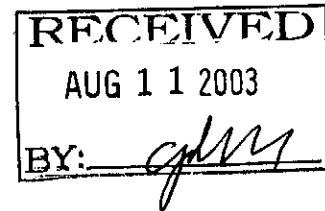


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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

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

No. 03-005 NAV

**STATE LAND DEPARTMENT'S
RESPONSE TO OPENING POST-
HEARING MEMORANDA**

The Arizona State Land Department responds to the Opening Post-Hearing Memoranda filed by Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association ("SRP"), Arizona State University ("ASU"), City of Tempe, Home Builders Association of Central Arizona ("Home Builders"), Phelps Dodge Corporation, City of Phoenix, City of Mesa, Gila River Indian Community ("GRIC"), and Transnation Title Insurance Company, *et al.* ("Title Companies")¹ concerning the Arizona Navigable Stream Adjudication Commission's ("ANSAC") April 7 and 8, 2003, hearings on the navigability of the Lower Salt River from Granite Reef Dam

¹ The Title Companies' Joinder Opening Post-Hearing Memorandum was filed untimely on June 20, 2003. The State objects to the untimely filing of this memorandum, and requests that the memorandum be stricken from the record.

to the Gila River confluence.

No one disputes that by 1912 the natural and ordinary flow of the River was substantially eliminated by impoundments at Roosevelt Dam, diversions at Granite Reef Dam, and numerous other diversions and canals. These irrigation projects dramatically altered both the form and function of the River, and changed it from a “natural” system to one that is entirely controlled. There is no evidence that suggests that anyone—from the earliest inhabitants to the current civilization—decided to harness and divert the Salt River’s reliable flows for domestic use and irrigation only because the Salt was not useful for navigation, or because it was prone to floods and drought. Rather, the Salt River was the key to surviving and creating a strong agricultural and economic base for the Salt River Valley. *See Arizona State Land Department Rep., Arizona Stream Navigability Study for Salt River: Granite Reef Dam to the Gila River Confluence, Draft Final Report*, at 3-16 (revised Apr. 2003) (hereinafter “ASLD Report”) (Evidence Item No. 30) (“E.I.”) (map derived from the 1900 census data shows that virtually the entire valley was irrigated, or was designated as irrigable).

I. The Lower Salt River, If in Its Ordinary and Natural Condition at Statehood, Would Have Been Susceptible to Use as a Highway for Commerce.

ANSAC should find the Lower Salt River navigable if it determines that the River was capable of being used for transportation or commerce in its ordinary and natural condition at statehood. It is not necessary that trade and travel actually occurred on the River. *See United States v. Utah*, 283 U.S. 64, 82 (1931) (“[q]uestion of . . . susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. . . . The extent of existing commerce is not the test.”); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122-123 (1921) (quoting *The Montello*, 87 U.S. (20 Wall.) 430, 441-442 (1874)) (“[c]apability of use by the

public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable its natural state of being used for purposes of commerce . . . it is navigable in fact and becomes in law a public river or highway.”); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (“[t]est is whether the river was susceptible of being used as a highway for commerce at statehood, not whether it was actually so used.”).

In applying the *Daniel Ball* test, ANSAC must consider the unique circumstances of Arizona’s development. If limited or infrequent use of a watercourse can be explained by settlement of the region, or the use of trails or roads in connection with the location of the watercourse, the watercourse still may be proven to be susceptible to use as a highway of commerce. *United States v. Utah*, 283 U.S. at 81-82 (nonuse not indicative of nonnavigability based on many factors including nonsettlement of the region). The Salt River’s dependable flows irrigated almost 140,000 acres of farmland that sustained a Hohokam population estimated between 80,000 and 200,000 from approximately 250-1450 A.D.² The Salt River was largely bypassed by exploration and development throughout the Spanish, Mexican, and United States Territorial periods, until the 1860s. ASLD Report at 3-1. Irrigation diversion began to reduce low flows as early as the 1870s. *Id.* at 7-7. In addition, alternative forms of transportation were available to the early settlers, including the railroad that reached Phoenix in 1887.³ *See id.* at 3-17-3-18. The emphasis on the use of the Salt River was for water storage and irrigation, not for transportation and commerce. ANSAC must

² Archaeological records indicate that climatic conditions and streamflow rates during that period were not significantly different from conditions at statehood. ASLD Report at 9-1.

³ In 1912, trade and travel were limited because there were less than 40,000 residents in Maricopa County. Maricopa Association of Governments, *Population Projections Issue Paper*, Table 1 (Sept. 19, 2001).

consider these factors in arriving at its navigability determination.⁴ *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409-410 (1940) (navigability not affected by nonuse over extended period, changed conditions, or other forms of transportation).

A. The Condition of the Lower Salt River at Statehood Was Not Ordinary and Natural.

ANSAC must find that the Lower Salt River was navigable when Arizona was admitted into the Union on February 14, 1912, if the River would have been susceptible to navigation in its ordinary and natural condition.⁵ See *United States v. Utah*, 283 U.S. at 75-76; *Alaska v. Ahtna, Inc.*, 891 F.2d at 1404 (citations omitted) (“Although the river must be navigable at the time of statehood, this only means that, at the time of statehood, regardless of the actual use of the river, the river must have been susceptible to use as a highway for commerce.”); *Ariz. Ctr. For Law In The Pub. Interest v. Hassell*, 172 Ariz. 356, 362-363, 837 P.2d 158, 164-165 (App. 1991) (“[n]avigability is determined by reference to the ordinary and natural condition of the watercourse at the time of the state’s admission to the Union.”). No one disputes that at statehood, the Lower Salt River’s flows were drastically and dramatically altered. See GRIC at 15; ASU at 3-4; Home Builders at 2; Phelps Dodge at 5; SRP at 1, 13. ANSAC therefore must determine the ordinary and natural condition of the Lower Salt River, that is, whether the River would have been susceptible of navigation if its flows had not been

⁴ Because the *Daniel Ball* test involves a fact intensive inquiry that varies from state-to-state and from watercourse-to-watercourse, navigability determinations of watercourses in other states are not binding and their relevance is marginal at best when their climatic, hydrological, and historical evidence is compared to the Lower Salt River. See SRP, *Information Regarding Navigability of Selected U.S. Watercourses*, (Apr. 2003) (E.I. 25).

⁵ ANSAC must determine both the ordinary and the natural condition of the River. See, e.g., *United States v. Utah*, 283 U.S. at 76; *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426, 18 P.3d 722, 737 (App. 2001); A.R.S. § 37-1101(5). An examination limited to the ordinary condition as advocated by ASU (ASU at 3-4) violates the explicit requirement that ANSAC determine both.

diverted for irrigation and storage.

1. Artificial Dams and Diversions Are Not the Ordinary and Natural Condition of the Lower Salt River.

The definitions and theories regarding the meaning of the phrase “ordinary and natural condition,” put forth by those who oppose a finding of navigability, are unsupported by case law. *See* GRIC at 7-8 (Commission must review evidence on how “flashy” the river was, the extent of dry periods and flood periods, the “typical” water flow, and the then-existing physical barriers to navigation); ASU at 3-4 (Commission should only determine ordinary flow, not natural flow); Tempe at 2-3 (A.R.S. § 37-1101(5) requires that ANSAC determine ordinary and natural flow as it existed at statehood). The *Daniel Ball* test requires that the navigability of rivers be determined “in their ordinary condition.” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). “Ordinary condition” means the “volume of water, the gradients and the regularity of the flow.” *Appalachian Elec. Power Co.*, 311 U.S. at 407. The Supreme Court intended by use of the phrase “ordinary and natural condition” that a watercourse be examined in its natural state, free of artificial obstructions such as dams, diversions, and canals. *Economy Light & Power*, 256 U.S. at 118. In discussing the building of dams and bridges across the Desplaines River, the Court stated that “[t]he fact, however, that **artificial** obstructions exist capable of being abated 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 be navigable in fact in its **natural** state.” *Id.* (emphasis added); *see also Holt State Bank*, 270 U.S. 49 (Court determined navigability of Mud Lake by considering the Lake its natural state (filled with water) rather than in its present condition (drained dry by a drainage ditch)).

2. The Ordinary and Natural Condition of the Lower Salt River Must Be Determined by Reviewing Its Past Physical Condition and Its Historic Use.

The manmade obstructions and diversions that drastically reduced the actual flow of the Salt

River at statehood do not make it nonnavigable if, but for those obstructions and diversions, the River could be used for trade and travel. In order to assess the River's ordinary and natural condition, and ultimately its susceptibility to navigation, ANSAC must examine the past physical condition and historic use of the River. See *United States v. Utah*, 283 U.S. at 83 (the susceptibility of a watercourse in its ordinary condition to be used as a highway for commerce "may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.").

B. The Past Physical Characteristics of the Lower Salt River Demonstrate That in Its Ordinary and Natural Condition, the River Could Have Been Used as a Highway for Commerce.

Where actual use is limited or infrequent, a river's susceptibility to use as highway for commerce may be proven by evidence of the river's physical characteristics. *Utah v. United States*, 403 U.S. 9, 12 (1971); *Appalachian Elec. Power Co.*, 311 U.S. at 410-419; *United States v. Utah*, 283 U.S. at 77-81; *Holt State Bank*, 270 U.S. at 52-53, 56-57; *Economy Light & Power Co.*, 311 U.S. at 118. The physical characteristics of the Lower Salt River clearly establish that the River could have been used for trade and travel if its ordinary and natural flows had not been altered.

1. Hydrology.

The hydrologic evidence indicates that the quantity and rate of flow in the Lower Salt River at statehood, if in its ordinary and natural condition, would have been sufficient to support navigation for commercial purposes. Several proponents for nonnavigability assert that the Lower Salt's flow was too erratic to support a finding of navigability, that is, they assert that the River was usually either dry or alternatively at a flood stage. *E.g.*, SRP at 22; Phelps Dodge at 8; Tempe at 3. In support of these claims these parties offer little (or no) quantitative hydrologic data and rely almost exclusively on the historians' opinions of anecdotal information. *E.g.*, Jack L. August, *The Lower*

Salt River: A Non-Navigable Stream, at 1-5 (submitted Apr. 7, 2003) (E.I. 31) (hereinafter “August Report”) (Carl Hayden’s “desperate experience” during a childhood flood influential in his congressional career); Doug Kupel and Ellen Endebrock, *Historical and Scientific Evidence Concerning Navigability of the Lower Salt River*, at 12-14 (Apr. 2003) (E.I. 29) (hereinafter “Kupel Report”) (describing flood damage to bridges from 1890 to 1905); Transcript of ANSAC hearings Apr. 7-8, 2003, at 8-5-8-12 (hereinafter “Tr. at __”) (Senator Bowers) (“anecdotal evidence” from late 1800s and early 1900s); *cf.* ASLD Report at 7-20 (some of Arizona’s largest floods occurred in the twenty years prior to statehood). Contrary to these claims, the hydrologic data demonstrates that the Lower Salt River’ flow was not erratic, but seasonal with higher flows from December through May. ASLD Report at 7-17, Table 7-14; Tempe at 4 (November through March are generally times of high flows); Kupel Report at 21 (flows follow a seasonal pattern); SRP, Appendix A at 1 (boating trip in 1873 occurred at the time of year that “typically is subject to relatively higher spring runoff”).

The evidence shows that the Lower Salt River historically was a perennial stream; by definition this means it was not a dry stream during any portion of the year. Kupel Report at 21 (perennial stream fed with snowmelt); *e.g.*, ASLD Report at 5-5, 5-9, 7-12, 7-13 (Halpenny reports that the study reach was perennial even as late as 1912 with one possible exception), and 7-26; Tr. at 163 (Littlefield) (permanent supply of water upstream of Tempe Canal); Tr. at 164 (Littlefield) (stream perennial at Tempe, but dry elsewhere in 1912); Tr. at 201(Schumm) (perennial in its natural and ordinary condition); GRIC at 10 (Pima and ancestors have farmed along the river for over 2,000 years); ASU at 3- 4 (irrigation uses date back thousands of years); *cf.* Tr. at 129 (August) (not perennial after the construction of Roosevelt Dam). If the Lower Salt River was dry on February 14, 1912, it was because all the water had been diverted for irrigation, not because of the natural physical conditions or water supplied by the watershed.

