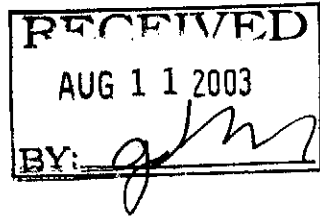


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6 **BEFORE THE ARIZONA NAVIGABLE STREAM**
7 **ADJUDICATION COMMISSION**

8 In re Determination of the Navigability of the) No. 03-005-NAV
Lower Salt River (from the Granite Reef Dam)
9 To the Confluence with the Gila River) **GILA RIVER INDIAN**
) **COMMUNITY'S RESPONSIVE**
10) **POST-HEARING MEMORANDUM**
)

11
12 The Gila River Indian Community respectfully submits its Responsive Post-Hearing
13 Memorandum detailing its opposition to the Opening Post-Hearing Memoranda submitted
14 by the Arizona State Land Department, the Defenders of Wildlife, *et al.*, and Maricopa
15 County.¹

16 The Community submits that the evidence and the law compel a determination by
17 the Arizona Navigable Stream Adjudication Commission that the Lower Salt River, from
18 Granite Reef Dam to the Confluence with the Gila River was, on February 14, 1912, and
19 always has been a non-navigable stream.

20 **I. HISTORY OF LAND AND WATER OWNERSHIP IN ARIZONA**

21 An understanding of the nature of federal and state ownership of land and water is
22 essential to an analysis of navigability for purposes of title under the equal footing doctrine.

23 ¹ The Community agrees with the basic principles contained in the Opening Post-Hearing Memoranda filed by
24 the Salt River Project, Phelps Dodge Corporation, City of Tempe, Home Builders Association of Central
Arizona, City of Phoenix, and Arizona State University.

1 The United States of America acquired the lands located within the current boundaries of
2 the State of Arizona from Mexico in 1848 and 1853 through conquest and purchase.²
3 Following acquisition, the United States owned all of the land, water, and other natural
4 resources in what is now New Mexico and Arizona. The United States determined whether
5 it would allow Arizona to become a territory and the terms and conditions that accompanied
6 territorial status. The United States determined whether it would allow Arizona to become
7 a state and the terms and conditions that accompanied state status.

8 The United States transferred ownership of some land, water, and other natural
9 resources to other entities before Arizona became a territory or a state. The United States
10 retained ownership of large amounts of the land, water, and other natural resources of
11 Arizona.³ The United States divided ownership of part of the land from the ownership of
12 part of the water. The United States retained ownership of some of the water, while
13 disposing of the land affiliated with the retained water, and retained ownership of some of
14 the land, while disposing of the water affiliated with the retained land.

15 If the water affiliated with land was from a non-navigable source, the United States
16 retained ownership of the land, but allowed the appropriation of the water. At statehood,
17 ownership of the non-navigable waters⁴ transferred to Arizona, subject to prior
18 appropriation and aboriginal rights to use the water. *See* Section 21 of the Desert Land Act
19 of 1877, as amended, 43 United States Code §§ 321 through 339. If the water affiliated

20
21 ² With the exception of the lands within the current boundaries of the Gila River Indian Reservation, the Salt
22 River Pima-Maricopa Indian Reservation, and the Ak Chin Indian Reservation, the United States acquired the
23 aboriginal lands of the *Akime! O'odham* (Pima) and *Peeposh* (Maricopa) Indians through its own theft and its
24 failure to protect their property from theft by Euro-American latecomers. The stolen aboriginal lands include
the area in dispute in this administrative proceeding. *See* Indian Claims Commission *Docket 228*.

³ The United States retained ownership of land, water, and other natural resources in Arizona for its own use;
as Trustee/Guardian of the American Indians residing in Arizona, and to carry out public purposes.

⁴ Excluding those waters retained by the United States under the *Winters* Doctrine or through other
mechanisms.

1 with land was from a navigable source, the United States retained ownership of the water,
2 but transferred ownership of the bed of the navigable watercourse to the State of Arizona on
3 February 14, 1912.

4 Eastern states, where water shortages are not a routine problem, tend to use the
5 riparian doctrine of water use. The Supreme Court of the Territory of Arizona explained
6 riparian law in *Clough v. Wing*, 17 P. 453, 455 (1888):

7 That law [riparian] had its origin in the island of Great Britain, under
8 conditions of climate peculiar to its position, in the path of the Gulf stream,
9 in an atmosphere laden with moisture, which is precipitated with lavish
10 profusion upon that favored spot. That law gave to the servient and
11 dominant heritage the right to the natural flow of the water. The riparian
12 owner might use the water in its course to turn his water-wheel, or for other
13 purposes, but was required to restore the same to its natural course. While
14 he might not hinder the flow so as to injure those below him, he might
15 depasture his domestic animals so as to drink therefrom, and take water for
16 domestic uses. He might not drain his land so as to increase the flood to
17 injure those below or dam the water back upon the lands above him.

18 The Territorial Supreme Court gave short shrift to the use of the riparian doctrine,
19 explaining the absolute necessity for use of the doctrine of prior appropriation in arid
20 Arizona:

21 Thus we see that this is the oldest method of skilled husbandry and probably
22 a large number of the human race have ever depended upon artificial
23 irrigation for their food products. The riparian rights of the common law
24 could not exist under such systems; and a higher antiquity, a better reason,
and more beneficent results have flowed from the doctrine that all right in
water in non-navigable streams must be subservient to its use in tilling the
soil.

Clough v. Wing, supra, 17 P. at 456.

The doctrine of prior appropriation was specifically adopted (and the doctrine of
riparian use rejected) by the very first territorial legislature.

The legislature of Arizona at its first session, in 1864, enacted that (C.L.
3240) "all rivers, creeks, and streams of running water are hereby declared

1 *public, and applicable to the purposes of irrigation and mining; [3242] all*
2 *the inhabitants who won or possess arable and irrigable lands shall have the*
3 *right to construct public or private acequias [canals] and obtain the necessary*
4 *water for the same from any convenient river, creek, or stream of running*
5 *water;" (3243) and prohibits the obstruction of such canals, "as the right to*
6 *irrigate the fields shall be preferable to all others."* [Emphasis added.]

7 *Clough v. Wing, supra*, 17 P. at 456. In 1893, the Territorial Legislature enacted Session
8 Law No. 86:

9 Section 1. That any person or persons, company or corporation shall have
10 the right to appropriate any of the unappropriated waters or the surplus or
11 flood waters in this Territory for delivery to consumers, rental, milling,
12 irrigation, mechanical, domestic, stock or any other beneficial purpose, and
13 such person or persons, company or corporation for the purpose of making
14 such appropriation of waters as herein specified, shall have the right to
15 construct and maintain reservoirs, dams, canals, ditches, flumes and any and
16 all other necessary water ways. And the person or persons, company or
17 corporation first appropriating water for the purposes herein mentioned shall
18 always have the better right to the same.

19 In 1912, Arizona became a state. Its constitutional provisions regarding
20 water reads as follows:

21 Section 1. The common law doctrine of riparian water rights shall not
22 obtain or be of any force or effect in the State.

23 Section 2. All existing rights to the use of any of the water in the State
24 for all useful or beneficial purposes are hereby recognized and confirmed.

25 A.R.S. Const. Art. 17 §§ 1, 2. That the Arizona legislature statutorily repudiated the
26 doctrine of riparian rights, and established the doctrine of prior appropriation, "has been
27 repeatedly and distinctly held by [the Arizona Supreme Court] consistently for many
28 years." *Maricopa County Municipal Water Conservation District No. 1 v. Southwest*
29 *Cotton Co.*, 39 Ariz. 65, 77, 4 P.2d 369, 374 (1931) See also, *Chandler v. Austin*, 4 Ariz.
30 346, 42 P. 483 (1895); *Boquillas, etc., Co. v. St. David, etc., Ass'n*, 11 Ariz. 128, 89 P. 504
31 (1907); *Arizona Copper Co. v. Gillespie*, 12 Ariz. 190, 100 P. 465 (1909).

1 As of 2003, the State of Arizona still legislatively authorizes any person, itself, or
2 any political subdivision to “appropriate unappropriated water for domestic, municipal,
3 irrigation, stock watering, water power, recreation, wildlife, including fish, unrecoverable
4 water storage . . . or mining uses for his personal use or for delivery to consumers.” A.R.S.
5 § 45-151(A). The State of Arizona still authorizes any person, itself, or any political
6 subdivision to “construct and maintain reservoirs, storage facilities . . . dams, canals,
7 ditches, flumes and other necessary waterways.” A.R.S. § 45-151(B).

8 II. LEGAL STANDARD

9 The Arizona Legislature has defined a watercourse as “navigable” if

10 [i]t was in existence on February 14, 1912 and at that time was used or
11 was susceptible to being used, in its ordinary and natural condition, as
12 a highway for commerce, over which trade and travel were or could have
13 been conducted in the customary modes of trade and travel on water.

14 A.R.S. § 37-1101(5). Through this enactment, the Legislature brought its definition of a
15 navigable watercourse into compliance with the criteria required by the Arizona Court of
16 Appeals in *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 419, 18 P.3d 722, 730 (2001),
17 which held [relying on *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L. Ed. 999 (1870) and
18 *Utah v. United States*, 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971)]:

19 Those rivers must be regarded as public navigable rivers in law which
20 are *navigable in fact*. And they are navigable in fact when they are used,
21 or are susceptible of being used, in their ordinary condition, as highways
22 for commerce, over which trade and travel are, or may be conducted in
23 the customary modes of trade and travel on water. [Emphasis added.]

