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

11 In re Determination of Navigability of the) No. 03-005-NAV
12 Lower Salt River, from Granite Reef Dam to)
13 the Gila River Confluence) **SALT RIVER PROJECT'S OPENING**
14) **POST-HEARING MEMORANDUM**
15)

16 The Salt River Project Agricultural Improvement and Power District and Salt River Valley
17 Water Users' Association (collectively, "SRP") submit their opening post-hearing memorandum
18 regarding this Commission's determination of whether the Lower Salt River (from Granite Reef Dam
19 to the Gila River confluence) was "navigable" when Arizona became a state on February 14, 1912. A
20 table of contents appears on the following page. Section III of this memorandum summarizes the
21 evidence presented to the Commission at and before its hearing held on April 7 and 8, 2003. Section
22 IV presents SRP's legal argument.

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1 **I. INTRODUCTION**

2 Marshall Trimble, Arizona's official State Historian, described the Lower Salt River and the
3 Salt River Valley as they existed in the period before statehood:

4 The Salt River Valley was an agricultural paradise. It was nestled at the heart of some
5 13,000 square miles of watershed. However, the Salt River, which meandered through
6 the valley, was as fickle as a stud at a snortin' post. One year it'd run over its banks
7 and flood all the way into the center of Phoenix; the next year would be so dry the
8 cows were giving powdered milk.

9 In 1891, a flood spread the banks of the Salt River eight miles wide, washing
10 out the railroad bridge at Tempe. Later in the decade, water was so scarce that folks
11 were loading up their belongings and moving on to California. It was said a cactus
12 wren wouldn't attempt to fly across the Salt River Valley without packin' a sack lunch.
13 Those who stayed to await better days patrolled their irrigation ditches on horseback,
14 armed with Winchesters. During the drought, brief but furious flash floods washed out
15 dirt diversion dams, and farmers watched the precious water escape into the Gulf of
16 California.

17 M. Trimble, Arizona: A Cavalcade of History 259 (1989) (EI 24).¹

18 At and before statehood, the Lower Salt River was a braided stream, consisting of multiple
19 channels interspersed with boulders, sandbars, beaver dams, and other natural impediments to
20 navigation. See Section III(B), infra. Prior to the construction of Roosevelt Dam and other dams on
21 the Upper Salt and Verde Rivers, the Lower Salt River was particularly subject to alternating periods
22 of floods and droughts. See Section III(A), infra. Since the construction of Roosevelt Dam was
23 completed in 1911, the stretch of the river below Granite Reef Dam has been dry or virtually dry for
24 almost every period of every year. On the few occasions when there has been water in the river, it has
25 come in the form of huge floods that destroy lives and property.

26 The Lower Salt River is not, was not in 1912, and never has been used or susceptible to being
27 used as a "highway for commerce." All the evidence submitted prior to and at the April hearing
28 supports a finding of "non-navigability," and no evidence was presented to support a finding that the
29 river is now or ever was "navigable." SRP requests that the Commission find the river "non-
30 navigable."

31 _____
32 ¹ As used in this memorandum, "EI ____" refers to the Evidence Item number established by the
33 Commission for each document.

1 **II. THIS COMMISSION'S TASK**

2 This Commission has an important job to do. Under the applicable statutes, the Commission
3 has exclusive jurisdiction to determine which, if any, Arizona watercourses were “navigable” on
4 February 14, 1912. See A.R.S. § 37-1123(G). The Commission’s statutory obligation for
5 determining navigability is relatively succinct:

6 If the preponderance of the evidence establishes that the watercourse was navigable,
7 the commission shall issue its determination confirming that the watercourse was
8 navigable. If the preponderance of the evidence fails to establish that the watercourse
9 was navigable, the commission shall issue its determination confirming that the
10 watercourse in question was nonnavigable.

11 A.R.S. § 37-1128(A). The statute defines “navigable” or “navigable watercourse” as:

12 A watercourse that was in existence on February 14, 1912, and at that time was used or
13 was susceptible to being used, in its ordinary and natural condition, as a highway for
14 commerce, over which trade and travel were or could have been conducted in the
15 customary mode of trade and travel on water.

16 Id. § 37-1101(5).²

17 The statutes provide that the proponents of navigability have the burden of proof. In order for
18 the Commission to determine that a particular watercourse is “navigable,” the proponents of
19 navigability must establish that fact by the “preponderance of the evidence.” See A.R.S. § 37-
20 1128(A).³ If sufficient evidence is not presented to show navigability for a particular watercourse, the
21 Commission must find the watercourse non-navigable. Under the “preponderance of the evidence”
22 standard, “a party who has the burden of proof must persuade you, by the evidence, that the claim is
23 probably more true than not true.” Recommended Arizona Jury Instructions (Civil) Standard 9
24 (1997). “Preponderance of the evidence” requires “[e]vidence which is of greater weight or more

25 ² The Arizona statutory definition is a codification of the “federal test” of navigability first articulated
26 by the United States Supreme Court in 1870 and applied by over one hundred courts in the last 130
27 years. E.g., The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). Thus, court decisions
28 construing the Daniel Ball test should be persuasive for this Commission in applying the definition in
29 A.R.S. § 37-1101(5).

30 ³ This allocation of the burden of proof is consistent with the pronouncements of the Arizona courts.
31 See Arizona Ctr. for Law in the Public Interest v. Hassell, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165
32 n.10 (App. 1991); Land Dep’t v. O’Toole, 154 Ariz. 43, 46 n.2, 739 P.2d 1360, 1363 n.2 (App. 1987);
33 Defenders of Wildlife v. Hull, 199 Ariz. 411, 420, 18 P.2d 722, 731 (App. 2001).

1 convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole
2 shows that the fact sought to be proven is more probable than not.” Black’s Law Dictionary 1064 (5th
3 ed. 1979).⁴

4 **III. REVIEW OF THE EVIDENCE IN THE RECORD**

5 This Commission solicited and received voluminous evidence with respect to the navigability
6 of the Lower Salt River. Over 5,000 pages of documents were filed. The Commission held a two-day
7 hearing, the transcript of which consists of 277 pages.⁵ This memorandum discusses the historical,
8 hydrologic, geomorphologic, and judicial evidence in the record.

9 **A. History of the Salt River Valley and the Lower Salt River**

10 None of the historical evidence introduced in this proceeding supports a finding of
11 navigability. To the contrary, all of the evidence weighs in favor of non-navigability.

12 **1. The prehistoric Salt River**

13 The report submitted by the State Land Department’s consultant, and his hearing testimony,
14 provide extensive evidence regarding the condition of the Salt River in the period before settlement by
15 non-natives. Even before the arrival of European settlers, “[t]he Salt River Valley was one of the
16 most densely populated areas in the prehistoric southwest and contained the most extensive irrigation
17 system in prehistoric North America.” JE Fuller/Hydrogeology & Geomorphology, Inc., Arizona
18 Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila River Confluence 2-1
19 (Sept. 1996) (EI 7). Despite the presence of between 80,000 and 200,000 residents in the area in
20 prehistoric times, no evidence exists that any of those individuals ever used or even tried to use the
21 Lower Salt River as a “highway for commerce.” Id.

22 From the beginning of time, the Lower Salt River was subject to alternating periods of floods
23 and droughts. See Tr. at 7:26 (Fuller); see also Fuller, supra, at 2-8. “Very high flood flows” existed
24 during the Colonial Period (A.D. 650-900), washing out prehistoric flood gates and damaging canals.

25 ⁴ See also generally Maricopa County Juvenile Action No. J-84984, 138 Ariz. 282, 283, 674 P.2d 836,
26 837 (1983) (quoting Cole v. Town of Miami, 52 Ariz. 488, 497, 83 P.2d 997, 1001 (1938)) (“the
27 ultimate test is, does the evidence convince the trier of fact that one theory of the case is more
probable than the other”); Hewett v. Industrial Comm’n, 72 Ariz. 203, 209, 232 P.2d 850, 854 (1951).

⁵ “Tr. at [date: page]” refers to the Reporter’s Transcript of the April 7-8 hearing.

1 See Fuller, supra, at 2-10. “Major floods, as well as lower-than-normal flows” continued through the
2 Classic Period (A.D. 1100-1350). Id. at 2-12. Although one archaeologist in the late 19th Century
3 speculated that prehistoric residents of the Valley might have used balsa rafts on their canals, no
4 evidence suggests that any of the early inhabitants tried or succeeded in floating boats on the river
5 itself. See id. at 2-13, 2-17; Tr. at 7:26-27 (Fuller).

6 **2. Early exploration of the Salt River Valley**

7 No evidence exists that any of the early explorers who ventured into the Salt River Valley ever
8 used the Lower Salt River as a means of transportation or commerce. Francisco Vasquez de
9 Coronado is reported to have used rafts on the Salt River, but the evidence shows that Coronado used
10 the rafts only to cross the river (not to travel up or down it), and the evidence also suggests that
11 Coronado’s use of the river was actually to the east (upstream) of the reach of the river currently at
12 issue or even on some other river. See Fuller, supra, at 3-6, 3-9; Tr. at 7:29-30 (Fuller). Trappers
13 such as James Ohio Pattie and Ewing Young are reported to have traveled along the river, but all
14 indications are that their travels were by foot or on horseback, not in boats or canoes. See Fuller,
15 supra, at 3-10; Tr. at 7:33 (Fuller). In 1849, Lt. Beckwith traveled from present-day New Mexico to
16 the Lower Colorado River, and a portion of his route included the Salt River. Again, however, the
17 evidence shows that his travels along the river were by foot or on horseback, not in a boat or a canoe.
18 See Fuller, supra, at 3-10; Tr. at 7:33 (Fuller). The travels of each of these individuals took them
19 along the Lower Salt River. If the river had been navigable, it surely would have been easier for them
20 to travel by boat rather than by foot or on horseback through this harsh desert land.

21 The United States Army kept a boat at the McDowell Crossing as early as 1867, but the
22 evidence demonstrates that the boat was used only to cross the river during floods. See Fuller, supra,
23 at iii, 3-1, 3-24; Tr. at 7:24 (Fuller). No evidence exists to show that the Army’s boat was ever used
24 to travel or transport goods or supplies up or down the river, even though one of the reasons for the
25 location of Phoenix was to supply agricultural products to the soldiers at Fort McDowell.

26 The early descriptions of the Salt River by explorers also support a finding that the river was
27 not navigable. See Tr. at 7:162-64 (Littlefield). Information from 1826, for example, shows that the

1 Salt River (“especially in the stretch from the Gila to the Verde”) was “abounding” with beavers.
2 Fuller, supra, at 3-6; Tr. at 7:30-31 (Fuller). The “abundant” presence of beavers, Nature’s own dam
3 builders, would be a natural impediment to navigation and supports SRP’s position that, even prior to
4 the construction of man-made dams, the Lower Salt River was not susceptible to being used as a
5 “highway for commerce.” Tr. at 7:30-31 (Fuller) (“[I]t would be an obstruction.”).

6 **3. Federal land surveys and patents**

7 Another group of individuals who were present in the Salt River Valley at a relatively early
8 date were the federal land surveyors who were responsible for conducting the rectangular survey in
9 the new territory. As Dr. Douglas Littlefield testified during the April hearing, each of these
10 surveyors was under specific instructions to distinguish between navigable and non-navigable
11 streams. See D. Littlefield, Assessment of the Salt River’s Navigability Prior to and On the Date of
12 Arizona’s Statehood 11-27 (December 5, 1996) (EI 16); Tr. at 7:167-71, 175-77 (Littlefield). None of
13 these Government representatives ever once indicated that the Lower Salt River was navigable. See
14 Littlefield, supra, at 27-50. “Significantly, while those surveys were done at varying times of the year,
15 in different years, and by several individuals, all of the descriptions and plats that resulted from this
16 work consistently portrayed the Salt River as being a non-navigable stream.” Id. at 51.

17 Similarly, the federal and state land patents issued along the river are persuasive evidence of
18 non-navigability. The Federal Government granted over 225 separate patents that touched or overlay
19 the river to private individuals. See id. at 113; Tr. at 7:171-75 (Littlefield). In not one case did any of
20 those patents (or the supporting patent files) indicate that acreage was being withheld because the
21 river was navigable. See Littlefield, supra, at 113; Tr. at 7:172 (Littlefield). Likewise, none of the
22 patents issued by the State of Arizona to private parties reserved lands because the river was
23 navigable or otherwise indicated that the river might be a “highway for commerce.” See Littlefield,
24 supra, at 113-14; Tr. at 7:173 (Littlefield). Dr. Littlefield, summarizing his conclusions based upon
25 hundreds of hours of historical research (including survey records, land patents, other government
26 documents, and newspapers), stated: “From this wealth of information, covering the huge array of
27

1 documentary sources, only one conclusion can be reached: The Salt River was not navigable on or
2 before February 14, 1912.” Littlefield, *supra*, at 223.

3 **4. The Lower Salt River from the 1870s to 1911**

4 Perhaps the best evidence in support of a finding of **non-navigability** comes from the
5 accounts of the Lower Salt River in the last few decades prior to statehood, including the early
6 settlers’ efforts to tame the river for irrigation purposes and the accounts of attempts by a few “daring
7 adventurers”⁶ to actually float boats on the river.

8 **a. Water storage efforts**

9 Much of the local community’s energy during the period prior to statehood was focused
10 toward building a water storage project, so that the landowners could “take control of the
11 unpredictable waterway.” See LeRoy, “Salt River Centennial,” *Phoenix Magazine* 67 (February
12 2003) (EI 24); see also Tr. at 7:217-18, 229-30 (Roberts). That water storage project, completed after
13 decades of fits and starts, became the Salt River Federal Reclamation Project, one of the first Federal
14 Reclamation projects undertaken after passage of the 1902 Reclamation Act:

15 For Valley residents, the [completion of Roosevelt Dam] was the culmination
16 of years of work and planning. The temperamental Salt River had vexed farmers with
17 alternative floods and droughts. In February 1903, a group of local farmers hoped to
18 turn the tide by forming the Salt River Valley Water Users’ Association. They pledged
more than 200,000 acres of their own land as collateral for a government loan to build
the massive dam, which would control the river’s erratic flow, generate electric power
and provide a water reserve. The plan was called the Salt River Project.

