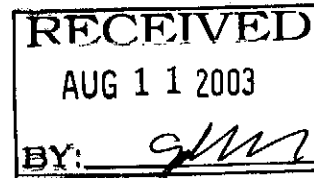


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8 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
9 **ADJUDICATION COMMISSION**

10 In re Determination of ) No. 03-005-NAV  
11 Navigability of the Lower Salt River )  
12 In Maricopa County )  
13 ) **MARICOPA COUNTY'S**  
14 ) **RESPONSIVE POST-HEARING**  
15 ) **MEMORANDUM**  
16 )  
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20 )

21 Maricopa County, by and through counsel undersigned, submits its Responsive Post-  
22 Hearing Memorandum on the Navigability of the Lower Salt River in Maricopa County,  
23 Arizona. The Memorandum is based upon the evidence submitted prior to, at and after the  
24 hearings held on April 7 and April 8, 2003 in Phoenix, Arizona, and on the testimony from  
25 those hearings, and on the Opening Post-Hearing Memoranda. Maricopa County takes no  
26 position on the navigability of the Lower Salt River in Maricopa County, but files the  
27 Memorandum to promote the integrity of the process the Commission has undertaken.  
28

29 **Memorandum**

30 There is no question that the issue of navigability of riverbeds in this state, especially  
31 during the last fifteen years or so, has been very controversial. The County would like to  
32 comment on several issues raised in the various opening memoranda submitted by the  
33 parties and evidence presented at the hearing on April 7 and April 8, 2003. First, while it is  
34 quite true that the Commission should consider all the evidence presented, it should be

1 careful to consider only facts and proper expert witness testimony. Second, the Commission  
2 should pay careful attention to the elements of navigability, namely “susceptible to being  
3 used,” “ordinary and natural” and “highway for commerce,” because the correct legal  
4 definition of these elements is essential for a valid determination of the navigability of a  
5 watercourse. Lastly, the Commission may want to consider whether the Responsive  
6 Memorandum could include rebuttal affidavits by expert witnesses who previously  
7 submitted oral or written testimony.  
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9  
10 1. The Commission Should Consider Factual Evidence and Expert Opinion Testimony  
11 that is based upon federal law.

12 The Commission should take care to base its decision on the navigability of the  
13 Lower Salt River, utilizing the proper federal standards, and based only upon the evidence  
14 presented. Many of the opening Post-hearing Memorandum and other evidence filed by the  
15 parties to the Lower Salt hearing direct the focus of the brief away from the controlling law  
16 in this area to historical facts that don’t have much significance to the determination of  
17 navigability or by making dire predictions about the effect of a determination of  
18 navigability. The Commission also needs to distinguish between factual evidence and  
19 expert opinion testimony, and to consider facts, not mere statements. While the  
20 Commission is charged with reviewing “all available evidence” (A.R.S. §37-1128(A)) that  
21 does not mean that the Commission must consider statements made by parties or their  
22 counsel simply because the statements are written down. For example, according to the  
23 Evidence Log maintained by the Commission for the Lower Salt hearings, there are  
24 numerous one to two page letters submitted by various interested individuals or civic  
25 organizations urging the Commission to rule against navigability for various reasons. For  
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1 example Evidence Items 41-45, 47-50. Those letters should only be considered if they  
2 contain facts or opinion testimony from expert witnesses. In addition, some parties predict  
3 dire consequences if the Commission were to find the Lower Salt River navigable. The  
4 Commission should not be swayed by the effect of its ruling; it should rule based upon the  
5 proper legal standard, the federal standard, and based upon the evidence, factual and expert  
6 witness opinion presented. For example, EI# 37, a one page letter from the Arizona  
7 Chamber of Commerce warns that a determination of navigability could subject “large  
8 quantities of land in the floodplain of the Lower Salt” to the risk of litigation. That  
9 statement overstates that law; the statute clearly defines the riverbed as bounded by the line  
10 on the banks of a watercourse which demonstrate the “ordinary high watermark,” and does  
11 not mean the line reached by “unusual floods.” (A.R.S. §37-1101 (6)). The use of the word  
12 “bank” in the definition of “ordinary high watermark” suggests that we are not dealing with  
13 the entire floodplain. Further, “floodplain” is defined as “the areas adjoining the channel of  
14 a watercourse including areas where the drainage is or may be restricted by man-made  
15 structures which have been or may be covered partially or wholly by floodwater from the  
16 one hundred-year flood.” (A.R.S. §48-3601).