24 The Commission’s task is set by A.R.S. § 37-1128(A):

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

1 its determination confirming that the watercourse was navigable. If the
2 preponderance of the evidence fails to establish that the watercourse was
3 navigable, the commission shall issue its determination confirming that the
4 watercourse was nonnavigable.

5 As the only entities arguing that that this reach of the Lower Salt River was navigable,
6 the Arizona State Land Department ("State") and the Defenders of Wildlife ("Wildlife") must
7 establish *every* required element of navigability by a preponderance of the evidence and, upon
8 their failure to do so, this Commission is required to determine that the reach of the Lower
9 Salt River between Granite Reef Dam and the Confluence with the Gila River was not
10 navigable.

11 **III. NAVIGABLE IN FACT**

12 Since its inception, the test for navigability in law required that the river be *navigable*
13 *in fact*. The watercourse must either have been *actually used* as a highway of commerce or
14 *actually susceptible* of being used as a highway of commerce. The requirement is that the
15 watercourse was *in fact* physically capable of conducting the customary modes of trade and
16 travel on water. A watercourse that is a highway of commerce only in the imaginations of
17 parties who want to seize control of property belonging to others is not navigable in fact. A
18 watercourse that is watered by statistical averages that seldom, if ever, existed in the real
19 universe is not navigable in fact. The proponents of navigability must prove, by a
20 preponderance of the evidence, that the Lower Salt River between Granite Reef Dam and the
21 confluence with the Gila River was actually used to conduct trade and/or travel—or they must
22 prove that it could realistically have been used to conduct trade and/or travel and that the
23 absence of actual use was from a lack of desire as opposed to practical infeasibility.

24 **IV. IN ITS ORDINARY AND NATURAL CONDITION**

1 In order to be navigable, a water course must, *in its ordinary and natural condition*,
2 have been used or susceptible of use as a highway of commerce. Both the State and Wildlife
3 claim that the ordinary and natural condition of the Reach in question must be determined at
4 some time other than February 14, 1912. Wildlife wants the Commission to pick a date “in
5 the early to mid 1870s” as the timeframe to determine the Reach’s ordinary and natural
6 condition. Wildlife Opening Post-Hearing Memorandum, page 11. The State is more
7 amorphous, but, presumably, wants the ordinary and natural condition determined sometime
8 around 1870. State Opening Post-Hearing Memorandum, page 6. Both the State and Wildlife
9 are wrong. The ordinary and natural condition of this Reach of the Lower Salt River must be
10 determined as of February 14, 1912.

11 **1. At That Time/February 14, 1912**

12 A.R.S. § 37-1101(5) is very clear: a watercourse is navigable if “it was in existence on
13 February 14, 1912 and *at that time* was used or was susceptible to being used, in its ordinary
14 and natural condition as a highway of commerce. . . .” [Emphasis added.] The legislation that
15 authorized this proceeding accurately implemented the requirement set out by the Court of
16 Appeals in *Defenders of Wildlife v. Hull, supra*, 199 Ariz. at 426, 18 P.3d at 737: “*On*
17 *February 14, 1912*, the watercourse, in its natural and ordinary condition, either was used or
18 was susceptible to being used for travel or trade. . . .” [Emphasis added.] The State and
19 Wildlife are demanding that the Commission ignore part of its judicially and legislatively
20 mandated duty, *i.e.*, the determination that navigability existed on the date that Arizona was
21 admitted into the union. To comply with the demands of the State and Wildlife, the
22 Commission would have to delete “and at that time” from the authorizing legislation. The
23 Commission does not have the authority to modify the statute or to ignore any part of the
24

1 statute. To comply with the demands of the State and Wildlife, the Commission would have
2 to ignore the Court of Appeals' mandate that navigability exist as of February 14, 1912.
3 Neither the Court of Appeals nor the Arizona Legislature authorized the Commission to
4 determine navigability as of some date "in the early to mid 1870s." Neither the Court of
5 Appeals nor the Arizona Legislature directed the Commission to pick some arbitrary date of
6 its own choosing to determine navigability. Both mandated that the facts upon which
7 navigability are to be determined are those facts that existed on February 14, 1912.

8 Wildlife and the State want the Commission to ignore "one of the basic rules of
9 statutory construction: no language of a statute should be treated as surplusage or rendered
10 nugatory." *Cheree L. v. Arizona Dept. of Economic Security*, 205 Ariz. 71, 66 P.3d 1248,
11 1254 (2003). Division One of the Arizona Court of Appeals [the same division that issued
12 *Defenders of Wildlife v. Hull*] explained that "[w]e avoid interpreting a statute 'so as to render
13 any of its language mere "surplusage," [and instead] give meaning to "each word, phrase,
14 clause, and sentence . . . so that no part of the statute will be void, inert, redundant, or
15 trivial.'"" [Citations omitted, bracketing and ellipses in the original.] *In re Estate of Zaritsky*,
16 198 Ariz. 599, 603, 12 P.3d 1203, 1207 (2000).

17 The United States Supreme Court agrees with Arizona's appellate courts. "The Court
18 will avoid an interpretation of a statute that "renders some words altogether redundant."
19 *United States v. Alaska*, 521 U.S. 1, 59, 117 S. Ct. 1888, 1918, 138 L. Ed. 2d 231 (1997).
20 The Supreme Court explains that "the more natural reading of the statute's text, which would
21 give effect to all of its provisions, always prevails over a mere suggestion to disregard or
22 ignore duly enacted law as legislative oversight." *United Food and Commercial Workers*
23 *Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 550, 116 S. Ct. 1529, 1533, 134 L. Ed.
24

1 2d 758 (1996). To determine whether this Reach of the Lower Salt River was used or
2 susceptible of use in its ordinary and natural condition, at any date other than February 14,
3 1912, would render the statutory mandate that these conditions exist “at that date” and the
4 statutory and judicial reference to February 14, 1912, meaningless, redundant, and surplusage.

5 The requirement of the Arizona Court of Appeals and the Arizona Legislature that
6 navigability be determined based on whether the Reach was used or susceptible of use in its
7 ordinary and natural condition on February 14, 1912, is in keeping with the requirement
8 imposed by the United States Supreme Court and other federal courts. Navigability for title
9 “must exist at the time the State is admitted into the Union.” *State of Oregon v. Riverfront*
10 *Protection Association*, 672 F.2d 792, 794 (9th Cir. 1982). “We must bear in mind that the
11 issue is one of potential commercial use and hence navigability at the time of statehood, not in
12 the present day.” *State of Alaska v. United States*, 662 F. Supp. 455 (1987). “Under the Equal
13 Footing Doctrine, title to the beds of those rivers which were navigable at the time of
14 statehood passes to the state upon admission to the union. Title to the beds of rivers that were
15 not navigable at the time of statehood remains in the United States.” *State of North Dakota ex*
16 *rel. Board of University and Schools*, 770 F. Supp. 506, 507 (1991).

17 In *United States v. Utah*, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931), the United
18 States Supreme Court reviewed a case involving navigability for title. The Supreme Court
19 upheld the decision of the master, who “made his findings as to navigability as of January 4,
20 1896, the date of the admission of Utah to the Union.” [Emphasis added.] 283 U.S. at 73, 51
21 S. Ct. at 440. The Supreme Court went on to confirm that the decision, as to whether the
22 watercourse was navigable, was to be made on the date of statehood and that the river had to
23 be navigable in fact. “Utah, with its equality of right as a state of the Union, is not to be
24

1 denied title to the beds of such of its rivers as were *navigable in fact at the time of the*
2 *admission of the state. . . .*” [Emphasis added.] 283 U.S. at 83, 51 S. Ct. at 443.

3 In reviewing the navigability for title decision involving some shallow lakes in
4 Oregon, the United States Supreme Court examined the evidence and wrote: “The conclusion
5 must be that *at the time of admission to statehood*, the bodies of water within the meander line
6 were shallow. . . .” [Emphasis added.] *United States v. State of Oregon*, 295 U.S. 1, 18, 55 S.
7 Ct. 610, 617 (1935). While the State and Wildlife argue that the date on which navigability
8 for title is to be determined does not have to be the date of statehood, they conspicuously fail
9 to provide a single navigability for title case to support their contention, relying instead on
10 abstract definitions of words that have no applicability to any navigability determination, let
11 alone a determination of navigability for title.

12 **2. Diversions for Irrigation and Storage**

13 Both the State and Wildlife argue that the Commission should ignore the mandate of
14 the Arizona Legislature, Arizona Court of Appeals, United States Supreme Court and other
15 federal courts that navigability be determined based on use or susceptibility to use in the
16 ordinary and natural conditions on February 14, 1912, because the amount of the flow had
17 been reduced by diversions for irrigation and storage. The State was quite emphatic about this
18 issue:

19 A waterway is navigable if, in its ordinary and natural condition, it is used or
20 susceptible of use as a highway for commerce. Should Arizona be denied title
21 to the bed of the Lower Salt River, which is navigable in its ordinary and
natural condition, simply because the waters of that stream were diverted for
irrigation and storage?

22 The answer is an emphatic “No.”

23 State’s Opening Memorandum, page 2. The State concluded:
24

1 The State should not lose title to the bedlands of the Salt River because
2 of an *accident of history*—the fact that the man-made diversions that
3 drastically altered the natural and ordinary condition of the River predated
4 statehood. [Emphasis added.]

5 State’s Opening Memorandum, page 15.

6 The Community is in awe of the State’s chutzpah. What the State describes as an
7 “accident of history” is the result of the concerted efforts of the legislature and courts of the
8 Territory of Arizona—efforts which were enthusiastically readopted after statehood by
9 Arizona’s Constitution, legislation, and judicial pronouncements. In answer to the State’s
10 question—“Should Arizona be denied title to the bed of the Lower Salt River . . . simply
11 because the waters of that stream were diverted for irrigation and storage?”—the Community
12 emphatically answers “Yes”! Those diversions for irrigation and storage were made possible,
13 and remain possible, only because the Territory and State of Arizona allowed and encouraged
14 them with enthusiasm.