19 LeRoy, *supra*, at 68; see also Trimble, *supra*, at 259-61.

20 Several things had to happen before the Federal Government could build Roosevelt Dam. See
21 K. Smith, *The Magnificent Experiment: Building the Salt River Reclamation Project, 1890-1917* 72
22 (1986) (EI 24). First, a local entity needed to be created to contract with the Government on behalf of
23 the landowners. The Salt River Valley Water Users’ Association became that entity. See Tr. at 7:231
24 (Roberts).

25 Second, the Government needed to obtain lumber to build the framework for the masonry
26 dam. A sawmill was constructed in the Sierra Ancha Mountains, upstream from the dam site. See

27 ⁶ See Fuller, *supra*, at 3-21 (quoting *Arizona Gazette* (June 5, 1885)); Tr. at 7:48 (Fuller).

1 Smith, supra, at 72-73; see also E. Zarbin, Roosevelt Dam: A History to 1911 89 (1984) (EI 24). A
2 road was constructed to cover the twenty-three miles from the sawmill to the dam: “The lumber road
3 was, by necessity, the first piece of construction on the project; wood was needed for construction of
4 the permanent camp, culverts, and bridges for the roads, tunnel timbering, and building forms for
5 concrete structures.” Smith, supra, at 73; see also Zarbin, supra, at 75. The historical record contains
6 no mention of floating the timber downstream on the river. Rather, all of the timber was transported
7 from the sawmill to the dam site using the lumber road. See Smith, supra, at 73; Zarbin, supra, at 75.

8 Third, the Government had to figure out a way to get workers and supplies from Phoenix to
9 the dam site. “[N]o freight road existed from the construction site to Mesa . . . , and the road to Globe
10 was treacherous, winding through several mountain ranges.” Id. If the Salt River had been navigable,
11 it would have been an easy task to float barges or other vessels up the river to haul workers and
12 supplies. Instead, the Government constructed the Apache Trail (initially known as the Roosevelt
13 Road), a remote, twisting route from Mesa to Roosevelt, including a stretch of eleven miles “in very
14 rough country known as Fish Creek Hill.” Zarbin, supra, at 76; see also Smith, supra, at 75.⁷
15 Construction of the road required the work of at least 200 men and involved a “3,700-foot-long
16 crossing over Tonto Creek and the removal of rock and other material eighteen to twenty miles,
17 primarily by hand.” Smith, supra, at 75; Zarbin, supra, at 77. These difficulties made construction of
18 the road extremely expensive. The total cost of building the road was \$350,644, in turn-of-the-
19 century dollars. Zarbin, supra, at 104; see also Smith, supra, at 76 (some portions of the road cost as
20 much as \$25,000 per mile).⁸ Still, no evidence exists in the record that the Government ever seriously
21 considered transporting workers or supplies up the Salt River using water-borne vessels.⁹

22 _____
23 ⁷ Photographs of construction and early use of the Apache Trail appear in Zarbin, supra, at 91, 114,
133, and 146.

24 ⁸ Consistent with the prior history of the river, among the biggest difficulties in the road construction
25 were the alternating periods of floods and droughts. In 1904, “[t]he greatest obstacle to all of the road
26 work . . . was the drought. The problem was getting water to the workers.” Zarbin, supra, at 90.
That same road was “heavily damaged by flooding” in the spring and fall of 1905. Smith, supra, at
75. At one point in February 1905, the road was covered by water fifteen feet deep. Zarbin, supra, at
96.

27 ⁹ See also generally Tr. at 7:124-26 (August), 7:234 (Roberts).

1 Between 1903 and 1911, the Federal Government, with substantial assistance and participation
2 from the local citizenry, constructed Roosevelt Dam—the largest stone masonry dam in the world—
3 on the Salt River upstream from Phoenix. This Herculean undertaking required the transport of
4 hundreds of men and many tons of supplies from Phoenix to the dam site. Despite the magnitude of
5 the task and the presence of the Salt River running directly from Phoenix to the destination, the
6 historical record contains no mention that the project participants ever used, attempted to use, or even
7 talked about using the river as a means by which to transport the workers and supplies necessary to
8 build the dam and related facilities.¹⁰

9 ***b. Attempts to boat the Salt River near statehood***

10 That the Federal Government never attempted to use the Salt River to transport workers or
11 materials from Phoenix to the Roosevelt Dam site during construction is perhaps not surprising when
12 one considers the calamitous record of those few brave souls who actually did attempt to navigate the
13 river between 1873 and 1915. During the period prior to the completion of Roosevelt Dam in 1911,
14 the river remained subject to alternating periods of devastating floods and prolonged droughts. For
15 example, major floods hit the area in 1890 and 1891. “Severe” and “extreme” drought plagued the
16 Valley from 1897 to 1904. Flooding returned again in 1905.¹¹

17 Table 6 of Mr. Fuller’s report discusses “16 accounts of successful or unsuccessful attempts to
18 boat or transport goods down the Salt River between about 1873 and 1910.” Fuller, supra, at 3-18 and
19 3-19. Those attempts are discussed in detail in Appendix A attached hereto. This scattered collection
20 of boating expeditions on the river does not provide evidence that the Lower Salt River is
21 “navigable” as defined in A.R.S. § 37-1101(5). To the contrary, these sixteen accounts not only are
22 insufficient to satisfy the navigability proponents’ burden of proof under A.R.S. § 37-1128(A), they
23 are persuasive evidence that the river was **non-navigable**, for several reasons.

24
25
26 ¹⁰ This exclusive use of overland conveyance even applied to a **ferry boat**, which was brought in by
27 rail and then transported by wagon for use at Roosevelt Lake. See Littlefield, supra, at 168-69; Tr. at
7:166 (Littlefield).

¹¹ See Fuller, supra, at 3-8; Tr. at 7:32-33 (Fuller), 7:109-12 (August).

1 First, the accounts of attempted boating consist entirely of anecdotal evidence from local
2 newspaper articles. These articles do not provide a sufficient basis to support a finding of
3 navigability. For example, one May 1873 trip (Account No. 1) is supported only by a single
4 newspaper article containing a mere forty-five words. See Appendix A. The only evidence of a trip
5 in February 1881 (Account No. 3) is a newspaper article reporting that two men “will leave-
6 tomorrow” on a boat to Yuma down the Salt and Gila Rivers; no subsequent article has been located
7 to show whether these gentlemen actually attempted the trip or whether it was successfully completed.
8 Id. The only support for another voyage, which purportedly occurred sometime in 1883 (Account No.
9 5), is what appears to be an obituary of one of the participants twenty-six years later, in 1909. Id.
10 Another attempt that is said to have occurred in June 1885 (Account No. 7) is mentioned in several
11 newspaper articles, one of which states that “the fish were so thick that the boat floated on their
12 backs.” See Fuller, supra, at 3-21 to 3-22. An alleged episode of floating some form of timber down
13 the river, which occurred in either 1890 or 1891 (Account No. 10), is based upon a modern-day
14 historian’s recollection of a newspaper article he **thinks he recalls seeing**, but no such article has ever
15 been located. See Appendix A. The evidentiary basis for each of these sixteen “attempted or
16 successful” trips is shaky, to say the least.¹²

17 Second, and perhaps more important, the sixteen accounts of attempted boating on the river
18 are so full of mishaps and misery that they themselves prove that the river was not used or susceptible
19 to being used as a “highway for commerce.” For example, a late 1881 expedition known as “Yuma or
20 Bust” (Account No. 4) actually “busted” and, only twelve miles from Phoenix, the participants were
21 seen “all wading in mud and water up to their knees, pulling the boat, and apparently as happy (?) as
22 mudturtles.” See Appendix A. On at least two of the trips (Accounts Nos. 2 and 7), the boats were
23 capsized and the parties lost all or nearly all of their supplies. Id. Two of the participants (in

24 ¹² These newspaper reports must also be considered in the context of the nature of 19th century
25 Western newspapers, which often acted not only as reporters of news but also as “boosters” for the
26 local community in an effort to attract settlers to growing towns. See Littlefield, supra, at 156; Tr. at
27 7:164-66 (Littlefield). These early newspapers had substantial incentive to exaggerate the benefits of
their local communities. See Littlefield, supra, at 156; see also Fuller, supra, at 3-20 (referring to
Account No. 6, wherein the newspaper promoted the Salt River as a candidate for federal funding
under the Rivers and Harbors Act).

1 Accounts Nos. 8 and 14) are known to have died as a result of their boating adventures. Id. In other
2 instances (Accounts Nos. 9 and 15), the boats were destroyed or badly damaged. Id.

3 Third, the only recorded opinions on navigability by the participants themselves show that the
4 river was not suitable as a “highway for commerce.” Charles Hayden and the other participants in a
5 June 1873 trip to float logs down the Salt River to Tempe (Account No. 2), the only known actual
6 attempt to float logs on the river, “pronounce[d] the scheme a failure.” Id.¹³ Two engineers from the
7 Reclamation Service, who survived only a mile in a boat on the river in 1905, stated that “[t]hey
8 found the Salt river a poor stream for navigation.” Id.

9 Fourth, the vast majority of these attempts (including Accounts Nos. 1, 3, 4, 6, 8, 9, 11, 12, 13,
10 14, and 16) occurred between December and May, typically the time of year subject to periods of
11 relatively higher precipitation and runoff. See Appendix A; Fuller, supra, at 7-17 (Table 26). The
12 record does not indicate what time of year two of the other alleged events (Accounts Nos. 5 and 10)
13 took place. See Appendix A. Account No. 15 happened during a flood. Id. Accounts Nos. 2 and 7
14 were clearly difficult and encountered, at most, limited success (Account No. 2 being Charles
15 Hayden’s attempt to float logs down the river, which he himself declared to be a “failure,” and
16 Account No. 7 being one of the trips in which the boat was “wrecked, losing provisions, fire arms,
17 etc.”). Id.

18 These sixteen anecdotal accounts of boating on the river over the course of forty-two years are
19 not sufficient to satisfy the burden of proof for navigability and, in fact, they prove just the opposite.
20 For the most part, people did not even attempt to float a boat on the river unless it was at flood stage
21 or during a period of higher precipitation and runoff. Even during these periods, people generally met
22 with disastrous consequences, with some people dying, others losing their supplies, and virtually all of
23 them encountering low water or sand bars that required them to get out and push. These ill-fated
24 attempts show that the Lower Salt River is not and never has been “navigable.”

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27 ¹³ Carl Hayden often spoke “about the 1873 attempt by his father to move those logs down, and what
a disaster it really was.” Tr. at 7:114, 125 (August).

1 **c. Fishing on the Salt River**

2 The historical record is devoid of any evidence that any person ever used a boat to fish on the
3 river. See Fuller, supra, at 3-15, 3-16. Actual evidence of fishing, even from the banks of the river, is
4 sparse. Two newspaper articles “mention[ed] fish being supplied to local markets,” but nothing in the
5 record supports a conclusion that these fish necessarily came from the Salt River, as opposed to the
6 Verde River, the Gila River, or one of the many canals. See id. at 3-16; Tr. at 7:34-35 (Fuller).
7 Another newspaper article states that “restaurants occasionally furnish their boarders with excellent
8 fish caught in the Salt River,” but this single article hardly supports a conclusion that a thriving
9 commercial fishery ever existed in the river. See Fuller, supra, at 3-16.

10 What evidence of fishing that does exist in the record in no way supports a finding of
11 navigability. At least one newspaper article states that the supply of fish was obtained at a time when
12 the river was “very low, and the pools [were] well filled with fish.” Id. at B-7. Evidence of fishing
13 in pools at a time when the river was low does not make it more likely that the river was navigable at
14 that time.

15 **d. The Salt River ferries**

16 It is well known that one or more ferries operated at some times of some years on the Salt
17 River. Hayden’s Ferry, a cable ferry which operated near present-day Mill Avenue in Tempe, is the
18 best known of those ferries. It is also beyond dispute, based upon the evidence in the record, that
19 Hayden’s Ferry was not used year-round on the river, but rather “was used only when high water
20 impeded fording the river.” Fuller, supra, at 3-7.; Tr. at 7:31 (Fuller).¹⁴ Mr. Fuller’s report correctly
21 concludes that “most of the ferries operated on the Salt River were short-lived, expedient ventures,
22 that were mentioned in the papers only when they first went into service.” Fuller, supra, at 3-26; Tr.
23 at 7:38 (Fuller), 7:113 (August).

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26 ¹⁴ See also Fuller, supra, at 3-7 (“When the Salt River was at a high stage, travelers depended on
27 Hayden’s Ferry to transport their teams and wagons across the swollen river. The wood ferry boat ran
from the northwest base of the butte to the north bank of the river by cable on poles. By lowering the
boat’s rear end, the current would swing it across the stream.”).

1 As shown by the evidence submitted at the hearing, the location of Hayden's Ferry was not
2 coincidental. Dr. Stanley Schumm, an internationally recognized geomorphologist, testified regarding
3 the "Tempe constriction," an outcropping of bedrock in the river near the former location of the ferry.
4 See Tr. at 7:198-99 (Schumm); see also S. Schumm, Geomorphic Character of the Salt River (March
5 2003) (EI 26); Tr. at 7:14 (Fuller). The constriction forces groundwater to the surface and also
6 narrows the width of the channel. These two factors combined to make the Hayden's Ferry site an
7 excellent location to cross the Lower Salt River. See Tr. at 7:198-99 (Schumm).¹⁵

8 The physical features of the Tempe constriction do not, however, cover any significant length
9 of the river. As seen on Dr. Schumm's slides, the braided nature of the channel is present just
10 upstream and downstream from the Tempe constriction. See Slides Presented by Dr. Schumm at
11 hearing on April 7, 2003 (EI 51).¹⁶ The physical nature of the Hayden's Ferry location was relatively
12 unique among other locations on the river. See Tr. at 7:198-99 (Schumm).