There was significant, but not extreme, variation between high and low flow rates, much like the other rivers in the western United States. Flow duration data derived from USGS stream gauges indicate that the flow rate was between 300 cubic feet per second (“cfs”) and 3,000 cfs ninety percent of the time, and less than 20,000 cfs ninety-nine percent of the time. ASLD Report at 7-17, Table 7-13, 10-35 (citing USGS Water Resources Investigations Report 91-4041); *see also id.* at 7-22, Table 7-16. Likewise, flow depths in the Lower Salt River varied seasonally. During the driest summer months, typical flow depths generally averaged between one and two feet, although there were pools and riffles that were deeper and shallower. During winter months, typical flow depths were generally greater than two feet. *Compare* ASLD Report at 7-10, Table 7-7, 7-17, Tables 7-13 - 7-14 *with* 7-25, Figure 7-4, 7-26, Table 7-18. Rating curves for the River indicate that the ordinary flow was not swift or turbulent; average flow depths for the range of flow between 300 cfs and 3,000 cfs were between 1.4 and 3.3 feet, with a maximum velocity of 2.2 feet per second, well within federal recreational boating limits. ASLD Report at 7-23-7-26 (rating curve information), 8-1-8-2 (boating standards). While there was normal seasonal variation in river flow, flows greater than the flooding threshold of 20,000 cfs were rare events that typically lasted no more than a few days. *Id.* at 7-17, Table 7-13.

SRP is critical of the flow data presented in the ASLD Report because there was no standard deviation analysis provided and because average values were used. SRP at 16. These criticisms are unfounded because standard deviation is only one measure of variability, and the ASLD Report provides numerous other measures related to flow variation. *E.g.*, ASLD Report at 7-17, Table 7-13 (flow duration statistics for 10, 50, and 90% thresholds), 7-17, Table 7-14 (monthly flow variation), 7-7, Table 7-3, 7-10, Table 7-7, 7-18, Table 7-15 (minimum, maximum, and average annual flow rates). The ASLD Report also presented average flow data from various time periods (ASLD Report

at 7-7), and flow rates derived using a variety of other methods, such as dendrochronology. *Id.* at 7-9. The ASLD Report contained explicit recognition of the differences between median flows and mean flows, and the skewing effect that large floods can have on statistical analysis. *Id.* at 5-5. Collectively, these data provide more useful and complete information about the Lower Salt River's ordinary and natural condition than would standard deviation analysis.

SRP also is critical of the assumption that water upstream in the watershed will flow downhill and reach the study area. SRP at 15 (no analysis done to show all the water actually made it downstream). But SRP is wrong; such analysis was performed. *E.g.*, ASLD Report at 7-7 (comparing flow rates at Salt and Verde confluence to those at Jointhead Dam and near Buckeye), 7-7 (USGS pre-development flow reconstruction), 7-10 (effects of diversions on downstream flow rates), 7-8.

Those who oppose navigability offer little data to support their claims that the Lower Salt River was prone to such wild and frequent fluctuations in flow that it could not have been navigated if its waters had been allowed to flow naturally. By contrast, their own experts and the ASLD Report demonstrate that the Lower Salt in its natural condition has had seasonally variable but perennial flows since before recorded history.

2. Geomorphology.

Several of the proponents for nonnavigability put great weight on the evidence showing that the Lower Salt River in part is now a braided stream and may have been braided prior to the effects of man. *E.g.*, Tempe at 6 (relying on Schumm); ASU at 4 (citing Schumm); Phelps Dodge at 6 (citing Schumm); and SRP at 17 (citing Schumm and asserting that his testimony is unrefuted). But, Schumm testified that braided streams can indeed be navigable. Tr. at 202. When asked how much water would be required for the Lower Salt River to be navigable, Schumm did not know, apparently

having not conducted any extended analysis of the Lower Salt River's hydrology. Tr. at 203, 206 ("the only hydrologic data that I used in [the] report was the mean annual flood"). And, SRP's expert Littlefield submitted evidence that refutes the description provided by Schumm. Compare Douglas Littlefield, *Assessment of the Salt River's Navigability Prior to and on the Date of Arizona's Statehood*, at 87 (Dec. 5, 1996) (E.I. 16) (hereinafter "Littlefield Report") (impossible for river to be wider than 150 feet) with Stanley Schumm, *Geomorphic Character of the Lower Salt River*, at 4 (Mar. 2003) (E.I. 26) (hereinafter "Schumm Report") (using width of 4,200 feet); Littlefield Report at 85 (flow up to 30 feet deep) and 96 (depth in summer of 1911 was 8 to 10 feet deep) with Schumm Report at 4 (depth of 1.7 feet at flood stage).

Schumm's testimony is of little probative value because there is firsthand evidence that the main low flow channel was not braided but was a stable, permanent channel lined by trees such as cottonwood and sycamore, inset within a braided flood channel. *E.g.*, Littlefield Report at 189 (deep narrow stream with permanent flow), 87 (cottonwoods line channel); ASLD Report at 3-15 (1877 description of Salt River as "having an average width of two hundred feet for a distance of one hundred miles above its junction with the Gila, and a depth of two feet or more"), 5-9 (early explorers' descriptions); Schumm Report at 3 (narrow low flow channel within wider river); Tr. at 208-209 (Schumm) (there will always be a low flow channel unless there is no flow). The low flow channel, the one that was susceptible to navigation, carried the normal flow of the river, and the flood channel was inundated only during floods. The location of the low flow channel within the flood channel or within the stream's ordinary high water mark might shift after extremely large floods, but would remain in essentially the same position for years or decades as evidenced by historical maps and surveyors' records. ASLD Report at 5-9; *see id.* (noting that because the Hohokam canals were able to be used in modern times channel conditions must have been stable).

C. Actual Use of the Lower Salt River Demonstrates That in Its Ordinary and Natural Condition the River Could Have Been Used as a Highway for Commerce.

ANSAC need not base its determination solely on the River's physical condition. Evidence of actual historic use of the Lower Salt River proves that the River was capable of being used for trade or travel. *Utah v. United States*, 403 U.S. at 11-12; *United States v. Utah*, 283 U.S. at 81; *Holt State Bank*, 270 U.S. at 57. It is beyond dispute that the historical records document several instances of actual navigation on the Salt River, both commercial and recreational, during the wettest and driest months of the year, before statehood. These instances, coupled with scientific and historical descriptions of typical (non-flood) river conditions, conclusively show that the Salt River was susceptible in its ordinary and natural condition to some forms of navigation such as canoes, flatboats, and rafts, all of which were in common use at the time of statehood.

1. Ferries.

Those who oppose a finding of navigability ignore that ferries, large boats that transported both people and goods across the River, are evidence of commercial traffic on the Lower Salt River. Furthermore, ferries are evidence that the River was ordinarily too deep and wide to ford by wagons or cars, and that a heavily loaded boat could regularly cross the River. The ferries therefore demonstrate that the River was susceptible to boating by heavily laden commercial boats. The Gentry & Cox Ferry was one of several ferry companies that operated on the Salt River. ASLD Report at 3-23, 3-28. A news account from 1889 reported that the large, Gentry & Cox Ferry successfully boated downstream from the Maricopa Crossing past the River's confluence with the Gila River, approximately twelve miles, without encountering any difficulty. *Id.*, 3-27 (Ferry may have been forty-eight feet long).

Ferries operated on the Lower Salt River for periods of at least several months and as much as

half the year, each year for many years. *See id.* at 3-25 (ferries on Salt and Gila Rivers were an absolute necessity for communication during several months every year), 3-27 (Salt and Gila Ferry in operation from 1884 to 1909), 3-26 (Hayden's Ferry in operation from 1874 to 1909). Ferry use was not an unusual occurrence confined to a short periods of temporary high water. *See Oklahoma v. Texas*, 258 U.S. 574, 587 (1922); *see also* ASLD Report at 3-27 (news account that waters on Salt were rising due to warm weather melting the snow illustrates that high spring runoff was a predictable and regular occurrence). Periodic navigability is enough to establish navigability for title purposes even if river is not susceptible to navigation at all seasons of the year or all stages of the water. *Economy Light & Power Co.*, 256 U.S. at 122; *see Athna*, 891 F.2d at 1402 (Gulkana River found navigable even though frozen six months of the year); *Oregon v. Riverfront Prot. Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982) (McKenzie River found navigable based on seasonal log drives for seventeen years that occurred primarily during three months of the year). Travelers depended on the ferries when high water impeded fording the River. ASLD Report at 3-7. Given the regularity and predictability of ferry use, descriptions of ferries used on "high water" did not refer to a flood stage (approximately 20,000 cfs that occurred less than one percent of the time), but rather to seasonal flow rates (flow rates that existed approximately seven months, November through May, of the year), according to long-term flow records. *Id.* at 7-17, Table 7-14.

Opponents of navigability claim that ferries must travel up and down a river in order for a river to be considered a "highway for commerce." The use of ferries to transport people and goods across a river is all that is required for the river to be deemed a highway for commerce, and therefore navigable under the statutes and federal law. *See* A.R.S. § 37-1101(3) (defining "Highway for commerce"); *Utah v. United States*, 403 U.S. at 11 (Great Salt Lake navigable based on evidence that ranchers had transported their cattle over the lake by ferry boat to and from an island); *The*

Montello, 87 U.S. (20 Wall.) at 441 (“the true test of the navigability of a stream does not depend on the mode by which commerce is or may be conducted . . .”). The Ninth Circuit upheld a finding that a river was navigable, based in part on the fact that “small ferries were used to carry passengers across the river.” *City of Centralia v. FERC*, 851 F.2d 278, 283 (9th Cir. 1988). Opponents of navigability have not cited a single case in which a court has required that travel be conducted upstream and downstream, across, or even diagonal to a river.

2. Boating.

Historic evidence of boating on the Lower Salt also supports a finding that it would have been navigable at statehood in its ordinary and natural condition. Advocates of nonnavigability distort the historical evidence of boating on the Salt River. They portray newspaper accounts of successful boating incidents as factually dubious entertainment pieces, but then rely on these same newspaper accounts as true stories of boating hazards. SRP at 8-10, Appendix A, ASU at 6-8, Tempe at 3-4, Phelps Dodge at 6-7. Contrary to their characterization that every boating incident on the Salt River resulted in disastrous consequences or only occurred during floods, the evidence itself provides a different, more realistic picture.

Based on historical boating accounts described in the ASLD Report, if success is defined as completing the boat trip without loss of boat or life, then fifteen of the boating accounts were successful. ASLD Report at 3-18-3-24, Table 3-2. Only two boating accounts were reported to have occurred during floods. *See id.* at 3-23 (Tilzer rescue), 3-24 (rescue of woman from rooftop). Three boating incidents occurred during June, the month with the lowest average flow rate. *See id.* at 3-20 (Hayden log float)⁶, 3-21- 3-22 (Burch, Meaders, Meadows, Robinson, and Logan account), 3-24

⁶ Charles Hayden’s “famous” attempt to float logs down the Upper Salt River to the Lower Salt River occurred in the driest month of the year, one month after five tons of grain were

(Thorpe and Crawford account).⁷ No historical account describes the difficulty of boaters having to get out and push on the Lower Salt River. *See id.* at 3-20 (“Yuma or Bust” account describes pulling a boat through the Gila River after the boat had successfully traveled on the Salt River), 3-24 (Thorpe and Crawford account describes portaging boats around riffles upstream of Granite Reef Dam). Newspaper accounts of historical boating involved two deaths: one man died from a gunshot wound when a duck hunter’s gun accidentally discharged, which had nothing to do with navigation; and a second man died during a rescue attempt in one of the largest recorded floods (1905 - 199,200 cfs) ever to occur on the River, an incident that indicates nothing about the ordinary condition of the River.