15 The Territory of Arizona could have preserved the flow rates of its streams and rivers
16 by adopting the riparian water use doctrines common in the eastern states. Had it done so, the
17 volume of flow on February 14, 1912, *might* have been similar to the volume of flow before
18 the arrival of the Euro-American latecomers. However, the Territory of Arizona did not do
19 that. Instead, the Arizona Territory rejected riparian doctrines with fervor and adopted the
20 doctrine of prior appropriation with gusto in its very first legislative session. In 1864, the
21 Territory of Arizona declared all rivers, creeks, and streams of running water [including this
22 Reach of the Lower Salt River] to be public and “applicable to the purposes of irrigation and
23 mining.” See Comp. Laws 1864-1871, page 25.

24 In 1888, the Supreme Court for the Territory of Arizona eagerly approved and
 endorsed the rejection of riparian doctrine and the adoption of prior appropriation, which

1 allows the consumptive use of the stream flow for irrigation, mining, and other beneficial
2 uses. See *Clough v. Wing, supra*, 17 P. 453. Prior to statehood, the Supreme Court for the
3 Territory of Arizona repeatedly confirmed the propriety of rejecting riparian doctrine [which
4 would have preserved the flow rate of the Lower Salt River] and affirmed the correctness of
5 prior appropriation [which allowed diversion of the waters of the Lower Salt River for
6 irrigation and storage]. See *Chandler v. Austin, supra*, (1895); *Boquillas v. St. David, supra*,
7 (1907); and *Arizona Copper Co. v. Gillespie, supra* (1909).

8 In 1893, well before construction of Granite Reef Dam and Roosevelt Dam, the
9 Arizona Territorial Legislature enacted Session Law No. 86, which specifically authorized the
10 construction and maintenance of reservoirs and dams to be used to appropriate unappropriated
11 waters, surplus waters, and/or flood waters for irrigation or any other beneficial purpose.

12 After achieving statehood on February 14, 1912, the State of Arizona could have
13 repudiated prior appropriation and adopted the riparian doctrine, so as to preserve the flow
14 rates of its rivers and streams from man-made diversions for irrigation and storage. The State
15 of Arizona was even less receptive to protecting the flow rates of rivers and streams
16 [including the Lower Salt River between Granite Reef Dam and the confluence with the Gila
17 River] than was the Territory of Arizona. The Arizona Constitution absolutely rejected the
18 doctrine of riparian rights. See Article 17, Section 1. It recognized and confirmed the
19 existing rights to use water for all useful or beneficial purposes—including the irrigation and
20 storage uses that were affecting the flow rate of the Lower Salt River, between Granite Reef
21 Dam and the confluence with the Gila River, on February 14, 1912.

22 After statehood, the Arizona Legislature adopted state legislation authorizing prior
23 appropriation of water for irrigation and storage purposes, and authorizing the construction
24

1 and maintenance of reservoirs and dams to store water. After statehood, the Arizona Supreme
2 Court reaffirmed the appropriateness of rejecting the riparian doctrine and adopting the prior
3 appropriation doctrine. See *Maricopa County Municipal Water Conservation District No. 1 v.*
4 *Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931). As of June 9, 2003 [the date that the
5 State of Arizona filed its Opening Memorandum], Arizona's legislation still authorized
6 appropriation of water for irrigation and still authorized use of reservoirs and dams to store
7 water that otherwise would flow downstream to the Reach of the Lower Salt River between
8 Granite Reef Dam and the confluence with the Gila River.

9 The State's efforts to paint itself as the helpless and innocent victim of parties who
10 divert water for irrigation and storage, which would otherwise flow in the Reach, are
11 disturbing. Whether phrased in terms of unclean hands, estoppel, or rank hypocrisy, it is
12 ridiculous for the State of Arizona to claim that the determination of the navigability of this
13 Reach of the Lower Salt River should not be made based on the conditions that existed on
14 February 14, 1912, because of changes in the flow rate—changes that could not have occurred
15 but for the Territory/State of Arizona's own eager actions authorizing and encouraging the
16 diversions for irrigation and storage.

17 3. Win the Land, Lose the Water

18 The Home Builders Association of Central Arizona subtly raises an issue of mammoth
19 importance:

20 This [a determination of navigability at statehood] will disrupt industry
21 and civic functions in the Phoenix metropolitan area, and undoubtedly end
22 up harming the state's economy by casting doubt not only on land title, but
also by raising new issues concerning the *validity of our state water laws*.
[Emphasis added.]

23 Home Builders Association's Post Hearing Memorandum, page 1, lines 11-14.

1 It is unfortunate for the Community that the facts and law mandate the Commission's
2 determination that this Reach of the Lower Salt River was *not* navigable on February 14,
3 1912. Honesty and ethics require the Community to advocate for this factually and legally
4 correct proposition. If, however, the Commission and the appropriate appellate courts find
5 that the Community is wrong in its good faith belief, and determine that the Reach of the
6 Lower Salt River between Granite Reef Dam and the confluence with the Gila River *was*
7 navigable on February 14, 1912, the Community will happily and enthusiastically take
8 advantage of the laudatory consequences of such a decision.

9 As discussed earlier, where the United States of America did not just maintain
10 ownership of the land and water [for its own uses, as trustee/guardian for the American
11 Indians of Arizona, or for other public purposes], it bifurcated ownership of the land and the
12 water. If the Lower Salt River (between Granite Reef Dam and the confluence with the Gila
13 River) was not navigable, then the water belongs to the State of Arizona,⁵ to be beneficially
14 used under the doctrines of prior appropriation and aboriginal water rights. If this Reach was
15 not navigable, the land underlying the watercourse remained in the ownership of the United
16 States, subject to its power to transfer the land to individuals, corporations, cities, etc.

17 If this Reach of the Lower Salt River was navigable on February 14, 1912, then the
18 ownership of the land underlying the watercourse did indeed transfer to the State of Arizona at
19 the moment of statehood. However, if the Reach was navigable, at the moment of statehood,
20 then the water remained in federal ownership and never was transferred to the State of
21 Arizona so as to allow its use under the prior appropriation doctrine. This means that the
22 State courts rendering all of the 26 prior decisions dealing with the water of the Lower Salt

23 ⁵ Subject, of course, to federal and Indian *Winters* federally reserved water rights and other federal
24 reservations of ownership of the water.

1 River [including the *Kibby* and *Kent Decrees*] did not have subject matter jurisdiction over the
2 *res* of the water, and none of their pronouncements have any force or effect.

3 If the State of Arizona is correct, and the Lower Salt River between Granite Reef Dam
4 and the confluence with the Gila River was navigable at the moment of statehood, the State
5 owns the land underlying the watercourse and the United States still owns the water. This
6 means, of course, that none of the parties that are currently using that water have any legal
7 right to continue to use the water—and those parties have been using the water illegally since
8 territorial days. Upon a determination that the State of Arizona owns the riverbed, the
9 Community will, of course, petition the United States of America, as legal owner of the
10 navigable waters of the Lower Salt River, to use *its water* to fulfill its trust responsibility to
11 the Gila River Indian Community and, thereby, return to the *Akimel O'odham* and *Peeposh*
12 Indians that which was theirs before the Euro-American latecomers stole it.

13 If the Reach of the Lower Salt River between Granite Reef Dam and the confluence
14 with the Gila River was navigable on February 14, 1912, federal law requires that its character
15 of navigability be retained. See the State of Arizona's argument, concerning the commerce
16 clause, at page 4 of their Opening Memorandum. This will necessitate the prohibition of all
17 diversions (surface or underground) from any upstream sources that feed this stretch of the
18 Salt River (including the Verde River, Black River, etc.), based on the fact that such continued
19 diversions would interfere with maintaining the navigability of the Reach.

20 The Community can but hope that it is mistaken in its belief that the Reach of the
21 Lower Salt River between Granite Reef Dam and the confluence with the Gila River was not
22 navigable as of February 14, 1912.

23 **V. WAS USED AS A HIGHWAY OF COMMERCE**
24

1 Neither the State nor Wildlife are able to point to any instance of successful navigation
2 through the Lower Salt River between Granite Reef Dam and the confluence with the Gila
3 River. Because this failing is fatal to their claim of navigability, they are reduced to exercises
4 of fertile, but faulty, imagination.

5 **1. The Evidence of Things Not Seen**

6 The State has evidently realized that its litany of failed [and sometimes fatal] attempts
7 by brave, if foolish, adventurers does not establish that *this* Reach of the Lower Salt River was
8 navigable at any time, let alone as of February 14, 1912. Since the evidence that actually
9 exists disproves their contention, the State is reduced to arguing that the total absence of any
10 evidence of successful use of this stretch, as a highway of commerce, is *prima facie* proof that
11 navigation was common. The State writes:

12 Historical evidence of boating on the Lower Salt indicates that there was
13 no shortage of boats in the Salt River Valley. *Id.* at 8-3. Virtually every
14 reported story of boating on the Salt River includes an account of some
15 unusual situation such as a boating accident, or an amusing anecdote; a
reasonable conclusion is that boats were so commonly used that ordinary
boating was not newsworthy and other boating incidents were generally
unreported.

