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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 **SALT RIVER PROJECT'S RESPONSIVE POST-HEARING MEMORANDUM**

In an attempt to chin themselves up closer to the bar of their burden of proof, the proponents of navigability take substantial liberties with the evidence in the record and advocate a lax legal standard never before adopted by any federal or state court.[1] Despite these efforts, Proponents do not even come close. Regardless of how the Commission views the evidence and how it interprets the details of the legal test, no reasonable basis exists upon which to conclude that Proponents have shown that the Lower Salt River is, was at statehood, or ever has been navigable.

I. Proponents Overstate the Evidence Regarding Navigability.

Virtually all of the expert testimony and other evidence presented at the April hearing favored a finding that the river was not navigable. Faced with this landslide of evidence, Proponents are confronted with the difficult task of not only trying to discredit the evidence presented by the other side but also trying to mount their own case so as to meet their burden of proof. They have failed in this effort, despite their best efforts to transform molehills of evidence into mountains.

[1] "Maricopa County" has taken no position on navigability. Only the State Land Department ("SLD") and the Defenders of Wildlife, et al. ("DOW") have argued in favor of navigability. Thus, this memorandum refers to the SLD and DOW collectively as "Proponents." All other parties filing opening memoranda agreed with SRP that the Lower Salt River is not "navigable."

A. No evidence exists in the record to support a finding that the Lower Salt River was ever actually used as a "highway for commerce."

Proponents take the historical evidence and try to show that somebody, at some time, must have used the river as a "highway for commerce." The SLD, for example, goes so far as to argue that there were "so many boats" in pre-statehood Arizona that the river must have been navigable. See SLD Mem., at 11. A review of the record, of course, shows no evidence of a multitude of boats in central Arizona at or before statehood. The best evidence the SLD's consultant could muster was a set of anecdotal accounts of sixteen boating attempts over the course of forty-two years.[2] The record does not support the existence of more than a handful of boats in central Arizona over the entire period from the 1870s to around statehood. See id.

The SLD argues that "virtually every reported story of boating on the Salt River includes an account of some unusual situation such as a boating accident, or an amusing anecdote" and, thus, "a reasonable conclusion is that boats were so commonly used that ordinary boating was not newsworthy." Id. This argument stands the burden of proof on its head. It would be patently unreasonable for the Commission to assume that, because the local newspapers say little or nothing about boating, boating must have been an every-day occurrence. The only rational explanation for why most or all of the accounts of Salt River boating attempts include reports of accidents or "amusing anecdotes" is that boating on the river was dangerous and difficult and such attempts were extremely rare and newsworthy events. As the Gila River Indian Community ("GRIC") stated in its opening memorandum, these attempts "are reminiscent of people who go over Niagara Falls in a barrel." GRIC Mem., at 11. Proponents cannot assume their way past their burden of proof.

The few accounts of attempted boating on the Lower Salt River before and shortly after statehood must be seen for what they are—exceptional attempts by a few "daring adventurers" to perform extraordinary feats that almost uniformly ended in disaster. These isolated attempts did not and cannot transform the river into a "highway for commerce."

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[2] See JE Fuller Hydrogeology & Geomorphology, Inc., Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to Gila River Confluence, at 3-18 to 3-24 (Sept. 1996) (EI 7) ("Fuller Report").

B. Proponents' reliance upon "average flow" data does not support a finding that the Lower Salt River was "susceptible" to navigation.

Unable to show that the river was ever actually used for navigation, Proponents make much of the "average" flow of the river prior to statehood and its "average" depth, in an effort to show that the river was "susceptible" to being used as a "highway for commerce." See, e.g., SLD Mem., at 12. Nothing about the Lower Salt River, however, is or ever was "average." The river has always been subject to alternating periods of devastating floods and prolonged droughts, especially prior to completion of Roosevelt Dam. See SRP Mem., at 1, 3-4, 6-8, 14-16. For a desert watercourse whose flow consists primarily of snowpack and other precipitation from nearby mountains and from violent occasional local storms, arguments about an "average annual flow rate" of 1,300 cubic feet per second ("cfs") have little meaning. See id. at 14-18, 23-24.

