercourse was navigable as of February 14, 1912. If the preponderance of the evidence establishes that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

Because the preponderance of the evidence concerning the Lower Salt River has failed to establish that the watercourse was navigable, the Commission must issue its determination that the Lower Salt River was not navigable as of February 14, 1912.

The Commission must use the federal test of navigability for title purposes originally stated in The Daniel Ball, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870). "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Defenders of Wildlife v. Hull, 199 Ariz. 411, 417-418, 18 P.2d 722, 728-729 (App. 2001) (citing cases); The Daniel Ball, 77 U.S. at 560; A.R.S. §37-1101(5) ("Navigable" means "a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.")

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

1 **II. THE EVIDENCE FAILS TO DEMONSTRATE THAT THE LOWER SALT**
2 **RIVER WAS USED AS A HIGHWAY FOR COMMERCE.**

3 Proponents attempt to augment the record of sixteen boating attempts on the Lower Salt
4 River by assuming that there were "unreported" boating incidents. State Land Department (SLD)
5 Opening Memorandum at 11; Defenders of Wildlife (Defenders) Opening Memorandum at 18.
6 Extrapolating from their assumption that there were more boating attempts than appear in
7 evidence, proponents argue that the Lower Salt River was used, or at least was susceptible to
8 being used, as a highway for commerce. The Commission should decline proponents' invitation
9 to use assumptions instead of facts to make the record of boating more robust, and instead base
10 its determination on the evidence in the record.

11 Proponents argue that pre-statehood ferries on the Lower Salt River demonstrate that the
12 river was used, or was susceptible to being used, as a highway for commerce. SLD at 9-10;
13 Defenders at 18-19. Periodic use of ferries to cross the river, even though moving "point to point
14 on water," provide scant evidence that the river was used as a "highway for commerce." In
15 analogizing a ferry to a highway, the ferry functions as a bridge over the highway as opposed to
16 its travel lanes. Even the State's expert testified that ferries indicate that the river was an
17 obstacle to cross in reaching transportation routes. Tr. at 72. Ferries do not provide persuasive
18 evidence that the river was used as a highway for commerce.

19 Defenders cite flour mills as an example of the uses of the Salt River around the time of
20 statehood. Defenders at 18. The Fuller Report (Evidence Item (EI) 7, 30) at 3-16 states that
21 "Several flour mills were also powered by water." Of the three flour mills listed, one was "steam
22 powered, with the water for the steam presumably coming from the canal." The other two were
23 "powered by Salt River water" and "water powered." *Id.* Mr. Fuller testified that there was no
24 evidence that the flour mills were located on the river. Tr. at 34. While this information
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1 indicates that water from the river was used to operate flour mills, it is not evidence of the use of
2 the Lower Salt River as a highway for commerce, over which trade and travel were or could have
3 been conducted.

4 Defenders' reference to flour mills may have been made in support of their novel
5 argument that water itself is a commodity transported by the river, and the fact that water from
6 the river was used means that the river was a highway for commerce. See Defenders at 19-21.
7 The fact that water was diverted from the Salt River for irrigation and other uses is not evidence
8 that the river was navigable at statehood. If the fact that water from a stream was diverted and
9 used provides sufficient evidence of navigability, courts would not need to review any other
10 evidence to determine whether a watercourse was navigable. Any watercourse from which
11 anyone had ever used water would be found navigable.
12

13 The current definition of "navigable" does not stretch far enough to accommodate
14 Defenders' "water equals commerce" theory. The Commission must adhere to the statutory
15 definition of "navigable" and its evidentiary requirements. The Commission must review all the
16 available evidence to determine whether the preponderance of the evidence shows that a
17 watercourse was used, or was susceptible to being used, as a highway for commerce, over which
18 trade and travel were or could have been conducted in the customary modes of trade and travel
19 on water. A.R.S. §37-1101(5). The Lower Salt River cannot be determined navigable simply
20 because water from the river was diverted and put to use for various purposes.
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22 In summary, despite proponents' attempts to bolster the factual record with assumptions,
23 the evidence fails to demonstrate that the Lower Salt River was used as a highway for commerce.
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1 **III. THE EVIDENCE FAILS TO DEMONSTRATE THAT THE LOWER SALT**
2 **RIVER WAS SUSCEPTIBLE TO BEING USED AS A HIGHWAY FOR**
3 **COMMERCE.**

4 Proponents assert that the volume, gradient and average flow of the Lower Salt River
5 made the river sufficient for navigation. SLD at 12-14; Defenders at 14-15. There is no
6 evidence in the record that the flow characteristics of the Lower Salt River made it sufficient for
7 navigation. The State Land Department's expert report did not reach that conclusion (Tr. at 22-
8 23), and Mr. Fuller expressly avoided reaching that conclusion in his testimony. Tr. at 74-75.
9 Facts not in evidence may not be assumed in legal argument. Expert geomorphologist Dr.
10 Schumm testified that the flow characteristics of the Lower Salt River do not support an
11 inference of navigability. The Commission should find the evidence presented by an expert in
12 his field more persuasive than inferential legal arguments not based on evidence in the record.