Despite attempts by those who oppose navigability to characterize all boating incidents that occurred on the Salt River as “mishaps and misery” (SRP at 9), historical boating accounts were described as: a “success”(ASLD Report at 3-20- 3-21 (Meadows account)); “well pleased with their adventure” (3-24 (Thorpe and Crawford account)); “enjoyed a most exciting and interesting trip” (3-22 (Burch, Meaders, Meadows, Robinson, Logan account)); and “thoroughly pleasant” except for rain when they camped out (3-21 (North Willcox and Dr. G.E. Andrews account)). Nearly all of the “difficulties” described by nonnavigability advocates never occurred in the Lower Salt River, but

shipped from his mill on the Salt River. Although he pronounced the scheme a failure, he started operating his ferry the next year, and continued that operation for three decades. ASLD Report at 3-19, Table 3-2, 3-25, Table 3-3.

⁷ The Thorpe and Crawford rowboat account of June 28, 1910 occurred after the Roosevelt Dam closed and nearly six months after the flood of 1910. The USGS lists the following gaged flow rates for June 1910: Salt River at Roosevelt, 136 cfs; Salt River at McDowell, 145 cfs; Verde River at McDowell, 65 cfs; and Salt River at Granite Reef, 209 cfs. This account, at a flow rate of less than 200 cfs, clearly shows that the Salt River was boatable even at flow rates well below the natural, annual low flow rates, and contradicts SRP’s claim that the River cannot be navigated with a flow of only 353.8 cfs. *See* SRP at 16.

instead occurred upstream or downstream. ASLD Report at 3-20 (Hayden’s account–canyons upstream from the Lower Salt), 3-20 (“Yuma or Bust” account–reached Gila Bend after successfully traveling Salt River), 3-21-3-22 (Burch account-difficulties in the canyons upstream from the Lower Salt River), 3-23 (Gentry and Cox Ferry successfully floated Salt River, damage to boat occurred 40 miles downstream from Phoenix), 3-24 (Thorpe and Crawford account-no obstacles or difficulties occurred in the Lower Salt River).⁸ The lack of a contemporaneous news account of Meadow’s successful boating trip in 1883 demonstrates that not all boating on the Salt River was reported in the newspapers. *Id.* at 3-20- 3-21 (boating trip reported in Meadow’s obituary). In another boating incident that did not make the papers, a smaller boat owned by Charles Hayden was stolen and eventually abandoned in Gila Bend, which showed that both the Salt and Gila Rivers were boatable. *Id.* at 3-26. These two accounts that were unreported when they occurred suggest that there may have been many more boating episodes than the historical accounts documented in the ASLD Report.

The indisputable conclusion is that boating did occur on the Lower Salt River throughout the years before diversion of the Salt’s natural runoff. Boating consisted primarily of shallow draft boating downstream, and included instances of commercial boating.

II. Prior Judicial Decisions that Did Not Determine Navigability According to the *Daniel Ball* Test Are Inapplicable, Irrelevant, and Inconclusive for Determining the Salt River’s Navigability.

Despite nonnavigability advocates’ urging that courts previously determined that the Salt River

⁸ Arguments that because construction crews building the Roosevelt Dam did not use the river to transport workers and materials, the River must be nonnavigable are irrelevant. *See* SRP at 7-8, Phelps Dodge at 8. First, the Roosevelt Dam is not located on the Lower Salt River. Second, once the dam construction was underway and the flow was cut off, crews would not have been able to use the River for navigation, therefore an alternative route was required.

was nonnavigable prior to statehood, to date no court has adjudicated the navigability of the Lower Salt River for title purposes.⁹ Without any evidence that these earlier court decisions performed the analysis required under the *Daniel Ball* test, these decisions do not satisfy *Hassell's* particularized assessment requirement. In *Defenders*, the Court rejected appellees' arguments that the Legislature made an "independent finding" of nonnavigability and that ANSAC's finding of nonnavigability was made under the most liberal federal test. 199 Ariz at 427, 18 P.3d at 738. The *Defenders* Court stated:

Thus, from a single sentence, we are unwilling to assume that, in addition to and separately from the state standards, the *Daniel Ball* test was also applied. In short, absent the appropriate particularized assessment, which is based on an application of the *Daniel Ball* federal navigability-for-title standard, Appellees' argument is too tenuous for us to accept when such precious public trust resources are at stake.

Id. Not one of the judicial decisions cited by the opponents of navigability complied with the federal standard for navigability articulated in *Daniel Ball*, and those decisions are therefore irrelevant to ANSAC's determination.

A. Kibbey and Kent Decrees.

Advocates of nonnavigability contend that decisions in *Wormser v. Salt River Valley Canal Co.*, No. 708, Second Judicial District, Territory of Arizona, County of Maricopa (Mar. 31, 1892) (the "Kibbey Decree") and *Hurley v. Abbott*, No. 4564, Third Judicial District, Territory of Arizona, County of Maricopa (Mar. 1, 1910) (the "Kent Decree") are conclusive determinations that the Lower Salt is nonnavigable. See SRP at 18-19, ASU at 10, Phelps Dodge at 4,6, GRIC at 15-16, Tempe at 7. Although these Decrees each included a statement that the Salt River was not navigable,

⁹ The Department incorporates by reference herein its Response to Salt River Project's Motion to Dismiss filed with the Commission on January 21, 1994, its Response to the Notice of Lack of Jurisdiction filed with the Commission on January 9, 1994, and its Response to Demand Petition filed with the Commission on January 19, 1994.

there is no basis on which to conclude that those courts applied the *Daniel Ball* test. A review of these Decrees shows that they were water rights cases, i.e, that they were concerned with the territorial law of prior appropriation with respect to determining rights to the use of surface waters and the Desert Land Act requirements. Because these courts did not make a “particularized assessment” of the validity of Arizona’s equal footing claims, all of their characterizations of nonnavigability are irrelevant and unpersuasive. *See Hassell*, 172 Ariz. at 371, 837 P.2d at 173.

B. Salt River Pima-Maricopa Indian Community Decision.

SRP contends that a prior lawsuit to which the Department was not a party, and which did not litigate the issue of navigability for title precludes the Department from now asserting the navigability of the Salt River. *See SRP* at 20, 25. But, the issue of whether the Salt River was navigable at statehood was not litigated, determined, or essential to the court’s ruling in *Salt River Pima-Maricopa Indian Cmty. v. Arizona Sand & Rock Co.*, D. Ariz. (CIV 72-376-PHX) (Apr. 13, 1977) (“SRPMIC”). SRP clings to one sentence referring to the Salt’s nonnavigability as “important to the court’s decision.” This one sentence, included with thirty paragraphs of stipulations among the parties, is not a judicial determination of navigability of the Salt River. In addition, no evidence was submitted in that case regarding the Lower Salt River’s navigability. Further, the Highway Commission or Department of Transportation’s interest in the subject property was limited to certain licenses and permits for removal of sand and gravel, and rights-of-way granted by the Bureau of Reclamation to Transportation, not navigability and advocating for the public trust.¹⁰

¹⁰ The “State” referred to in the SRPMIC pleadings is the Arizona State Highway Commission (CIV 72-376), and the State on behalf of the Director of the Arizona Department of Transportation (CIV 74-529). The State Land Commissioner, not the Highway Commission or its Director, is responsible for advocating for the public trust. *See* A.R.S. §§ 37-102(A) (Department shall administer all laws relating to lands owned by, belonging to the State); 37-101(17) (defining state lands as any land owned or held in trust, or otherwise, by the State).

It is a matter of essential fairness and good sense not to apply a judgment to someone who has not had a full opportunity to litigate, or where the issue was not essential to the judgment rendered. *See Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986). SRPMIC involved causes of action in trespass and ejectment. Here, the issue is limited to determining the navigability of the Lower Salt and related public trust values. The causes of action are not the same; therefore, the doctrine of res judicata does not apply.

The Department is not barred from asserting that the River was navigable for title purposes because the elements of equitable estoppel and res judicata are not met: “[e]stoppel may apply against the state only when the public interest will not be unduly damaged, or when its application will not affect the exercise of governmental powers or make binding the unauthorized acts of the government.” *Calmat of Arizona v. State ex rel. Miller*, 172 Ariz. 300, 311, 836 P.2d 1010, 1021 (App. 1992), *vacated in part on other grounds*, 176 Ariz. 190, 859 P.2d 1323 (1993) (citing *Freightways, Inc. v. Arizona Corp. Comm’n*, 129 Ariz. 245, 630 P.2d 541 (1981)). The *Calmat* Court correctly noted that no court has determined the navigability of the Salt River based on the evidence. 172 Ariz. at 311, 836 P.2d at 1021. The *Calmat* Court recognized the importance of the State’s duty to assert an ownership interest in navigable watercourses, and that the application of the estoppel doctrine to prevent the State from doing so and presenting evidence would harm the public interest. *Id.*

III. Land Patents, and Surveyors’ Actions Are Not Determinative of the Navigability of the Lower Salt River.

Federal and State patents did not dispose of the bedlands beneath the Salt River, and thereby deprive Arizona of its title to these lands under the equal footing doctrine. *See* SRP at 5-6, Phelps Dodge at 5, Tempe at 7-8 (arguing that federal and state land patents are evidence of

nonnavigability). There is no evidence that the federal government departed from its established policy of treating lands underlying navigable waters as held for future states. *Holt State Bank*, 270 U.S. at 54-55 (“It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.”); see *Defenders*, 199 Ariz. at 426, 18 P.3d at 737 (“determinations regarding the title to beds of navigable watercourses in equal footing cases must begin with a strong presumption against defeat of state’s title.”). No evidence exists that the government issued these patents as an exceptional circumstance required by some international duty or public exigency. *Holt State Bank*, 270 U.S. at 55; see *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) (Supreme Court upheld the Illinois Legislature’s repeal of an earlier legislative grant of land beneath the navigable waters of Lake Michigan to the Illinois Central Railroad). Any attempted disposition of public trust property must be preceded by an application of the *Daniel Ball* test under the equal footing doctrine—which was never done for the Salt River.

The fact that surveyors did not meander the Salt River is not evidence of the nonnavigability of the Salt River. See SRP at 5, Phelps Dodge at 4, Tempe at 7 (arguing that surveys are evidence of nonnavigability). The Supreme Court was unpersuaded that a legal inference of navigability was created by the actions of surveying officers. *Oklahoma v. Texas*, 258 U.S. at 585. The Court gave little weight to the surveyors’ actions because their actions were similar in surveying both navigable and nonnavigable rivers, and “those [surveying] officers were not clothed with power to settle questions of navigability.” *Id.*

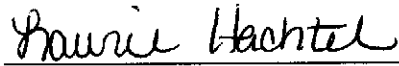
IV. Conclusion.

As SRP correctly noted: This Commission has an important job to do. It must determine as of February 14, 1912, what the ordinary and natural condition of the Salt River would have been if its

reliable flows were not already impounded and diverted for uses other than navigation. ANSAC is entrusted with protecting the citizens of Arizona's entitlement under the equal footing doctrine to precious natural resources—the beds of navigable watercourses. The interests of the beneficiaries of the public trust are just as important as the interests of private parties. The preponderance of the evidence standard is not tipped in favor of private property owners merely because the number of memorandums filed by those who oppose navigability outnumber the memorandums of those who favor navigability. The State has established by a preponderance of the evidence that the Salt River was susceptible for use as a highway for commerce in its ordinary and natural condition. Indisputable proof of susceptibility of the Salt River includes the following: (1) historical accounts establish that people boated the River during every part of the year; (2) early settlers found it necessary to establish ferries to cross the Lower Salt River which indicates that the River was frequently too deep and wide over long stretches to ford; (3) historical descriptions and survey data reveal boatable depths and widths which demonstrate a permanent, significant river with a single, well-defined channel; (4) scientific flow records demonstrate permanent, adequate water supply; and (5) archaeological data confirm that the River in its ordinary and natural condition supplied very reliable flow for centuries. The Department requests that the Commission find that the Lower Salt River was navigable on February 14, 1912.