The SLD states that the average depth of the river, "in its natural state," was "about three and one-half feet." AG Mem., at 12. This use of "average," however, is deceptively simple and, unless properly understood, can distort reality both in terms of geography and time. A one-mile stretch of river, for example, can have an average depth of 3 ½ feet if the upper half-mile has a depth of 6 ½ feet and the lower half-mile has a depth of six inches. This mile of watercourse is obviously not "navigable," under any legal definition, because the stretch with a six-inch depth could not be boated by any means. This particular numerical example, although perhaps extreme in magnitude, is not entirely unlike the geomorphology of the Lower Salt before and near statehood. Dr. Stanley Schumm testified at length during the hearing that the bed of the river was highly variable within relatively short stretches. For example, Dr. Schumm stated:

> Here is the Salt River in 1934, an aerial photograph. It's downstream from Phoenix. You see very dramatic changes, from a narrow constriction to a very, very wide reach, almost a mile wide, of islands and bars and multiple channels. Typical braided river.
>
> Again, you can imagine if you're coming downriver—suppose you had a boat coming down here, you would reach very high velocities coming through this narrow reach. It would be pretty hazardous. Then, bang, you would be out into this reach of ground of a sandbar or an island.

Reporter's Transcript of Proceedings, at 195 (April 7, 2003) ("Tr.").

Referring to an "average" depth and flow rate also distorts the view of the river over time. One day of a flood of 294,000 cfs (which occurred in January 1910, according to Mr. Fuller's report) would make up for almost eight months (226.2 days) of **zero** flow and still result in an "average" flow, for those 227 days, of 1,300 cfs. See Fuller Report, supra, at 7-12 (Table 28). As Mr. Fuller himself correctly acknowledged, "averages" can be extremely deceiving, especially when applied to streams with highly variable flows like the Lower Salt. See id. at 5-5; Tr. at 7:63-64.

II. Proponents Misstate the Legal Standard of Navigability.

In addition to exaggerating the evidence in the record, Proponents also substantially understate the rigor of the test for navigability under the federal cases and the Arizona statutes.

A. The case law upon which Proponents rely does not support their position.

In general, Proponents cite to prior court decisions that espouse platitudes about the "equal footing" and "public trust" doctrines but do not address the "navigability" of any specific river. Like the three published Arizona opinions, the public trust law is full of decisions in which the courts have discussed the general scope of the legal doctrines without ever getting to a factual determination of navigability.[3] Proponents' heavy reliance upon such cases is not surprising because, as SRP found in preparing its compilation of "navigability" cases submitted to the Commission,[4] there is virtually no case law that would support a finding of navigability for the Lower Salt River on a factual basis. Although Proponents might take comfort in some favorable statements made in passing in court *dicta*, no court has ever found any river with the same general characteristics as the Lower Salt to be navigable. See EI 26.

DOW thinks it has found such a case, but it has not. In its memorandum, DOW cites North Dakota v. Andrus as a case where "[t]he broad jurisdictional construction of 'navigability' is well-illustrated." DOW Mem., at 8. DOW states that, in 1982, the federal "court found the Little Missouri

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[3] See, e.g., Land Dep't v. O'Toole, 154 Ariz. 43, 739 P.2d 1360 (App. 1987); Arizona Ctr. for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (App. 1991), review dismissed (Oct. 6, 1982); Defenders of Wildlife v. Hull, 199 Ariz. 411, 18 P.3d 722 (App. 2001), reconsideration denied (May 8, 2001).

[4] See Information Regarding Navigability of Selected U.S. Watercourses (April 2003) (EI 26).