16 State's Opening Memorandum, page 11.

17 This argument is remarkable. The State is arguing that its inability to produce any
18 evidence of successful navigation meets its obligation to prove the existence of navigability
19 by a preponderance of the evidence. Law just does not work that way. The party with the
20 burden of proof has to produce something more than a bald claim that the absolute absence of
21 any record, of any nature, as to successful boating leads to a reasonable conclusion that boats
22 were common. The only reasonable conclusion to be drawn from a total lack of evidence is
23 that the party with the burden of proof has failed to carry that burden.

1 In addition, the State's argument is silly. If boats were commonly used, there would
2 have been records of some nature. The more common the activity, the more common the
3 documented references to the activity. If boating were common, there would have been
4 references other than "amusing anecdotes" about people dying in failed attempts to navigate
5 the Lower Salt River. There would have been advertisements offering to transport goods or
6 people by water, and advertisements for new or used boats and boating equipment. There
7 would be references in diaries or the social pages about recreational boating. Lack of
8 evidence of successful boating is most certainly not proof that boating was common.

9 **2. Vague and Misleading Language**

10 Neither the State nor Wildlife have presented evidence of successful use of the Lower
11 Salt River, between Granite Reef Dam and the Confluence with the Gila River, as a highway
12 for commerce. However, they would like the Commission to think that such evidence exists.
13 One way to create such a false impression is the deliberate use of vague language.

14 At page 18 of their Opening Memorandum, Wildlife claims: "There are numerous
15 reported (and likely many more unreported)⁶ instances of boating in the Lower Salt River
16 from prehistoric to modern times." The Salt River extends from the confluence of the White
17 and Black Rivers to the confluence with the Gila River. This administrative proceeding deals
18 only with the navigability of the Reach of the Salt River from Granite Reef Dam to the
19 confluence with the Gila River. Evidence that a different reach of the Salt River [Lower,
20 Upper, or Middle] might be navigable has no more meaning than evidence that a part of the
21 Mississippi River might be navigable. We know that courts routinely find part of a
22 watercourse to be navigable, while other parts were not navigable.

23 ⁶ See the preceding section dealing with the fact that a lack of evidence is not proof of the proposition being
24 advanced.

1 The Arizona Court of Appeals properly rejected an effort by the Arizona Legislature to
2 declare an entire watercourse to be non-navigable, because of a determination of non-
3 navigability for a portion or a reach. See *Defenders of Wildlife v. Hull, supra*, 18 P.3d at 732.
4 It is equally wrong to attempt to mislead the Commission by claiming that evidence of
5 navigation on a different portion or reach of the Lower Salt River has any relevance to the
6 determination of navigability for the Reach between Granite Reef Dam and the confluence
7 with the Gila River.

8 Indeed, a cursory reading of the *Arizona Stream Navigability Study for the Salt River:*
9 *Granite Reef Dam to the Gila River Confluence* [EIN 030] demonstrates how sweeping
10 statements in a memorandum, with generalized references to the evidence, can be used to
11 mislead. At page 3-24, one of the instances of “successful” navigation was:

12 In 1910, Roy Thorpe and James Crawford took a rowboat trip from
13 Roosevelt Dam to Mesa. They boated the Salt River until they arrived at
 Granite Reef, after which they floated the South Canal and the Mesa Canal.

14 It is more than a little misleading to claim that a rowboat trip on the Salt River that stopped at
15 Granite Reef Dam, and then continued through irrigation canals,⁷ establishes that the Salt
16 River itself below Granite Reef Dam was navigable. If the reach below Granite Reef Dam
17 was navigable, why did Mr. Thorpe and Mr. Crawford use the canals as their “highway of
18 commerce”? Any “evidence” of the navigability of the Salt River, that is not specific to the
19 reach between Granite Reef Dam and the confluence with the Gila River, is meaningless and
20 has no probative value in this determination. Any generalized references, to the use or
21 susceptibility of use of the Salt River or Lower Salt River as a highway of commerce, that are

22 _____
23 ⁷ In actuality, the artificially constructed irrigation canals could have been navigable where the Salt River
24 itself (between Granite Reef Dam and the confluence with the Gila River) was not. Unlike this reach of the
river (a braided river, with multiple and shifting channels, continuous obstructions, ill defined banks, and
unreliable flow), the large artificial irrigation canals would have been relatively straight, free of obstacles,
with steady and defined banks and a reliable flow of water.

1 not specific and exclusive to the reach between Granite Reef Dam and the confluence with the
2 Gila River are misleading.

3 At page 18 of its Opening Memorandum, Wildlife writes: “At the time of statehood,
4 boats were in use for ‘travel, ferries, recreation, mail delivery, flood rescues, and transport of
5 goods.’ EIN 030 at 3-17, 8-3.” The Community observes that such statement is possibly true,
6 but completely irrelevant. It is certainly true that, at the time of statehood, boats were used for
7 those purposes—in Maine, Louisiana, and California. They may have been used for those
8 purposes at some locations in Arizona. However, the statement has no applicability to the
9 question of successful navigation on the Lower Salt River between Granite Reef Dam and the
10 confluence with the Gila River.

11 3. Contemporary Use

12 Wildlife claims that contemporary use of a watercourse, for guided fishing and
13 sightseeing, could be evidence that the watercourse was navigable on February 14, 1912.
14 Wildlife’s legal claim is disputable. In *State of North Dakota v. United States*, 972 F.2d 235,
15 240 (1992), the Eighth Circuit Court of Appeals upheld the district court’s determination “that
16 modern day canoe use and modern day ‘boatability’ data are not reliable indicators of the
17 River’s navigability at statehood.” More important, Wildlife’s factual allegation is false and
18 misleading. As noted before, the only question before this Commission is whether the Lower
19 Salt River between Granite Reef Dam and the confluence with the Gila River was navigable
20 on the day of statehood.

21 Wildlife writes, at page 18 of its Opening Memorandum: “In the present day, the
22 Lower Salt River continues to be used for commercial and recreational rafting, canoeing, and
23 kayaking. EIN 010 at 38, 47, and 50 (Affidavits).” Wildlife’s continues, at page 19:
24

1 “Furthermore, guided commercial river trips as well as private recreational boating trips
2 continue to the present day. EIN 010 at 38, 47, 50 (Affidavits).” The implication of these
3 statements is that they are evidence of current or past commercial and recreational boating *on*
4 *the Reach of the Lower Salt River between Granite Reef Dam and the confluence with the*
5 *Gila River*. That implication is false. None of the affidavits deal with the Reach in question
6 in this administrative proceeding.

7 The Affidavit of James Anthony Slingluff states, at page 1:

8 I have canoed each of the following sections of Arizona rivers on multiple
9 occasions (exceptions noted) and believe each to be very suitable for river
travel in the seasons indicated at the boating skill level noted.

10 1. Salt River:

- 11 A. Highway 60 bridge to Horseshoe Bend; all seasons; intermediate
boating skills.
- 12 B. Horseshoe Bend to Highway 288 bridge; all seasons; beginning
boating skills.
- 13 C. Stewart Mountain Dam to *Granite Reef Dam*; subject to dam
releases (ordinarily in summer); beginning boating skills.

[Emphasis added.]

14 In light of the fact that Mr. Slingluff made no statements about ever boating *below* Granite
15 Reef Dam, there can be no legitimate reason for claiming that his experience has any
16 relevance to the navigability of the reach below Granite Reef Dam—in 1912 or 2003.

17 The Affidavit of George Marsik states, at page 2:

18 On the Salt River, Worldwide Explorations conducts approximately 100
19 trips per year between the Highway 60 bridge and the Highway 288 bridge.
We conduct trips within this stretch year around.

20 Mr. Marsik made no statement about ever boating below Granite Reef Dam.

21 The Affidavit of Jerry Van Gasse states, at page 1: “We run approximately twenty
22 trips each year on the Salt River in the period from December through May.” The
23 Community has no doubt that this is a true statement. However, nothing in this statement
24

1 makes any reference to the Reach of the Salt River from Granite Reef Dam to the confluence
2 with the Gila River. Indeed, it is likely that Mr. Gasse runs trips on the same reach (between
3 the Highway 60 bridge and the Highway 288 bridge) that Mr. Slingluff and Mr. Marsik boat.

4 These affidavits might have some relevance if this Commission were determining the
5 navigability of the reach of the Salt River between the Highway 60 bridge and the Highway
6 288 bridge. It is disingenuous to use generalized references to these affidavits so as to imply
7 that they have any applicability, of any nature, to the determination of whether the Reach of
8 the Salt River between Granite Reef Dam and the confluence with the Gila River is navigable
9 in 2003, or was navigable in 1912.

10 4. Successful

11 Wildlife claims, at page 19 of its Opening Memorandum, that “success is not an
12 element of the navigability-for-title test,” citing *Defenders of Wildlife v. Hull, supra*, 199 Ariz.
13 at 422, 18 P.3d at 733. *Defenders of Wildlife v. Hull* simply does not say what Wildlife claims
14 it says. Paragraph 34 (found in 199 Ariz. at 422, 18 P.3d at 733) dealt with the requirement in
15 the predecessor statute that the trade and travel had to be part of a profitable commercial
16 enterprise before it could constitute clear and convincing evidence of navigability. The
17 Arizona Court of Appeals properly overturned this requirement because “nothing in the
18 Daniel Ball test necessitates that the trade or travel sufficient to support a navigability finding
19 need be from a ‘profitable commercial enterprise.’”

20 Merriam-Webster’s Collegiate Dictionary, Tenth Edition (1998), defines “profit” as:

21 1: A valuable return : GAIN 2: the excess of returns over expenditure in
22 a transaction or series of transactions: esp: the excess of the selling price
23 of goods over their cost 3: net income usu. for a given period of time
24 4: the ratio of profit for a given year to the amount of capital invested or
to the value of sales 5: the compensation accruing to entrepreneurs for the
assumption of risk in business enterprise as distinguished from wagers or rent.