13 Dr. Schumm's testimony regarding the Hayden Ferry location is consistent with Mr. Fuller's
14 testimony and the information contained in Mr. Fuller's report. For example, the entry for 1881 in
15 Table 5 of Mr. Fuller's report states: "Several times floods washed out the cable supports on the
16 north side of the river and took the ferry downstream. Hayden had only to send a team of horses
17 downstream to haul the boat back because it would only float a few miles before landing on a
18 sandbar." Fuller, supra, at 3-7; see also Tr. at 7:32 (Fuller), 7:114 (August). The actual ferry site was
19 a unique location resulting from the presence of the Tempe constriction, and the area downstream
20 soon returned to the braided nature of most of the channel. The boat apparently could float relatively
21 well **across** the river at the point of the constriction in times of high water, but could not float very far
22

23 ¹⁵ See also Tr. at 7:144-45 (Gookin); W. Graf, The Gila and Salt Rivers in Central Arizona: A
24 Geographic Field Guide 105 (1988) (EI 23) ("The Salt River is constricted here by Tempe Butte on
25 the south and the Papago Hills on the North. . . . The Salt River is effectively narrowed at Tempe
26 Crossing, which makes it an ideal location for a ford and bridge crossing."); P. Ruff, A History of the
27 Salt River Channel in the Vicinity of Tempe, Arizona, 1868-1969 8 (1971) (EI 23) ("The constriction
of the Salt River channel as it passes the Tempe Butte and the conglomerate outcropping to the north
. . . in effect produces a gorge. . . . In this region of the Salt River, the flow of water is pooled . . .").

¹⁶ The 1971 report by Dr. Ruff (EI 23) also contains numerous photographs showing the Tempe
constriction.

1 **up or down** the braided channel (even at high water) without getting stuck on a sandbar or other
2 obstruction. See Fuller, supra, at 3-7.

3 **5. The Lower Salt River after completion of Roosevelt Dam in 1911**

4 The erratic and flashy nature of the Lower Salt River changed with the completion of
5 Roosevelt Dam in 1911. The very purpose of constructing the dam was to capture the extreme flood
6 flows and to store the water for use during the alternating periods of floods and droughts.¹⁷ Due in
7 part to the construction of Roosevelt and subsequent dams on the Salt and Verde Rivers, “[b]y
8 statehood, except on rare occasions when runoff from the Salt River watershed exceeded the capacity
9 of SRP’s water storage and diversion facilities, water users in the Valley appropriated all of the water
10 in the Salt River for diversion and use on Valley lands.” Roberts, supra, at 29; see also Tr. at 7:217
11 (Roberts).

12 Limited evidence exists that, on a few of the rare occasions in the last several decades when
13 the river flows have exceeded the capacity of all the Salt and Verde River dams, a handful of
14 adventurous individuals have attempted to boat or kayak on the river for recreational purposes. Such
15 occasions are the extreme exception rather than the rule, however, and are notable only for their rarity.
16 For example, no attempts to boat the Lower Salt River are known to have occurred between 1940 and
17 1965 or since 1995. See Tr. at 7:72-73 (Fuller).

18 Not unlike those “daring adventurers” who tried to boat the river near the turn of the last
19 century (see Section III(A)(4), supra, and Appendix A), several of the individuals who have tried to
20 boat the river in recent decades have either died or required rescue. See Fuller, supra, at 8-4.
21 Furthermore, as Mr. Fuller readily admitted, “modern boat use on the river does not provide proof of
22 susceptibility of a stream to navigation at statehood.” Id.; Tr. at 7:69 (Fuller).

23 Nothing in the historical record before this Commission indicates that the Lower Salt River
24 was used or susceptible to being used as a “highway for commerce” at statehood, or at any time before

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26 ¹⁷ See D. Roberts, The Historical Development and Use of Water from the Salt River in the Salt River
27 Valley 29 (April 7, 2003) (EI 36) (“The creation of the Salt River Federal Reclamation Project tamed
the flashy, unpredictable Salt River bringing certainty to the Valley’s water supply to support its
continued growth and economic development.”); see also Tr. at 7:217-18 (Roberts).

1 or after statehood. In fact, every piece of historical evidence (from the archaeological information to
2 the records of the early explorers and the accounts of actual attempts to boat the river around
3 statehood) shows that the river is and always has been non-navigable.

4 **B. Climate, Hydrology, and Geomorphology of the Lower Salt River**

5 The other evidence presented to the Commission is similarly insufficient to constitute a
6 “preponderance of the evidence” in favor of navigability. All of the climatic evidence indicates that
7 the desert climate provided for brief, violent periods of precipitation and runoff, rather than the type
8 of weather that would produce a particularly large or regularly flowing stream. The hydrologic
9 evidence, which is limited in degree, shows that the river was erratic and never included sufficient
10 flows to support a “highway for commerce.” The geomorphologic evidence shows that the river had a
11 braided channel, with numerous snags and sandbars that constituted natural impediments to
12 navigation.

13 As anyone who has lived in central Arizona for any period of time is aware, precipitation in
14 the Salt River Valley and the adjoining watersheds “occurs during two major seasons; in late summer
15 as intense, localize[d] orographic thunderstorms; and in winter as large-scale cyclonic storms which
16 originate over the Pacific Ocean.” Fuller, supra, at 5-4; see also id. at 7-3; Tr. at 7:62 (Fuller).¹⁸ This
17 weather pattern is reflected in the data relating to the monthly average flows of the river. In Table 26
18 of his report, Mr. Fuller summed gauge data on the Upper Salt River at Roosevelt and the Verde River
19 at Tangle Creek to yield an estimated combined flow number at the confluence of the Salt and Verde
20 Rivers (near the upper end of the reach at issue in this proceeding). See Fuller, supra, at 7-17. That
21 data shows a variation in monthly average flows from 3,420 cubic-feet per second (“cfs”) in March to
22 501 cfs in June. See id. These variable flows reflect the erratic nature of the Lower Salt River, even
23 on an average basis.

24 The hydrologic information submitted to the Commission is no more supportive of a finding
25 of navigability than is the climate data. There were little or no stream gauge records available for this
26

27 ¹⁸ “Orographic” refers to the fact that the storms are “associated with or induced by the presence of mountains.” Webster’s New Collegiate Dictionary 810 (1977).

1 reach of the river at or before statehood, and no flow duration statistics were available to reflect flow
2 conditions. Id. at 5-4, 7-1, 7-6; Tr. at 7:15, 7:62 (Fuller). No flow records exist for the actual day of
3 statehood—February 14, 1912. See Fuller, supra, at 7-14. Due to this almost complete lack of any
4 real data, what Mr. Fuller did was to add the Upper Salt and Verde figures discussed above and arrive
5 at an **estimate** of flows on the Lower Salt River. See id. at 7-17 (Table 26); Tr. at 7:15, 7:68 (Fuller).

6 Several methodological difficulties exist, however, with respect to an estimate derived from
7 measured flows of the two upstream reaches (Verde and Upper Salt). First, the Upper Salt gauge was
8 at Roosevelt, and the Verde gauge was at Tangle Creek. No analysis was performed to determine
9 whether the flows at Roosevelt or Tangle Creek actually made it (in the same magnitude) to the
10 confluence of the Upper Salt and Verde. Furthermore, no analysis was performed to determine
11 whether the combined flow at the Upper Salt/Verde confluence ever made it to the Lower Salt/Gila
12 confluence or to any particular point in between. See Tr. at 7:68-69 (Fuller). The average annual
13 flow rate of 1,445 cfs contained in Table 26 of Mr. Fuller’s report is an estimate based upon measured
14 values for points outside the study area and assuming that every drop of water in the Upper Salt River
15 at Roosevelt and the Verde River at Tangle Creek makes it all the way down to the Lower Salt/Gila
16 confluence.¹⁹ No reasonable basis exists for such an assumption.

17 Furthermore, even without those methodological limitations, knowing the average annual flow
18 of a river is of dubious value in determining whether that river is or was “navigable.” As Mr. Fuller
19 testified and noted in his report, “average annual flow rates are skewed due to high flood flow
20 volumes relative to ‘typical’ flow rates.” Fuller, supra, at 5-5. Due to the prevalence of huge floods
21 in the Salt River, the “average” flow rate is biased substantially upward. See Tr. at 7:63-64 (Fuller).
22 For example, a flow of 199,500 cfs occurred during a flood on November 27, 1905 (approximately the
23 same time that Reclamation Service Engineers in a boat on the river were running into rocks and
24

25 ¹⁹ Dr Hjalmar Hjalmarson, on behalf of the Maricopa County Department of Transportation, also
26 submitted information on annual average flows. See Hjalmarson, Hydrology Along the Natural
27 Channel of the Salt River (February 25, 2003) (EI 22). Because Dr. Hjalmarson submitted only a one-
page report and was not called to testify at the hearing, it is difficult to determine what methodology
he used. His brief report states that the “estimated Mean annual flow” of the Salt River upstream of
the Salt River Indian Reservation is 1,730 cfs, and the “base flow” is about 260 cfs. See id.

1 hitting sandbars, see Section III(A)(4), supra. See Fuller, supra, at 7-21. If that flood had lasted for
2 only two days, an average daily flow for all of the other 363 days in the year of only 353.8 cfs would
3 have resulted in an average annual flow of 1,445 cfs.²⁰ It should be beyond dispute that the Lower
4 Salt River cannot act as a “highway for commerce” with a flood flow of 199,500 cfs. It is likewise
5 indisputable that the river cannot be navigated with a flow of only 353.8 cfs. Knowing the average
6 annual flow of an erratic stream like the Lower Salt River provides little information about whether
7 that river is or ever was navigable.

8 Based upon the evidence in the record, it appears that neither Mr. Fuller nor Dr. Hjalmarson
9 performed any standard deviation or “sensitivity” analysis to determine the relative distribution of
10 flows around their estimated averages (or “means”). As shown by the evidence of flooding in the
11 record, extremely high flows in the river are a significant impediment to navigation, as are extremely
12 low flows. Without knowing the distribution of flow data around the mean, any evidence of
13 “average” flows is unhelpful with respect to determining whether the river was used or susceptible to
14 being used as a “highway for commerce.”

15 Even if the Commission finds the “average annual flow” information to be important, that
16 information does not support a finding of navigability. A document compiled and submitted by SRP,
17 Information Regarding Navigability of Selected U.S. Watercourses (April 2003) (EI 26)
18 (“Watercourse Information”), contains information on every federal or state court decision SRP could
19 locate in which the “navigability” of a river was actually determined using the Daniel Ball test.
20 Appendix B attached hereto summarizes the annual mean (average) flow information, compiled by
21 the United States Geological Survey, for each of the twenty-one watercourses discussed in that
22 document.

23 Mr. Fuller estimated the average annual flow of the Salt River, without considering the
24 presence of any dams or diversion structures, at 1,445 cfs. See Fuller, supra, at 7-17 (Table 26). Dr.
25 Hjalmarson estimated the average annual flow at 1,730 cfs. See Hjalmarson, supra. Four of the

26 _____
27 ²⁰ If a flood of 199,500 cfs lasted for three or more days, the flow in those three days alone would be
enough to make the average annual flow be greater than 1,445 cfs—even if the flow for each of the
other days in the year was **zero**.

1 twenty-one watercourses listed in Appendix B have been found “navigable,” in whole or in part, by a
2 state or federal court. Of those four “navigable” watercourses, the lowest annual average flow is
3 2,277 cfs—for the Great Miami River in Ohio, which was found navigable in part and non-navigable
4 in part. See Appendix B. The other three “navigable” watercourses had average annual flow rates of
5 7,316 cfs (the Colorado River in Utah), 6,930 cfs (the Green River in Utah), and 4,066 cfs (the
6 McKenzie River in Oregon). Id. Five rivers that courts have specifically determined to be non-
7 navigable (the Arkansas River in Oklahoma, the Chattahoochee River in Georgia, the Little River in
8 Arkansas, the Neosho River in Kansas, and the Red River on the border between Oklahoma and
9 Texas) have average annual flow rates higher than either Mr. Fuller’s 1,445 cfs or Dr. Hjalmarson’s
10 1,730 cfs. See Appendix B; Watercourse Information, supra.²¹ The hydrologic evidence in the
11 record, and any related attempts to “model” whether the river was navigable at any time, do not
12 support a finding of navigability for the Lower Salt River.

13 The geomorphologic evidence in the record also refutes, rather than supports, a finding of
14 navigability. Dr. Schumm presented extensive testimony regarding the braided nature of the Lower
15 Salt River, containing numerous islands and sandbars. See Schumm, supra, at 2; Tr. at 7:194-200
16 (Schumm). The Lower Salt “was a braided river, and the pattern of bars, islands, and low-water
17 channels changed through time.” Schumm, supra, at 3; see also Tr. at 8:7 (Bowers). It “was a wide,
18 sandy-gravelly channel,” and “the low-water channels shifted within the main channel and often more
19 than one low-water channel was present.” Schumm, supra, at 3. As Dr. Schumm concluded, “[t]his
20 wide and shallow Salt River channel, that contained numerous bars and islands, would not be
21 favorable for navigation.” Id. at 4.

22 Dr. Schumm’s testimony regarding the geomorphology of the river stands unrefuted in the
23 record. In fact, that testimony is supported by all of the relevant geomorphologic evidence. For
24 example, referring to the area near old Jointhead Dam in a 1988 report, former Arizona State
25

26 ²¹ The Rio Grande in New Mexico, which the United States Supreme Court determined to be non-
27 navigable in 1899 before any major water storage or diversion facilities were constructed, has an
average annual flow of 1,513 cfs. See Appendix B; Watercourse Information, supra, Tab 17; United
States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899).

1 University geomorphologist Dr. William L. Graf stated: “The channel pattern here is braided.” Graf,
2 supra, at 117. In another report, Dr. Paul F. Ruff, then an Associate Professor of Engineering at ASU,
3 described the Lower Salt River as having two distinct channels. See, e.g., Ruff, supra, at 8-10. Dr.
4 Ruff’s report also contains a general description of braided channels, such as those found on the
5 Lower Salt River:

6 Braided channels are associated with aggradation, easily eroded (sandy) bank
7 materials, rapid shifting of the bed sediments, and continuous shifting of the flow
8 channels. A braided configuration occurs when any channel is excessively wide for the
9 amount of sediment that is available to be transported by the water. . . . The braided
channel(s) that carries the largest part of the sediment load will usually aggrade until it
carries only a small part of the streamflow, and eventually the channel is abandoned.
Fluctuating discharges also contribute to braided channel configurations.

10 Id. at 3. Braided channels, such as those found on the Salt River, are not conducive to navigation.

11 **C. Prior Judicial Opinions Regarding Navigability of the Lower Salt River**

12 This Commission is only the most recent of several adjudicatory bodies that have been
13 required to consider whether some or all of the Lower Salt River was navigable. At least three courts
14 have previously stated that the river was **not** navigable on or before February 14, 1912.