River navigable at statehood." Id. at 8. That 1982 finding is, however, not the end of the story and, as a matter of law, is not even any longer part of the story. [5]

The Little Missouri River navigability litigation began sometime prior to 1981 as a dispute between the United States and the State of North Dakota. See North Dakota v. Andrus, 506 F. Supp. 619 (D.N.D. 1981).[6] The United States, throughout the first phases of that litigation, consistently contended that the Federal Quiet Title Act applied and that, under that act, North Dakota had waited too long to bring its "public trust" title claim. See North Dakota v. Andrus, 671 F.2d 271, 273 (8th Cir. 1982). In part for that reason, during the first hearing before the federal district court, the United States "did not present any evidence on navigability." Id. Both the federal district court in 1981 and the court of appeals in 1982 rejected the United States' legal argument and found that the statute of limitations in the Federal Quiet Title Act did not apply. Id. at 276.

In 1983, the U.S. Supreme Court reversed the lower courts' decision and agreed with the United States that North Dakota's "public trust" title claims were subject to the statute of limitations under the Federal Quiet Title Act and, therefore, North Dakota had waited too long to bring those claims. See North Dakota v. Andrus, 461 U.S. 273 (1983). Following that decision, North Dakota led a successful initiative to amend the Quiet Title Act and relieve itself from the effects of the statute of limitations. See North Dakota v. U.S., 972 F.2d at 237 n.2.

After the federal statute was amended, North Dakota filed a second lawsuit in the same court to assert its same claims to streambed lands against the United States. This time, however, the United States hired experts, submitted evidence, and vigorously presented its factual case regarding "navigability." North Dakota v. United States, 770 F. Supp. 506 (D.N.D. 1991). When presented with a more complete evidentiary record, the same federal district court that had in 1981 found the

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[5] DOW also cites Oregon v. Riverfront Protection Ass'n, 672 F.2d 792 (9th Cir. 1982), for the proposition that a watercourse can be determined navigable even though it "was used for log drives for as little as three months per year even though suffering frequent log jams, flooding and low flows." DOW Mem., at 8. The record is clear, however, that the Mackenzie River at issue in that case supported the transportation of "[t]housands of logs and millions of board feet of timber," 672 F.2d at 795, and had an annual mean flow rate of approximately 4,000 cfs. See SRP Mem., Appendix B. Those characteristics bear no relation to those of the Lower Salt River, during any time period.

[6] The entire history of the Little Missouri River litigation is recounted in North Dakota v. United States, 972 F.2d 235 (8th Cir. 1992), a copy of which included at Tab 14 of EI 26.

river navigable at statehood held in 1991 that "North Dakota ha[d] failed to prove by a preponderance of the evidence that the Little Missouri River was a navigable river when North Dakota was admitted to the union and became a state in 1899." Id. at 513. The Eighth Circuit Court of Appeals affirmed in 1992. North Dakota v. U.S., 972 F.2d at 240.

In its compilation of "navigability" cases submitted to the Commission, SRP included the 1991 federal district court decision and the 1992 Eighth Circuit affirmance. See EI 26, Tab 13. DOW, conversely, relies solely upon the 1981 and 1982 decisions, not even mentioning the later decisions. DOW's reliance is severely misplaced. First, as a practical matter, the 1981 and 1982 decisions are less persuasive authority because they were both issued following a hearing at which only one side presented evidence. The United States, choosing to rely upon its statute of limitations argument under the Federal Quiet Title Act, submitted no evidence on the actual issue of navigability. North Dakota v. Andrus, 671 F.2d at 273.

