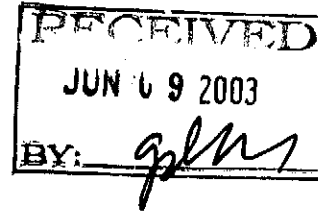


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BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION

In re Determination of Navigability of  
the Lower Salt River

No. 03-005 NAV

STATE LAND DEPARTMENT'S OPENING  
POST-HEARING MEMORANDUM

The Lower Salt River flows through Central Arizona, a desert region in which water is more precious than gold. "Prior to statehood, perennial streamflow rates were sufficient to support rich riparian vegetation, fish and beaver populations, and extensive prehistoric irrigation systems." Arizona State Land Department Rep., *Arizona Stream Navigability Study for Salt River: Granite Reef Dam to the Gila River Confluence, Draft Final Report*, at iv. (revised Apr. 2003) (Exhibit No. 30) (hereinafter "ASLD Report"). Phoenicians reported catching fish five feet long, and weighing as much as forty pounds. *Id.* at 3-7. One 1884 pioneer (Elliott) reported that "at low water [the Salt River] is a clear, beautiful stream, having an average width of 200 feet for a distance of 100 miles

above its junction with the Gila, and a depth of two feet or more. Its length is about two hundred miles and it flows through the largest body of agricultural land in the Territory after it leaves the cañon." *Id.* at 3-8.

Although this beautiful river could and did afford a means of travel and commerce using boats designed for shallow waters, inhabitants of the region deemed its waters more valuable for irrigation of the rich agricultural lands through which it flowed than for other commercial uses. Proponents of agricultural development in the Salt River Valley successfully lobbied Congress and secured the enactment of the 1902 Reclamation Act, and a commitment of federal funds for construction on the Salt River of the first federal reclamation project: Roosevelt Dam. By 1912, extensive settlement of the Salt River Valley, dependent upon irrigation, and filling of the newly-completed Lake Roosevelt Reservoir combined to produce reaches of dry or limited flow. Currently, the river flows only during periods of flooding or due to the release of treated effluent.

The principal issue in this adjudication has not been squarely addressed by any court. Each new state is admitted to the Union on an "equal footing" with the original thirteen states, which became sovereign owners of the beds of navigable waterways. A waterway is navigable if, in its ordinary and natural condition, it is used or susceptible of use as a highway for commerce. Should Arizona be denied title to the bed of the Lower Salt River, which is navigable in its ordinary and natural condition, simply because the waters of that stream were diverted for irrigation and storage? The answer is an emphatic "No."

I. Title to the Beds of Navigable Watercourses in Arizona Automatically Passed to the State Pursuant to the Public Trust and Equal Footing Doctrines.

According to the equal footing doctrine, each new state entered the Union "with all of the

powers of sovereignty and jurisdiction which pertain to the original states, and . . . such powers may not be constitutionally diminished." *Coyle v. Smith*, 221 U.S. 559, 572-73 (1911); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). One attribute of sovereignty enjoyed by the original thirteen states was their succession to the Crown's sovereign interest in the beds of navigable waters under the common law of England, which interest was subject to the public right (*jus publicum*) of navigation and commerce. *Martin v. Waddell's Lessee*, 41 U.S. 367, 413-14 (1842); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). To assure that each new state receives the bedlands of navigable waterways pursuant to this public trust doctrine, the federal government, as sovereign, held title to the beds and banks of navigable waters in territorial lands; pursuant to the equal footing doctrine, that sovereign title was held in trust for future states. *Coeur d'Alene Tribe*, 521 U.S. at 284. In England only tidelands were considered navigable, but in the United States the *jus publicum*, or public trust interest, extends to inland navigable waterways, in keeping with the trust's fundamental purpose of preventing private interests from interfering with the use of navigable waters for transportation. *Packer v. Bird*, 137 U.S. 661, 667 (1891); *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 436 (1892). Thus, upon admission to the Union each new state received title to the beds of navigable waterways within its boundaries, except in a handful of cases where the United States either did not acquire or conveyed away title to such lands. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977) (citing *Pollard's Lessee*, 44 U.S. (3 How.) 212; *see also Defenders of Wildlife v. Hull*, 199 Ariz. 411, 415-416, 18 P.3d 722, 726-727 (App. 2001).