13 All the evidence presented on the flow characteristics of the Lower Salt River, by expert
14 and lay witnesses, demonstrates that flows were highly variable, along with other factors leading
15 to the conclusion that the river was not susceptible to being used as a highway for commerce.
16 Schumm Report (EI 26) at 4; Tr. at 199; Kupel Report (EI 29) at 20; August Report (EI 31) at 5;
17 Tr. at 163 (Littlefield); Tr. at 217, 220, 229, 241 (Roberts); April 8 Tr. at 7 (Bowers). This
18 evidence of the ordinary and natural condition of the Lower Salt River stands uncontradicted in
19 the record.
20

21 Defenders cite the Arizona Stream Navigability Study for the Salt River: Granite Reef
22 Dam to the Gila River Confluence (Fuller Report) (EI 7, 30) page 2-1 for their assertion that
23 "...the Salt River Valley has been inhabited for the past 1,000 years primarily because the Salt
24 River had a 'reliable flow.'" Defenders at 11. Defenders provided that statement as evidence in
25 support of their argument that the pre-dam river was susceptible to navigation. The Fuller
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1 Report, however, only states that "Early cultures exploited its reliable flow to irrigate crops and
2 to provide drinking water, and derived sustenance from the abundant fish and wildlife living
3 within the river corridor." Fuller Report (EI 7, 30) at 2-1. The fact that prehistoric people
4 diverted water from the Lower Salt River for irrigation and domestic use, and acquired food
5 along the river, is not evidence that the river was susceptible to being used as a highway for
6 commerce.

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8 In fact, there is abundant evidence in the archaeological record of the Lower Salt River
9 Valley that occupation was precarious due to alternating high and low flows in the river that
10 repeatedly destroyed canal systems and displaced communities. See, e.g., Chaco and Hohokam,
11 edited by P.L. Crown and W.J. Judge, School of American Research Press, Santa Fe (1991)
12 (D.A. Gregory at pp. 183-188; W.B. Masse at pp. 217-222). The flow of the Lower Salt River
13 for the past 1,000 years was anything but "reliable." The evidence in the record shows that the
14 flow of the Salt River was always extremely variable. See Tr. at 26 (Fuller).

15
16 Proponents argue that the Commission should subtract all the diversion and
17 impoundment structures ever constructed on the Salt River to determine its ordinary and natural
18 condition. SLD at 7, 16; Defenders at 10. This would be a useless and unnecessary exercise for
19 two reasons. First, the preponderance of the evidence shows that the flow of the Salt River was
20 highly variable and not conducive to navigation before the construction of dams and diversions.
21 There is no need for the Commission to attempt to create its own evidence of past river flows.

22
23 Second, both the Arizona statute defining "navigable" and federal case law clearly
24 require that navigability be determined at the time of statehood, not at some unidentified time in
25 the distant past. A.R.S. §37-1101(5) ("a watercourse that was in existence on February 14, 1912,
26 and at that time was used or was susceptible to being used, in its ordinary and natural condition,
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1 as a highway for commerce..."); Alaska v. United States, 662 F. Supp. 455, 462 (D. Alaska
2 1987), aff'd, 891 F.2d 1401 (9th Cir. 1989), cert. den., 495 U.S. 919 (1990) ("This court
3 consequently concludes that the requirement that title navigability be determined at the time of
4 statehood means only that when making a title navigability determination, the Daniel Ball test is
5 to be applied to the physical dimensions and configuration of the river existing at the time of
6 statehood."); Alaska v. United States, 213 F.3d 1092, 1097 (9th Cir. 2000) ("The key moment
7 for the determination of title is the instant when statehood is created.") (citing Utah v. United
8 States, 482 U.S. 193, 196 (1987) for the "governing doctrine").

9
10 The evidence in the record fails to demonstrate that the Lower Salt River was susceptible
11 to being used as a highway for commerce.