1 That same dictionary defines “success” as:

2 1 obs: Outcome, result 2a: degree or measure of succeeding b: favorable or
3 desired outcome; also: the attainment of wealth, favor, or eminence 3: one that
4 succeeds.

5 There is no rational way to conclude that just because trade and travel on water do not
6 have to be *profitable*, in order to constitute evidence of navigability, the trade or travel do not
7 have to be *successful*—*i.e.*, you are physically capable of getting from point A to point B
8 alive, with your boat in one piece, and with a modicum of practicality. To be navigable in
9 law, the watercourse must be navigable in fact. Other than substituting its word “successful”
10 for the Court of Appeals’ word “profitable,” Wildlife gives no support of any nature to its
11 unique claim that *failed attempts* to use a watercourse as a highway of commerce can prove
12 that the watercourse was actually used as a highway of commerce.

12 5. Ferries

13 Both the State and Wildlife place inappropriate emphasis on the existence of ferries at
14 various times on the Reach in question. The State and Wildlife cannot find any support in
15 *Defenders of Wildlife v. Hull, supra*, for a claim that the presence of a ferry is evidence that
16 the watercourse was navigable at that location. The predecessor statute prohibited the
17 Commission from taking into account “the use of ferries to cross the watercourse.” The Court
18 of Appeals properly overturned this restriction, noting: “However, because all evidence
19 should be examined during navigability determinations and no relevant facts should be
20 excluded, we find that the exclusions of section 37-1128 (E) are contrary to the Daniel Ball
21 test.” 18 P.3d at 736. Before making that procedural decision, the Court of Appeals noted
22 that other courts had found the existence of ferries to be “insufficient to support a finding of
23 navigability.” 18 P.3d at 736. The Court of Appeals referenced *State of North Dakota v.*
24

1 *United States, supra*, 972 F.2d at 239 (ferries that merely “functioned much like bridges” did
2 not establish navigability). 18 P.3d at 736 n. 15.

3 Indeed, neither the State nor Wildlife cite any authority to support their contention that
4 the operation of a ferry constitutes evidence of navigability. There is, however, persuasive
5 authority that the presence of a ferry actually constitutes evidence that the stretch of the
6 waterway in question was not navigable. In *United States v. Crow, Pope & Land Enterprises,*
7 *Inc.*, 340 F. Supp 25, 35 (D.C. Ga. 1972) the Court found:

8 [T]he existence of ferries is no more an example of commercial use than
9 the presence of a bridge or railroad trestle whose primary purpose is to avoid
the river rather than to employ it as a means for trade and transportation.

10 In *State of North Dakota v. United States*, 770 F. Supp. 506, 511 (1991), the United States
11 District Court for North Dakota wrote a lengthy analysis of the use of ferries as evidence of
12 navigability in a title case, explaining:

13 The court finds the evidence of ferries on the Little Missouri River does
14 not support a finding of navigability.

15 North Dakota has established the existence of cable ferries at Watford City
16 and Marmarth in the early 1900s. Cable ferries are ferries which are attached
17 to a cable that is strung across a river from two relatively high points, towers,
or posts. The ferries functioned as bridges where funds were not available to
18 construct traditional bridges and were rendered unnecessary after bridges were
built. The ferries were used only to provide crossings on the river; they were
not used to transport persons up or down the river.

19 The ferries on the Little Missouri served the sole purpose of providing
20 passage across the river. Although the ferries operated on the water, they
were the *functional equivalents of bridges*. The existence of a bridge on a
21 river may establish that the bed of the river is covered at times by water too
22 deep or too wide at a given point to be crossed by foot, by horse, or by
23 automobile; however, it does not establish that the river is a channel for
useful commerce. On the contrary, the existence of a bridge, or a ferry,
24 establishes that *the river is an obstruction to commerce which must be overcome*. Clearly, those persons who used the ferries to cross the river
would have had less difficulty making their trips had the river not existed.
The river was not a channel for useful commerce. [Emphasis added.]

1 The Eighth Circuit Court of Appeals upheld the district court's decision:

2 The ferries functioned much like bridges where funds were not available to
3 construct traditional bridges. The ferries were used only to provide transportation
4 across the River; they were not used for transportation up or down the River. The
5 district court found the ferry service irrelevant to the issue of navigability because
6 the fact that a cable ferry could cross at one point did not show the susceptibility of
7 the River for upstream or downstream commercial use.

8 *State of North Dakota v. United States, supra*, 972 F.2d at 239.

9 VI. WAS SUSCEPTIBLE TO USE AS A HIGHWAY OF COMMERCE

10 Because of their complete inability to establish any actual *use* of the Reach of the
11 Lower Salt River (between Granite Reef Dam and the confluence with the Gila River) as a
12 highway of commerce—at any time in history, let alone as of February 14, 1912—the State
13 and Wildlife are forced to focus on the language “or was susceptible to being used” as their
14 sole hope for salvation. Their reliance on susceptibility to navigation is not meritorious. In
15 order for a watercourse to be susceptible to being used as a highway of commerce, it actually
16 had to be physically capable of having trade or commerce conducted upon it, using the
17 customary modes of trade and travel on water.

18 Black's Law Dictionary, Sixth Edition (1990), defines “susceptible” as “capable.”
19 The Merriam-Webster's Collegiate Dictionary, Tenth Edition (1998), defines “susceptible” as:
20 1: capable of submitting to an action, process or operation.” The American Heritage
21 Dictionary of the English Language, Fourth Edition (2000), defines “susceptible” as:
22 permitting an action to be performed; capable of undergoing.” Synonyms for “susceptible”
23 include “receptive” and “amenable.”

24 For a watercourse to be susceptible to use as a highway of commerce, it must be
physically structured so that it can actually be used as a means of transporting people or

1 goods. The watercourse must be physically arranged so that real modes of transportation can
2 actually move people and/or goods from one point on the watercourse to another point on the
3 watercourse. "Susceptible to use as a highway of commerce" is not some abstract concept
4 allowing theoretical assumptions that, if certain nonexistent conditions were to occur
5 simultaneously during the dark of the moon, it might be possible to use a watercourse for
6 fifteen minutes on some undetermined date.

7 The most compelling evidence that a watercourse was susceptible of being used as a
8 highway of commerce is that it *was* so used. In the absence of actual use, it takes more than
9 theoretical possibilities to prove, by a preponderance of the evidence, that a watercourse that
10 was never actually used as a highway for commerce nevertheless was, in reality, susceptible
11 of being so used.

12 1. Remoteness or lack of use

13 Both the State and Wildlife argue that actual use as a highway of commerce is not
14 required, and that there are factors that could otherwise establish susceptibility of use.

15 Wildlife writes, at page 7 of its Opening Memorandum:

16 Furthermore, the remoteness of a river or lack of actual use at statehood as
17 a "highway of commerce" does not defeat a finding of navigability because
18 the definition includes not only watercourses that were certainly used as a
19 highway for commerce, but also those watercourses that are susceptible to
20 such use, even if they were never used for that purpose.

19 The State advances the same argument, at page 8 of its Opening Brief:

20 The Supreme Court recognized that the arid, western states would be
21 disadvantaged if navigability could only be established by actual use. *United*
22 *States v. Utah*, 283 U.S. at 82; *see Appalachian*, 311 U.S. at 405-406 ("[i]t is
23 obvious that the uses to which the streams may be put vary from the carriage
24 of ocean liners to the floating out of logs; that the density of traffic varies
equally widely from the busy harbors of the seacoast to the sparsely settled
regions of the Western mountains").

1 While there may be some isolated circumstances, in which a watercourse that was
2 actually navigable in fact was not actually used, none of those circumstances are present here.
3 This reach of the Salt River was neither remote nor isolated from substantial human habitation
4 and trade in 1912 (or for the preceding two thousand years).⁸

5 In *United States Holt State Bank*, 270 U.S. 49, 57, 46 S. Ct. 197, 199, 70 L. Ed. 465
6 (1926), the United States Supreme Court noted, as to a river that was navigable: "True, the
7 navigation was limited, but this was because trade and travel in that vicinity were limited."
8 In *United States v. Utah, supra*, the United States Supreme Court discussed the fact that the
9 allegedly navigable Green, Colorado, and San Juan Rivers had not been actually used for
10 navigation. The Court observed:

11 The master points out that the nonsettlement of Eastern Utah in these years,
12 the fact that none of the trails to Western Utah or to California were usable
13 to advantage in connection with these rivers, and many other facts, are to
14 be considered in connection with that of nonuse.

15 283 U.S. at 81, 51 S. Ct. at 443. The Supreme Court concluded:

16 The evidence of the actual use of streams, especially of extensive and
17 continued use for commercial purposes may be most persuasive, but,
18 *where conditions of exploration and settlement explain the infrequency*
19 *or limited nature of such use*, the susceptibility to use as a highway of
20 commerce may still be satisfactorily proved. [Emphasis added.]

21 283 U.S. at 82, 51 S. Ct. at 443.

22 If a watercourse is remote, there are very few people in the area, and those few people
23 have no inclination to use the watercourse as a highway of commerce, the watercourse could
24

21 ⁸ Nothing in *United States v. Utah*, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931), or *United States v.*
22 *Appalachian Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940), in any way supports a
23 claim that the United States Supreme Court viewed the arid nature of the west as an excuse for not actually
24 using a watercourse that was navigable in fact. Indeed, *United States v. Appalachian Electric Power Co.* was
a federal commerce power case, not a navigability for title case, and its reference to the differences between
busy harbors of the seacoast to the sparsely settled regions of the Western mountains was solely in terms of
the ability of the United States to regulate the operation of rivers for the interests of the commerce of the
whole country.