Navigability is the key to the state's title to watercourses. Because this title was acquired

from the federal government, navigability for title purposes is determined by federal law. *Defenders*, 199 Ariz. at 419, 18 P.3d at 730; *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 362, 837 P.2d 158, 164 (App. 1991). ANSAC's determination is thus governed by the federal test of navigability, known as the "*Daniel Ball*" test, which provides:

[t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

*The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); see *Defenders*, 199 Ariz. at 420, 18 P.3d at 731 (*Daniel Ball* test correctly paraphrased in A.R.S. §37-1101 (5)). The *Daniel Ball* test is a flexible test that is "apt to uncover variations and refinements which require further elaboration." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940).

The *Daniel Ball* test is applied to determine navigability in title, admiralty and maritime, and commerce clause cases. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979); see *Defenders*, 199 Ariz. at 418-419, 18 P.3d at 729-730. Under the commerce clause, once a river is determined to be navigable, it is considered navigable forever whether or not it remains navigable in fact. *Appalachian*, 311 U.S. at 408 (citing *Economy Light & Power v. United States*, 256 U.S. 113 (1921)). The Ninth Circuit has held that the commerce clause test applies to riverbed title cases. *City of Centralia, Wash. v. F.E.R.C.*, 851 F.2d 278, 281 (9<sup>th</sup> Cir. 1988).

Because the rules applicable in commerce clause cases also apply in title cases, this concept of "indelible navigability" applies to navigability-for-title cases. David M. Guinn, *An Analysis of Navigable Waters of the United States*, 18 Baylor L. Rev. 599, 564-565 (1966) (state should not lose title to river even if presently nonnavigable, as long as river was navigable at some point in the past).

In fact, the Arizona Supreme Court has confirmed that the State owns title to the beds of all navigable streams within its borders, and that this title may not be defeated by artificial changes in the bed because it was channeled, artificially controlled, dammed, or diverted. *State v. Bonelli Cattle Co.*, 107 Ariz. 465, 468, 489 P.2d 699, 702 (1971).<sup>1</sup> It follows that Arizona received title to the beds of all rivers that were once navigable even if man-made diversions and obstructions have altered the physical features of the watercourse, so that it is no longer in its ordinary and natural condition and will no longer support commercial traffic.

In determining whether the Lower Salt is navigable, ANSAC should consider “the changes and complexities” in its circumstances. *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 789-90 (9th Cir. 1981) (quoting *Appalachian*, 311 U.S. at 404).

- II. The Lower Salt River, In Its Natural and Ordinary Condition, Was Used or Was Capable of Being Used As a Highway for Commerce. Therefore, Title to the Bed of the Lower Salt Passed to Arizona at Statehood.
  - A. To Determine Navigability of the Lower Salt River, ANSAC Must First Determine the Ordinary and Natural Condition of the River.

Watercourses are navigable in fact when they are used, or are susceptible of being used as highways for commerce, in their “natural and ordinary condition.” *See, e.g., United States v. Utah*, 283 U.S. 64, 76 (1931) (“natural and ordinary condition”); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (“natural and ordinary condition”); *The Montello*, 87 U.S. (20 Wall.) 430, 435, 443

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<sup>1</sup> The United States Supreme Court reversed the Arizona Court’s decision in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517 (1973) on the basis that Arizona should have applied federal law rather than state law to determine the property dispute. However, the United States Supreme Court reversed itself three years later in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582 (1977), making *Bonelli* a valid pronouncement by the Arizona Supreme Court on the question of the State’s title to navigable riverbed land.

(1874) (“natural navigation”); *The Daniel Ball*, 77 U.S. at 563 (“ordinary condition”); *Defenders*, 199 Ariz. at 426, 18 P.3d at 737 (“natural and ordinary condition”). The *Daniel Ball* test requires that the navigability of rivers be assessed “in their ordinary condition.” *The Daniel Ball*, 77 U.S. at 563; see also *United States v. Utah*, 283 U.S. at 76; *Holt State Bank*, 270 U.S. at 56 (subsequent Supreme Court cases requiring assessment of “natural and ordinary” condition). The Supreme Court defined the phrase “ordinary condition” as the river’s “volume of water, the gradients and the regularity of flow.” *Appalachian*, 311 U.S. at 407. Courts are not limited to examining the physical condition of a watercourse at statehood, but may also consider historic evidence of its physical condition. See *United States v. Oregon*, 295 U.S. 1, 15-18 (1935). The historic, physical condition of the Lower Salt River is discussed in Section B (2) herein.