15 **1. Wormser v. Salt River Valley Canal Co. (Kibbey Decree)**

16 The first decision regarding the navigability of the Lower Salt River was issued by Judge
17 Joseph H. Kibbey of the Territorial District Court in 1892.²² That suit was initiated by downstream
18 water users and canal companies against upstream appropriators. See generally Kibbey Decree, supra,
19 at 1-5; see also Tr. at 7:226, 241 (Roberts). The court characterized the plaintiffs’ complaint as
20 follows: “[The plaintiffs] filed their complaint in this court against the Arizona canal company,
21 alleging that the Salt River is a natural **unnavigable** stream rising in the mountains in the eastern part
22 of the territory and running thence in a westerly direction to its junction with the Gila River in

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24
25 ²² Wormser v. Salt River Valley Canal Co., No. 708, Second Judicial District, Territory of Arizona,
26 County of Maricopa (March 31, 1892) (“Kibbey Decree”). A copy of the Kibbey and Kent Decrees
27 was submitted to the Commission as part of SRP’s Motion to Dismiss filed on January 14, 1994, and
resubmitted on August 27, 1996 (EI 6). SRP incorporates by reference herein the facts presented in
its 1994 Motion to Dismiss.

1 Maricopa County.” Kibbey Decree, supra, at 4-5 (emphasis added); see also Tr. at 7:161-62
2 (Littlefield).

3 In ruling on the water rights at issue in that case, Judge Kibbey relied upon the 1864 “Howell
4 Code” and the Desert Land Act of 1877. Judge Kibbey decided that territorial law applied and went
5 on to apply that law to the water rights dispute. See Kibbey Decree, supra.

6 As discussed in SRP’s 1994 Motion to Dismiss, a finding of non-navigability was necessary to
7 Judge Kibbey’s decision in that case. When the case was decided in 1892, the United States retained
8 control over all navigable streams. See generally Federal Power Comm’n v. Oregon, 349 U.S. 435,
9 454 n.2 (1955). Had the river been navigable, it is much less clear that Judge Kibbey would (or
10 could) have applied the territorial law of prior appropriation. Judge Kibbey found, however, that
11 because the Lower Salt River was “unnavigable,” territorial law applied.

12 2. Hurley v. Abbott (Kent Decree)

13 The Kibbey Decree set forth the rights to water from the Salt River as between the various
14 canal companies, but Judge Kibbey did not “attempt to define the rights of individual irrigators.”
15 Kibbey Decree, supra, at 74; see also Tr. at 7:226, 241 (Roberts). Events subsequent to the issuance
16 of the Kibbey Decree, including the pending development of the Salt River Federal Reclamation
17 Project, made it necessary that rights be established as between individual appropriators and not just
18 between the canal companies. The determination of these individual rights was set forth in the 1910
19 Kent Decree.²³

20 In determining the rights of individual appropriators, Judge Kent relied heavily on the legal
21 rules set forth in the Kibbey Decree. Judge Kent expressly stated that the relevant portion of the river
22 was a “**non-navigable stream**” and, therefore, applied territorial prior appropriation law. Id. at 3.
23 The finding of non-navigability was essential to the adjudication of water rights in the Kent Decree, as
24 it was in the Kibbey Decree, because it determined what law applied. See also Tr. at 7:161-62
25 (Littlefield).

26
27 ²³ Hurley v. Abbott, No. 4564, Third Judicial District, Territory of Arizona, County of Maricopa
(March 1, 1910) (copy attached to EI 6).

1 3. SRPMIC v. Arizona Sand & Rock Co.

2 A more recent court decision addressed the navigability of the Lower Salt River. See Salt
3 River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., D. Ariz. (April 13, 1977)
4 (Cause No. CIV 72-376-PHX) (“SRPMIC”). In 1972, the Salt River Pima-Maricopa Indian
5 Community filed an action in federal court to eject certain defendants from lands claimed to be part of
6 the Salt River Indian Reservation. A portion of the lands in dispute was situated within the banks of
7 the river below Granite Reef Dam. SRP, the State, and Maricopa County were parties to that
8 consolidated action. See Consolidated Pretrial Order, SRPMIC (March 17, 1976).²⁴

9 The State initially argued that it held title to the disputed lands because the river was navigable
10 and the State owned its bed. In the final judgment, the court held that the title to the lands was vested
11 in the United States, not the State of Arizona. The court based its finding upon its conclusion that
12 “[t]he Salt River is not now [1977] and never has been a navigable river.” Appendix C, ¶ 30, at
13 11 (emphasis added).

14 Because the SRPMIC litigation involved title as between the United States and the State of
15 Arizona, the issue of navigability as of February 14, 1912, was important to the court’s decision. The
16 court’s finding was based upon the conclusion that the river was not navigable. See Appendix C, D.

17 **IV. LEGAL ARGUMENT**

18 The Commission must review all of the evidence and determine whether the Lower Salt River
19 was “navigable” on February 14, 1912. SRP submits that, although the task of reviewing the evidence
20 is perhaps time-consuming and tedious, making the actual decision should be easy. No evidence
21 supports a finding that the Lower Salt River is or ever was used or susceptible to being used as a
22 “highway for commerce.”

23 ...

24 ...

25 _____
26 ²⁴ Complete copies of the Consolidated Pretrial Order and Judgment in SRPMIC are attached hereto
27 as Appendices C and D. The pretrial order was expressly incorporated into the final judgment. See
Appendices C, D (Judgment, at 1; Findings of Fact and Conclusions of Law, at 4). Copies of these
and other pleadings in SRPMIC are included in the record as part of EI 4 (submitted by SRPMIC) and
EI 2 and 15 (submitted by counsel for CalMat Co., et al.).

1 A. **Based upon the Evidence in the Record, the Lower Salt River is Not “Navigable”**
2 **as Defined in A.R.S. § 37-1101(5).**

3 In its 2001 decision in Defenders of Wildlife v. Hull, the Arizona Court of Appeals stated that
4 “all evidence should be examined during navigability determinations and no relevant facts should be
5 excluded.” 199 Ariz. at 425, 18 P.3d at 736.²⁵ “[A] river is navigable in law when it is navigable in
6 fact.” Muckleshoot Indian Tribe v. FERC, 993 F.2d 1428, 1431 (9th Cir. 1993). Thus, the
7 Commission must consider all of the evidence in the record before it. SRP submits that, when the
8 Commission reviews the evidence submitted at and before the April hearing, and considers the totality
9 of that evidence, it must determine that the Lower Salt River never has been used or susceptible to
10 being used as a “highway for commerce,” regardless of how the Commission interprets the particular
11 legal details of the test for “navigability.”

12 1. **The Lower Salt River has never actually been used as a “highway for**
13 **commerce.”**

14 A watercourse can meet the test for “navigability” under the Arizona statute and the case law
15 if it satisfies either of two elements: (1) If it was actually used as a “highway for commerce,” or (2) if
16 it was “susceptible to being used” as a “highway for commerce.” See A.R.S. § 37-1101(5).

17 It is beyond reasonable dispute that the Lower Salt River has never been actually used as a
18 “highway for commerce.” Despite speculation that the HoHoKam might have floated balsa rafts on
19 their canals in prehistoric times, no evidence exists that they ever used any type of boat on the river
20 itself. See Section III(A)(1), supra. Likewise, no evidence exists that the early explorers or soldiers in

21 ²⁵ It is important to note the procedural posture of the Court of Appeals’ decision in Hull. That court
22 **did not** decide whether any particular watercourse was navigable. See 199 Ariz. at 430, 18 P.3d 741
23 (Thompson, J., concurring in part, dissenting in part). Rather, the court was faced with deciding the
24 constitutionality of the 1994 statute, which contained a variety of presumptions and evidentiary
25 exclusions. The court considered each of the provisions of the 1994 statute as though it was an all-or-
26 nothing proposition. For example, the Court stated: “[W]e conclude that a mandatory finding of non-
27 navigability for watercourses that flow in direct response to precipitation, **although such a fact may**
be probative, is contradictory to the *Daniel Ball* test.” Id. at 422, 18 P.3d at 733 (emphasis added).
The court determined that the provisions of Section 37-1128 in effect under the 1994 statute created a
“one strike and you’re out” test. The court found that these individual restrictions did not comply
with the federal standard. The court recognized, however, that the Commission could and should
consider most (if not all) of the factors contained in those statutes as part of the totality of the
evidence in determining navigability. See id. at 425, 18 P.3d at 736. The Legislature simply could
not require that each watercourse satisfy **all** of the factors in order to be navigable.

1 the Salt River Valley, who traveled through the area on several occasions, ever used the river—for
2 “commerce” or otherwise. See Section III(A)(2), supra. No credible evidence exists in the record that
3 any successful “tie drive” or any other effort to float logs or timber down the river was ever conducted
4 on the Lower Salt River. See Section III(A)(4)(b), supra. The evidence of the sixteen accounts of
5 attempted boating on the river between 1873 and 1915, discussed in detail in Appendix A, does not
6 establish that the river was used for any type of regular (or even periodic) trade or transportation
7 during the period immediately before and at statehood. See Section III(A)(4)(b), supra. Although
8 there is limited anecdotal evidence of fishing on the river, no evidence in the record supports a finding
9 that any such fishing involved the use of boats. See Section III(A)(4)(c), supra. Any adventurous
10 attempts to float boats on the river since 1911 have been sporadic, recreational, and almost uniformly
11 unsuccessful (and, at times, disastrous). See Section III(A)(5), supra.

12 The only other evidence in the record of the use of boats on the river relates to the ferries,
13 which were, for the most part, “short-lived, expedient ventures.” See Fuller, supra, at 3-26. Even
14 Hayden’s Ferry, which is by far the best known and likely the longest-lasting ferry on the river, “was
15 used only when high water impeded fording the river.” Id. at 3-7. Furthermore, although the
16 Commission should consider the facts in the record relating to the use of ferries on the river, that
17 evidence is not, in this instance, sufficient to support a finding that the Lower Salt River was actually
18 used as a “highway for commerce.”²⁶ Hayden’s Ferry, like the ferries at issue in the North Dakota
19 case involving the Little Missouri River, was a **cable ferry** “attached to cables strung across the River
20 from two relatively high points, towers, or posts.” Compare Fuller, supra, at 3-7, with North Dakota
21 v. United States, 972 F.2d 235, 239 (8th Cir. 1992). With respect to the probative value of ferry
22 evidence, the federal district court in North Dakota, applying the Daniel Ball test, stated:

23 The ferries on the Little Missouri River served the sole purpose of providing
24 passage across the river. Although the ferries operated on the water, they were the
25 functional equivalents of bridges. The existence of a bridge on a river may establish
26 that the bed of the river is covered at times by water too deep or too wide at any given
point to be crossed by foot, by horse, or by automobile; however, it does not establish

27 ²⁶ See Tr. at 7:72 (Fuller) (“Q. The river, for purposes of those main transportation routes, as you have talked about in your report, really was an impediment that needed to be crossed by the ferry? A. It would be an obstacle, yes.”).

1 that the river is a channel for useful commerce. On the contrary, the existence of a
2 bridge, or a ferry, establishes that the river is an obstruction to commerce which must
3 be overcome. Clearly, those persons who used the ferries to cross the river would have
4 had less difficulty making their trips had the river not existed.

4 North Dakota, 770 F. Supp. 506, 511 (D.N.D. 1991), aff'd, 972 F.2d 235 (8th Cir. 1992).²⁷

5 The federal courts' logic is equally applicable with respect to the Salt River ferries. The
6 ferries "served the sole purpose of providing passage across the river." Id. They were the "functional
7 equivalents of bridges." Id. They were "short-lived, expedient ventures" that were used only in times
8 of high water. See Fuller, supra, at 3-7, 3-26. The ferries are proof that "the Salt River served as a
9 barrier rather than a corridor for transportation." Tr. at 7:113 (August). The people who used the
10 ferries would have had an easier trip if the river had not existed. The ferries are not persuasive
11 evidence the Lower Salt River was ever actually used as a "highway for commerce."

12
13 **2. The Lower Salt River has never been "susceptible to being used" as a**
"highway for commerce."

14 Because it is abundantly clear that the river was never actually used as a "highway for
15 commerce," the only way it can be considered navigable is if it was "susceptible" to such use. No
16 evidence exists in the record to show that the river, in any condition at any time, was capable of acting
17 as "a corridor or conduit within which the exchange of goods, commodities or property or the
18 transportation of persons may be conducted." A.R.S § 37-1101(3) (defining "highway for
19 commerce").

20 Although the river existed in close proximity to much of the exploration and settlement in
21 early Arizona, it was never used for any type of trade or transportation. In order for the Commission
22 to determine that the river was "susceptible to being used . . . as a highway for commerce," it must
23 find that the prehistoric inhabitants, the early explorers, the soldiers at Fort McDowell, and thousands
24 of citizens who resided in the area prior to statehood simply failed to comprehend the potential
25 usefulness of the river as an avenue for navigation. No evidence exists to support such a finding.

26 ²⁷ See also United States v. Crow, Pope & Land Ents., Inc., 340 F. Supp. 25, 35 (N.D. Ga. 1972) ("the
27 existence of ferries is no more an example of commercial use than the presence of a bridge or railroad
trestle whose primary purpose is to avoid the river rather than to employ it as a means for trade or
transportation").

1 To the contrary, all of the evidence in the record shows that the river was not “susceptible to
2 being used” for navigation. From the beginning of time and until the erratic flows were harnessed by
3 the Salt River Federal Reclamation Project, the river was subject to alternating periods of devastating
4 floods and prolonged droughts. See Section III, supra. Prior to European settlement, the river was
5 “abounding” with beavers, a natural impediment to navigation. See Section III(A)(2), supra. The
6 river was always a braided channel, with a “pattern of bars, islands, and low-flow water channels” that
7 moved over time. See Section III(B), supra.