DATED: August 11, 2003

TERRY GODDARD
Attorney General



Laurie A. Hachtel
Thomas Shedden
Assistant Attorneys General

ORIGINAL AND SIX COPIES of the foregoing
hand-delivered for filing this 11th day of
August, 2003, to:

Arizona Navigable Stream Adjudication Commission
1700 West Washington, Suite #404
Phoenix, AZ 85007

and COPY sent by U.S. mail this 11th day
of August, 2003, to:

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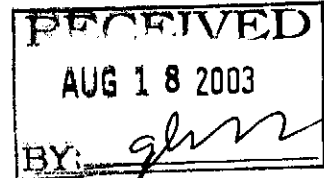
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August 12, 2003

Mr. George Mehnert
Executive Director
Arizona Navigable Stream Adjudication Commission
1700 West Washington, Room 304
Phoenix, AZ 85007

Re: State Land Department's Response to Opening Post-Hearing Memoranda
for the Lower Salt River

Dear Mr. Mehnert:

For the Commission's convenience, enclosed are copies of the following pleadings that are referred to in the Department's Response on page 16, footnote 9: Response to Salt River Project's Motion to Dismiss, Response to the Notice of Lack of Jurisdiction, and Response to Demand Petition. We also are providing copies to the parties.

Sincerely,

A handwritten signature in cursive script that reads "Laurie Hachtel".

Laurie A. Hachtel
Assistant Attorney General
Natural Resources Section

LAH:caf

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7 Attorneys for State of Arizona,
ex rel. M.J. Hassell as the State
8 Land Commissioner

9 BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

10 IN THE MATTER OF THE) Admin. Docket No. 94-1
11 NAVIGABILITY OF THE SALT RIVER))
[From Granite Reef Dam to the) STATE LAND DEPARTMENT'S
12 Gila River Confluence]) RESPONSE TO NOTICE OF LACK OF
13) JURISDICTION AND REQUEST FOR
TERMINATION OF PROCEEDINGS

14 The State Land Department ("LAND") responds to the Notices of
15 Lack of Jurisdiction¹ as follows:

16 The gravamen of both Notices is that the doctrine of res
17 judicata prevents the State of Arizona from relitigating the
18 navigability of the Salt River because the State was a party to
19 prior litigation in which the State had full opportunity to liti-
20 gate the issue of navigability of the Salt River, and establishment
21 of non-navigability was essential to the prior judgment. The

22
23 Two Notices have been filed, one by CalMat Co., CalMat
24 Co. of Arizona and Allied Concrete & Materials Co., and one by the
25 Salt River Pima-Maricopa Indian Community. Although by rule LAND
26 is a party to every Commission proceeding, A.A.C. R12-17-101(4),
and is represented by the Attorney General, neither LAND nor its
counsel were served as required, A.A.C. R12-17-103(C), with these
Notices. Nonetheless LAND will respond to both Notices through
this Response.

1 relief requested is termination of the proceeding. First, the doc-
2 trine of res judicata² does not apply; LAND is not collaterally
3 estopped from advocating navigability of the Salt River before the
4 Commission. Second, even if LAND were estopped, the public benefi-
5 ciaries of the trust are not estopped; termination of the proceed-
6 ing is the wrong remedy. LAND requests that the Notices (peti-
7 tions) be denied.

8 A. IT IS NECESSARY TO CLARIFY PETITIONERS' VERSION OF THE
9 PRIOR PROCEEDINGS IN THE UNITED STATES DISTRICT COURT

10 In response to the Petitioners' recitation of the proceedings
11 in the United States District Court lawsuits as evidenced by the
12 Exhibits attached to the Notice, LAND directs the Commission's
13 attention to the following clarifications:

14 1. The named defendant in Cause No. CIV 72-376 was the
15 Arizona State Highway Commission³ comprised of Lou Davis, Rudy E.
16 Campbell, Walter Surrentt, Walter A. Nelson and Len W. Mattice. See
17 Exhibit A to the Notice. The named plaintiff in CIV-74-529-Phx was
18 the State of Arizona ex rel. W.A. Ordway, Director of the Arizona

19 ² Res judicata, concerns a judgment on the merits in a
20 prior suit involving the same parties or their privies; it bars a
21 second suit based on the same cause of action. Chaney Building Co.
22 v. City of Tucson, 148 Ariz. 571, 573, 576 P.2d 28, 30 (1986). The
23 prior consolidated lawsuits involved causes of action in trespass
24 and ejection. The Commission's hearing is an administrative
25 proceeding limited to determining navigability and public trust
26 values. The causes of action are not the same. The doctrine of
res judicata does not apply.

27 ³ The Arizona Department of Transportation ("Transporta-
28 tion") was created in 1973 (during the course of these consolidated
29 lawsuits) and replaced the Arizona Highway Commission, which was
30 terminated by Transportation's enabling legislation. See 1973
31 Ariz. Sess. L. (1st Reg. Sess) ch. 146.

1 Department of Transportation. See Findings of Fact and Conclusions
2 of Law, p.4,⁴ attached and made a part of the Judgment (Exhibit H
3 to Notice).

4 2. The issues essential to the final Judgment in these
5 Consolidated cases were 1) whether the location of the Reservation
6 Boundary was within the scope and authority of the Secretary of
7 Interior to determine and 2) whether a survey and plat approved in
8 1972 established the south boundary of the reservation as a fixed
9 boundary line. See Findings of Fact and Conclusions of Law at-
10 tached and made a part of the Judgment (Exhibit H to Notice).

11 B. LAND IS NOT ESTOPPED FROM ADVOCATING THE NAVIGABILITY OF
12 THE SALT RIVER

13 The elements required to establish collateral estoppel or
14 issue preclusion against a party in a new and different proceeding
15 have been succinctly stated in Chaney Building Co. v. City of

16 Tucson:

17 Collateral estoppel or issue preclusion is applicable
18 when the issue or fact to be litigated was actually
19 litigated in a previous suit, a final judgment was en-
20 tered, and the party against whom the doctrine is to be
21 invoked had a full opportunity to litigate the matter and
22 actually did litigate it, provided such issue or fact was
23 essential to the prior judgment.

24 148 Ariz. 571, 573, 576 P.2d 28, 30 (1986).

25 ⁴ "No. CIV-74-529. This is an action brought by the State
26 of Arizona on behalf of the Director of the Arizona Department of
Transportation. The State of Arizona claims an interest in a
portion of the disputed property by reason of certain licenses and
permits for the removal of sand and gravel and rights of way which
were granted to the Department by the Bureau of Reclamation,
Department of Interior." (Emphasis supplied.)

1 In deciding whether LAND is barred from advocating on behalf
2 of the navigability of the Salt River before the Commission, "we
3 must look both to the degree of identity of the parties and to the
4 degree of identity of the issues in the two actions." Industrial
5 Park Corp. v. U.S.I.F. Palo Verde Corp, 26 Ariz. App. 204, 206, 547
6 P.2d 56, 58 (1976).

7 1. LAND, the State Agency Delegated Public Trust Land
8 Management Authority, Is Not a Party Estopped by
9 Transportation's Ultra Vires Admissions in Prior
10 Litigation

11 With regard to the degree of identity of the parties,
12 Petitioners disingenuously name the party in the first lawsuit as
13 the "State of Arizona." Petitioners' exhibits plainly show that
14 the party was the State on the relationship of the Director of
15 Transportation. Transportation and the office of Director were
16 created by 1973 legislation. See 1973 Ariz. Sess. L. (1st Reg.
17 Sess.) ch. 146. A review of Transportation's powers discloses no
18 statutory power delegated to it or to its Director to dispose of or
19 to deal in any way with State public trust land. "[A]dministrative
20 officers and agencies have no common law or inherent powers. . .
21 The powers and duties of an administrative agency are to be mea-
22 sured by the statute creating them." Kendall v. Malcolm, 98 Ariz.
23 329, 334, 404 P.2d 414, 417 (1965); accord Cochise County v.
24 Kirschner, 171 Ariz. 258, 261, 830 P.2d 470, 473 (App. 1992)
25
26

1 (citations omitted) (an agency has no powers other than those the
2 legislature has delegated to it).⁵

3 A recent case is dispositive. In CalMat of Ariz. v. State ex
4 rel. Miller, the Court of Appeals held:

5 Generally, equitable estoppel does not apply to the state
6 in matters affecting sovereign immunity, and this is
7 especially true if the claim of estoppel is based upon an
8 ultra vires or illegal act of a government official.
9 However, this rule is not absolute. Estoppel may apply
10 against the state only when the public interest will not
11 be unduly damaged or when its application will not affect
12 the exercise of governmental powers or make binding the
13 unauthorized acts of the government. Given the substance
14 of our holding in Hassell, we believe that this case must
15 be remanded for a new trial at which the state shall be
16 permitted to assert any ownership interest in this prop-
17 erty. Binding the state by estoppel to a position as-
18 serted in another lawsuit, after that position has been
19 declared unconstitutional, would unduly damage the public
20 interest. Since Hassell determined that the state held
21 the land of all navigable water courses within its bound-
22 aries as of February 14, 1912, when Arizona achieved
23 statehood, the state must be allowed to put on evidence
24 as to whether any of the condemned property in this case
25 falls within the boundaries of any navigable watercourse.
26 To agree that the state is estopped from presenting this
evidence on remand would be inconsistent with our holding
in Hassell that quit claims of riverbed land are uncon-
stitutional and that the state cannot waive its right to
hold such lands in the public trust. Therefore the state
has the duty to assert, and must assert, this ownership
interest in this and any future condemnation litigation
involving riverbed land.

21 ⁵ Long before the legislature enacted the 1992 Ownership of
22 Streambeds Act, codified at A.R.S. § 37-1101 to -1156, LAND was
23 authorized to "have charge and control of all lands owned by the
24 state . . . except lands under the specific use and control of
25 state institutions." A.R.S. § 37-102(B). Moreover, LAND was
26 authorized to both "prosecute and defend all actions and proceed-
ings to protect the interest of the state in lands within the
state." Id. subsection (C). It should also be noted that the
Attorney General on his own has no authority to sue or defend
interests in State land managed by LAND. Arizona State Land
Department v. McFate, 87 Ariz. 139, 144-48, 348 P.2d 912, 915-18
(1960).

1 172 Ariz. 300, 311, 836 P.2d 1010, 1021 (App. 1992), vacated in
2 part, but aff'd in pertinent part, 148 Ariz. Adv. Rep. 3, 859 P.2d
3 1323 (1993). The ultra vires actions of officers of Transportation
4 and its lawyer in stipulating that Salt River was not navigable
5 cannot bind the State. ⁶

6 2. CALMAT Is Estopped from Litigating Whether the State
7 Is Estopped from Advocating Navigability of the Salt
8 River

9 Petitioner CalMat of Arizona ("CALMAT") is itself estopped
10 from raising the issue that the State is barred by principles of
11 res judicata or collateral estoppel. CALMAT bases its argument
12 before the Commission on the same prior case on which it based
13 identical arguments before the Court of Appeals. In its brief in
14 CalMat of Ariz. v. State ex rel Miller, 172 Ariz. at 311, 836 P.2d
15 at 1021, CALMAT argued:

16 A copy of the Pretrial Order and subsequent Findings
17 of Fact and Conclusion [sic] of Law in District Court No.
18 CIV 72-376 were attached to Calmat's Motion in Limine
19 (I.R.A. 101). Both Calmat's predecessor and [sic] inter-
20 est, Arizona Sand & Rock Co., and the State were parties

21 ⁶ Petitioners rely on Section F(2) of the 1992 Ariz. Sess.
22 L. (2d Reg. Sess.) ch. 297, which provides: "This act does not
23 affect: 2) Reaches of watercourses where determinations have been
24 made by judicial actions before the effective date of this act."
25 This provision is a reference to res judicata and collateral
26 estoppel. It cannot be enough that there has been a determination
made in prior litigation to which the State was not a party or
where the issue was not litigated. To interpret Section F(2) to
permit a 1977 Judgment to estop LAND from asserting navigability of
the Salt River under the factual circumstances underlying the
stipulation relied on in that case, would be to make Section F(2)
as unconstitutional and violative of the public trust doctrine as
the statutes found wanting in Center for Law v. Hassell. The
Commission should not so interpret Section F(2), but should recog-
nize that it is a reference to principles of res judicata and
collateral estoppel and not more.