“Natural” means “[u]ntouched by man or by influences of civilization; wild, untutored, and is the opposite of the word ‘artificial.’” Black’s Law Dictionary, 712 (6th ed.1991). Likewise, “ordinary” means “[r]egular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances . . .” *Id.* at 758; see *Holt State Bank*, 270 U.S. at 57 (drought conditions on Mud River “exceptional,” not “the usual conditions”). Dams or diversions that caused low flow or a dry bed in the River are man-made obstructions. Black’s at 712. Moreover, construction activities in the bed and banks of the River made its condition unnatural, uncommon, and unusual. *Id.* at 758.

By statehood, a man-made flow regime had replaced the natural and ordinary condition of the Lower Salt. Between 1870 and 1912, numerous diversion dams and canals were built on the

Lower Salt River which diverted most of its flow for agricultural purposes.<sup>2</sup> Roosevelt Dam began to store water in 1908, and by 1911 it stored more than 500,000 acre-feet of water. David Roberts, *The Historical Development and Use of Water from the Salt River in the Salt River Valley*, (Presentation for Salt River Project, Apr. 7, 2003) Slide Nos. 18 and 25 (Exhibit No. 036) (hereinafter “SRP No. 36”) Because the initial filling of Roosevelt occurred around statehood, the Lower Salt River had unusually low flows during that period, even relative to other post-diversion years. ASLD Report at 7-12-13. When Granite Reef Dam was completed in 1908, the 1,100-foot concrete dam was designed to divert all of the flow in the River. SRP No. 036, Slide No. 18. As a result of these man-made obstructions, by 1912 nearly all of the flow of the Salt River had been diverted which caused the River to become ephemeral or dry, flowing only due to above-average flows, irrigation return flows, and local inflows. ASLD Report at 7-12-13, 9-2; *see also* SRP No. 036, Slide No. 29. To determine the River’s ordinary and natural condition, ANSAC must determine the volume, gradient, and regularity of flow that would have occurred if these obstructions and diversions including in-stream mining, channelization, grading, artificial discharges, bridges, bank protection, and development did not exist. *See Economy Light & Power Co.*, 256 U.S. at 118 (artificial obstructions that may be reduced by public authority do not preclude navigability of waterway if, assuming obstruction is reduced, waterway is navigable in its natural and ordinary condition).

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<sup>2</sup> The following are irrigation structures that existed prior to statehood: Swilling’s Ditch, the Salt River Valley Canal, in 1867; Maricopa Canal in 1870; Tempe Canal in 1870; Broadway Canal in 1870; Utah Canal in 1877; Mesa Canal in 1878; Grand Canal in 1878; San Francisco Canal in 1880; Arizona Canal in 1883; Highland Canal in 1888; and Consolidated Canal in 1891. ASLD Report at 7-11 Table 7-8.

B. The Preponderance of the Evidence Establishes That the Lower Salt River Was Susceptible to Navigation in its Ordinary and Natural Condition.

The *Daniel Ball* test does not require actual commercial use or navigation of a river; all that is required is proof that the Lower Salt River in its ordinary and natural condition was susceptible to use as a highway for commerce at the time of statehood. *United States v. Utah*, 283 U.S. at 82-83; *see also The Montello*, 87 U.S. (20 Wall.) at 441-442. The Supreme Court recognized that the arid, western states would be disadvantaged if navigability could only be established by actual use. *United States v. Utah*, 283 U.S. at 82; *see Appalachian*, 311 U.S. at 405-406 (“[i]t is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains.”). Consequently, this test may be met if a river is shown merely to be capable of commercial use even if there is no evidence that it was in fact so used. *See United States v. Utah*, 283 U.S. at 82. In resolving navigability-for-title issues, courts have therefore relied upon two types of evidence: (1) historic records of navigation; and (2) records that demonstrate physical characteristics of the watercourse that could have supported navigation.

1. The Lower Salt River Was Historically Actually Used, and Was Susceptible to Being Used for Navigation.

In evaluating the navigability of a river, federal courts have adopted a liberal construction of the *Daniel Ball* test that allows the consideration of evidence of the historic navigability of the watercourse, even though the watercourse is not currently navigable. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971) (most traffic on the Great Salt Lake occurred in the 1880s, while Utah did not become a state until 1896); *Appalachian*, 311 U.S. at 413-419; *Economy Light & Power*, 256 U.S. 113; *The Montello*, 87 U.S. (20 Wall.) 430; *Puget Sound*, 644 F.2d at 788 (White River in Oregon



found navigable based on historic use of River prior to construction of hydroelectric project that diverted substantial portion of River's flow).