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20       Assertions by counsel in the memorandum are not evidence. For example, counsel  
21 for the Gila River Indian Community states the “The Pimas were farmers, not boaters, for a  
22 reason—the Lower Salt could sustain crops, but not boats.” (See pages 10-11, Opening  
23 Post-Hearing Memorandum of Gila River Indian Community at P. 10-11). The Commission  
24 should only consider the factual or expert opinion testimony, whether it be oral or written.  
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1           Along the same lines, the statement that a particular politician believed the Lower  
2 Salt River was not navigable is not a fact upon which the Commission should rely. EI#31  
3 (August report). See Phelps Dodge Corporation Opening Memorandum page 4.  
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5           Two parties, namely Phelps Dodge and the City of Phoenix make reference to the  
6 countywide election in Maricopa County and a statement of opinion by a County Attorney  
7 in 1909. EI# 29 and Phelps Dodge Opening Memorandum page 4. Neither the election,  
8 nor the subsequent construction of a bridge by the County over the Lower Salt, nor the  
9 County Attorney's opinion are relevant, nor facts upon which the Commission can rely. The  
10 countywide election was merely that, a vote by the public to construct a bridge. The  
11 election was not a legal determination of navigability. The legal precedent in our state is  
12 clear; the voters are not qualified to determine if a particular river is navigable. Navigability  
13 is a question of fact; the determination of navigability by a judicial or administrative process  
14 must precede the relinquishment of a state claim to a particular parcel of riverbed land.  
15 Arizona Center for Law v. Hassell, 172 Ariz. 356, 363 & 370, 837 P.2d 158, 165 & 172  
16 (App. 1991). The Hassell case also requires a "particularized assessment" of the validity of  
17 equal footing claims. Id. at 371, 837 P.2d at 173. For the same reasons, a statement of  
18 opinion by a County Attorney does not have any binding effect; it is not a ruling of law or a  
19 legal determination of fact. Moreover, the City's citation to this County Attorney's opinion  
20 is merely a newspaper article dated in 1909. EI#29 (Exhibit 164).  
21

22           Finally, when reviewing the expert opinion, the Commission should pay careful  
23 attention to whether the expert based his or her opinion upon the federal standard as stated in  
24 Defenders. If the expert did not base his or her opinion on the correct legal standard, the  
25 opinion testimony is unreliable and not probative and must be disregarded by the  
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1 Commission. The County has already shown in its Opening Memorandum that the opinion  
2 testimony by Dr. Littlefield and Dr. Schumm is unreliable. Schumm testified, under cross  
3 examination, that his opinions are not based upon the standards in Defenders of Wildlife v.  
4 Hull, 199 Ariz. 411, 18 P.3d 722 (App. 2001) (April 7, 2003 Transcript, page 207, lines 2-  
5 12). (Hereinafter, April 7, 2003, T.P. \_\_\_\_\_, L \_\_\_\_\_.) Dr. Littlefield admitted during  
6 cross examination that his opinions in his report disagreed with the standards set out in  
7 Defenders. Dr. Littlefield's deposition in another case, Flood Control District of Maricopa  
8 County v. Paloma Investment Limited Partnership CV 1997 – 07081, was submitted as  
9 Exhibit #39. In that deposition, Dr. Littlefield admitted that a report he prepared regarding  
10 the navigability of the Gila River was not "designed to apply to any particular legal  
11 standard," and that his opinion was an historical opinion based upon observations of  
12 contemporaneous observers. (Exhibit #39, page 89 lines 3-21).<sup>1</sup> Dr. Littlefield also testified  
13 that his opinions on the Lower Salt River were not based on the condition of the Salt River  
14 in its normal and natural state prior to any diversions or man-made structures being placed  
15 upon the river. (April 7, 2003, T.P. 180, LL 18-22). Any factual evidence that Dr. Schumm  
16 or Dr. Littlefield may have presented is a different story; the Commission may determine  
17 what weight to give that evidence. These experts' ultimate opinions, however, must be  
18 disregarded because they are not based upon the applicable legal standard.

## 22 2. Components of Navigability

23 As stated in the County's Opening Memorandum and by other parties, the Defenders

26 \_\_\_\_\_  
27 1 Dr. Littlefield testified that he used the same methodology on his  
28 report on the Lower Salt River as he did in his Gila River report, which  
is the basis of the admission in his deposition. (April 7, 2003, T.P. 177,  
LL. 14-22)

1 of Wildlife v. Hull, 199 Ariz 411, 18 P.3d 722 (App. 2001) sets out the standard for  
2 determining navigability for title purposes:

3 We hold that, to prove navigability of an Arizona watercourse  
4 under the federal standard for title purposes, one must merely  
5 demonstrate the following: On February 14, 1912, the  
6 watercourse, in its natural and ordinary condition, either was  
7 used or was susceptible to being used for travel or trade in any  
8 customary mode used on water.  
9 Id. at 426, 18 P.3d at 737.