12 **IV. EXPERT TESTIMONY MUST BE CONSIDERED BY THE COMMISSION.**

13 Defenders and Maricopa County argue that expert testimony admitted by the
14 Commission should be disregarded as irrelevant because it was not based on the correct legal
15 standard. Defenders at 12, 22, 24; Maricopa County at 4-6. That argument must fail for two
16 reasons. First, A.R.S. §37-1128(A) requires the Commission to review "all available evidence."
17 The expert reports and testimony complained of by Defenders and Maricopa County are
18 available to the Commission and must be reviewed. Second, there is no legal rationale for
19 excluding expert evidence from the Commission's consideration when the evidence may assist
20 the Commission in determining navigability.
21

22 Defenders and Maricopa County fail to recognize that expert opinion is not based on the
23 legal standard for determining navigability, but on the standards of the expert's profession.
24 Experts use their professional standards to ascertain the facts provided for consideration as
25 evidence. The Commission, not the experts, will apply the correct legal standard to the facts in
26 reaching its determination whether the Lower Salt River was navigable at statehood.
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1 Determining navigability requires a factual inquiry. The Daniel Ball, 77 U.S. (10 Wall)
2 557, 563 (1871) (“Those rivers must be regarded as public navigable rivers in law which are
3 **navigable in fact.**”) (emphasis added). The Commission necessarily relies on expert reports and
4 testimony to provide the facts on which the Commission will base its determination. The
5 Commission must obtain the historical and hydrological information required to determine
6 whether a watercourse is navigable in fact, and properly does so through expert witnesses.
7

8 The Commission properly admitted expert evidence that will assist it in making its
9 determination. As an example, historian Dr. Littlefield provided an expert report and testimony
10 that were highly probative of the navigability question. Assessment of the Salt River’s
11 Navigability Prior to and On the Date of Arizona’s Statehood (December 5, 1996) (EI 16). Dr.
12 Littlefield followed professional standards in examining historical survey records, and concluded
13 that those records indicate that the Lower Salt River was not navigable. EI 16 at 51. Dr.
14 Littlefield followed professional standards in reviewing historical patent records, and concluded
15 that patents issued by the federal government indicate that the Lower Salt River was not
16 navigable. EI 16 at 114; Tr. at 173-174. Dr. Littlefield is qualified as a historian to review
17 survey and patent records, and the Commission properly admitted his findings as an expert
18 witness to assist the Commission in making its determination.
19

20 Dr. Littlefield’s evidence that the federal government did not meander the boundaries of
21 the Lower Salt River, and that the government did patent riverbed land to private parties, is
22 factual information that will assist the Commission in determining whether the Lower Salt River
23 was navigable at statehood. This kind of evidence has been considered relevant by courts in
24 determining navigability for title purposes. “The meandering of those streams by government
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1 survey was considered as evidence to assist in determining whether or not they were navigable.”
2 Webb v. Neosho County, 124 Kan. 38, 257 P. 966 (1927) (citing cases).

3 The United States Supreme Court explained the importance of evidence concerning
4 meandering boundaries in federal surveys, and evidence of government land patents to settlers,
5 in determining navigability. “The United States had surveyed Utah Lake between 1856 and
6 1878, and had established the “meander line”—the mean high-water elevation—segregating the
7 land covered by navigable waters from land available for public sale and settlement.” Utah v.
8 United States, 482 U.S. 193, 199 (1987). The Supreme Court used that evidence in determining
9 the navigability of Utah Lake. “We find it inconceivable that Congress intended by this simple
10 proviso to abandon its long-held and unyielding policy of never permitting the sale or settlement
11 of land under navigable waters under the general land laws.” Id. at 198.

12 The Court of Appeals for the Ninth Circuit has followed the Supreme Court’s lead in
13 relying on this line of evidence in navigability determinations. “Congress has never undertaken
14 by general laws to dispose of land under navigable waters.” Alaska v. Ahtna, Inc., 891 F.2d
15 1401, 1405 (9th Cir. 1989) (citing Utah v. United States, 482 U.S. 193, 203 (1987)) (quoting
16 Shively v. Bowlby, 152 U.S. 1, 48 (1894)).

17 As this example illustrates, the information provided by experts will assist the
18 Commission in making the factual inquiry required to determine whether the Lower Salt River
19 was navigable at statehood. The Commission should resist the urging of Defenders and
20 Maricopa County to ignore expert evidence in the record.

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24 V. **THE EVIDENCE FAILS TO DEMONSTRATE THAT THE LOWER SALT**
25 **RIVER WAS NAVIGABLE AT STATEHOOD.**

26 Based on the preponderance of the evidence, the Commission must find that the Lower
27 Salt River was not navigable at statehood. The evidence overwhelmingly demonstrates that the
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1 river was not used as a highway for commerce and was not susceptible to being used as a
2 highway for commerce. In making its determination of navigability, the Commission must
3 review "all available evidence" as required by A.R.S. §37-1128(A), including the expert reports
4 and expert testimony in the record.

5 DATED this 11th day of August, 2003.

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