1 to and bound by the admissions made and judgment entered
2 in that action.

3 See Cross Appellants Answering Brief, pp. 27-29, attached hereto as
4 Exhibit 1. Neither the Court of Appeals nor the Supreme Court was
5 impressed with CALMAT's position, fully argued and essential to the
6 decision of the Court of Appeals. The rule in Arizona is:

7 [T]he determination of an issue may also be conclusive in
8 a subsequent action when . . . it is raised by a party
9 not involved in the prior action so long as it is assert-
10 ed defensively' against a party who was involved in that
11 prior action. Thus, [a non-litigant in the first action]
12 can defensively assert against [a litigant in the first
13 action] any issues actually litigated and determined, and
14 essential to the judgment, in the first action.

15 King v. Superior Court, 138 Ariz. 147, 151, 673 P.2d 787, 791
16 (1983) (citation omitted). CALMAT had its opportunity to litigate
17 the effect of the Judgment in CIV 72-376 and lost; it is estopped
18 from relitigating the issue. LAND requests that the Commission
19 find that CalMat of Arizona is estopped from raising the stipula-
20 tion regarding the Salt River's navigability entered in Cause No.
21 CIV-72-376 in the United States District Court, to estop LAND from
22 advocating for navigability before the Commission.

23 3. **Whether the Salt River Was Navigable at Statehood
24 Was Not Essential to the Prior Judgment in the
25 United States District Court**

26 Additionally, the issue of whether the Salt River was naviga-
ble at statehood was not essential to the Court's ruling in Cause
No. CIV 72-376. In King v. Superior Court the court held:

Under certain circumstances it may also be used
offensively. See Wetzel v. Arizona State Real Estate Dep't, 151
Ariz. 330, 727 P.2d 825 (App. 1986), cert. denied 482 U.S. 914, 107
S. Ct. 3186 (1987).

1 [P]reclusion exists only when an issue was actually liti-
2 gated and determined in the prior suit. If an issue was
3 neither essential nor necessary to the prior judgment,
4 such preclusion is inappropriate. The Restatement (Sec-
5 ond) of Judgments states the general rule as follows:

6 "When an issue of fact or law is actually litigated
7 and determined by a valid and final judgment, and
8 the determination is essential to the judgment, the
9 determination is conclusive in a subsequent action
10 between the parties, whether on the same or a
11 different claim."

12 138 Ariz. 147, 150, 673 P.2d 787, 790 (1983) (citations omitted).

13 A review of the Judgment and Findings of Fact and Conclusions of
14 Law in Cause No. CIV 72-326, Exhibit H to the Notice, will
15 conclusively demonstrate that, although all parties stipulated that
16 the Salt River was not navigable at statehood, that issue was not
17 litigated, determined or essential to the ruling on the case. See
18 argument A(2) and FN 4, supra. See, e.g. King v. Superior Court,
19 138 Ariz. at 151-52, 673 P.2d at 791-92.

20 4. **Transportation Had No Incentive to Protect Public
21 Trust Land Ownership**

22 One further principle is essential in order for LAND to be
23 estopped before the Commission: the incentive of the "State" in
24 the prior litigation must be sufficient for the "State" to obtain a
25 full and fair adjudication of the issue in that action. As indi-
26 cated in footnote 4, supra, Transportation had an interest in the
subject property only because of certain licenses and permits for
the removal of sand and gravel, and because of rights-of-way that
were granted to Transportation by the Bureau of Reclamation. Thus,
Transportation had no incentive to press for the navigability of
the Salt River. Although a determination of navigability and State

1 ownership would have countered the Indian Community's possessory
2 rights to land in the bed, it also would have undermined
3 Transportation's licenses and rights-of-way granted by the federal
4 government, with no guarantee that LAND would issue similar licens-
5 es or rights-of-way to Transportation to use public trust land for
6 sand and gravel extraction. The requisite identity of interest to
7 apply collateral estoppel against LAND before the Commission is
8 missing.

9 C. TERMINATION OF THE PROCEEDING IS THE WRONG REMEDY

10 Finally, assuming for purposes of argument only that LAND is
11 estopped, this proceeding should not terminate. A.R.S.
12 § 37-1121(B) provides "[p]rivate citizens, clubs, organizations,
13 corporations, partnerships, unincorporated associations, municipal
14 corporations and public entities" may appear and take part in the
15 navigability hearings. Both the Center for Law in the Public
16 Interest and the Arizona Paddler's Club have manifested deep
17 interest in the Commission's proceedings to date. Arizona Center
18 for Law in the Public Interest has already sued to protect the
19 public's interest in the beds of navigable rivers within Arizona.
20 If LAND is estopped from its statutory advocacy role, principles of
21 collateral estoppel cannot be applied to the Center for Law, the
22 Arizona Paddlers Club, or any other like-minded person or entity
23 who would take up the cause before the Commission. If the State,
24 as Trustee of the Public Trust on behalf of the beneficiaries has
25 abrogated its trust duties, the beneficiaries cannot be estopped
26 from litigating in their own behalf.


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CONCLUSION

The petitioners have failed to demonstrate that LAND is estopped from advocating for the navigability of the Salt River. The petitions for termination of the above-captioned proceeding should be denied.

RESPECTFULLY SUBMITTED this 9 day of January, 1994.

GRANT WOODS
Attorney General


Shirley S. Simpson
Assistant Attorney General
Civil Division
Attorneys for the Arizona State Land
Department

1 ORIGINAL AND FIVE COPIES OF THE
2 FOREGOING FILED this 6 day of
3 January, 1994, with

4 Rebecca Good, Secretary
5 Arizona Navigable Stream Adjudication
6 Commission
7 1616 West Adams Street, 3rd Floor
8 Phoenix, Arizona 85007

9 COPY OF THE FOREGOING MAILED this
10 6 day of *January*, 1994, to:

11 Robert B. Hoffman
12 SNELL & WILMER
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ANSWERING BRIEF ON CROSS APPEAL

STATEMENT OF THE CASE

Although not technically inaccurate, the State's summary of the procedural background of this case (which is included in its Statement of Facts) is misleading in that it omits a number of crucial facts. In October 1985 the State filed a condemnation action (C 557965) in an attempt to acquire the legal right to occupy the property at issue in this case. The Verified Complaint the State filed in that action affirmatively alleged Calmat owns the subject property in fee. (Complaint at IV and Exhibit D; App at 4.) Calmat admitted that fact in its Answer. (Answer at IV; App at 5.) The State obtained immediate possession of Calmat's land under those pleadings but took no further action to prosecute the action. The State's action was ultimately dismissed for lack of prosecution in November 1986. (App at 1.)

Calmat filed its inverse condemnation action (CV 87-17569 on July 6, 1987. (I.R.A. 1.) On September 11, 1987 Calmat served a standard set of requests for admission and nonuniform interrogatories which, among other things, asked the State to identify the witnesses and exhibits it intended to use at trial. (I.R.A. 4.) In response the State identified a single real estate appraiser, but stated he had not yet formed an opinion of value. The State also included the somewhat cryptic statement: "questions of ownership of riverbed property have not been resolved." (App. at 5.)

Those interrogatory responses were given on October 16, 1987. (I.R.A. 5.) The State took no further action in this case until after Calmat filed its original motion to set and certificate of readiness in March 1988. At that time, the State filed a controverting certificate which again referenced the riverbed issue. (I.R.A. 59.) The State never supplemented its interrogatory responses, nor did it actually deny Calmat owns the land in question. Instead, it simply noted that the "State Land Department in 1985 stated an intention to claim ownership over the beds of navigable streams in the State." The State did not and, to this day, has not stated it has ever claimed an interest in the subject property.

Calmat's original motion to set was denied because, due to a clerical error, its list of witnesses and exhibits was not properly filed. Calmat filed a new list of witnesses and exhibits on May 16, 1988. (I.R.A. 12.) The State filed its list on June 6, 1988 and Calmat's second motion to set and certificate of readiness was filed on June 9, 1988. (I.R.A. 16 & 17.) Again the State failed to supplement its interrogatory responses to identify expert witnesses or the opinions they would offer at trial.

In late August 1988, with just over one month left before the trial date then set, the State attempted to begin discovery by taking the depositions of Calmat's expert witnesses. That dispute resulted in a motion to compel which was heard on September 14, 1988. At that hearing Calmat explained

that when the State's witnesses were deposed they each stated they had not completed their final opinions. The State had therefore agreed, on the record at those depositions, that it would inform Calmat of any changes in its expert's opinions and provide an opportunity for redeposition. The trial court granted the State's motion to compel, but also ordered the State to provide those final opinions by supplementing its interrogatory responses by Friday, September 16, 1988. (App at 7.)

The State actually delivered its supplemental responses on Saturday, September 17, 1988. (I.R.A. 100.) It is those answers, filed over a year after the requests were served and only one month before trial, that the State now cites as its pretrial disclosure of Mr. Halpenny's proposed expert testimony. Calmat moved in limine to exclude Mr. Halpenny's testimony arguing both that the State had failed to disclose his proposed testimony in a timely manner and that the State was estopped from claiming ownership of the Salt River riverbed. (I.R.A. 101.) The court granted Calmat's motion, on both grounds, by minute entry dated October 7, 1988. (App at 8.)

The trial was continued until February 23, 1989 at the State's request. However, the State did not ask the trial court to reconsider the riverbed issue at that time. The State did raise the riverbed issue in its motion for new trial, but although the trial court granted that motion on the valuation date issue, it reaffirmed its ruling on the riverbed issue.

STATEMENT OF FACTS

The Facts Relevant to Calmat's Response to the State's Cross Appeal are contained in the Statement of the Case.

Issue Presented

1. Did the Trial Court Abuse its Discretion in Excluding Evidence of the Riverbed Issue?

ARGUMENT

- I. The Trial Court Did Not Abuse Its Discretion In Excluding Evidence of the Riverbed Issue.

The trial court properly prohibited the State's eleventh hour attempt to claim ownership of the Salt River riverbed in this case. The State failed to raise the issue or disclose its intention to present evidence to support such a claim in discovery. The State has not and cannot argue the trial court abused its discretion in refusing to allow the State to introduce Mr. Halpenny's testimony at trial. *Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982).

Rule 26(e) of the Arizona Rules of Civil Procedure deals with the supplementation of discovery responses.

A party is under a duty seasonably to supplement the response with respect to any question directly addressed to
(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify and the substance of the person's testimony.

Ariz. R. Civ. P. 26(e)(1) (Emphasis added). The State Bar Committee Notes to the 1983 Amendment to that rule emphasize

that a party cannot wait until the eve of trial to disclose its expert witnesses and their opinions:

A party has an affirmative duty to disclose information which is the subject of this rule in a timely fashion. The primary duty is to supplement discovery responses concerning (B) and (C) seasonably after receiving the information. . . . That duty may not be fulfilled by waiting until the last minute (e.g. 31 days before trial) to make the required disclosures. Similarly, in those courts [where filing a list of witnesses and exhibits is a requisite to filing a motion to set] discovery responses concerning (B) and (C) should be seasonably supplemented, and information should not be withheld until the filing of the list of witnesses and exhibits required to be filed prior to the motion to set and certificate of readiness.

(Emphasis added).