8 It might be theoretically possible that, on one or more occasions in particular years, it would
9 have been feasible for a person to boat or float logs down some portion of the river. Occasional use in
10 exceptional times does not, however, support a finding of navigability. “The mere fact that a river
11 will occasionally float logs, poles, and rafts downstream in times of high water does not make the
12 river navigable.” Crow, Pope & Land, 340 F. Supp. at 32 (citing Rio Grande Dam, 174 U.S. at 690).
13 “The waterway must be susceptible for use as a channel of useful commerce and not merely capable
14 of exceptional transportation during periods of high water.” Id. (citing Brewer-Elliott Oil & Gas Co.
15 v. United States, 260 U.S. 77 (1922)).²⁸

16 Perhaps the best evidence that the river was not “susceptible to being used” for navigation at
17 or before statehood are the accounts of those “daring adventurers” who actually tried to use the river
18 for that purpose. See III(A)(4)(b); Appendix A. The record of those sixteen accounts of attempted
19 boating is replete with evidence of “much toil and difficulty” and “great hardships.” See, e.g.,
20 Appendix A (Accounts Nos. 2 and 4). One boat was “cut in two parts as if she had come across a
21 buzz saw,” and another ended up “in a very dilapidated condition” after only one trip. Id. (Accounts
22 Nos. 9 and 15). Those who actually tried to boat the river “pronounce[d] the scheme a failure” and
23 “found the Salt river a poor stream for navigation.” See id. (Accounts Nos. 2 and 12). The
24 Commission can be certain that the river was not “susceptible to being used” for navigation because
25 several individuals tried it and failed.

26
27 ²⁸ See also United States v. Harrell, 926 F.2d 1036, 1040 (11th Cir. 1991) (“susceptibility of use as a
highway for commerce should not be confined to ‘exceptional conditions or short periods of
temporary high water’”) (quoting United States v. Utah, 283 U.S. 64, 87 (1931)).

1 **B. The SRPMIC Decision is Preclusive on the Navigability Issue.**

2 Another basis exists upon which the Commission should find the Lower Salt River to be non-
3 navigable, separate and apart from the technical evidence presented at and before the hearing. The
4 1977 SRPMIC decision discussed above acts as a bar against the State under the legal doctrines of *res*
5 *judicata* and collateral estoppel. See Section III(C)(3), *supra*. Under *res judicata*, for example, when
6 a court has entered a final judgment on the merits of a case,

7 [I]t is a finality as to the claim or demand in controversy, concluding parties and those
8 in privity with them, not only as to every matter which was offered and received to
9 sustain or defeat the claim or demand, but as to any other admissible matter which
might have been offered for that purpose.

10 Nevada v. United States, 463 U.S. 110, 129-30 (1983). *Res judicata* and collateral estoppel are
11 particularly applicable in cases involving land titles. *Id.* at 130 n.12; Arizona v. California, 460 U.S.
12 605, 620 & n.10 (1983). The party who lost the prior case is precluded (by *res judicata* or collateral
13 estoppel) from bringing the same claims and raising the same issues in a subsequent lawsuit. See
14 Gilbert v. Board of Medical Examiners, 155 Ariz. 169, 745 P.2d 607 (App. 1987).

15 The State was a party to SRPMIC, and that final judgment is entitled to preclusive effect
16 against the State and any party in privity with it.²⁹ Because the only ownership claim under the public
17 trust and equal footing doctrines is on behalf of the State, all parties arguing that the river is navigable
18 are in privity with the State for purposes of preclusion analysis. SRP was a party to SRPMIC and has
19 standing to raise defenses resulting from that judgment. See Appendix C. The court determined that
20 the river was not navigable, and the State (and those in privity with the State) are now precluded from
21 arguing that the river is navigable or asserting any ownership claims based upon navigability.

22 **V. SUMMARY AND REQUESTED ACTION**

23 The Commission should find the Lower Salt River “non-navigable.” Nothing in the record
24 supports a finding that the river is, was at statehood, or ever has been used or susceptible to being
25 used as a “highway for commerce.”

26
27 ²⁹ These preclusion doctrines apply to government entities as well as private parties. See generally
Arizona v. California, 460 U.S. at 617, 626.

1 DATED this 9th day of June, 2003.

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APPENDIX A

INFORMATION ON “16 ACCOUNTS OF SUCCESSFUL OR UNSUCCESSFUL ATTEMPTS TO BOAT OR TO TRANSPORT GOODS DOWN THE LOWER SALT RIVER BETWEEN ABOUT 1873 AND 1915”¹

1. **May 1873:** Two men allegedly transported a flat boat down the river from Hayden’s Ferry to the Swilling Canal. The support for this boating account, however, is limited to one 1873 newspaper article that consists of forty-five words. This trip, if it did occur, went from Hayden’s Ferry to the Swilling Canal, a distance of no more than one to two miles and happened at a time of year that typically is subject to relatively higher spring runoff. See Fuller, *supra*, at 3-18, 3-19; Reporter’s Transcript of Proceedings, at 7:39-41 (April 7-8, 2003) (Fuller) (“Tr. at [date: page]”); *id.* at 7:221 (Dave Roberts testified that the head of the Swilling Canal was located near present-day 48th Street).

2. **June 1873:** Charles Hayden and others attempted to float logs down the river to establish a lumber mill at Tempe. The trip involved “much toil and difficulty,” and the Hayden party itself “pronounce[d] the scheme a failure.” The group “lost their arms, ammunition and provisions, excepting flour.” At one point, they came to a canyon so narrow that a log could not pass through it. Eventually, they “were compelled to abandon their boat and foot it.” See Fuller, *supra*, at 3-18, 3-19; Tr. at 7:42-43 (Fuller).

3. **February 1881:** A February 17, 1881 newspaper reports that two men “will leave to-morrow” on a trip to Yuma down the Salt and Gila Rivers. Nothing in that newspaper article (or from any other source) indicates whether the trip actually occurred. See Fuller, *supra*, at 3-19; Tr. at 7:43-44 (Fuller).

¹ JE Fuller/Hydrology & Geomorphology, Inc., Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila River Confluence 3-18 to 3-19 (September 1996) (EI 7).

4. **November/December 1881**: Bucky O'Neill and two other men initiated the somewhat infamous "Yuma or Bust" expedition. The boat "busted" near Gila Bend, with the crew "enduring great hardships." A November 30, 1881 Phoenix Gazette article reported that the party was seen "yesterday, only twelve miles from here, all wading in mud and water up to their knees, pulling their boat, and apparently as happy (?) as mudturtles." See Fuller, supra, at 3-20 (parenthetical in original); Tr. at 7:44-45 (Fuller).

5. **1883**: What appears to be Mr. Jim Meadows' obituary in 1909 states that Mr. Meadows and three other men floated the river from near present-day Roosevelt Dam to Tempe in 1883. No contemporaneous report of this voyage has been located. The 1909 article recounts navigational difficulties that the crew experienced. Nothing in the 1909 article indicates what time of year this trip took place (if it did take place) or whether it occurred during a flood. See Fuller, supra, at 3-20, B-4; Tr. at 7:45-46 (Fuller).

6. **February 1883**: A local newspaper article states that the "Salt River is a navigable stream and should be included in the river and harbor appropriation." The river was not, however, included in any appropriation under the Rivers and Harbors Act. The same 1883 article reports on a purported trip from McDowell to a pier on the Salt River Valley Canal. The trip was reportedly made in a "canvas skiff." See Fuller, supra, at 3-20; Tr. at 7:47-48 (Fuller).

7. **June 1885**: Five men attempted to float a boat on the river as an experiment to see if logs could be successfully floated down the river. "The rapids with numerous projecting boulders [made] the trip a hazardous one," and, "on one occasion, they were wrecked, losing provisions, fire arms, etc." Nothing in any of the newspaper articles suggests that these individuals actually floated logs down the river, as opposed to simply trying to float a boat and investigate whether logs could be floated. See Fuller, supra, at 3-21, 3-22; Tr. at 7:48-50 (Fuller).

8. **December 1888:** Two soldiers from Fort McDowell tried to float a canoe on the Verde and Salt Rivers to Phoenix. One of the soldiers was killed when he accidentally shot himself while lifting the boat over a dam. According to Mr. Fuller's report, there was a major flood sometime in 1888, although nothing in the record indicates what time of year the flood occurred. See Fuller, supra, at 3-20, 7-21 (Table 28); Tr. at 7:50-51 (Fuller).

9. **January 1889:** A ferry boat broke loose from the Maricopa Crossing (somewhere on the Lower Salt River) and floated downstream on the Gila River until it hit a snag and "was cut in two parts as if she had come across a buzz saw." Table 28 of Mr. Fuller's report indicates that a major flood occurred on the Salt River in the spring of 1889, with a maximum recorded flow rate of 33,794 cubic-feet per second ("cfs") occurring on March 17. See Fuller, supra, at 3-22, 7-21; Tr. at 7:52-53 (Fuller).

10. **1890 or 1891:** A modern-day historian thinks he remembers seeing a newspaper article from 1890 or 1891, indicating that logs or sawn timber from Fort McDowell were floated down the Verde River to be used in constructing headgates for the Consolidated Canal. No such article has ever been found. Even the historian's recollection, as described in Mr. Fuller's report, does not indicate that the timber was actually floated on the Salt (as opposed to the Verde) River. Furthermore, even if this recollection were correct and documented, nothing exists in the record to show that this event did not occur during the major flood in 1890 (143,288 cfs on February 22, 1890) or 1891 (258,000 cfs in February 1891). See Fuller, supra, at iii, 3-22, 7-21 (Table 28); Tr. at 7:24-25, 7:53-54 (Fuller).

11. **February 1895:** Two men allegedly boated down the San Francisco River to Clifton, down the Gila River to Sacaton, and then down the Salt and Verde Rivers to Yuma. This trip, if it did occur, was taken in close proximity to the flood in the winter of 1895 (82,994 cfs on January 18, 1895). See Fuller, supra, at 3-22, 7-21 (Table 28); Tr. at 7:54-55 (Fuller).

12. **December 1905:** Two engineers from the Federal Reclamation Service, inspecting certain facilities on the Lower Salt River, tried to travel by boat on the river. “They found the Salt river a poor stream for navigation. In the course of a mile, they were shipwrecked twice. . . . In the first incident the boat went on a rock in a rapid and the next time stuck on a sandbar.” The participants ended up walking about a mile, where someone picked them up and drove them to town. They later resumed their inspection on horseback. These two individuals encountered these difficulties with exposed rocks and sandbars despite the fact that the river was almost certainly at or near record flood stage. The newspaper account of their expedition is dated December 9, 1905. One of the largest floods on record for this period occurred in late November and early December 1905, with a maximum recorded flow of 199,500 cfs on November 27, 1905. See Fuller, supra, at 3-23, 7-21 (Table 28); Tr. at 7:55-57 (Fuller); D. Littlefield, Assessment of the Salt River’s Navigability Prior to and On the Date of Arizona’s Statehood, February 14, 1912 160 (December 5, 1996) (EI 16).

13. **March 1905:** A gentleman constructed a boat at a lumber company in Phoenix, “intending to float it to Yuma.” The only locations at which this craft is reported to have been spotted are on the Gila River, not the Salt River, so no evidence exists to indicate that this boating effort actually involved the Salt River. See Fuller, supra, at 3-23; Tr. at 7:57-58 (Fuller).

14. **February 1905:** A boat was used to rescue people on the river during a flood. The first boat, piloted by John Tizler, “struck a barbed wire fence and capsized. Tizler was drowned.” A second boat was sent to rescue his wife. The sheriff, who coordinated the rescue efforts, “believed the river so dangerous that he said he would not undertake a similar venture for \$500.” See Fuller, supra, at 3-23; Tr. at 7:58-59 (Fuller); Littlefield, supra, at 160.

15. **June 1910:** Two men reportedly took a rowboat from Roosevelt Dam to Granite Reef Dam, and then to Mesa via the South Canal. No portion of this trip

occurred on the reach of the Lower Salt River that is at issue in this proceeding. Furthermore, the record is replete with evidence that this was not a successful boating trip: “The row boat which was used throughout the journey was in a very dilapidated condition at the end of the trip. Before the start was made three bottoms had been placed in the craft and one of these bottoms had been worn through by the constant friction of the boulders and sands found in shallow waters.” On several occasions, “the men were compelled to lift their craft from the water and carry it over obstacles and at other times to haul it along the stands.” The newspaper article reporting on their adventure expressly states that they “have no serious intention of attempting to go into competition with the stage company.” In addition, this trip (which apparently involved a substantial amount of pushing and portaging) was undertaken in relatively close proximity to the flood of 1910, which included a maximum recorded flow rate of 294,000 cfs on January 2, 1910. See Fuller, supra, at 3-23, 7-21 (Table 28); Tr. at 7:59-61 (Fuller).

16. **January 1915:** According to one newspaper account, a boat was used to rescue people from the flooded Salt River. The newspaper article does not specify where on the Salt River the rescue occurred, so it cannot be determined whether this event took place in the reach of the Lower Salt River at issue. See Fuller, supra, at 3-23; Tr. at 7:61 (Fuller).

APPENDIX B

COMPARISON OF ANNUAL MEAN FLOW RATE FOR VARIOUS STREAMS (cubic-foot per second)

River	Navigable?	Cfs	Data Source
Salt River (AZ)	To be determined	1,455	Fuller Report
Arkansas River (OK)	No	7,561	USGS data at Tulsa, OK (1926-1999)
Cedar River (WA)	No	164	USGS data near Cedar Falls, WA (1946-2000)
Chattahoochee River (GA)	No	2,031	USGS data at Buford Dam, GA (1943-2000)
Colorado River (UT)	Yes	7,316	USGS data near Cisco, UT (1914-2000)
Fisheating Creek (FL)	No	252	USGS data at Palmdale, FL (1932-2000)
Great Miami River (OH)	In part	2,277	USGS data at Dayton, OH (1914-1999)
Green River (UT)	Yes	6,930	USGS data at Green River, UT (1895-2000)
Little River (AR)	No	2,892	USGS data at Rivervale, AR (1948-1976)
Little Missouri River (ND)	No	555	USGS data near Watford City, ND (1935-1999)
McKenzie River (OR)	Yes	4,066	USGS data near Vida, OR (1925-2000)
Neosho River (KS)	No	2,764	USGS data near Parsons, KS (1922-2000)
Red River (OK/TX)	No	9,363	USGS data at Arthur City, TX (1906-1999)
Rio Grande (NM)	No	1,513	USGS data at Otowi Bridge, NM (1896-2000)
Sinnemahoning Creek (PA)	No	399	USGS data at Sinnemahoning, PA (1954-2000)
White River (AR)	No	563	USGS data at Fayetteville, AR (1964-1993)
Wolf River (TN)	No	1,107	USGS data at Germantown, TN (1970-2000)

Source: Information Regarding Navigability of Selected U.S. Watercourses (April 2003) (EI 25).