1 be susceptible to use, even though no actual use took place. But the Lower Salt River,
2 between Granite Reef Dam and the confluence with the Gila River, was not a remote area in
3 1912. This reach of the Salt River was not a remote area in the 1870s, the date advocated by
4 the State and Wildlife to determine navigability.

5 Even before the arrival of the Spanish, the area in question was not remote. The
6 Reach of the Salt River between what is now Granite Reef Dam and the confluence with the
7 Gila River has been here since time immemorial. This area has been a center for residence,
8 agriculture, trade, and culture for thousands of years. The *HoHoKam*, *Akimel O'odham*, and
9 *Peeposh* Indians all lived with, and their lifestyle was inextricably tied to, this River. The JE
10 Fuller/ Hydrogeology & Geomorphology, Inc. report, *Arizona Steam Navigability Study for*
11 *the Salt River: Granite Reef Dam to the Gila River Confluence*, documented the presence of
12 between 80,000 and 200,000 residents in the area in prehistoric times. The *Akimel O'odham*
13 and *Peeposh* have occupied this area in great numbers (in an agrarian, not nomadic, lifestyle)
14 for hundreds of years—and had ample incentive to use the river reach as a highway of
15 commerce, if it had been susceptible to such use.

16 Euro-Americans have been aware of this stretch of the Salt River—and have explored
17 it, lived around it, and conducted trade around it in great numbers—since the 1850s. These
18 Euro-Americans had strong incentives to use any practical means available to move
19 themselves and their goods. If this Reach of the Lower Salt River had been susceptible to use
20 as a highway of commerce, it would have been used. Yet, there is no evidence of Euro-
21 American explorers, military, trappers, traders, or early settlers using this reach as a highway
22 for commerce.

1 Neither the State nor Wildlife have, as required by *United States v. Utah, supra*, given
2 any explanation as to why this particular well-peopled stretch of the Salt River was not
3 actually used as a highway of commerce.

4 **2. Lies, Damn Lies, and Statistics**

5 Mark Twain is reported to have stated that there are “lies, damn lies, and statistics.”
6 The arguments presented by the State and Wildlife bears out his rank ordering of deception.
7 Because they are unable to present any evidence of *actual* successful use of this Reach of the
8 Salt River, they set out to demonstrate, by statistical analysis, that it *should* have been possible
9 to use this stretch and that, therefore, it was “susceptible to being used.”

10 The State argues, at page 12 of its Opening Memorandum:

11 The Lower Salt River, in its natural state, was a perennial stream. [Citation
12 omitted.] The average annual flow rate was at least 1,300 cubic feet per
13 second (“cfs”). [Citation omitted.] At this flow rate, the average depth of
14 the River would be about three and one-half feet, velocity around two feet
per second, and the width about 300 feet. [Citation omitted.] These conditions
exceed the minimums required for boating and are consistent with historical
descriptions of the River.

15 Statistical concepts, such as averages, can be used to illustrate or to mislead. One should
16 never allow statistical averages to take the place of historical facts. The State alleges that
17 these *average conditions* “exceed the minimums required for boating.” Obviously, the real
18 conditions did not exceed the minimums required for boating, because none of the thousands
19 of inhabitants and visitors to this Reach of the Salt River managed to successfully boat down
20 its length. Theoretical possibilities must not be allowed to substitute for documented fact.

21 The Salt River (both in general and in this Reach in particular) is a very “flashy” river.
22 It is a river that usually has too much or too little water and is seldom “just right.” Phelps
23 Dodge Corporation is correct when it observes, at page 9 of its Opening Memorandum, that
24

1 “[p]redictability of trade or travel on a river is key to its navigability.” Phelps Dodge cites to
2 numerous federal cases acknowledging that transportation during exceptional periods does not
3 constitute navigability. If a watercourse can only be used during brief and unpredictable
4 times, it has no practical value as a highway of commerce.

5 A second fatal flaw to the statistical average argument is that it ignores the fact that
6 volume of water was not the only, or even the most serious, barrier to use of the Salt River
7 (between Granite Reef Dam and the confluence with the Gila River) as a highway of
8 commerce. As noted by Arizona State University in its Opening Memorandum: “Even if
9 there were enough water in the stream to theoretically float a boat, the river’s braiding
10 punctuated by turbulent confining channels prevented navigation.” The Reach of the Lower
11 Salt River between Granite Reef Dam and the confluence with the Gila River is characterized
12 by broadening and narrowing channels that braid and shift location and are blocked by
13 repeated obstructions such as sandbars, gravel pits, boulders, etc. Even if a statistical average
14 amount of water happened to be flowing in the riverbed, at some given time, it still would not
15 make the river navigable.

16 Wildlife argues, at page 15 of its Opening Brief:

17 The pre-1870 flow rates are estimated to have been at least 1,000 cfs with
18 minimum rates in the 260-300 cfs range. [Citations omitted.] This flow rate
19 is enough to satisfy the federal standard according to the Ninth Circuit which
20 found a watercourse in Alaska navigable when it ranged from 200 cfs to 3,600
21 cfs depending on the season. *Alaska v. Ahtna*, 891 F.2d at 1402.

22 Unreasoning reliance on averages creates misleading assumptions. A river in Alaska
23 is not the same as a river in Arizona. Indeed, one part of the Salt River in Arizona is not the
24 same as a different part of the Salt River. This is the reason that the United States Supreme

1 Court admonished that “[e]ach determination as to navigability must stand on its own facts.”
2 *United States v. Utah, supra*, 270 U.S. at 87, 51 S. Ct. at 445.

3 If the State and Wildlife want to use *average* flow rates and comparisons to other
4 rivers in other states, then average flow rates demonstrate that the Salt River is not navigable.
5 The Arkansas River in Oklahoma, with an annual mean flow rate of 7,561 cfs, was
6 determined to be non-navigable. The Red River in Oklahoma and Texas, with an annual
7 mean flow rate of 9,363 cfs, was determined to be non-navigable. The Chattahoochee River
8 in Georgia, with an annual mean flow rate of 2,031 cfs, was determined to be non-navigable.
9 The Great Miami River in Ohio, with an annual mean flow rate of 2,277 cfs, was determined
10 to be partially navigable and partially non-navigable. See Appendix B to the Opening
11 Memorandum of the Salt River Project.

12 3. American Indians and the Lower Salt River

13 At page 11 of its Opening Memorandum, Wildlife observes that “[i]t is believed that
14 the Salt River Valley has been inhabited for the past 1,000 years primarily because the Salt
15 River had a ‘reliable flow.’ EIN 030 at 2-1. In fact, the Salt River Valley contained one of
16 the most extensive irrigation systems in prehistoric North America.” Wildlife’s estimate is off
17 by at least a thousand years. The *HoHoKam* Indians lived in the area of the Salt and Gila
18 Rivers since before the birth of Jesus. They were the ancestors of the *Akimel O’odham*, the
19 Pima Indians, who have lived in the area of the Salt and Gila Rivers since time immemorial.

20 Before the arrival of European invaders, the American Indians lived in harmony with
21 their environment, making beneficial use of its resources. Courts traditionally look to the
22 activities of American Indians in determining the historic navigability of watercourses. As a
23
24

1 practical matter, if a watercourse was susceptible to use as a “highway of commerce,” the
2 American Indians used it as such.

3 The transition from the *HoHoKam* to the *Akimel O’odham* occurred around 1400 to
4 1450 A.D. The Pima name for themselves, in their own language, is the “River People.” The
5 Salt and Gila Rivers were the lifeblood and cultural center of the *Akimel O’odham*. The
6 Peeposh [Maricopa] Indians are a Yuman Tribe, who moved into the area of the Salt and Gila
7 Rivers in the 1700s and formed a political, economic, and military confederation with the
8 *Akimel O’odham*. The *HoHoKam*, *Akimel O’odham*, and *Peeposh* have lived with and around
9 the confluence of the Salt and Gila Rivers since time immemorial.

10 The proponents of navigability have not been able to produce any evidence that the
11 *HoHoKam*, *Akimel O’odham*, or *Peeposh* ever used any of the Salt River, let alone the Reach
12 between what is now Granite Reef Dam and the confluence with the Gila River, as a highway
13 over which trade and travel were conducted. They can present no historic records
14 documenting American Indian navigation of the Lower Salt River. They can present no
15 archeological evidence of American Indian navigation on the Lower Salt River. They can
16 present no cultural or oral history, from the Indians themselves, of American Indian
17 navigation on the Lower Salt River.

18 These American Indians knew how to maximize the resources available in their
19 aboriginal homeland. They were master farmers, using the water of the Salt River to bring
20 abundance from the desert. The *HoHoKam* canals were so carefully located that, not only did
21 Euro-American latecomers dig them out for reuse, but, even with satellite technology, we
22 cannot to this day determine a more beneficial location for canals than those selected by the
23
24

1 *HoHoKam*. If the Lower Salt River were susceptible to use as a highway of commerce, the
2 River People would have used it.

3 **4. Reduction of Artificial Obstructions by Public Authority**

4 At page 7 of its Opening Memorandum, the State argues that, when determining
5 navigability for purposes of title, the ordinary and natural condition of the watercourse on the
6 date of statehood must be determined by assuming that all dams, diversions, channelization,
7 bridges, and bank protection that actually existed on that date had magically disappeared. In
8 support of this claim, the State cites *Economy Light & Power Company v. United States*, 256
9 U.S. 113, 118, 41 S. Ct. 409, 65 L. Ed. 847 (1921), as providing that “artificial obstructions
10 that may be reduced by public authority do not preclude navigability of waterway if, assuming
11 obstruction is reduced, waterway is navigable in its natural and ordinary condition.”