The State did not even attempt to comply with this rule. Although it filed two separate lists of witnesses and exhibits, it never revealed that it intended to have Mr. Halpenny offer both expert opinion and factual testimony concerning the navigability and the boundaries of the Salt River as it existed in 1912. This failure was not simply inadvertence. On March 23, 1988 Calmat filed a response to the controverting certificate the State filed in connection with Calmat's first Motion to Set and Certificate of Readiness. (I.R.A. 60.) That pleading, filed some three months before the State's List of Witnesses and Exhibits specifically noted that the State had "not supplemented its interrogatory responses to identify any witnesses or exhibits it expects to offer on [the

riverbed issue]." (I.R.A. 60 at 2 (emphasis in original).) Despite the fact that Calmat explicitly reminded the State of its obligations under Rule 26(e), the State did nothing to supplement its discovery responses or reveal that Mr. Halpenny would testify on the riverbed issue.

As the trial court recognized, this last minute identification was no trivial matter that could be cured through a deposition. The State attempts to minimize the riverbed issue and pretend the equal footing doctrine, through which the State now contends it may someday claim ownership of the Salt River riverbed, can be explained in a few short paragraphs and established through a single witness. This Court may take judicial notice (as could the trial court) of the court files in *Maricopa County v. State of Arizona, et al.*, C 569870, and *Arizona Center For Law In The Public Interest, et al. v. Hassell, et al.*, CV 87-20506, which were consolidated before Judge Hendrix and are now on appeal as 1 CA-CV 89-134. Ariz. R. Evid. 201. The memoranda of law submitted on the equal footing doctrine in those cases consumed hundreds of pages. The parties took tens of depositions attempting to establish the necessary factual predicates and anticipated calling at least twenty or thirty witnesses on those issues if the case were tried.

Calmat did not take that discovery or list those witnesses in this case because the State never revealed it intended to call a witness to attempt to establish it owned the Salt

River riverbed under the equal footing doctrine. The trial court recognized that fact and correctly excluded that evidence at trial. The State has not and cannot argue that evidentiary ruling was a clear abuse of discretion. *Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342 (1982) (trial court's exclusion or admission of evidence will not be disturbed on appeal unless a clear abuse of discretion appears and prejudice results.) There is thus no basis on which to reverse the trial court's ruling.

II. The State Cannot Be Allowed To Ignore Its Own Judicial Admissions.

The State does not assert and never has asserted it owns the subject property, which it now alleges is located in the Salt River riverbed. Instead, the State notes *Arizona Center for Law in the Public Interest v. Hassell*, No. 1 CA CV 89-134, is on appeal. The trial court in *Hassell* upheld the constitutionality of a statute allowing the State to issue quit claim deeds to claimants along areas within the banks of navigable rivers. The State now argues that if that case is reversed on appeal the State Land Department might be able to claim an interest in the subject property.

The State does not and cannot argue that the trial court erred in excluding its evidence concerning the so-called "equal footing" doctrine. Instead, the State implies that the trial court's ruling in this case was based entirely on the trial court decision in *Hassell* and should be reversed if

that decision is overturned on appeal. The State thus seeks to ignore the fact that it is the appellee in the *Hassell* case. More importantly, regardless of the constitutionality of the statute at issue in *Hassell*, the State's Answer filed in that case is clear and unambiguous with regard to any ownership of the Salt River riverbed:

[The State admits] that the "Equal Footing" doctrine would vest title to beds of all bodies of navigable waters in the State. Deny that the defendants [including the State of Arizona] made claims to lands [including lands in the Salt River riverbed] plaintiff has acquired or which it is attempting to acquire.

* * *

deny that defendants have asserted claims [to, among other things, property lying in the Salt River riverbed]. Further deny that defendants have clouded any title to lands plaintiff has acquired or any other land.

(State's Answer in C 569870 at ¶¶ 3-4).

The trial court in the *Hassell* case ultimately granted the State's Motion for Summary Judgment which essentially argued the State did not own the Salt River riverbed. As the *Hassell* Court explained:

It is undisputed that under the Equal Footing Doctrine, the State owns the beds of the rivers that were navigable at Statehood. It is not known if any rivers, other than the Colorado, were navigable at Statehood. It has never been established whether or not the Verde, Gila and Salt Rivers were navigable at Statehood. In Yavapai County Cause No. 45245, the State ultimately concluded that its claim that the Verde River was navigable at Statehood was weak. The State of Arizona has entered into

a stipulation with the City of Tempe and the Maricopa Flood Control District that under the Equal Footing Doctrine, it has no ownership interest in the Agua Fria River, New River of Skunk Creek. In CIV 72-376 of the District Court of Arizona, a stipulation was entered into which stated that the Salt River is not now and never has been a navigable river.

(Minute Entry dated 7/12/88 at 27-28; emphasis added).

A copy of the Pretrial Order and subsequent Findings of Fact and Conclusion of Law in District Court No. CIV 72-376 were attached to Calmat's Motion in Limine (I.R.A. 101). Both Calmat's predecessor and interest, Arizona Sand & Rock Co., and the State were parties to and bound by the admissions made and judgment entered in that action. In the trial court below the State attempted to justify ignoring these judicial statements, final judgments and the pleadings by arguing it is not subject to the doctrine of laches and estoppel.

The Trial Court correctly recognized that laches, estoppel and other equitable defenses do run against the State. *Mohave County v. Mohave - Kingman Estates*, 120 Ariz. 417, 586 P.2d 978 (1978); *Sumid v. City of Prescott*, 27 Ariz. 111, 230 P. 1103 (1924). The Supreme Court has unequivocally held that the State can be bound by laches and estoppel even when it exercises its governmental authority. *Freightways, Inc. v. Arizona Corp. Comm'n.*, 129 Ariz. 245, 248, 630 P.2d 541, 544 (1981). In *Freightways*, laches and estoppel were held to have run against the Corporation Commission because of its repeated approval of the certificate in question. The

Court held that "a void certificate can ripen into a valid certificate due to the passage of time."

In each of the cited cases the State stipulated, agreed or formally denied having any claims or interest in the Salt River riverbed. In the District Court case, for example, the State obtained the goals it desired by stipulating with, among others, Calmat's predecessor in interest, that the Salt River was not and never had been a navigable river. That stipulation was incorporated into both the District Court's pretrial order and its Findings of Fact and Conclusions of Law. It must, therefore, be enforced. *Chaney Building Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1985); *May v. Sexton*, 68 Ariz. 358, 206 P.2d 573 (1949) (Adoption by Appellants of testimony of respondent and reliance upon such testimony constituted an admission that such testimony was true).

In *Chaney* the Supreme Court addressed the application of collateral estoppel to a stipulated dismissal. The Court explained that based on the facts presented in *Chaney* the doctrine did not apply because the parties had not indicated an intent to establish certain facts. The Court also explained that if the parties had intended the dismissal "to be binding as to certain factual issues, and their intention was reflected in the dismissal, we would enforce the intent of the parties and collateral estoppel would apply."

The State cannot argue it did not have a full and fair opportunity to litigate the Salt River riverbed issue. The issue before the trial court was not simply Judge Hendrix's ruling in the Hassell litigation. Having used the condemnation statutes to obtain possession of Calmat's property in 1985, the State waited almost three years before attempting to transform this case into a quiet title action. In so doing the State sought to ignore the history of this case, its pleadings in the Hassell litigation as well as its stipulation (and the subsequent order) in the District Court case. No litigant is entitled to shift its position from case to case in this fashion. There was no abuse of discretion here. The trial court properly excluded Mr. Halpenny's testimony and the State's last minute attempt to raise the riverbed issue at trial. The State's motion for a new trial on the riverbed issue should therefore be denied.

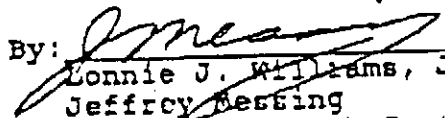
Conclusion

The Trial Court did not abuse its discretion in excluding evidence concerning the navigability of the Salt River in 1912. The State did not disclose its intention to rely on such evidence and, instead, attempted to raise new issues on the eve of trial. More importantly, the State cannot be allowed to ignore its own judicial admissions, stipulations and the collateral estoppel effect of prior rulings which conclusively establish that the State has no ownership interest in the Salt River riverbed. Regardless of the outcome of the

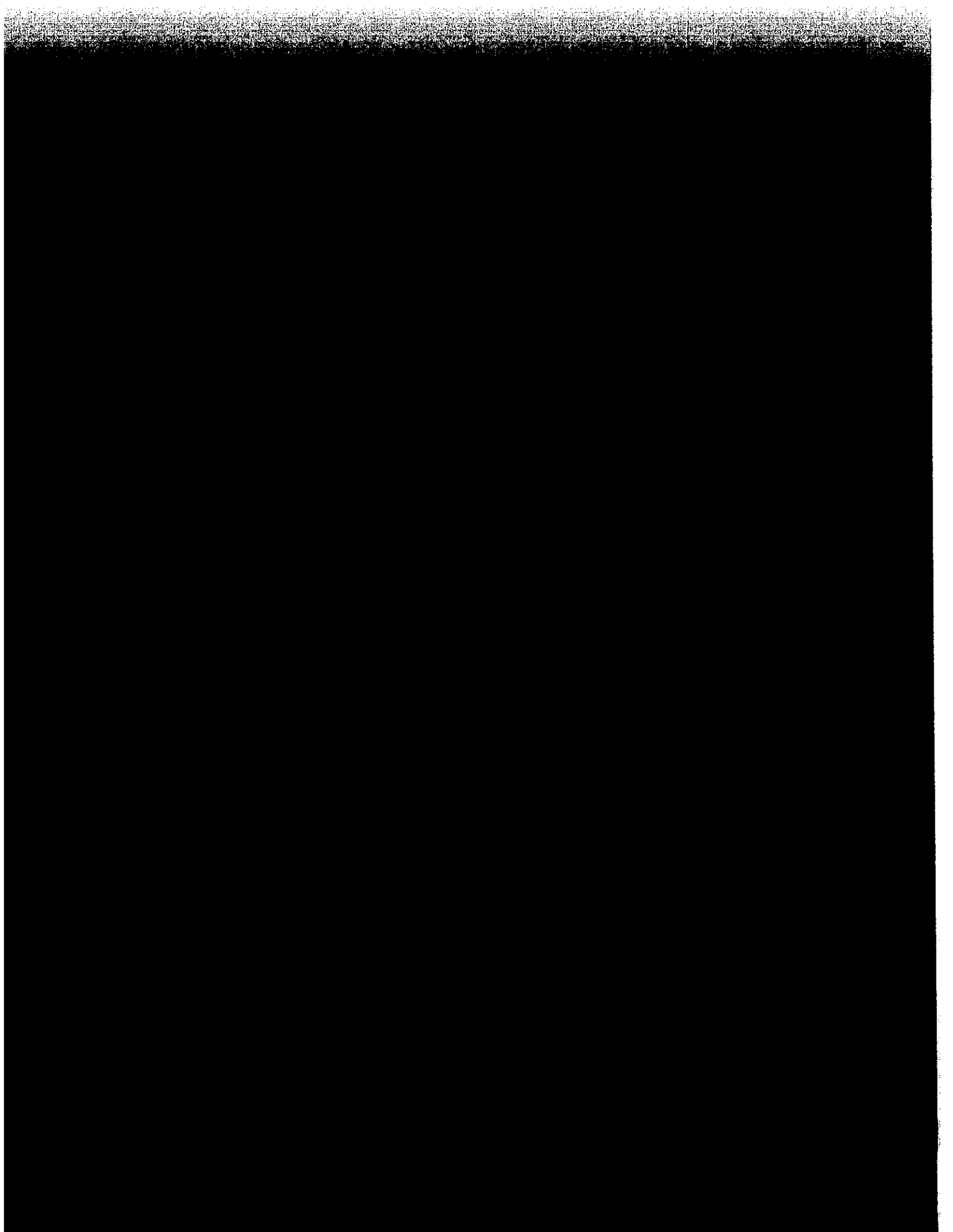
Hassell appeal, there is no basis for a new trial in the I-10 case.

RESPECTFULLY submitted this 27 day of April, 1990.