- a. Commercial Ferries Operating on the Lower Salt River Prior to Statehood Clearly Demonstrate that the River Was Used, or Was Susceptible of Being Used as a Highway for Commerce.

At least a half-dozen ferries operated on the Salt River between Granite Reef Dam and the Gila River between 1860 and 1915, well after diversions began on the River. ASLD Report at 3-25. These ferry boats ranged in size up to 16 x 48 feet, and transported passengers, mail, and large, loaded freight wagons with team. *Id.* at 3-27. Hayden's Ferry, established in 1874 and in operation until at least 1909, is the most well-known of the ferries that crossed the Salt River. *Id.* at 3-25, 7-8 Table 7-4 (in 1909 there were at least 11 canal diversions in the Lower Salt). Mr. Trumball had a ferry built to transport approximately 60,000 pounds of freight at a profit of 12 ½ cents per 100 [wt.]. *Id.* at 3-28. The Haws and Finch Ferry, located three miles above Maricopa Dam operated as early as 1884, and could transport three single buggies or a tally ho and four horses. *Id.* at 3-28. Mr. Finch purchased the Ferry because the demand for transportation across the river was great, and the river was too deep to ford. *Id.* And, although his business was cyclical, Mr. Finch reported that he anticipated a five hundred dollar profit. *Id.* The number of ferries eventually diminished as the ordinary and natural flow in the River was impounded in reservoirs, diverted to canals, and as bridges over the River were constructed. *Id.* at 3-25.

Historical evidence of ferries not only demonstrates actual navigability of the Lower Salt River, but also demonstrates susceptibility to navigability even if the ferries merely traveled from point-to-point across the River, rather than between sites along the River's course. A watercourse is a highway for commerce if it was utilized as a path between two points. *Alaska v. United States*,

754 F.2d 851, 854 (9th Cir. 1985) (“central theme remains the movement of people or goods from point to point on the water”). The Supreme Court found that nine boats used occasionally by ranchers to haul their livestock from the mainland to one of the islands or vice-versa was sufficient evidence to show that the Great Salt Lake was used as a highway for commerce. *Id.* at 11. The Court concluded that “[t]he Lake was used as a highway and that is the gist of the federal test.” *Id.* If owners transporting their livestock or one sheep boat for hire demonstrates that a watercourse was used as a highway for commerce then numerous ferries that transported both passengers and goods for a profit clearly demonstrate that the Lower Salt was a highway for commerce. *Id.* at 11-12.

b. Evidence of Boats on the Lower Salt River Demonstrates that the River Was Susceptible to Use as a Highway for Commerce.

There are many recorded accounts of downstream boating on the Salt River: some successful, some unsuccessful. *See* ASLD Report at 3-19-3-25, 3-29 (sixteen accounts of attempts to boat or transport goods down the Salt River between 1873 and 1910). The type of boats typically used were flat-bottomed boats, skiffs, or canvas and wooden canoes. *Id.* at 8-3. In one successful account in May 1873, two men transported a flat boat loaded with five tons of wheat down the Salt River from Hayden’s Ferry to the Swilling Canal, then down the canal to Hellings and Co.’s mill. *Id.* at 3-18-3-19.

Some boating attempts were unsuccessful; however, this was not due to lack of stream flow, but rather natural obstructions such as snags, sandbars, or narrow canyons on the Upper Salt River, all of which exist on other navigable rivers. *Id.* at 8-3, 9-2. Navigability is not destroyed because a watercourse is interrupted by occasional natural obstructions or portages, nor need navigation be open at all seasons of the year, or at all stages of the water. *Economy Light & Power*, 256 U.S. at

122. Also, boating on the Lower Salt River around statehood was not limited to the wetter months or seasonal flows. ASLD Report at 8-3. In fact, several accounts of boating occurred during May and June, two months in which the annual minimum flow typically occurs. *Id.* at 3-19-20, 8-3. In June 1885, a party boated successfully in a 18' x 5' boated from four miles above the Tonto Creek confluence to Phoenix. *Id.* at 3-19, 21-22, 9-1-2. The trip was to determine if logs could float down the Salt River. *Id.* at 3-22. Based on the trip's success, one of the men contracted for the delivery of over one thousand railroad ties. *Id.* Charles Hayden's attempt to float logs failed in the reach of the Upper Salt River due to an obstruction of a narrow canyon, not conditions in the Lower Salt. *Id.* at 3-19. The fact that Charles Hayden attempted his log floatation in June, the summer low flow period, is strong evidence that he believed that flow in the Lower Salt, the reach he was presumably, most familiar with, could support log transportation.