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IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE DISTRICT OF ARIZONA U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
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SALT RIVER PIMA-MARICOPA INDIAN)
COMMUNITY,)

Plaintiff,)

vs.)

ARIZONA SAND & ROCK CO., an)
Arizona corporation, et al.,)

Defendants.)

NO. CIV-72-376-Phx.

JOHNSON & STEWART MATERIALS, INC.,)
et al.,)

Plaintiff,)

vs.)

ROGERS C. B. MORTON, Secretary of)
the Department of the Interior;)
et al.,)

Defendants.)

NO. CIV-73-579-Phx.

CITY OF MESA, an Arizona municipal)
corporation,)

Plaintiff,)

vs.)

ROGERS C. B. MORTON, Secretary of)
the Department of the Interior;)
et al.,)

Defendants.)

NO. CIV-73-769-Phx.

SALT RIVER VALLEY WATER USERS')
ASSOCIATION, an Arizona corpora-)
tion; et al.,)

Plaintiffs,)

vs.)

ROGERS C. B. MORTON, Secretary of)
the Department of the Interior;)
et al.,)

Defendants.)

NO. CIV-74-553-Phx.

133

1058

1 STATE OF ARIZONA, ex rel., W. A.)
 2 ORDWAY, Director of the Arizona)
 Department of Transportation,)
 3 Plaintiff,) NO. CIV-74-529-Phx.
 4 vs.)
 5 ROGERS C. B. MORTON, Secretary of)
 the Department of the Interior;)
 6 et al.,)
 7 Defendants.)

8 CONSOLIDATED PRETRIAL ORDER

9 I.

10 These consolidated actions involve the south boundary
 11 of the Salt River Indian Reservation in Township 1 North, Range
 12 5 East, Gila and Salt River Base and Meridian, north of Mesa,
 13 Arizona. As a result of a decision by the then Secretary of
 14 Interior on January 17, 1969, a plat of survey was prepared and
 15 filed on August 17, 1972, showing that boundary at a location
 16 which would result in the inclusion within the reservation of
 17 certain property to which other parties claim an interest. The
 18 individual actions are these:

19 NO. CIV-72-376. This is an action filed by the Indian
 20 Community against Arizona Sand and Rock Co., et al., for trespass,
 21 ejectment and damages for the removal of sand and gravel. The
 22 issue of the amount of damages, if any, has been severed and only
 23 the issue of liability is now before the Court. Of the defendants
 24 originally named in this action, only the following still remain:
 25 Johnson & Stewart Materials, Inc., Allied Concrete & Materials
 26 Co., Salt River Valley Water Users' Association, Arizona State
 27 Highway Commission (now the Arizona Department of Transportation),
 28 the County of Maricopa, Roy Johnson and Earl C. Johnson and their
 29 respective wives and the Executor of the Estate of Leroy Johnson,
 30 Deceased. Transamerica Title Insurance Company subsequently
 31 became a party defendant to this action on its motion to inter-
 32 vene upon the grounds that it has issued a policy of title

1 insurance upon property owned by Allied Concrete & Materials Co.

2 In this action the Indian Community seeks an order of
3 ejectment against all defendants from the reservation as deter-
4 mined by the Secretarial memorandum of January 17, 1969, and
5 damages for trespass against all defendants except Allied Concrete
6 and Materials Company, Inc.

7 In the course of proceedings in this case the Court
8 ruled that it would not consider a collateral attack by the
9 defendants upon the decision of the Secretary of the Interior
10 and this ruling resulted in the filing of the subsequent actions
11 in which the following claims are asserted:

12 NO. CIV-73-579. This is an action instituted by
13 Johnson & Stewart Materials, Inc., Roy Johnson and Earl C. Johnson
14 and their respective wives, and the executor of the Estate of
15 Leroy Johnson (hereinafter collectively referred to as "Johnson &
16 Stewart") against the Secretary of Interior seeking to invalidate
17 the decision of the Secretary and the 1972 Plat of Survey. The
18 plaintiffs claim an interest in a portion of the disputed property
19 by reason of unpatented mining claims and assert that the
20 Secretarial memorandum of January 17, 1969 is unlawful, exceeds
21 the Secretarial powers, violates due process and constitutes a
22 taking of property interests without just compensation and due
23 process.

24 NO. CIV-73-769. This is a similar action brought by
25 the City of Mesa. It claims a fee simple interest in portions of
26 the disputed property by reason of patents issued by the United
27 States prior to the filing of the 1972 Plat of Survey.

28 NO. CIV-74-553. This is a similar action brought by
29 the Salt River Valley Water Users' Association. The Association
30 claims an interest in a portion of the disputed property pursuant
31 to a contract entered into with the United States in 1917 by
32 which said land, which previously had been withdrawn for

1 reclamation purposes, was conveyed to the Association, as Agent
2 of the United States, for use in connection with the operation of
3 the Salt River Project, a Federal reclamation project.

4 NO. CIV-74-529. This is an action brought by the State
5 of Arizona on behalf of the Director of the Arizona Department of
6 Transportation. The State of Arizona claims an interest in a
7 portion of the disputed property by reason of certain licenses
8 and permits for the removal of sand and gravel and rights of way
9 which were granted to the Department by the Bureau of Reclamation,
10 Department of Interior.

11 For convenience, the parties will some times hereinafter
12 be designated by referring to the plaintiff in No. CIV-72-376
13 as the "Indian Community", the defendants in the remaining docket
14 numbers as the "Secretary", and the remaining parties as the
15 "Land Claimants".

16 II.

17 The jurisdiction of this Court is invoked under Title 28
18 U.S.C. §1331 (Federal Question), §1361 (Action to Compel a Federal
19 Officer to Perform his Duty), §1362 (Indian Tribe as a Plaintiff),
20 §§2201-2202 (Declaratory Judgment) and Title 5 U.S.C. §§701-706
21 (Administrative Procedure Act).

22 To the extent this action might be regarded as an
23 action against the United States, the Land Claimants rely upon
24 the rationale of Ritter v. Morton, 513 F.2d 942 (9th Cir., 1975);
25 Armstrong v. Udall, 435 F.2d 28 (9th Cir., 1970); Andros v. Rupp,
26 433 F.2d 70 (9th Cir., 1970).

27 III.

28 The following facts are admitted by the parties and
29 require no proof:

30 1. The Salt and the Verde Rivers converge at a point
31 approximately four miles northeast of what is now Granite Reef
32 Dam in Maricopa County, Arizona, to form the Salt River.

1 2. On October 22, 1868, there was filed with the
2 General Land Office of the United States of America a plat of
3 survey and subdivision of Township 1 North, Range 5 East of the
4 Gila and Salt River Base and Meridian in conformity with the field
5 notes of the survey thereof conducted by W. F. Ingalls and William
6 H. Pierce.

7 3. By Executive Order dated January 10, 1879, President
8 Rutherford B. Hayes set apart for the use of the Pima-Maricopa
9 Indians as an additional reservation a large parcel of land
10 within Maricopa County, Arizona, including what is now the greater
11 Phoenix area.

12 4. By Executive Order dated June 14, 1879, President
13 Rutherford B. Hayes cancelled his previous Executive Order dated
14 January 10, 1879, and set apart for the use of the Pima-Maricopa
15 Indians a substantially smaller tract of land described in part
16 as follows:

17 Beginning at the point where the range line
18 between ranges four and five each crosses the
19 Salt River, thence up and along the middle of
20 said river to a point where the easterly line
21 of Camp McDowell Military Reservation, if pro-
22 longed south, would strike said river, thence
23 northerly to the southeast corner of Camp
24 McDowell Reservation; thence west along the
25 southern boundary line of said Camp McDowell
26 reservation to the southwest corner thereof;
27 thence up and along the west boundary of
28 said reservation until it intersects the
29 north boundary of the southern tier of
30 sections in township three north, range six
31 east; thence west along the north boundary
32 of the southern tier of sections in township
three north, ranges five and six east to the
northwest corner of section thirty-one, town-
ship three north, range five east; thence
south along the range line between ranges
four and five east to the place of beginning.
[Emphasis added]

33 5. On December 27, 1887, L. D. Chillson was instructed
34 to survey the exterior boundaries of the Salt River Indian
35 Reservation and to subdivide the reservation into 40 acre allot-
36 ments. On July 11, 1888, there was filed with the General Land

1 Office a plat of survey in conformance with Chillson's field notes.
2 The surveyor meandered the north bank of Salt River as it flows
3 through Township 1 North, Range 5 East.

4 6. On July 2, 1902 the Secretary of the Interior, pur-
5 suant to Section 3 of the Reclamation Act (Title 43 U.S.C. §§416,
6 432 and 434), entered a Second Form of withdrawal order purporting
7 to withdraw the public lands in the Salt River Valley including
8 all of the land situated in Township 1 North, Range 5 East.
9 Thereafter, on June 29, 1940 and June 3, 1954, the Secretary
10 entered orders purporting to change from Second Form Withdrawal
11 to First Form Withdrawal the withdrawal of certain lands situated
12 within Section 3 of said township, more particularly described as
13 Lots 2, 3, 4 and the Southwest Quarter of the Northwest Quarter
14 of Section 3 in Township 1 North, Range 5 East, Gila and Salt
15 River Base and Meridian. The Salt River Valley Water Users'
16 Association claims an interest in this property pursuant to the
17 provisions of a contract between the Association and the United
18 States dated September 6, 1917. It is within this area that the
19 Bureau of Reclamation issued sand and gravel permits to the
20 Arizona Highway Department and Maricopa County. Fee title to
21 this property is vested in the United States.

22 7. On October 11, 1910, R. A. Farmer was instructed to
23 survey (1) the boundary and exterior lines embraced within the
24 Salt River Indian Reservation, and (2) to subdivide the Salt River
25 Indian Reservation. On March 29, 1913, there were filed with the
26 United States General Land Office in Washington, D. C. plats of
27 survey of Township 1 North, Range 5 East, Township 2 North,
28 Range 5 East, and Township 2 North, Range 6 East of the Gila and
29 Salt River Base and Meridian, Arizona, in conformance with R. A.
30 Farmer's field notes. On these plats there appears a dotted line
31 labeled "reservation boundary". A dispute exists between the
32 parties whether this line constitutes a part of the survey.

1 8. By Executive Order dated September 28, 1911, Presi-
2 dent William Howard Taft amended the Presidential Executive Order
3 dated June 14, 1879, so as to permanently withdraw from settle-
4 ment, entry, sale or other disposition all those tracts of land
5 lying south of the Salt River in Sections 25, 26, 34 and 36,
6 except the Southeast Quarter of the Southeast Quarter, Section 34,
7 in Township 2 North, Range 5 East, of the Gila and Salt River
8 Base and Meridian, for the use of the Pima and Maricopa Indians.

9 9. On September 30, 1924, the United States Surveyor
10 General Charles M. Donahoe, filed with the United States General
11 Land Office a supplemental plat of Section 35 of Township 2 North,
12 Range 5 East, Gila and Salt River Base and Meridian in compliance
13 with instructions contained in General Land Office letter "E"
14 dated July 11, 1924. A supplemental plat relating to a portion
15 of Section 12 of Township 1 North, Range 4 East was also filed
16 at the same time by Surveyor General Donahoe.

17 10. Between 1892 and 1933 the United States issued
18 patents covering various parcels of which, either directly or by
19 mesne conveyances, the City of Mesa is now record owner. Such
20 parcels are as follows:

21 PARCEL NO. 1: The Southeast Quarter of the
22 Southeast Quarter of Section 7, Township 1
23 North, Range 5 East of the Gila and Salt River
Base and Meridian, Maricopa County, Arizona.

24 PARCEL NO. 2: A strip or parcel of land 300
25 feet in width off the West side of the North-
26 east Quarter of the Northeast Quarter of
Section 18, Township 1 North, Range 5 East,
extending the entire length North and South of
said Quarter Section.

27 PARCEL NO. 3: The East Half of the Southwest
28 Quarter of the Southeast Quarter of Section 7,
29 and the East Half of the Northwest Quarter of
30 the Northeast Quarter of Section 18, all in
Township 1 North, Range 5 East of the Gila and
Salt River Base and Meridian, Maricopa County,
Arizona.

31 PARCEL NO. 4: The West Half of the Southwest
32 Quarter of the Southeast Quarter of Section 7,
and the West Half of the Northwest Quarter of

1 the Northeast Quarter of Section 18, all in
2 Township 1 North, Range 5 East of the Gila and
Salt River Base and Meridian.

3 PARCEL NO. 5: The Northwest Quarter of
4 Section 18, Township 1 North, Range 5 East
5 of the Gila and Salt River Base and Meridian,
6 EXCEPT the South one-half of the North one-
7 half, and the North one-half of the South one-
8 half of Lot 2 (which said Lot 2 is sometimes
referred to as the Southwest Quarter of said
Northwest Quarter) deeded to the United States
of America in instruments recorded March 23,
1954, in Docket 1311, at Page 210.

9 PARCEL NO. 6: All of the Southeast Quarter
10 of the Northwest Quarter of Section 3, Town-
11 ship 1 North, Range 5 East, of the Gila and
Salt River Base and Meridian, EXCEPT the East
33 feet and the South 20 feet thereof.

12 11. Johnson & Stewart claims certain rights, titles,
13 interests and licenses in the Northwest Quarter of the Northwest
14 Quarter of Section 9, Township 1 North, Range 5 East pursuant to
15 certain unpatented mining claims located originally in 1947 and
16 again relocated in 1953 which have been worked, mined and main-
17 tained to the present time in compliance with all applicable
18 federal and state laws.

19 12. Allied Concrete and Materials Company, Inc. holds
20 record title originating with patents from the United States to
21 the Southwest Quarter of the Northeast Quarter of Section 3, Town-
22 ship 1 North, Range 5 East, Gila and Salt River Base and Meridian.

23 13. Maricopa County, a political subdivision of the State
24 of Arizona, has removed sand and gravel within Section 3 pursuant
25 to permits issued by the Bureau of Reclamation which date from
26 and after 1948.