Second, and more important, because the 1981 decision was made by a court acting outside its authority under the Federal Quiet Title Act (as subsequently found by the U.S. Supreme Court in 1983), neither the 1981 nor the 1982 decision has any force or effect as a matter of law. In fact, in the second round of litigation starting after the federal act was amended, North Dakota argued that the 1981 decision was entitled to great weight as "law of the case," but the court of appeals firmly rejected that argument: "In view of our holding that the trial court was without jurisdiction to inquire into the merits of North Dakota's complaint, however, we need not belabor this point. **Entered in the absence of jurisdiction, the entire judgment must be reversed.**" North Dakota v. Block, 789 F.2d 1308, 1314 (8th Cir. 1986) (emphasis added).[7]

Although SRP agrees with DOW that much can be learned from the Little Missouri River litigation regarding application of the federal "navigability" test to particular watercourses, that information must come from the proper and final disposition of that case—not from an interim decision that was issued by a court lacking jurisdiction and with only one side presenting evidence.

[7] See also North Dakota v. U.S., 770 F. Supp. at 508 n.6 (EI 26, Tab 13); North Dakota v. U.S., 972 F.2d at 237 n.3.

When presented with complete evidence and legal argument regarding the Little Missouri River, the federal district court found that it was not navigable at statehood, and the Eighth Circuit Court of Appeals affirmed. That dispute involved some of the same type of evidence at issue here for the Lower Salt, and North Dakota lost despite having significantly more and better evidence than does Arizona in this case. North Dakota presented evidence of a "tie drive," which the courts found did not prove navigability, even though that tie drive was infinitely more successful than any such attempt on the Lower Salt. See 770 F. Supp. at 509-10. North Dakota put forth evidence of cable ferries used to cross the river, and the courts found that such evidence "does not establish that the river is a channel for useful commerce." Id. at 511. North Dakota presented evidence of prehistoric boating on the river; no such evidence exists for the Lower Salt. Id. at 511-12. The North Dakota court also was not persuaded by the state's "statistical analysis" of the river's "boatability," finding that such analysis "is not a reliable indicator of the river's navigability at the time of statehood." Id. at 512. The Little Missouri River cases strongly refute Proponents' position that the Lower Salt is "navigable."[8]

B. "Navigability" requires successful navigation or susceptibility thereto.

DOW argues that "success is not an element of the navigability-for-title test." DOW Mem., at 19. As support for its statement, DOW cites the April hearing transcript and the Hull opinion. The portion of the hearing transcript upon which DOW relies (pages 30 and 31) contains portions of Mr. Fuller's testimony that have nothing to do with whether the legal test requires successful navigation. The page of the Hull opinion DOW cites does state that the test does not require that navigation be "profitable," but does not support DOW's illogical proposition that **unsuccessful** attempts to boat a river can prove that the river is "navigable." See 199 Ariz. at 422, 18 P.3d at 733.

The plain requirement of the "navigability" test is that the river must be "used" or "susceptible to being used" as a "highway for commerce." A.R.S. § 37-1101(5). Attempting to float a boat on a

[8] The SLD also cites the Arizona Supreme Court's ill-fated decision in State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), rev'd, 414 U.S. 313 (1973), reh'g denied, 434 U.S. 1090 (1978). The Arizona court's Bonelli holding was, however, based upon a factual determination that the channelization of the Colorado River affected the river "rapidly and perceptibly." 107 Ariz. at 468, 489 P.2d at 702. No such factual determination has been requested, authorized, or made in this matter. Furthermore, Bonelli dealt with **post-statehood** changes in the river, after the State's title had already vested. See id. at 469, 489 P.2d at 703. Such events are not at issue here.

river and drowning, repeatedly running aground on sandbars and having to get out and push, or having the boat "cut in two parts as if she had come across a buzz saw" does not constitute "navigation" or use of a watercourse as a "highway for commerce." See SRP Mem., Appendix A. Although the venture might not necessarily need to generate a financial profit, the boat must actually get itself (and its occupants or cargo) to the destination in one piece in order to be considered "navigation."

C. DOW's "water is commerce" argument is illogical and not supported by the statutes or case law.

Toward the end of its memorandum, DOW presents a rather bizarre legal argument in support of its "navigability" position that has never been adopted by (or, to SRP's knowledge, proposed to) any federal or state court. See DOW Mem., at 19-21. DOW argues that (1) a watercourse is navigable if it can be used to carry articles of commerce, (2) water itself is an article of commerce, (3) there has been water in the river at times in the past, so (4) the river must be "navigable." DOW concludes that "[t]his is an important factor for the ANSAC to consider, and one which weighs heavily in favor of a finding of navigability." Id. at 19-21.