Historical evidence of boating on the Lower Salt indicates that there was no shortage of boats in the Salt River Valley. *Id.* at 8-3. 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; a reasonable conclusion is that boats were so commonly used that ordinary boating was not newsworthy, and other boating incidents were generally unreported. While boat use may have declined as diversions diminished the River's natural flow, the mere presence of so many boats in an arid region like Arizona during the early settlement period suggests that boats were commonly used on the River. *Id.*

When assessing evidence of historic use such evidence must be weighed in context, including the distribution of population in Arizona, the types of industry that were conducted at statehood, and the availability of numerous alternatives to river transportation. As the Supreme Court observed:

[t]he character of the region, its products and the difficulties or dangers of navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.

*Appalachian*, 311 U.S. at 409-10. The use of other modes of transportation does not mean that the Salt River was not navigable; rather, it was simply less efficient than other modes of commerce.

2. In Its Ordinary and Natural Condition, the Volume, Gradient, and Regularity of Flow of the Lower Salt River Was Sufficient to Support Navigation and Commerce.

The second type of evidence bearing on navigability is the physical characteristics of the watercourse. These characteristics are examined to determine whether a watercourse could support navigation. *See Utah*, 403 U.S. at 12; *Appalachian*, 311 U.S. at 410; *United States v. Oregon*, 295 U.S. at 15-18; (Master's Report made findings of present and past physical condition). *United States v. Utah*, 283 U.S. at 77-81; *Holt State Bank*, 270 U.S. at 52-53, 56-57; *Oklahoma v. Texas*, 258 U.S. 574, 586-589 (1922).

The Lower Salt River, in its natural state, was a perennial stream. *See, e.g.*, ASLD Report at 5-5, 5-8, 7-26. The average annual flow rate was at least 1,300 cubic feet per second ("cfs"). *Id.* at 7-26. At this flow rate, the average depth of the River would be about three and one-half feet, velocity around two feet per second, and the width about 300 feet. *Id.* These conditions exceed the minimums required for boating and are consistent with historical descriptions of the River. *Id.* at 8-1-8-5 (boating characteristics).

Because large-scale diversions started before the Lower Salt was gauged, there are no direct measurements of the River in its natural state, but numerous studies and historic observations

support a finding that flows averaged 1,500 cfs. In 1893, John Wesley Powell reported his estimate that average annual flow was 2,844 cfs. *Id.* at 5-5. A study conducted in 1991 using modern gauge records indicated an average annual flow value of 1,689 cfs. *Id.*; *see id.* at Appendix E-6 (modern records likely underestimate historic flows). The Salt River Valley Water Users Association estimated that the average annual flow from 1889 to 1953 was 1,773 cfs, and from 1889 to 1912 was 1,876 cfs. *Id.* at 7-8. The 1910 Kent Decree reports irrigation diversions from the Lower Salt between 1896 and 1909 which indicate an average inflow of 1,576 cfs and an average flow rate at the Gila River of 893 cfs, which includes diversions. *Id.* at 7-10. These values are supported by the observations of many explorers who described the River as being approximately two to three feet deep. *Id.* at 3-14 (river 2 to 3 feet deep in July, a low flow month); *see e.g., id.* at 3-14, 7-11. Each of these flow rates provides an average flow depth sufficient for boating. *See id.* at 7-24-7-26, Appendix D (rating curves showing depth of flow for a given flow rate).