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8 BEFORE THE
9 ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

10 IN THE MATTER OF THE) Admin. Docket No. 94-1
NAVIGABILITY OF THE SALT RIVER)
11 [From Granite Reef Dam to the) STATE LAND DEPARTMENT'S
Gila River Confluence]) RESPONSE TO SALT RIVER
12) PROJECT'S MOTION TO
DISMISS
13)

14 The State Land Department ("LAND") responds to SALT RIVER
15 PROJECT'S Motion to Dismiss as follows:

16 I. THIS COMMISSION HAS SUBJECT MATTER JURISDICTION TO HEAR AND
17 DETERMINE THE NAVIGABILITY OF THE SALT RIVER

18 The interests of the beneficiaries of the Public Trust are
19 important interests that require the same protections as private
20 property interests. SALT RIVER PROJECT'S argument that "ques-
21 tions affecting titles to land, once decided, should no longer
22 be considered open" must not be read to apply where neither the
23 State of Arizona, as Trustee of the Public Trust, nor its prede-
24 cessor in interest the United States,¹ as Trustee under the

25 ¹ The land under navigable waters is an incident of
26 sovereignty. The federal government holds such lands in trust
for future states, to be granted to such states when they enter

1 Equal Footing Doctrine, have had an opportunity to litigate the
2 ownership of the bed on behalf of the public beneficiaries. It
3 is patently unfair to apply a judgment resulting from litigation
4 between others who agree the Public Trust has no interest.

5 A. Common Law Principles of Collateral Estoppel Apply;
6 LAND Is Not Barred from Arguing for Navigability
7 Before the Commission

8 In response to SALT RIVER PROJECT's assertion that LAND is
9 estopped by principles of res judicata from arguing that the
10 Salt River was navigable as of Statehood, LAND relies on and
11 incorporates herein by reference its Response to the Notices of
12 Lack of Jurisdiction filed with the Commission on January 6,
13 1994.

14 B. Section 1(F)(2) Must Be Construed as Consistent with
15 Common Law Principles of Res Judicata and Collateral
16 Estoppel

17 With regard to the construction of Section 1(F)(2) argued
18 for by SALT RIVER PROJECT, A.R.S. § 1-201 provides:

19 The common law only so far as it is consistent
20 with and adapted to the natural and physical condi-
21 tions of this state and the necessities of the people
22 thereof, and not repugnant to or inconsistent with the
23 constitution of the United States or the constitution
24 or laws of this state, or established customs of the
25 people of this state, is adopted and shall be the rule
26 of decision in all courts of this state.

Principles of res judicata and collateral estoppel are not
statutory, but have developed through case law to establish when
repose is appropriate and when litigation is appropriate. These

the Union and assume sovereignty on an "equal footing" with the
established states. Montana v. United States, 450 U.S. 544,
551, 101 S. Ct. 1245, 1251, 67 L. Ed. 2d 493 (1981).

1 principles are common law principles that do not fall within any
2 of the exceptions set out in A.R.S. § 1-201. It is a matter of
3 essential fairness and good sense not to apply a judgment to
4 someone who has not had a full opportunity to litigate or where
5 the issue was not essential to the judgment rendered. See
6 Chaney Building Co. v. City of Tucson, 148 Ariz. 571, 573, 576
7 P2d 28, 30 (1986).

8 Arizona case law holds that principles of res judicata and
9 collateral estoppel apply with full force in Arizona unless a
10 statute, by express language or necessary implication, abrogates
11 the common law. S.H. Kress & Co. v. Superior Court, 66 Ariz.
12 67, 73, 182 P.2d 931, 935 (1947). Nothing in the Commission's
13 enabling legislation expressly abrogates or necessarily implies
14 that Section 1(F)(2) abrogates the common law principles of res
15 judicata or collateral estoppel. Instead, Section 1(F)(2)
16 appears to partially codify the law of res judicata. Cf. Tucson
17 Gas & Electric Co. v. Schantz, 5 Ariz. App. 511, 515, 428 P.2d
18 686, 690 (1967) (a shareholder's common law right of inspection,
19 which exists independently of statute, is not abrogated by
20 statutory remedy). In this instance, the common law rule still
21 applies and must be harmonized with Section 1(F)(2). The Court
22 of Appeals has set out the proper way to construe Section
23 1(F)(2):

24 Where a right exists at common law and a statute
25 is enacted which could be construed as being consist-
26 ent with the common law, then rules of statutory
construction require [the decision maker] to indulge
every intendment in favor of consistency with the
common law. We are not to presume that the Legisla-

1 ture has repudiated the common law without a clear
2 manifestation that such was its intent.

3 In re Estate of Thelen, 9 Ariz. App. 157, 160-61, 450 P.2d 123,
4 126-27 (1969).

5 The State, as Trustee, has the right to the benefit of
6 principles of collateral estoppel that have been developed to
7 give every litigant a fair opportunity to be heard where impor-
8 tant rights are involved. Section 1(F)(2) does not abrogate
9 that right.

10 C. "Navigability" for Purposes of Adjudicating Water
11 Rights Is Different from "Navigability" for the Pur-
12 pose of Determining Title to the Riverbed

13 A determination that the Salt River was navigable as of
14 statehood for purposes of title, is not inconsistent with a
15 determination that the Salt River was not navigable prior to
16 statehood for purposes of determining water rights under prior
17 appropriation. See Oregon by Division of State Lands v. River-
18 front Protection Assn., 672 F.2d 792, 794 n.1 (9th Cir. 1982).

19 The Commission's mission is to determine navigability for
20 purposes of land title, not for purposes of determining water
21 rights. Nonetheless, SALT RIVER PROJECT's discussion of the law
22 of prior appropriation as it has developed in Arizona does
23 provide several important insights into the jurisdiction of the
24 Commission.

25 The first insight is that the Desert Land Act provided for
26 the "bifurcation of the methods of acquiring land and water
 rights. Land rights were to be purchased or otherwise acquired
 from the Federal Government; water rights were to be regulated

1 under state and territorial appropriation systems." SALT RIVER
2 PROJECT memorandum at 8. The importance of this insight is that
3 it clearly demonstrates that we must look to federal law to
4 construe a federal grant of land, but must look to state law to
5 determine water rights. Thus, we apply federal law, i.e., the
6 Equal Footing Doctrine, for the presumption that Arizona owns
7 the beds of watercourses navigable as of statehood, but look to
8 the state law of prior appropriation to determine how rights to
9 use surface waters within Arizona are determined. Different law
10 applies, different rights are involved.²

11 The second insight is that under the Desert Land Act, "the
12 United States relinquished complete control of only nonnavigable
13 waters; all navigable streams remained subject to Congress'
14 plenary power over commerce." Id. The importance of this
15 insight is that a determination of navigability for purposes of
16 title to riverbeds differs from a determination of navigability
17 for purposes of federal regulatory jurisdiction under the
18 commerce clause. No interstate commerce requirement exists when

19 ² There is some confusion as to whether the Howell Code
20 rejection of the doctrine of riparian water rights and the same
21 provision in the Arizona Constitution, Article 17, Section 1,
22 reject principles that apply to land ownership in or near
23 watercourses. That issue was settled in State v. Gunther &
24 Shirley Co., 5 Ariz. App. 77, 83, 423 P.2d 352, 358 (1967),
25 which holds that ownership rights in land situated along or on
26 (or riparian to) a watercourse are not affected by the rejection
of riparian rights to water in that watercourse. See also State
v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699, 503
(1971) (Lockwood, J., dissenting), Supp. op. 108 Ariz. 258, 495
P.2d 1312 (1972), rev'd, Bonelli Cattle Co. v. Arizona, 414 U.S.
313, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1973), overruled by Oregon
ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S.
363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977).

1 the issue is navigability for title. Oregon by Division of
2 State Lands v. Riverfront Protection Asso., 672 F.2d at 794 n.1.
3 Thus, although courts may look at the some of the same or
4 similar evidence to determine navigability for both purposes,
5 the fact that a court has made a determination that a river is
6 nonnavigable for federal commerce clause purposes is not deter-
7 minative in title cases. Nothing in either the Kibbey or Kent³
8 Decrees shows specifically on what basis the determination of
9 nonnavigability was made. A review of these decrees does show
10 that they were water rights cases concerned only with the Desert
11 Land Act requirements and the apportionment of the waters of the
12 Salt River, a watercourse not required for interstate commerce
13 purposes. The navigability determination relied on from these
14 two Decrees is not sufficiently the same issue to preclude the
15 Commission from determining navigablity for purposes of title.

16
17 ³ Although the United States intervened in Hurley v.
18 Abbott, it intervened in its capacity as guardian of Indian
19 settlers to protect their water rights, see page 7 of the Kent
20 Decree, not as the sovereign holding the beds of navigable
21 rivers in trust under the Equal Footing Doctrine for Arizona at
22 statehood. Furthermore, because control over Public Trust land
23 is so strongly identified with the sovereign power of govern-
24 ment, it will not be held that the United States has conveyed
25 such land except because of some international duty or public
26 exigency. A court deciding a question of title to such land
must begin with a strong presumption against conveyance by the
United States and must not infer such a conveyance unless the
intention was definitely declared or otherwise made by the
appropriate federal authority. Montana v. United States, 450
U.S. 544, 552-557, 101 S. Ct. 1245, 1251-54, 67 L.Ed. 2d 493
(1981). Intervention by the United States on behalf of Indian
settlers in a water rights case cannot affect the Pubic trust
interest in the bed of the Salt River.

The United States was not a party to Wormser v. Salt River
Valley Canal Co. (the Kibbey Decree).


1 II. CONCLUSION

2 Public policy considerations concerning state sovereignty
3 and the rights of the public beneficiaries to use Public Trust
4 lands have been important enough to withstand the deference with
5 which courts treat Indian rights. See Montana v. United States.
6 These same policy considerations are important enough for this
7 Commission to continue its deliberations on the navigability of
8 the Salt River irrespective of the numerous red herrings pulled
9 from the history of Salt River litigation over other matters and
10 between other litigants.

11 LAND respectfully requests that the Commission find that it
12 has subject matter jurisdiction over the navigability of the
13 Salt River and that LAND is not barred from advocating for
14 navigability before the Commission.