10 This standard, which is based upon federal law, has several key elements which the  
11 Commission needs to understand fully in order to render a valid determination of  
12 navigability, whether this is for the watercourse currently at issue, the Lower Salt River, or  
13 for any other watercourse in the future. These key elements are “natural and ordinary  
14 condition,” “susceptibility” and “used for travel or trade” (also referred to as “highway of  
15 commerce) and are intricately tied together. The Commission must consider the  
16 watercourse in its “natural and ordinary condition,” and then consider whether it was used  
17 for “trade and travel” or was capable of being used for “trade and travel.”

18 Natural and Ordinary

19 What is the “ordinary and natural condition of the riverbed?” This issue is perhaps  
20 the crux of the matter before the Commission. There is no question that the Lower Salt  
21 River was dammed before statehood. See EI #30 (JE Fuller Report for State of Arizona, see  
22 especially Chapter 3) and EI #36, presentation by David Roberts, Salt River Project. There  
23 is also ample evidence that significant irrigation provided by an extensive canal system was  
24 occurring on the Lower Salt River by the 1870s, which is some thirty years prior to  
25 statehood. See EI # 30 (Chapter 3); (April 7, 2003, T.P. 223-225). Several parties argue  
26 that the fact of irrigation and the existence of the dam prove that the river was not navigable.  
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1 Case law, however, is to the contrary, and in fact, the opposite conclusion can also be drawn,  
2 which is the extensive irrigation network proves that there was water in the Lower Salt. The  
3 issue, however, is not whether the dams and canals destroyed navigation. The issue is what  
4 is the condition of the river in its natural state; this means the natural flow of the river is  
5 analyzed as if the dams and other manmade impediments were removed. See Defenders,  
6 199 Ariz. at 424, 18 P.3d at 735. (citing Economy Light & Power Co. v. United States, 256  
7 U.S. 113, 118.). The citation the Defenders court quotes is unequivocal: “The fact,  
8 however, that artificial obstructions exist capable of being abated by due exercise of the  
9 public authority, does not prevent the stream from being regarded as navigable in law, if  
10 supposing them to be abated, it be navigable in fact in its natural state.” Id.

### 13 Susceptible to Being Used

14 Several parties cite the fact many of the 16 examples of boating cited by the State in  
15 the Fuller report (EI #30) ended in failure. The standard, however, is not the success or  
16 failure of a particular trip. The language in Defenders of Wildlife is clear; either the  
17 watercourse “was used” or “was susceptible to being used” for travel or trade in any  
18 customary mode used on water. Id. at 426, 18 P.3d at 737. The Defenders decision does not  
19 favor the United States Supreme Court case, Oklahoma v. Texas, 258 U.S. 574, 42 S. Ct.  
20 406, 66 L. Ed. 771 (1922), which has been cited by at least two parties (City of Tempe and  
21 ASU) for the proposition that a finding of navigability cannot be established if transportation  
22 was “confined to the irregular and short periods of temporary high water.” Id. 258 U.S. at  
23 591. The Arizona Supreme Court prefers the holding in Economy Light & Power Co. v.  
24 United States, which determined that periodic navigability was enough. Defenders, 199  
25 Ariz. at 421-422, 18 P.3d at 732. “Susceptible to being used” does not mean that that the  
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1 river must be navigable at all seasons of the year or all stages of water. Id. Nor does  
2 “susceptibility” require actual use; a watercourse that is “capable of transporting people or  
3 goods” is susceptible for use as a highway of commerce. State of Alaska v. Ahtna, Inc., 662  
4 F.Supp. 455, 466 (1987). United States v. Utah, 283 U.S. 64, 83, 51 S. Ct. 438 , 75 L. Ed.  
5 844 (1931).  
6

7 Highway for Commerce

8 One of the elements of navigability is whether the watercourse was used for trade  
9 and travel. The Arizona decisions rely upon The Daniel Ball, 77 U.S. (10 Wall.) 557 19  
10 L.Ed. 999 (1870), an admiralty case which describes the federal standard:  
11

12 Those rivers must be regarded as public navigable rivers in  
13 law which are navigable in fact. And they are navigable in  
14 fact when they are used, or are susceptible of being used, in  
15 their ordinary condition, as highways for commerce, over  
16 which trade and travel are or may be conducted in the  
17 customary modes of trade and travel on water.

18 Defenders, 199 Ariz. at 419, and Hassell, 172 Ariz. at 363 (Quoting The Daniel Ball,  
19 77 U.S. at 563) (co auth.), 172 Ariz. at 363.  
20

21 Some parties emphasize in their opening memorandum that the Lower Salt River has  
22 never been used as a “highway for commerce.” (SRP and Tempe, for example). However,  
23 as with “susceptibility” it is not the actual use which is important. The question is whether  
24 the watercourse in its natural and ordinary condition is capable of conducting trade and  
25 travel. The Defenders case is clear on this subject: “The federal test has been interpreted to  
26 neither require both trade and travel together nor that the travel or trade be commercial.” Id.  
27 at 421. It is the river’s “capacity for use” which is the issue, not whether the river has  
28 “practical utility for trade or travel.” Id. at 423.