Not only is this evidence of average flows large enough to support boating, there is also substantial hydrologic data showing that a sufficient volume of flow to allow boating occurred with enough regularity to support the conclusion that the Lower Salt was navigable. The average flows of at least 1,300 cfs include all months, even the dry summer months of June, July and August. The record shows that, but for irrigators' diversions, there would never have been a recorded instance when the Lower Salt had no flow even in the driest months. *Id.* at 7-9, 7-10 (none of the early explorers described a dry river bed at any time of year), 7-17 Table 7-13, 7-18 Table 7-15. Average flows for the winter months of December to May range from 1,589 cfs (December) to 3,420 cfs (March). *Id.* at 7-17. The average flow for the month of February is 2,420 cfs. *Id.* In an analogous situation, the Ninth Circuit upheld a ruling of navigability based on susceptibility only during the

high flow summer months on the Gulkana River in Alaska. *See Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989) (river frozen from November through April). Collectively these hydrologic data show that in its ordinary and natural condition, the Salt River regularly had enough water and was deep enough to support navigation in a variety of boats.

Reports of early explorers, surveyors, and settlers also describe the physical conditions of the Lower Salt River prior to the construction of dams, diversions, and canals that diverted most of the streamflow of the River. In July 1852, John R. Bartlett, head of the United States Boundary Commission, traveled up the Salt River Valley from the confluence with the Gila River to what is now known as Mesa. ASLD Report at 3-14, 7-11. He described the Salt River as eighty to one hundred twenty feet wide, and from two to three feet deep. *Id.* at 3-15. In 1877, Hiram Hodge described the 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.” *Id.* at 3-15. In 1893, George Finch stated that “[t]he biggest problem we had was crossing the [Salt] river which was past fording most of the time.” *Id.* at 3-18. These early descriptions of the Lower Salt River demonstrate that the River’s depth, width, and discharge are capable of supporting transportation. This information not only helps determine the River’s natural and ordinary condition, but also whether it was capable of being used as a highway for navigation or commerce.

C. The Federal Government Did Not Intend Construction of Reclamation Projects to Divest the State of Title to the Bed of the River.

Under the equal footing doctrine, a strong presumption exists against defeat of a state’s title. *Montana v. United States*, 450 U.S. 544, 552 (1981); *see Utah Div. of State Lands v. United States*, 482 U.S. 193, 197-198 (1987). Only an express statement of congressional intent can operate to

divest future states of their public trust land. *Montana*, 450 U.S. at 551-552. The only purposes for which such divestiture has been found to be proper are: (1) to perform international obligations; (2) to improve the land for commerce with foreign nations and other states; or (3) or to carry out public purposes for which the United States held the territory. *Id.*

The federal government constructed Roosevelt Dam and other reclamation projects on the Salt River pursuant to the 1902 Reclamation Act, 32 Stat. 388, 43 U.S.C. § 371. *See Inspiration Consol. Copper Co. v. Bryan*, 35 Ariz. 285, 288, 276 P. 846 (1929). There is no language in the Reclamation Act suggesting that the federal government intended 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. In *Utah Div. of State Lands*, the Court stated that Congress may create a reservoir, but may nevertheless intend that the state obtain title to the land underneath the reservoir at statehood. 482 U.S. at 202. Without a clear expression of Congressional intent to defeat Arizona's title to the Lower Salt River, the erection of artificial dams and diversions on an otherwise navigable River cannot defeat the State's title to the bedlands of that River.

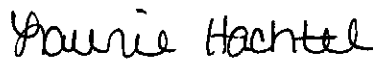
### III. Conclusion.

The Salt River has been the backbone of development for the Salt River Valley. Without its reliable flows, there would be no modern-day Phoenix, Tempe, or Mesa. It supported the prehistoric Hohokam, and encouraged development of the Arizona Territory by pioneers. The first priority of all settlers was to tame and divert the Salt River's flows to create rich agricultural land, rather than to preserve its flows for transportation or commerce. The State should not lose title to the bedlands of the Salt River because of an accident of history---the fact that the man-made diversions that drastically altered the natural and ordinary condition of the River predated statehood.

The *Daniel Ball* test for determining title to the beds of navigable rivers is flexible. It takes into account the vast differences that exist between regions of the Nation. In determining the Salt River's navigability, the unique circumstances of Arizona's settlement, statehood, development, industry, and its climatic, geologic, and hydrologic conditions warrant different consideration than navigability determinations of watercourses in other states. The historical evidence of use of the River by ferries and boats, along with its historic flow, depth, and width demonstrates that the Salt River was used, or was capable of being used, for transporting people or goods. The State urges ANSAC to acknowledge these facts, to disregard the man-made obstructions for title purposes, and to declare that the River was navigable at statehood. The *Daniel Ball* test is sufficiently flexible to support such a result.

DATED: June 9, 2003

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June, 2003, to:

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