DOW's argument has numerous flaws. First, if this were the test, every river, stream, and creek in the United States would be navigable. A small mountain creek with a steep, rocky slope and only a few inches of depth, for example, would be "navigable" (and thus, all private property rights would revert to the State) if any person had, at any time, used any of the water out of that creek for any purpose. Although DOW likely would not object to such a result, that obviously is not the intent of the doctrine and is not and cannot be the test.

Second, DOW's "water is commerce" argument has illogical results if carried to its unavoidable conclusion. DOW is correct that, in Sporhase v. Nebraska, 458 U.S. 941 (1981), the U.S. Supreme Court found that pumped groundwater is an "article of commerce," so that the Federal Government had authority to regulate the interstate effects of groundwater pumping under the Commerce Clause of the U.S. Constitution. Water is not, however, the only "article of commerce." New pickup trucks, motorcycles, and bowling balls also can be "articles of commerce" over which the Federal Government has regulatory power relating to interstate activities. Under DOW's theory, any

dry streambed would be considered "navigable" for title purposes if someone could drive a pickup truck, ride a motorcycle, or roll a bowling ball down it. Again, this is not the test for navigability.

DOW's argument makes no sense because it fails to recognize even the most basic premise of "navigability" determinations under the public trust doctrine. The federal test for navigability, as codified in the Arizona statutes, centers around a use or susceptibility for use for "trade and travel . . . conducted in the customary modes of trade and travel **on water**." A.R.S. § 37-1101(5) (emphasis added). Unable to show that any persons or goods were or could have been "customarily" transported up or down the river "on water," DOW turns to the water itself. Neither the Arizona statutes, the federal case law, nor any thread of logic or reason supports DOW's argument. "Navigability" requires "navigation," which requires a boat or other vessel to move "**on** water."[9]

III. The "Ordinary and Natural Condition" Portion of the Definition, Although Not Determinative on the Lower Salt, Refers to the Condition of the River at Statehood.

The evidence shows that the river is not, was not at statehood, and never has been used or susceptible to being used as a "highway for commerce." Proponents have not met their burden of proving that the river is or was "navigable," **under any conditions at any time.** See A.R.S. § 37-1128(A). The evidence in the record dictates a finding of non-navigability, regardless of how the Commission considers the effects of Roosevelt Dam and other pre-statehood facilities on the river. The most direct and logical answer to the question of whether and how the Commission should view any pre-statehood changes to the river is that **it doesn't matter**. The river was not used or susceptible to being used as a "highway for commerce" prior to settlement in the Valley, and it was not used or susceptible to being used as a "highway for commerce" after settlement began. Proponents' arguments about what is meant by the "ordinary and natural condition" of a watercourse might raise interesting intellectual issues, but they should have no bearing on this Commission's final conclusion.

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[9]See, e.g., Alaska v. United States, 754 F.2d 851, 854 (9th Cir. 1985) (holding that landing of floatplanes did not make Slopbucket Lake navigable and stating: "The floatplanes go to and from the lake; they do not travel on the water.").

A. The Arizona statutes and federal case law require that the "navigability" determination be made as of the date of statehood.

Proponents' argument about the "ordinary and natural condition" of the river ignores the plain language of the Arizona statutes and federal law. The statutes, for example, provide that a watercourse is "navigable" if it "was in existence on February 14, 1912 and **at that time** was used or susceptible to being used, it is ordinary and natural condition, as a highway for commerce . . . ." A.R.S. § 37-1101(5) (emphasis added). The focus of this statutory inquiry is on the river as of February 14, 1912—not upon the river as it might have existed at the dawn of civilization or some speculation about what the river might have looked like in 1912 if nobody lived here to see it. The statutes require that the Commission focus its attention on the river as of the date of statehood.