15 RESPECTFULLY SUBMITTED this 21 day of January, 1994.

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26

1 ORIGINAL AND FIVE COPIES of the
2 foregoing filed this 21st day of
3 January, 1994, with:

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4 Arizona Navigable Stream Adjudication
5 Commission
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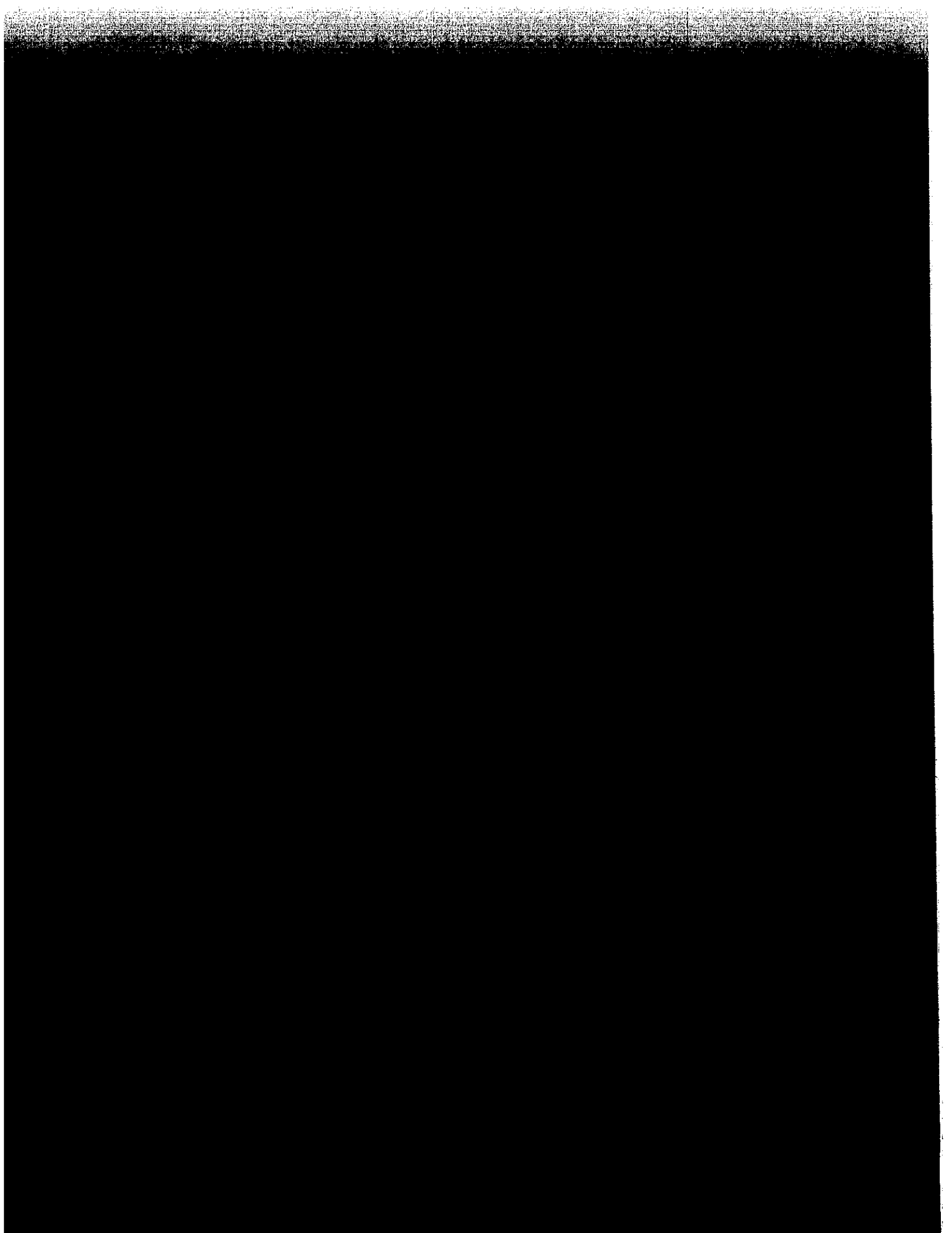
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8 BEFORE THE
9 ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

10 IN THE MATTER OF THE) Admin. Docket No. 94-1
NAVIGABILITY OF THE SALT RIVER)
11 [From Granite Reef Dam to the) STATE LAND DEPARTMENT'S
Gila River Confluence]) RESPONSE TO DEMAND
12) PETITION

13 The State Land Department ("LAND") responds to the Demand
14 that the Arizona Navigable Stream Adjudication Commission
15 Immediately Determine and Declare that the Salt River, from
16 Granite Reef Dam to the Gila River Confluence, Was Non-Navigable
17 as of the Date of Statehood¹ filed by Ronald A. Schlosser,
18 Pamela R. Schlosser, Thomas A. Schlosser, Gilbert R. Rogers,
19 Shirley Rogers, the Estate of Leeroy Rogers, the Estate of
20 Arlene Rogers, Shannon M. Hurley, the Estate of Thomas P.

21
22 ¹ Although by rule LAND is a party to every Commission
23 proceeding, A.A.C. R12-17-101(4), and is represented by the
24 Attorney General, neither LAND nor its counsel were served as
25 required, A.A.C. R12-17-103(C), with these Demand. Moreover
26 undersigned counsel was not made aware of the filing of this
document with the Commission until the Commission's Secretary
sent a copy of the filing docket to all the parties who had made
appearance. Nonetheless LAND will respond to the Demand through
this Response.

1 Hurley, Walda J. Peterson and the Estate of Frank M. Peterson as
2 follows:

3 Undersigned counsel will follow the organization of the
4 Demand in order to facilitate understanding.

5 I. THE DUE PROCESS ARGUMENT IS BOTH MOOT AND PREMATURE

6 A. With regard to the due process arguments based on
7 inadequate time for preparation, the Chairman has now entered
8 his order postponing the hearing date in order to give adequate
9 time for preparation to all parties who have appeared. Addi-
10 tionally, the initial investigative report on the Salt River and
11 the sources for that report are available, or completely dis-
12 closed, as a public record of the Commission and the Land
13 Department.

14 B. With regard to the due process argument of inadequate
15 notice because the property was not adequately described. The
16 notice meets the tests enunciated in In re Rights to the Use of
17 the Gila River, 171 Ariz. 230, 830 P.2d 442 (1992).

18 C. With regard to the prior investigation by agency staff
19 followed by a full adversarial hearing being a violation of due
20 process, there has been no violation of due process for the
21 following reasons:

22 1. Within administrative law it is appropriate for a
23 factual investigation by or for the agency to precede an ad-
24 versarial hearing. No determination of navigability has been
25 made by the Commission nor will such a determination be made
26

1 until a full adversarial hearing. See A.A.C. R12-17-111(A).

2 This assertion is premature.

3 2. The administrative decision must be based on the
4 evidence presented in the course of the hearing.

5 3. The decision of the Commission must include
6 findings of fact and conclusions of law. A.A.C. R12-17-112.

7 4. Administrative review protects the parties from
8 arbitrary and capricious action by an administrative agency.
9 See A.R.S. 37-1129(A)(B). Moreover, accusations of bias are
10 attacks on the integrity of public spirited Commissioners who
11 have volunteered their time and considerable talents and exper-
12 tise to assist the State through a very difficult and misunder-
13 stood process. Unsubstantiated allegations of bias should not
14 be so cavalierly asserted. The Commission is entitled to the
15 presumption of impartiality. Judicial review protects the
16 parties from any bias which can be proved by the parties.

17 II. TITLES ARE CLOUDED BY THE EXISTENCE OF THE EQUAL FOOTING
DOCTRINE

18 A. With regard to the "vested" rights of persons getting
19 notice, titles to property in or near watercourses in Arizona
20 have been clouded since statehood and before by the Equal
21 Footing Doctrine which is incorporated into the Arizona Enabling
22 Act as follows: "[T]he proposed State of Arizona shall be
23 deemed admitted by Congress into the Union by virtue of this Act
24 on an equal footing with other States." See Act of June 20,
25 1910, ch. 310, 36 U.S. Stat. 557, 568-579 (found in Vol 1, Ariz.
26 Rev. Stat. 104). The purpose of the 1992 Ownership of

1 Streambeds Act, codified at A.R.S. § 37-1101, et seq., is to
2 provide a less expensive, but effective way, within constitu-
3 tional limits, to finally remove the cloud from properties in or
4 near watercourses in Arizona.

5 III. THE CONSTITUTIONALITY OF 1992 STREAMBEDS OWNERSHIP ACT IS
6 NOT FOR COMMISSION TO DETERMINE

7 With regard to the asserted unconstitutionality of the 1992
8 Ownership of Streambeds Act, an administrative body has no power
9 to determine whether a statute complies with the Constitution.
10 Manning v. Reilly, 2 Ariz. App. 310, 408 P.2d 414 (1965). An
11 agency's only authority to act comes by delegation of authority
12 through its enabling legislation. Cf. Kendall v. Malcolm, 98
13 Ariz. 329, 334, 404 P.2d 414, 417 (1965) (The powers and duties
14 of an administrative agency measured by its enabling legisla-
15 tion). Where statutes are ambiguous, an agency is required to
16 carry out its duties so that the statutes as applied are consti-
17 tutional, and can defend those statutes until a court determines
18 they are unconstitutional. See e.g., Arizona Center for Law in
19 Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (App.
20 1991) (State Land Department defended the 1987 Streambeds Act
21 from a constitutional challenge by the Arizona Center for Law in
22 the Public Interest; statutes were determined to be unconstitu-
23 tional). The Commission can defend but not attack its enabling
24 legislation.
25
26

1 IV. THE STATE CANNOT DISCLAIM WITHOUT A FACTUAL INVESTIGATION

2 Arizona Center for Law in Public Interest v. Hassell, 172
3 Ariz. 356, 837 P.2d 158 (App. 1991), holds that the State,
4 whether represented by the legislature or by the Commission,
5 cannot disclaim its interest in public trust land without
6 particularized information to assess "(1) the validity of the
7 equal footing claims that it relinquishes; (2) the continuing
8 value of land subject to such claims for purposes consistent
9 with the public trust; (3) equitable and reasonable consider-
10 ation for claims that may be relinquished without impairing the
11 public trust; and (4) conditions that may be necessary to any
12 transfer to assure that public trust interest remain protected."
13 Id. at 371, 837 P.2d at 173.

14 V. ESTOPPEL, LACHES, WAIVER AND STATUTES OF LIMITATION HAVE
15 ALREADY BEEN JUDICIALLY DETERMINED NOT TO RUN AGAINST THE
16 STATE'S PUBLIC TRUST CLAIM

17 In the recent case of CalMat of Arizona v. State ex rel.
18 Miller, 172 Ariz. 300, 836 P.2d 1010 (App. 1992), vacated in
19 part but aff'd in pertinent part, 148 Ariz. Adv. Rep. 36, 859
20 P.2d 1323 (1993), the court stated that "[e]stoppel may apply
21 against the state only when the public interest will not be
22 unduly damaged, or when its application will not affect the
23 exercise of governmental powers or make binding the unauthorized
24 acts of government." The court went on to remand the case to
25 the superior court for a new trial in which the State must
26 assert any public trust interest in the property claimed by
CalMat. The court further stated: "To agree that the state is

1 estopped from presenting this evidence on remand would be
2 inconsistent with our holding in Hassell that quit claims of
3 riverbed land are unconstitutional and that the state cannot
4 waive its right to hold such lands in the public trust." 172
5 Ariz. at 311, 836 P.2d at 1021. See also Center for Law, 172
6 Ariz. at 369, 837 P.2d at 171. ("That generations of trustees
7 have slept on public rights does not foreclose their successors
8 from awakening.").

9 VI. JUDICIAL OR OFFICIAL NOTICE IS INEFFECTUAL TO BRING FACTS
10 JUDICIALLY DETERMINED IN A PRIOR CASE INTO THE ADJUDICATION

11 Where there is no preclusive effect to a judgment,² Arizo-
12 na courts may not take "judicial notice" of the truth of an
13 evidentiary record in another action³ tried in the same court.
14 It is permissible to take notice that a judgment has been
15 rendered, that a record exists and of the nature of its con-
16 tents; it is not permissible to bind a party to evidence in that
17 record except where the party was joined in, or privy to the


18 ² See LAND'S Response to Notice of Lack of Jurisdiction
19 for discussion of collateral estoppel principles and why they do
20 not preclude the State from litigating the navigability of the
21 Salt River. These principles apply with even more force to the
22 Kent Decree. No representative of the State's public trust
23 interest was a party to Hurley v. Abbott, and every party had an
24 interest in finding the Salt River non-navigable.

25 ³ The United States Supreme Court took judicial notice
26 of the historical fact that the Colorado River was navigable in
fact in Arizona v. California, 283 U.S. 423, 452-454, 51 S. Ct.
522, 525 (1931). In ruling on a motion to dismiss where Arizona
had asserted that the Colorado River was not navigable in its
Bill of Particulars, the Court looked at historical evidence,
not the judgment of another court, for the purpose of granting
the motion to dismiss. It is apparent from the recent Arizona
case law that navigability of the Salt River is a fact question
which has yet to be determined.

1 action. Scottsdale Memorial Health Systems, Inc. v. Clark, 157
2 Ariz. 461, 759 P.2d 607, (1988). If the pronouncements of a
3 court, which do not rise to the level of collateral estoppel
4 cannot be judicially noticed, certainly the pronouncements of
5 Bureau of Land Management as to navigability of river cannot
6 deprive the State of public trust lands held for it under the
7 Equal Footing Doctrine. Although the Commission may take
8 official notice of the existence of the Kent Decree, it may not
9 bind the State to the finding of non-navigability of the Salt
10 River.

11 RESPECTFULLY SUBMITTED this 19 day of January, 1994.

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