27 14. The Arizona Department of Transportation has claimed
28 certain rights to remove sand and gravel within Section 3, Town-
29 ship 1 North, Range 5 East of the Gila and Salt River Base and
30 Meridian, pursuant to permits and licenses issued by the United
31 States Department of the Interior, Bureau of Reclamation, which
32 date from and after 1942 and has been granted rights of way

1 covering portions of Country Club Drive by the Bureau of Reclama-
2 tion.

3 15. In 1962, the Arizona State office of the Bureau of
4 Land Management, at the request and expense of Arizona Sand and
5 Rock Co. and the Indian Community, undertook to establish an
6 agreed line for the south boundary of the reservation. In the
7 course of this work, the surveyors reported the existence of two
8 channels within the Salt River, one lying north of the other.

9 16. On October 26, 1962, the Arizona State Director of
10 the Bureau of Land Management requested the Director of the Bureau
11 of Land Management to decide whether the north or south channel
12 constituted the boundary of the reservation. The State Director's
13 report indicated that his position conflicted with that of the
14 Bureau of Indian Affairs Superintendent at the Salt River Pima-
15 Maricopa Reservation.

16 17. In response to the State Director's request, the
17 Director of the Bureau of Land Management ruled on March 5, 1963,
18 that the north channel constituted the reservation boundary in
19 Township 1 North, Range 5 East, Gila and Salt River Base and
20 Meridian.

21 18. A memorandum dated April 14, 1964 from the Associate
22 Solicitor of Public Lands to the Assistant Secretary, Public Land
23 Management, concluded that the evidence "preponderated" in favor
24 of the north channel as the southern boundary of the reservation.

25 19. The Secretary of the Interior in 1968 requested the
26 Solicitor of the Department of the Interior to review the Bureau
27 of Land Management's 1963 opinion. The Solicitor is the chief
28 legal officer of the Department of the Interior and has the
29 responsibility for the legal affairs of both the Bureau of Land
30 Management and the Bureau of Indian Affairs.

31 20. By memorandum dated January 17, 1969, to the
32 Secretary of the Interior, the Solicitor of the United States

1 Department of the Interior, expressed the opinion that the bound-
2 dary of the Salt River Indian Reservation lies within the south
3 rather than the north channel of the Salt River.

4 21. By memorandum dated January 17, 1969 the former
5 Secretary of the Interior, Stewart L. Udall, relying upon the
6 Solicitor's 1969 memorandum, concluded that the south boundary
7 of the Salt River Indian Reservation lies within the south
8 channel of the Salt River in Township 1 North, Range 5 East of
9 the Gila and Salt River Base and Meridian and ordered the Bureau
10 of Land Management to note the official records accordingly.

11 22. By memorandum dated November 17, 1971 to the Director
12 of the Bureau of Land Management, Harrison Loesch, the then
13 Assistant Secretary - Public Land Management, determined that the
14 south boundary of the Salt River Indian Reservation in Section 3,
15 of Township 1 North, Range 5 East should be accepted as being in
16 the south channel as it existed during the 1965-66 flood.

17 23. On August 17, 1972, a plat of dependent resurvey
18 and survey was filed with the United States Department of the
19 Interior, Bureau of Land Management in Phoenix, Arizona, by Clark
20 F. Gumm, Chief of the Division of Cadastral Survey of the United
21 States Department of the Interior purporting to show thereon the
22 south boundary of the Salt River Indian Reservation as an ambula-
23 tory line representing the middle of the Salt River.

24 24. The Federal Register in Volume 37, #175 for Friday,
25 September 8, 1972, at page 18224, announced that interested
26 parties were to be given the opportunity to protest the filing of
27 the aforementioned 1972 plat of survey.

28 25. Protests were filed by all of the original parties
29 to the above entitled and numbered consolidated action, excepting
30 Maricopa County and the Secretary.

31 26. All of the aforementioned protests have been denied
32 by the Department of Interior excepting the protest of the

1 Indian Community which was withdrawn upon condition that the other
2 protests be denied. The parties were informed that such denial
3 represented final administrative action by the Department of
4 Interior.

5 27. The Land Claimants, other than Maricopa County,
6 claim certain rights, titles, claims and other interests to lands
7 lying north of the reservation boundary as set forth in the 1972
8 plat of survey.

9 28. A diversion dam (Granite Reef) was built below
10 the confluence of the Salt and Verde Rivers in 1906-1908.

11 29. Storage dams were constructed on the Salt and Verde
12 Rivers as follows:

13	<u>SALT RIVER</u>		<u>STORAGE CAPACITY</u>
14	Roosevelt Dam	1905 - 1911	1,381,580 acre feet
15	Horse Mesa	1924 - 1927	245,138 acre feet
16	Mormon Flat	1923 - 1925	57,852 acre feet
17	Stewart Mountain	1928 - 1930	69,765 acre feet
18	<u>VERDE RIVER</u>		<u>STORAGE CAPACITY</u>
19	Horseshoe	1944 - 1946	139,238 acre feet
20	Bartlett	1936 - 1939	178,477 acre feet

21 30. The Salt River is not now and never has been a
22 navigable river.

23 IV.

24 The contested issue agreed upon between the Land
25 Claimants and the Secretary is as follows:

26 With regard to Causes No. CIV-74-553, CIV-74-529 and
27 CIV-73-579, whether the Secretary in connection with his 1969
28 memoranda and 1972 survey, acted in a manner which was arbitrary,
29 capricious, an abuse of discretion, or otherwise not in accordance
30 with law. No agreement has been reached as to other contested
31 issues of fact and law in said actions.

32 No agreement has been reached as to the contested

1 issues of fact and law between the plaintiff Indian Community and
2 the defendants in Cause No. CIV-72-376. No agreement has been
3 reached as to the contested issues of fact and law between the
4 plaintiff City of Mesa and the Secretary of the Interior in Cause
5 No. CIV-73-769.

6 v.

7 The following additional issues of fact and law are
8 deemed material:

9 A. By the Indian Community:

10 1. Whether the Salt River Project, the State of
11 Arizona, and Maricopa County, have been mere licensees with re-
12 spect to the lands withdrawn for reclamation purposes in Section
13 3, with the result that they lack standing to have the Secretary's
14 Survey set aside.

15 2. Whether the Secretary's Survey of the southern
16 boundary of the Salt River Indian Reservation was arbitrary,
17 capricious, or beyond the scope of his authority, with the result
18 that it should be set aside as being invalid.

19 3. If the Court orders that the Secretary's Survey
20 of the southern boundary of the Salt River Indian Reservation is
21 invalid, then the next issue will be whether the Court can pro-
22 ceed any further in the matter other perhaps than to remand the
23 proceeding to the Secretary of the Interior.

24 4. If the Court finds the Secretary's Survey of the
25 southern boundary of the Salt River Indian Reservation is invalid
26 and thereupon retains jurisdiction to determine where the boundary
27 should be relocated, then the remaining issue will be - where is
28 the southern boundary of the Salt River Indian Reservation to be
29 relocated.

30 B. By the Land Claimants jointly:

31 1. Whether the south boundary of the Salt River
32 Indian Reservation was established prior to the Secretarial

1 Memorandum of January 17, 1969.

2 a. Whether the contemporaneous historical
3 evidence surrounding the issuance of the Executive Order of June
4 14, 1879 indicate that it was the intent of the Order to establish
5 the south boundary in the center of the north channel.

6 b. Whether the south boundary was platted and
7 fixed by the Surveyor General's map dated July 12, 1879.

8 c. Whether the south boundary was established
9 by the L. D. Chillson survey of 1883 and the official plat of
10 record filed in the General Land Office.

11 d. Whether the south boundary was established
12 by the R. A. Farmer survey of 1910 and the official plat of record
13 filed in the General Land Office.

14 e. Whether the south boundary was fixed by
15 interpretations and holdings of the Department of the Interior or
16 its bureaus or divisions as being in the north channel.

17 f. Whether the United States as trustee and
18 the Indian Community as beneficiary have acknowledged by their
19 actions and transactions over a period of many years that the
20 reservation did not extend south of the R. A. Farmer 1910 boundary
21 line.

22 g. Whether the members of the plaintiff, Salt
23 River Pima-Maricopa Indian Community, and the trustee of their
24 reservation lands, for many years have taken no action or failed
25 to register any objection to the establishment of mining claims,
26 grants of patents or licenses within the property involved in
27 this litigation.

28 h. Whether the members of the plaintiff Indian
29 Community ever cultivated, inhabited or used or asserted any
30 dominion or control over the so-called island located in Section 9
31 of Township 1 North, Range 5 East.

32 2. If the south boundary of the Salt River Indian

1 Reservation was not established prior to the Secretarial memoran-
2 dum of January 17, 1969, was the 1969 memorandum of the Secretary
3 and the 1972 survey pursuant thereto arbitrary, capricious, an
4 abuse of discretion or otherwise not in accordance with law?

5 a. Whether the Secretarial memorandum of Jan-
6 uary 17, 1969 created new boundaries for the reservation in
7 violation of the provisions of Title 25 U.S.C. §393(d), Title 25
8 U.S.C. §211 and Title 43 U.S.C. §772 or clarified the original
9 boundaries.

10 b. Whether the Secretary properly interpreted
11 the Executive Order of June 14, 1879.

12 c. Whether due process of law was violated by
13 the Secretary of the Interior when he refused to hold any hearings
14 or take any evidence on the question of the disputed boundary
15 and refused to recognize any protests other than those questioning
16 the appropriate location of the boundary line within the south
17 channel.

18 3. Assuming the Secretarial memorandum of January
19 17, 1969 was valid, whether the memorandum was followed and
20 properly applied through the use of a "thalweg" as the "middle of
21 the river" in the August 17, 1972 plat of survey.

22 4. Assuming the line shown on the 1972 plat of
23 survey is not binding upon the Court, where is the "middle of the
24 river" in compliance with the Executive Order of June 14, 1879
25 and is that line ambulatory?

26 a. The effect of the man-made changes within
27 the bed of the Salt River upon the location of the south boundary.

28 b. Whether the south boundary should be an
29 ambulatory line.

30 c. Whether the reference in the Executive
31 Order to the "middle" of the river should be interpreted as refer-
32 ring to a medial line between the high bank, to the "thalweg",

1 to the "thread of the stream", or to some other measuring line.
2 d. At what level of water flow should the
3 "middle" of the river be measured?
4 e. Whether the "middle" of the river should
5 be determined with reference to the existence of the river bed
6 when dry.
7 f. Whether the evidence, geologic information
8 and photographs show a highly erratic river flow and that the
9 location of channels within the defined cut banks is constantly
10 subject to change.
11 g. Whether the Salt River in Township 1 North,
12 Range 5 East should be regarded as containing two "channels".
13 h. If so, whether at the present time, the
14 north channel of the Salt River in Township 1 North, Range 5
15 East is the main channel of the river.
16 i. Is it scientifically possible today to
17 determine a midline boundary, complying with the original Execu-
18 tive Order by using the high banks or cutbanks of the river?
19 j. Whether by reason of the doctrine of prior
20 appropriation such water which does occasionally flow in the
21 river bed is not available for use by the adjacent owners, includ-
22 ing any of the parties hereto, but must be permitted to continue
23 down stream for diversion by the Buckeye Irrigation District,
24 whose landowners have prior appropriative rights thereto.
25 k. Whether by reason of the foregoing circum-
26 stances access to the flow of water in the river bed is of no
27 value to any of the parties hereto.
28 l. Whether the common law rules respecting a
29 boundary lying between two parcels separated by a river are inap-
30 plicable to these actions.
31 m. Whether this Court may properly fix a period
32 of time when the flow of water in the Salt River became so

1 infrequent that the common law rules ceased to apply and the
2 Court may fix a line, susceptible to survey on the ground, which
3 will fix a permanent boundary to the reservation.

4 n. Whether the extensive man-made activities
5 within the bed of the Salt River in the subject area starting from
6 before the creation of the Indian Reservation in 1879, continuing
7 through the present and anticipated in the future, have so arti-
8 ficially influenced and changed the flow and the course of the
9 Salt River that the Court may properly and permanently fix the
10 south boundary as a midline between the natural high banks (out-
11 side banks) of the Salt River.

12 5. Whether the Indian Community's claim for damages
13 and ejectment is barred by statutes of limitation, laches,
14 estoppel or immunity.

15 a. Whether the plaintiff Indian Community has
16 standing to sue in trespass or ejectment without first establish-
17 ing its possessory interest in the disputed land.

18 b. Whether if any portion of the reclamation
19 withdrawn land in Section 3 is included within the reservation,
20 the Salt River Valley Water Users' Association, the Department
21 of Transportation and Maricopa County are immune from liability
22 to the Indian Community because they have used the land pursuant
23 to valid contracts and permits from the United States and in the
24 case of the Association as agent of the United States.

25 C. By the Secretary:

26 1. The Secretary maintains that all he has thus
27 far done is resolve an internal departmental dispute and has not
28 affected any of the non-Indians alleged interests, that no federal
29 question is present and that he has fulfilled the requirements of
30 the Administrative Procedure Act.

31 2. The Executive Order of June 14, 1879, which
32 established the present Salt River Pima-Maricopa Reservation

1 described the south boundary of the Salt River Pima-Maricopa
2 Reservation by means of calls to natural objects. The Executive
3 Order also preserved Indian interests lying south of the Salt
4 River.

5 3. Calls to natural objects govern courses and
6 distances run by a surveyor.

7 4. A meander line is not a boundary but merely
8 describes the sinuosities of the banks of a stream and the
9 amount of land to be conveyed.

10 5. The Bureau of Land Management is the agency
11 within the Department of the Interior charged with administering
12 the public lands of the United States. The Bureau of Land Manage-
13 ment had an admitted self-interest in its 1963 opinion that the
14 north channel of the Salt River constituted the boundary of the
15 Salt River Pima-Maricopa Indian Reservation.

16 6. None of the non-Indian land claimants acquired
17 any interest in lands between the north and south channels of
18 the Salt River subsequent to, or in reliance upon, the Director
19 of the Bureau of Land Management's May 3, 1963 opinion.

20 7. Neither the Bureau of Indian Affairs nor the
21 Salt River Pima-Maricopa Tribe have ever assented to the Bureau
22 of Land Management's view that the north channel of the Salt
23 River is the southern boundary of the Salt River Indian Reserva-
24 tion.

25 8. Notwithstanding the rights asserted by the non-
26 Indian land claimants, the United States has fee title to much of
27 the land lying between the north and south channels of the Salt
28 River.