This statutory requirement is consistent with the test applied by the federal courts. In a case involving the Gulkana River in Alaska, for example, the federal district court stated that "the requirement that title navigability be determined at the time of statehood means only that when making a title navigability determination, the *Daniel Ball* test is to be applied to the **physical dimensions and physical configuration existing at the time of statehood**." Alaska v. United States, 662 F. Supp. 455, 463 (D. Alaska 1987), aff'd, 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990) (emphasis added). The Ninth Circuit Court of Appeals, in a subsequent Alaska case regarding the Kukpowrak River, put it even more succinctly: "The key moment for the determination of title is the instant when statehood is created." Alaska v. United States, 213 F.3d 1092, 1097 (9th Cir. 2000) (quoting Utah v. United States, 482 U.S. 193, 196 (1987)).

B. The federal case law does not support Proponents' "ordinary and natural condition" argument.

Proponents argue that "ordinary and natural" means that the Commission must disregard all human interaction with the river. DOW, for example, contends that the Commission must consider the river "free of man-made obstructions or influences" and "before it was impacted by development, canals, and other diversions." DOW Mem., at 9-10; see also SLD Mem., at 6. Proponents cannot, however, have it both ways. If "natural" means the absence of any human effect, the Commission

also must assume that no dredging or other channel clearing work could occur on the river—an assumption that would constitute the death knell for Proponents' navigability arguments on a braided river like the Lower Salt.

Although chastising SRP for submitting copies of cases that allegedly decided navigability in contexts other than "public trust" title, see DOW Mem., at 6 n.3, Proponents choose to rely upon those same types of cases to support their "ordinary and natural condition" argument. Both Proponents, for example, rely upon the U.S. Supreme Court's decision in Economy Light & Power v. United States, 256 U.S. 113 (1921), for the proposition that "ordinary and natural" requires the Commission to imagine that human hands had never touched the river. See DOW Mem., at 10; SLD Mem., at 7. Economy Light, however, was not a case involving "navigability" for purposes of determining a state's "public trust" title to streambeds. Rather, that 1921 decision involved a determination of the Federal Government's powers under the Commerce Clause of the U.S. Constitution and the Rivers & Harbors Appropriation Act of 1899. Economy Light, 256 U.S. at 117.

"Navigability for title determination under the equal footing doctrine is distinguishable from navigability for determination of federal jurisdiction under the Commerce Clause." Hull, 199 Ariz. at 421, 18 P.3d at 732. No court in a "public trust" title case has ever adopted the holding of Economy Light in construing the words "ordinary and natural condition" in the process of finding a particular river navigable. Furthermore, other courts have distinguished and limited the holding of that case, even within the narrow context in which it was decided. For example, in a subsequent 1940 decision, the U.S. Supreme Court held that, although courts can assume away some artificial obstructions to navigation in a Commerce Clause case, those assumptions must be within reason: "There must be a balance between cost and need at a time when the improvement would be useful." United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940), reh'g denied, 317 U.S. 594 (1941). Proponents contend that, based primarily upon the holding in Economy Light, this Commission should assume away all of the diversion and storage works on the Lower Salt River, all of the groundwater pumping near the river, and all development in the proximity of the river, so as to

consider the river in its "ordinary and natural condition." That argument could not be said to strike "a balance between cost and need," **even if** the Economy Light concepts applied in this context. See id.

No federal or state court appears to have squarely decided the exact legal issue Proponents attempt to raise: What is the meaning of the term "ordinary and natural condition" in a "public trust" title case involving dams and other public improvements constructed in the river prior to statehood? The Commission need not decide that issue here, either, because Proponents failed to submit sufficient evidence to satisfy their burden of proof—regardless of how the Commission considers the pre-statehood improvements. The Lower Salt River always has been a braided stream subject to extreme variations in flows. See generally SRP Mem. The river was not used or susceptible to being used as a "highway for commerce" before, during, or after construction of any physical improvements.