1           3. Expert Testimony

2           The City of Phoenix in its Opening Memorandum comments on the expert testimony  
3 provided by the County's expert witness, Hjalmar W. Hjalmarson. The Memorandum  
4 argues that it is "impossible to extrapolate the County's flow number in any meaningful  
5 way." City of Phoenix' Opening Post-Hearing Memorandum, page 5 (referring to the  
6 "estimated mean flow," "median flow" and "base flow" included in the submission by the  
7 County's expert witness, Hjalmar W. Hjalmarson, P.E.). The attorneys for the City are just  
8 that, attorneys, and not expert witness, and are therefore not qualified to comment on the  
9 opinion testimony of expert witnesses, except of course, to the extent that the expert  
10 testimony witness lacks a proper legal foundation or is not based upon a correct legal  
11 standard. The Salt River Project, in its Opening Post-Hearing Memorandum, makes a  
12 statement similar to that by the City of Phoenix, when its states in a footnote, that "Because  
13 Dr. Hjalmarson submitted only a one-page report and was not called to testify at the hearing,  
14 it is difficult to determine what methodology he used." SRP Opening Memorandum, page  
15 15.

16           The County asserts, however, that its expert testimony by Hjalmar W. Hjalmarson  
17 should be taken for what it is, namely, an expert opinion as to the average and median  
18 predevelopment annual discharge and the base flow of the natural flow of Salt River, which  
19 is consistent with the "natural and ordinary" requirement of Defenders. 199 Ariz. at 426.  
20 See EI# 22 (Hjalmarson report)<sup>2</sup>. The County's expert describes natural flow as "the flow

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21           2 It is worth noting, that even with the diversions from the Salt River by  
22 the various canals and dams, Dr. Schumm's written report does state that  
23 there existed a single low-water channel in bed of the Salt River around  
24 the time of statehood (blue channel). EI#26, page 3. In fact, during  
25 cross-examination, Dr. Schumm testified that the blue channel was in fact  
26 the low flow channel. Transcript page 204, lines 13-15, April 7, 2003.  
27 Schumm's report goes on to state that if a watercourse has "abundant  
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1 that existed before the settlers arrived in about 1860 and build many rock dams to divert  
2 water for irrigation." This description of "natural flow" means that for the purposes of  
3 calculation, the man-made uses evidenced by Granite Reef Diversion Dam, Roosevelt Dam  
4 and the numerous irrigation canals have been disregarded. Contrary to SRP's statement,  
5 Hjalmarson does state what method he uses. His report stated that "The basin accounting  
6 method for natural stream base flow developed by Freethy and Anderson (1986) was used to  
7 estimate the 90<sup>th</sup> percentile of daily discharge." The 90<sup>th</sup> percentile of daily discharge is in  
8 fact the base (Q90) flow of 260 cubic feet per second stated in Hjalmarson's report. Further,  
9 Hjalmarson's opinion as to the mean annual flow (1730cfs) and the median annual flow  
10 (1310cfs) is based upon the U.S. Geological Survey Water Resources Investigations Report  
11 91-4132 IADD, "Predevelopment hydrology of the Salt River Indian Reservation (Thomsen,  
12 B.W., and Porcello, J.J. 1991). Mr. Hjalmarson's written testimony is thus another piece of  
13 expert opinion testimony for the Commission to consider.  
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16 These comments by the City of Phoenix and the Salt River Project illustrate  
17 something that the Commission may wish to consider in future post-hearing briefing. It  
18 might be useful for a party's expert witness to file a post hearing affidavit to comment on the  
19 report or testimony of other expert witnesses. Since parties are allowed to file evidence,  
20 including expert witness reports on the day of the hearing, that makes cross- examination of  
21 such witnesses difficult. An expert witness is not likely to testify about everything in his or  
22 her report. In addition, an expert may only submit a report and does not have to testify.  
23 Such experts cannot then be cross examined, and since attorneys admittedly are not qualified  
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26 perennial flow" it will not permit navigation. EI#26, page 4. Then  
27 Schumm testifies in cross-examination that 1000 cfs would be "abundant  
28 perennial flow" in Arizona. Transcript page 202 lines 18-25, page 203  
lines 1-2, April 7, 2003.

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as expert witnesses, their statements should be limited to such as whether an expert witness has a proper foundation for his or her testimony.

Respectfully submitted this 11<sup>th</sup> day of August, 2003.

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