12 The State’s argument is irrelevant to this proceeding for the following reasons:

13 **a. *Economy Light & Power Co.* was not a navigability for title case.**

14 *Economy Light and Power Co.*, *supra*, dealt with the issue of navigability within the
15 context of the commerce clause and the power of Congress to pass legislation making it
16 unlawful to build any structure that obstructed or impaired navigation, without the permission
17 of the Secretary of War. The fact that Congress has the authority to prohibit a party from
18 building a structure in a navigable stream (such as would interfere with interstate commerce)
19 has no bearing on whether the stream was in fact navigable on the date the state was admitted
20 into the union. The Arizona Court of Appeals warned us in *Defenders of Wildlife v. Hull*:

21 Because of the variant circumstances in which navigability is raised, the
22 cases interpreting navigability “cannot be ‘simply lumped into one basket.’”
23 [Citations omitted.] Indeed, when discussing navigability, any reliance on
24 judicial precedent should be predicated on a careful appraisal of the purpose
for which the concept of navigability is invoked. [Citation omitted.] For the

1 present purpose, navigability is being used to determine the extent of land the
2 State of Arizona received by virtue of the equal footing doctrine.

3 199 Ariz. at 418-419, 18 P.3d at 729-730.

4 No authority of any nature is provided to support a claim that—when determining
5 whether a particular watercourse was navigable on the date of statehood, for purposes of
6 title—the decision must be made by pretending that all of the existing human-influenced
7 conditions did not exist.

8 **b. The State mischaracterized the actual holding of *Economy Light and Power Co.***

9 Paraphrasing the language of a Supreme Court decision lends itself to erroneous
10 analysis. The actual language from *Economy Light & Power Co.* reads as follows:

11 The fact, however, that artificial obstructions exist *capable of being abated*
12 by due exercise of the public authority, does not prevent the stream from
being regarded as navigable in law, if, supposing them to be abated, *it is*
navigable in fact in its natural state. [Emphasis added.]

13 256 U.S. at 118, 41 S. Ct. at 411. Even under a navigability for commerce test, the artificial
14 obstructions must be capable, physically and legally, of being abated before they have a
15 bearing on navigability—and if the artificial obstructions were actually removed, the
16 watercourse would have to then be navigable in fact.

17 **c. The State of Arizona has no public authority to abate the human-influenced**
18 **conditions that existed on February 14, 1912.**

19 Even if the determination—as to whether a watercourse was navigable for purposes of
20 title on the date of statehood—must be made by simulated calculations that assume the
21 influence of artificial obstructions (such as diversions for agriculture and storage and
22 Roosevelt Dam) did not physically exist, the State of Arizona does not have the public
23 authority to abate the conditions.
24

1 The United States of America owns Roosevelt Dam and the land upon which it
2 resides. Roosevelt Dam was constructed pursuant to the lawful authority of the federal
3 government under the 1902 Reclamation Act. The State of Arizona does not have the legal
4 authority to enter onto federal lands and destroy Roosevelt Dam or to order the United States
5 of America to destroy Roosevelt Dam. The State of Arizona has no legal authority to order
6 the United States to operate Roosevelt Dam as if it did not exist. When the State of Arizona
7 adopted its Constitution, it denied itself the public authority to prevent parties to divert the
8 water of the Salt River for purposes of irrigation and storage.

9 ***d. No amount of abatement of artificial obstructions would render this Reach of***
10 ***the Salt River navigable as of February 14, 1912.***

11 Even if Roosevelt Dam were completely obliterated, and even if the State of Arizona
12 could forbid every water user on the entire Salt River (and all of its tributaries) from diverting
13 any water for any purpose, the Salt River (between Granite Reef Dam and the confluence with
14 the Gila River) would not have been navigable on February 14, 1912. Roosevelt Dam and
15 diversions for irrigation and storage do not cause or prevent rain. The Salt River is a river of
16 floods and droughts, without regard to what humans may do with the water. The Salt River
17 (between Granite Reef Dam and the confluence with the Gila River) was still a braided river,
18 with narrow restrictions and continuous sandbars and other natural barriers to navigation, no
19 matter what humans may have done with the water.

20 ***e. State v. Bonelli Cattle Co. has no relevance to a navigability determination.***

21 At page 5 of its Opening Brief, the State argues:

22 In fact, the Arizona Supreme Court has confirmed that the State owns title
23 to the beds of all navigable streams within its borders, and that this title may
24 not be defeated by artificial changes in the bed because it was channeled,
 artificially controlled, dammed, or diverted. *State v. Bonelli Cattle Co.*, 107
 Ariz. 465, 489 P.2d 699, 702 (1971).

1 The States' claim, that the Arizona Supreme Court has confirmed that the State owns
2 title to the beds of all navigable streams within its borders, is a tautology—a needless
3 repetition of an idea. Of course the State owns title to the bed of all streams that were
4 navigable as of February 14, 1912. That is not in dispute. At dispute in this proceeding is
5 whether this particular stretch of the Salt River, between Granite Reef Dam and the
6 confluence with the Gila River, was navigable as of February 14, 1912. *Bonelli Cattle Co.*
7 offers nothing to help in that determination.

8 *Bonelli Cattle Co.* was not a navigability case—for any purpose. It did not deal with
9 navigability for title, admiralty, or commerce. *Bonelli Cattle Co.* was an avulsion/erosion
10 case. There was no dispute that the Colorado River, in the area of that controversy, was
11 navigable for purposes of title, commerce, and/or admiralty. The navigability of the Colorado
12 River only had meaning in that case in that it explained why the State of Arizona had a dog in
13 the fight—the State owned land that could be affected by avulsion or erosion in the same way
14 that private property could be affected by avulsion or erosion.

15 Nothing in the *Bonelli Cattle Co.* case dealt, in any way, with how a watercourse is
16 determined to be navigable or non-navigable. *Bonelli Cattle Co.* held that, whatever the
17 character of a watercourse was, that character was not changed by re-channeling, damming, or
18 diverting the water of the watercourse.

19 **5. Occasional Natural Obstructions**

20 At page 10 of its Opening Memorandum, the State argues:

21 Some boating attempts were unsuccessful; however, this was not due to lack
22 of stream flow, but rather natural obstructions such as snags, sandbars, or
23 narrow canyons on the Upper Salt River, all of which exist on some other
24 navigable rivers. [Citation omitted.] Navigability is not destroyed because a
watercourse is interrupted by occasional natural obstructions or portages, nor
need navigation be open at all seasons of the year, or at all stages of the water.

1 At page 6 of its Opening Memorandum, Wildlife argues: "In addition, a river may be deemed
2 navigable despite occasional impediments such as sand or gravel bars, and despite the fact that
3 it is only navigable a few months out of the year."

4 The statement of law is correct; its application to this case is inappropriate. In *United*
5 *States v. Holt State Bank, supra*, the United States Supreme Court explained "that navigability
6 does not depend . . . on an absence of *occasional* difficulties in navigation, but on the fact, if it
7 be a fact, that the stream in its natural and ordinary condition affords a channel for useful
8 commerce." [Emphasis added.] 270 U.S. at 56, 46 S. Ct. at 19. The Merriam-Webster's
9 Collegiate Dictionary, Tenth Edition (1998), defines "occasional" as "encountered, occurring,
10 appearing, or taken at irregular or infrequent intervals." Synonyms for "occasional" are
11 "infrequent," "irregular," "sporadic," "rare," "intermittent," and "special."

12 It makes sense, legally and in the real world, that, if there is an infrequent and sporadic
13 barrier to use of a watercourse as a highway of commerce, people are going to work around it.
14 So, if there is a rare and intermittent sand bar, people might take the risk that they could get
15 hung up on the sandbar and have to put their boat back in the water. If there are irregular and
16 special restrictions like a brief span of rapids, people might be willing to portage around them
17 to continue an otherwise practical journey on the watery highway of commerce.

18 However, the barriers to successful navigation in the Salt River (between Granite Reef
19 Dam and the confluence with the Salt River) are not *occasional*, they are pervasive, all-
20 encompassing, omnipresent, sweeping, and the norm. It is irrational to claim that because a
21 person could carry a boat on their shoulders and walk the dry riverbed between Granite Reef
22 Dam and the Confluence with the Gila River that they have used the stretch as a "highway of
23 commerce," and are only by-passing an occasional obstruction. A watercourse is not a
24

1 highway for commerce if its use is so difficult and impractical that nobody bothers to use it.
2 The Lower Salt River, between Granite Reef Dam and the confluence with the Gila River,
3 was “running the gauntlet” not a highway for commerce.

4 **VII. Water Sometimes Flows in the Salt River Between Granite Reef Dam and the**
5 **Confluence with the Gila River**

6 At page 19 of its Opening Memorandum, Wildlife writes:

7 One element of the definition of a highway for commerce which is often
8 overlooked, particularly by parties seeking a finding that a watercourse is
9 nonnavigable, is that the watercourse may be navigable if it is a corridor or
10 conduit for the exchange of goods or commodities. A.R.S. § 37-1101 (3). As
11 described above, there can be no debate that the Lower Salt River was used as
12 a corridor or conduit for the movement of the most precious of all goods:
13 water.

14 Imaginative as this argument may be, it is not sound, legal, or rational. The gist of the
15 argument appears to be:

16 Water can be a commodity.

17 Water can move in the bed of the Salt River between Granite Reef Dam and the
18 confluence with the Gila River.

19 Therefore, water flowing in this Reach of the Salt River is, in and of itself, navigation.

20 Wildlife cites absolutely no authority for this bizarre proposition. The reason, of course, is
21 that none exists. Quite frankly, this argument is too strange for even a law school exam.