C. In authorizing Arizona to become a state in 1910, Congress expressed its intent that statehood would not affect the Federal Government's activities under the Reclamation Act.

As the final part of its "ordinary and natural condition" argument, the SLD contends that the Federal Government, in constructing Roosevelt Dam prior to statehood, did not "intend to divest the State of its public trust interests, or to convey title or interests in streambeds to the beneficiaries or operators of reclamation projects." SLD Mem., at 15. This argument lacks merit, for several reasons. First, the SLD incorrectly assumes that some entity other than the Federal Government holds title to the Reclamation facilities and the lands beneath them. SRP operates the project and holds a possessory interest, but the legal title holder for all Reclamation facilities in the Salt River bed is the United States of America.[10] Thus, although it is correct that the Federal Government did not "convey title or interests in streams to the beneficiaries or operators of reclamation projects," that statement is true only because the United States expressly intended to **retain legal ownership interest in itself.**[11]

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[10] See City of Mesa v. Salt River Project Agric. Imp. & Power Dist., 101 Ariz. 74, 78, 416 P.2d 187, 191 (1966), cert. denied, 385 U.S. 1010 (1976) ("In all of the contracts with the United States government, the government retained title to the property."); see also Salt River Valley Water Users' Ass'n v. Giglio, 113 Ariz. 190, 192-98, 549 P.2d 162, 164-70 (1976) (detailed discussion of relationship between SRP and the United States).

[11] See Alaska, 662 F. Supp. at 459-60 ("in the newly admitted states, the concept of navigability served the purpose of distinguishing not public from private, but rather state from federal").

The United States did not necessarily convey legal title to streambed lands associated with the Reclamation Project to SRP or its shareholders, but it likewise did not intend to convey such title to the State of Arizona on February 14, 1912.

Furthermore, the intention of the U.S. Congress with respect to the interaction of the Reclamation Act and the "equal footing" doctrine is clear and not subject to reasonable challenge. As Proponents must acknowledge, any State interest in streambed lands is the result of Arizona becoming a state in 1912, on an "equal footing" with the prior forty-seven states. See SLD Mem., at 3. The act of Congress that allowed Arizona to become a state—the very vehicle through which Arizona obtained title to any "equal footing" lands within its boundaries—is the 1910 Arizona-New Mexico Enabling Act.[12] The Arizona courts have recognized the Enabling Act as "the fundamental and paramount law," which "cannot be altered, changed, amended, or disregarded without an act of Congress" and is controlling over even the Arizona State Constitution.[13]

The 1910 Enabling Act makes it clear that Congress expressly intended that Arizona's admission as a state would not infringe upon the Federal Government's right, title, and interest under the 1902 Reclamation Act and its ability to operate Reclamation facilities. Section 20 states

> [t]hat there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of [the 1902 Reclamation Act] and Acts amendatory thereof or supplementary thereto, to the same extent as if the said State had remained a Territory.

Enabling Act § 20, ¶ "Seventh."

If that were not enough, a later section of the Enabling Act expressly provided for "Water Power Designations," to be made by Secretary of the Interior within five years after statehood. In addition to the broad reservation of authority for Reclamation projects under Section 20, the lands

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[12] See Act of June 20, 1910, 36 Stat. 557, 568-579 (reprinted in Arizona Revised Statutes, Volume 1); see also id. § 23 (incorporating the "equal footing" doctrine).

[13] See Murphy v. State, 65 Ariz. 338, 344, 181 P.2d 336, 340 (1947); see also Gladden Farms, Inc. v. State, 129 Ariz. 516, 518, 633 P.2d 325, 327 (1981) ("The Enabling Act is one of the fundamental laws of the State of Arizona and is superior to the Constitution of the State of Arizona, in that neither the Arizona Constitution nor laws enacted pursuant thereto may be in conflict.").

within the Water Power Designations were specifically retained by the Federal Government and not passed to the State upon admission to the Union:

> There is hereby reserved for the United States and **excepted from the operation of any an all grants made or confirmed by this act to said proposed State** all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no land so reserved and excepted shall be subject to any disposition whatsoever of said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named . . . .