22 Every watercourse in the country—whether perennial, intermittent, or ephemeral;
23 whether large or small; whether untouched by human activity, modified by human activity, or
24 completely constructed by humans—can carry water at some time. If a unit of land does not
transmit water at least sometimes, it is not a watercourse. Using Wildlife’s argument, every
watercourse in the nation carries water—a commodity of trade. Therefore, every watercourse
in the country is navigable.

1 There is indisputable proof that the United States Supreme Court and every other court
2 that has ever considered navigability (whether for title, admiralty, or the commerce clause)
3 had no interest in this type of game playing. Courts have routinely found watercourses
4 (including watercourses that transmit a great deal of water) to be non-navigable, even in
5 Arizona and other arid western states.

6 *The Daniel Ball* held that a watercourse is not navigable in fact unless it is a “highway
7 for commerce *over which* trade and travel are or may be conducted in the customary modes of
8 trade and travel *on water.*” 77 U.S. at 563. [Emphasis added.] *Defenders of Wildlife v. Hull*,
9 *supra*, approved this definition and the Arizona Revised Statutes use the same definition.
10 Water flowing *in* a watercourse is not trade and/or travel over a highway of commerce; it is
11 the highway itself. The trade and/or travel take place *on* the water (*over* the water). The
12 water in the watercourse is not the trade and/or travel but, rather, the physical structure over
13 which the trade and/or travel take place. The water in a watercourse is no more trade and/or
14 travel than the concrete in a solid highway is trade and/or travel as it lies on the ground.

15 **VIII. Expert Witnesses Are Not Judges, Juries, or Administrative Hearing**
16 **Tribunals**

17 Maricopa County explains, in its Opening Post-Hearing Memorandum, that it “takes
18 no position on the navigability of the Lower Salt River in Maricopa County, but files the
19 Memorandum for the purpose of ensuring that correct standards are used by the Commission
20 in evaluating the testimony and evidence to protect the integrity of the process.” Page 1, lines
21 17-20. Maricopa County argues that “[e]xpert opinion not based upon the correct legal
22 standard should be disregarded as unreliable and not probative of navigability.” Page 4, lines
23 17-18. Maricopa County complains:

24 . . . Stanley Schumm, Ph.D., geomorphologist and expert witness for the

1 Salt River Project opined that the reach of the Lower Salt River in question
2 was “not suitable for navigation.” [Citation omitted.] Schumm testified,
3 under cross examination, that his opinions are not based upon the standards
4 in Defenders of Wildlife [citation omitted]. . . .Dr. Littlefield admitted that a
5 report he prepared regarding the navigability of the Gila River was not
“designed to apply to any particular legal standard,” and that his opinion was
an historical opinion based upon observations of contemporaneous observers.
. . . .Dr. August, also admitted, however, that his opinions were not premised on
the Defenders case. [Citation omitted.]

6 Maricopa County Opening Post-Hearing Memorandum, page 4, lines 25-27, page 5, lines 1-4,
7 lines 13-16, and lines 23-24.

8 Wildlife also makes this criticism, at page 22 of its Opening Memorandum, arguing
9 that “[i]n some instances, the authors of the documents admitted that they did not rely on
10 Arizona or federal law, but rather on their own personal definition of navigability.” Both
11 Maricopa County and Wildlife create a misleading straw man argument, beat the tar out of the
12 straw man, and then declare themselves victorious.

13 Of course Dr. August, Dr. Littlefield, Mr. Gookin⁹, and Dr. Stanley Schumm did not
14 base their expert opinions on *Defenders of Wildlife v. Hull*. They were not supposed to. If
15 they had, rather than criticizing them for not using the “right” legal standard, these parties
16 could legitimately have jumped up with, “Objection, calls for a legal conclusion.” While
17 testifying about factual matters of a scientific and technical nature, expert witnesses are not
18 supposed to draw legal conclusions.

19 Rule 702 of the Federal Rules of Evidence provides that:

20 If scientific, technical, or other specialized knowledge will assist the trier of
21 fact to understand the evidence or to determine a fact in issue, a witness

22 ⁹ Mr. Gookin testified both as an expert witness on scientific and factual matters and as a representative of the
23 Gila River Indian Community on certain policy issues, where he simply stated the Community’s position. Mr.
24 Gookin used scientific and engineering fact about flow rates to make his analysis as to whether this specific
stretch of the Salt River was navigable on February 14, 1912, without regard to any legal definitions. He did
use the federal definition of navigability with regard to his policy statements about the inability of this process
to affect the boundaries of the Gila River Indian Reservation, which the United States established for this
portion of the Reservation decades before statehood.

1 qualified as an expert by knowledge, skill, experience, training, or education
2 may testify thereto in the form of an opinion or otherwise.”¹⁰

3 When testifying as to factual conditions (with scientific, technical, or other specialized
4 knowledge that would assist the trier of fact in understanding the evidence), matters of law are
5 not proper subjects for expert opinion. The Commission and, ultimately, the courts will
6 determine the matters of law. See *Whitmill v. City of Philadelphia*, 29 F. Supp. 2d 241 (E.D.
7 Pa. 1998); *Albany Surgical, P.C. v. Department of Community Health*, 572 S.E.2d 638 (Ga.
8 App. 2002); *Bay General Community Hospital v. County of San Diego*, 203 Cal. Rptr. 184
9 (1984); *Edgar v. Barndvold*, 515 P.2d 991 (Wash. App. 1973). For the experts to testify as to
10 factual elements, and give expert scientific, hydrologic, or historic opinion as to what those
11 factual elements mean, is permissible. Comparing the factual elements to specific legal
12 requirements could have been objectionable. Maricopa County and Wildlife are complaining
13 because the Salt River Project, Arizona State University, and Community experts limited their
14 testimony to the facts and their particular expertise, and left the legal determinations to the
15 Commission. They did what they were supposed to do.

16 Dr. Schumm testified in his capacity as a geomorphologist. The Salt River (in the
17 Reach between Granite Reef Dam and the confluence with the Gila River) was a braided
18 river, with a highly variable water supply and almost constant obstructions, before statehood,
19 at the date of statehood, and after statehood. That is a scientific fact that is not affected by any
20 legal standard. Braided rivers, with highly variable water supplies and almost constant
21 obstructions are not conducive to navigation. That is a reasonable conclusion for an expert to
22 draw, without regard to legal standards. Whether, ultimately, the braided river with a highly

23 ¹⁰ The United States Supreme Court approved the appropriateness and applicability of this federal rule of
24 evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469
(1993). Rule 702 of the Arizona Rules of Evidence is virtually identical to the federal rule.

1 variable water supply and almost constant obstructions was navigable on February 14, 1912,
2 based on the Arizona statute and *Defenders of Wildlife v. Hull*, is a legal determination that
3 the Commission will make by applying the facts and opinions to the legal requirements.

4 Mr. Gookin, while testifying as to engineering and historic factors, testified in his
5 capacity as a civil engineer and hydrologist. The volume of water that existed, as of 1912 and
6 before, and the geographic conditions affecting this stretch of the Salt River are hydrologic
7 and historic facts that exist independent of any legal standard. The expert opinion that the
8 water volumes and geographic conditions were not conducive to navigation is a reasonable
9 conclusion for an expert to draw, without regard to the legal standard. Whether these facts
10 establish navigability, or the lack of navigability, under the *Defenders of Wildlife v. Hull*
11 standards is for the Commission and the courts to decide.

12 Dr. Littlefield and Dr. August testified in their capacity as historians. There are
13 historic records of attempts to use this stretch of the Salt River as a highway for commerce.
14 Those historic records demonstrate that the attempts failed. The historic records do not
15 provide any evidence of any successful use of this Reach of the Salt River for trade or travel.
16 The existence of these historic records, and what is found within the records, are matters of
17 fact, without regard to whatever legal standard may apply. Whether or not these records, the
18 information that they contain, and the information that is not to be found within them, lead to
19 a conclusion that this stretch of the Salt River was or was not navigable on February 14, 1912,
20 under the *Defenders of Wildlife v. Hull* standards is a matter for the Commission and the
21 courts to decide.

22 No question has been raised as to the qualifications of these individuals to testify as
23 geomorphologists, civil engineers, hydrologists, or historians. There is no dispute about the
24


1 substance of their testimony: that the Salt River in this Reach was braided; lacked water or
2 had a lot of water; was filled with numerous obstructions; and that there are no historic
3 records of successful use of this stretch for trade or travel. The only complaint is that, because
4 they limited their testimony to the facts and the natural consequences of those facts, rather
5 than rendering academic opinions as to legal determinations, their undisputed facts should be
6 ignored. This is illogical, as well as an improper statement of the legal standards for evidence
7 and testimony.

8 **CONCLUSION**

9 Because of the failure of the proponents to prove, by a preponderance of the
10 evidence, that the Reach of the Salt River between Granite Reef Dam and the confluence
11 with the Gila River was, on February 14, 1912, used or susceptible to being used, in its
12 ordinary and natural condition, as a highway for commerce, over which trade and travel
13 were or could have been conducted in the customary modes of trade and travel on water,
14 the Gila River Indian Community respectfully requests the Arizona Navigable Stream
15 Adjudication Commission determine that this Reach of the river was not navigable on the
16 date of Arizona's admission to the Union as a state.

17 RESPECTFULLY SUBMITTED this 11th day of August, 2003.

18 GILA RIVER INDIAN COMMUNITY

19
20 
21 Rodney B. Lewis
22 Attorney for the Gila River Indian Community

23 ORIGINAL AND TEN COPIES of the foregoing
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