Id. § 28 (emphasis added). Significant portions of lands lying within and along the Lower Salt were the subject of "Water Power Designations" issued pursuant to Section 28 of the Enabling Act.[14]

Ample authority exists, in the very act that allowed Arizona to ultimately become a state, that Congress intended the Reclamation interests to be paramount and that the new state "fully acquiesce[d]" in the United States' ultimate rights to construct and operate the Reclamation facilities on the river. The Enabling Act constitutes a "clear expression of congressional intent" on this subject.[15]

IV. The Expert Testimony Was Properly Admitted and Must be Considered.

Although it purports to take "no position on the navigability of the Lower Salt River" and presented no witnesses of its own, "Maricopa County" attempts to disparage various witnesses and their testimony. The County states that "[e]xpert opinion not based upon the correct legal standard should be disregarded as unreliable and not probative of navigability." County Mem., at 4; see also DOW Mem., at 12 n.7, 22-23. Each of the witnesses presented by the parties, however, properly testified within his own area of expertise, and the Commission should find that testimony persuasive.

The County and DOW argue that the experts' testimony should be stricken in its entirety because the County and DOW believe the experts applied the wrong legal standard in forming their

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[14] See, e.g., Water Power Designation No. 4, Arizona No. 1 (January 31, 1917); Water Power Designation No. 5, Arizona No. 2 (January 31, 1917); Water Power Designation No. 6, Arizona No. 3 (January 31, 1917); Water Power Designation No. 8, Arizona No. 5 (February 5, 1917); Water Power Designation No. 9, Arizona No. 6 (February 7, 1917).

[15] See generally Idaho v. United States, 533 U.S. 262 (2001) (in creating Indian reservation prior to statehood, Congress intended to divest public trust interest in submerged lands).

opinions. This argument ignores the fact that it is this Commission, not the experts, that must ultimately determine whether the facts presented satisfy the legal test of navigability. The experts' job was to give the Commission the specific facts and information necessary to make that decision.

The Arizona Rules of Evidence are not strictly applicable to this proceeding, but their contents provide sound general guidance for the Commission. Those rules state that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Ariz. R. Evid. 702. No party has alleged or can allege that Drs. Schumm, Littlefield, and August are not "qualified by knowledge, skill, experience, training, or education" to testify on the matters at issue. Likewise, no party can dispute that these individuals' "scientific, technical, or other specialized knowledge will assist" the Commission in making its decision. Thus, each of these witnesses' testimony would be admissible, even in a court of law enforcing stricter requirements than those that apply before this Commission.

Furthermore, the Rules of Evidence make it clear that an expert's opinion can "embrace the ultimate issue to be decided by the trier of fact," but need not do so. Ariz. R. Evid. 704. The experts' testimony should be of significant assistance to the Commission in making its determination, regardless of whether the Commission agrees with (or even considers) any stated opinions on the ultimate question of whether the river satisfies the legal test for navigability.

The testimony by Drs. Schumm, Littlefield and August was among the most thoroughly researched and documented of any factual evidence presented at the hearing and should be considered by the Commission.[16]

V. Summary and Requested Action

Proponents have not satisfied their burden of showing that the Lower Salt River is, was at statehood, or ever has been "navigable" as defined in A.R.S. § 37-1101. The Commission should find the river "non-navigable."

[16] DOW incorrectly implies that Dr. Schumm testified that the river would be "navigable" with a flow of 1,000 cfs. See DOW Mem., at 15. What Dr. Schumm actually said was that his opinions regarding the river would not change if the river had a perennial flow of 1,000 cfs. See Tr. at 7:203.

DATED this 11th day of August, 2003.

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