29 9. The south boundary of the Salt River is an
30 ambulatory line which changes with the non-avulsive changes in
31 the main channel of the Salt River.

32 10. The 1972 survey was conducted in accordance

1 with the instructions by the Department of the Interior and
2 accepted surveying practice.

3 11. A topographic map made in 1902-03 shows the
4 Salt River running only in one channel--the south channel-- and
5 a dotted line in the center of said channel indicates the reser-
6 vation boundary.

7 12. None of the parties suing the Secretary have
8 suffered a legal wrong because of agency action or have been
9 adversely affected or aggrieved by agency action within the
10 meaning of a relevant statute.

11 13. The Court's jurisdiction in the suits against
12 the Secretary is limited to determining, on the basis of the
13 administrative record before the Secretary, whether the Secretary
14 acted in a manner which was arbitrary, capricious, an abuse of
15 discretion, or otherwise not in accordance with law and, if so,
16 to remanding the case to the Secretary for further proceedings.

17 D. By the City of Mesa, Transamerica Title Insurance
18 Co. and Allied Concrete & Materials Co.:

19 1. Did the filing of the 1972 Plat of Survey con-
20 stitute a decision by the Secretary of Interior regarding the
21 proper location of the reservation boundary?

22 2. As against the claims of adjoining patentees
23 from the United States and their successors in interest, did the
24 Secretary of Interior have legal authority to decide the location
25 of the boundary?

26 3. Did the filing of the 1972 Plat of Survey as a
27 part of the public records of the Phoenix office of the Bureau of
28 Land Management constitute a decision by the Secretary of Interior
29 that all property lying to the north of the reservation boundary,
30 as there delineated, was the property of the United States as
31 trustee for the Indian Community?

32 4. Does the 1972 Plat of Survey as now filed with

1 the Bureau of Land Management constitute a cloud upon the titles
2 of the City of Mesa and Allied Concrete & Materials Co.?

3 5. Was the filing of the 1972 Plat of Survey,
4 including the boundary line shown thereon, within the legal powers
5 of the Department of Interior irrespective of the nature and extent
6 of the administrative procedures which preceded the filing of the
7 plat?

8 E. By the Arizona State Highway Commission:

9 1. What is the appropriate scope of review of
10 the decision of the former Secretary of the Interior, Stewart L.
11 Udall?

12 2. What is the appropriate standard of review?

13 3. Are plaintiff Indian Community's claims for
14 relief in trespass barred by the provisions of A.R.S. §12-542?

15 4. To what extent does prior construction of the
16 June 14, 1879 Executive Order by the Bureau of Indian Affairs,
17 the General Land Office (now the BLM) and the Bureau of Reclama-
18 tion indicate a long-standing administrative interpretation of
19 the location of the boundary within the bed of the Salt River?

20 5. Whether or not the plaintiff's action against
21 the State of Arizona in the Federal District Court is barred by
22 the Eleventh Amendment to the United States Constitution.

23 6. Whether or not there may be other indispensable
24 parties having fee or lesser interests in real property lying
25 within the bed of the Salt River within Township 1 North, Range 5
26 East, who may be adversely affected by any determination which
27 this Court may make.

28 7. Whether or not the United States of America
29 is an indispensable party to the present action under Rule 19
30 of the Federal Rules of Civil Procedure.

31 8. If the line to be established is a fixed rather
32 than an ambulatory line, what date (or flow) should be utilized

1 for the purpose of establishing the rights of the parties to the
2 lands in question?

3 9. Should the entire matter be remanded to the
4 Department of the Interior in order to hold hearings, take testi-
5 mony, allow the introduction into evidence of exhibits, take
6 testimony and generally augment a woefully inadequate administra-
7 tive record.

8 F. By Johnson & Stewart Materials, Inc.:

9 Johnson & Stewart Materials, Inc. adopts the issues
10 of fact and law set forth above jointly by the Land Claimants
11 without additions thereto.

12 G. By Salt River Valley Water Users' Association and
13 Salt River Project Agricultural Improvement and Power District:

14 Salt River Valley Water Users' Association and the
15 Salt River Project Agricultural Improvement and Power District
16 adopts the issues of fact and law set forth above jointly by the
17 Land Claimants without additions thereto.

18 VI.

19 A list of exhibits is attached hereto and incorporated
20 herein by reference. The parties stipulate to the admission in
21 evidence of all exhibits previously marked for identification.
22 This stipulation is made solely in the interests of trial conven-
23 ience and does not preclude any party from challenging any exhibit
24 as being wholly irrelevant and immaterial to any of the issues in
25 this litigation or as being beyond the scope of review of the
26 Secretary's actions nor to challenge the weight to be given to any
27 of the contents thereof.

28 VII.

29 The Land Claimants intend to offer all of the following
30 depositions:

31 Deposition of Boyd S. Owens, dated March 28, 1974.

32 Deposition of the Honorable Stewart L. Udall, dated

1 October 22, 1974.

2 Deposition of Harrison Loesch, dated October 22, 1974.

3 Deposition of Edward Weinberg, dated October 21, 1974.

4 Deposition of Henry Taliafero, dated October 22, 1974.

5 Deposition of Clark Gumm, dated October 21 and October
6 22, 1974.

7 The Indian Community intends to offer the following
8 depositions:

9 Deposition of James H. Jones, Jr., dated January 15,
10 1975, together with all depositions marked as exhibits herein.

11 The Secretary intends to offer the following depositions:

12 The Secretary believes that depositions are not rele-
13 vant to the lawsuits in which he is a defendant since the only
14 issue therein is the reasonableness of the decision made on the
15 basis of the administrative record. In the event the Court per-
16 mits the use of depositions herein, the Secretary reserves the
17 right to use any of the depositions listed herein by the other
18 parties.

19 VIII.

20 The Land Claimants intend to call the following wit-
21 nesses at the trial:

- 22 1. Lawrence Hanline, Bureau of Indian Affairs
23 124 West Thomas Road
Phoenix, Arizona
- 24 2. James H. Jones, Jr.
25 1536 East Mountain View Road
Phoenix, Arizona
- 26 3. Clark Gumm
27 Greater Washington, D.C. area, exact
address unknown.
- 28 4. Stewart Udall
29 6400 Goldsboro Road
Bethesda, Maryland
- 30 5. Leonard Halpenny
31 3938 Santa Barbara Avenue
Tucson, Arizona
- 32

- 1 6. Dr. Troy L. Pewe
2 538 East Fairmont Drive
3 Tempe, Arizona
- 4 7. Paul Smith, Bureau of Indian Affairs
5 124 West Thomas
6 Phoenix, Arizona
- 7 8. Earl Johnson
8 1401 North Alma School Road
9 Mesa, Arizona
- 10 9. Everett Stewart
11 1401 North Alma School Road
12 Mesa, Arizona
- 13 10. Boyd Owens, Bureau of Land Management
14 Valley Center, 24th Floor
15 Phoenix, Arizona
- 16 11. Orson Phelps
17 827 East Seventh Street
18 Mesa, Arizona
- 19 12. Waldo Williams
20 502 North Alma School Road
21 Mesa, Arizona
- 22 13. Lewis Phelps
23 1014 West University Drive
24 Mesa, Arizona
- 25 14. Forrest Jennings, Location Section
26 Arizona Department of Transportation
27 206 South 17th Avenue
28 Phoenix, Arizona
- 29 15. Richard Pinkerton, Photogrammetry
30 Arizona Department of Transportation
31 206 South 17th Avenue
32 Phoenix, Arizona
- 33 16. Bryan Rockwell, Title Section
34 Arizona Department of Transportation
35 206 South 17th Avenue
36 Phoenix, Arizona
- 37 17. Richard K. Esser, Supervisor
38 Production Control, Right of Way Operations
39 Arizona Department of Transportation
40 206 South 17th Avenue
41 Phoenix, Arizona
- 42 18. A. J. Pfister, Deputy General Manager
43 Salt River Project
44 1521 Project Drive
45 Tempe, Arizona
- 46 19. Don Weesner, Chief Engineer
47 Salt River Valley Water Users' Association
48 1521 Project Drive
49 Tempe, Arizona

- 1 20. Francis Smith, Secretary
Salt River Project
1521 Project Drive
Tempe, Arizona
- 2
- 3
- 4 21. Victor I. Corbell, former President of
Salt River Project
303 East Del Rio Drive
Tempe, Arizona
- 5
- 6 22. Ted Wilson, Supervisor
Hydrologic Records and Analysis
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona
- 7
- 8
- 9 23. Jim Gardner, Supervisor
Cartographic Section of Drafting Department
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona
- 10
- 11
- 12 24. John S. Schaper
215 East Lexington
Phoenix, Arizona 85012
- 13
- 14 25. Joe T. Fallini
Boise, Idaho area
exact address unknown
- 15
- 16 26. George Hedden, former Assistant Area Director of
Bureau of Indian Affairs
1902 East Dartmouth
Mesa, Arizona
- 17
- 18
- 19 27. Garnet Hayes
10000 East McDowell
Scottsdale, Arizona
- 20
- 21 28. Charles K. Luster
Director of Public Works
City of Mesa
55 North Center
Mesa, Arizona
- 22
- 23
- 24 29. Francis H. Lathrop
Deputy County Engineer
Maricopa County
3325 West Durango
Phoenix, Arizona
- 25
- 26
- 27 30. Joseph C. Alexander
Maricopa County Right of Way Agent
111 South Third Avenue
Phoenix, Arizona
- 28
- 29 31. Title Officer
Lawyers Title of Arizona
2200 North Central Avenue
Phoenix, Arizona
- 30
- 31
- 32 32. Title Officer
Transamerica Title Insurance Company
114 West Adams
Phoenix, Arizona

- 1 33. Title Officer
2 Dynacompa, Inc.
3 930 East Highland
4 Phoenix, Arizona
- 5 34. State witness re grade and location of North
6 Country Club Drive

7 The Plaintiff Indian Community intends to call the
8 following witnesses at the trial:

- 9 1. W. S. Gookin
10 4203 North Brown Avenue
11 Scottsdale, Arizona
- 12 2. G. Donald Voorhees
13 Bureau of Land Management
14 Washington, D. C.

15 The Secretary believes that the jurisdiction of the
16 Court is limited to reviewing the administrative record upon which
17 the 1969 decision and 1972 survey were made since the relief
18 sought is a review of those administrative actions. However, if
19 the Court is of the view that the introduction of other evidence
20 is proper, the Secretary adopts the list of witnesses submitted
21 by the tribe and in addition may call the following:

- 22 1. Boyd S. Owens, Bureau of Land Management
23 Valley Center, 24th Floor
24 Phoenix, Arizona
- 25 2. James H. Jones, Jr.
26 1536 East Mountain View Road
27 Phoenix, Arizona
- 28 3. Harrison Loesch
29 Counsel to the Committee on Interior
30 and Insular Affairs
31 House of Representatives
32 Washington, D. C.
- 33 4. Edward Weinberg
34 1700 Pennsylvania Avenue, N.W.
35 Washington, D. C.
- 36 5. Henry B. Taliaferro, Jr.
37 815 Connecticut Avenue, N.W.
38 Washington, D. C.
- 39 6. Stewart L. Udall
40 6400 Goldsboro Road
41 Bethesda, Maryland
- 42 7. Clark Gumm
43 Address to be supplied

1 8. G. Don Vorhees
2 Bureau of Land Management
3 Department of the Interior
4 Washington, D. C.

5 IX.

6 The foregoing pretrial order has been approved by the
7 parties to this action as evidenced by the signature of their
8 counsel hereon, and the order is hereby entered and will govern
9 the trial of this case. This order shall not be amended except
10 by order of the Court pursuant to agreement of the parties or to
11 prevent manifest injustice.

12 DATED this 17th day of March, 1976.

13 W. D. Murray
14 W. D. Murray, Senior U. S. District
15 Court Judge

16 APPROVED AS TO FORM AND CONTENT:

17 MARKS & MARKS

18
19 By Philip J. Shea
20 Philip J. Shea
21 Attorneys for Plaintiff

22 SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

23 By Donald O. Fuller
24 Donald O. Fuller
25 Attorneys for Johnson & Stewart
26 Materials, Inc., Johnson & Campo

27 PERRY & HEAD

28 By Dale A. Head
29 Dale A. Head
30 Attorneys for Allied Concrete & Materials

31 BRUCE E. BABBITT
32 The Attorney General

By Donald O. Loeb
Donald O. Loeb
Assistant Attorney General
Attorneys for Arizona State Highway Commission

CERTIFIED TO BE A TRUE COPY
DATED: 05 JUN 1976
RICHARD H. WEARE, CLERK
U. S. DISTRICT COURT
BY: [Signature]
DEPUTY CLERK

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MOISE E. BERGER
The County Attorney

By David B. Krom
David Krom
Deputy County Attorney
Attorneys for Maricopa County

POWERS, BOUTELL, FANNIN & KURN

By James Powers
James Powers
Attorneys for City of Mesa and
Transamerica Title Insurance Co.

WILLIAM SMITHERMAN
United States Attorney

By John F. Flynn
John F. Flynn
Assistant U. S. Attorney
Attorneys for Secretary of the Interior

JENNINGS, STROUSS & SALMON

By Robert E. Hurley
Robert E. Hurley
Attorneys for Salt River Valley Water
Users' Association and Salt River
Project Agricultural Improvement and
Power District

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96-002-004

FILED

SALT RIVER
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APR 13 1977

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,)	NO. CIV. 72-376 PHX WDM
)	
Plaintiff,)	J U D G M E N T
)	
vs.)	
)	
ARIZONA SAND & ROCK CO., an Arizona corporation; et al.,)	
)	
Defendants.)	

The Court having tried this matter without a jury on March 17, 18, 22, and 31, 1976, the Plaintiffs and Defendants were represented by their respective counsel. The Court on August 16, 1976 made findings of fact and conclusions of law which are marked Exhibit "A" attached hereto and incorporated into this Judgment by reference. Based upon the foregoing findings of fact and conclusions of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the determination by the Secretary of the Interior on January 17, 1969 that the South boundary of the SALT RIVER PIMA-MARICOPA INDIAN RESERVATION in Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, Maricopa County, State of Arizona is located in the South channel, was a proper determination and within the scope of his authority and power.

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1 2. That the ultimate boundary line established by
2 the Department of the Interior, Bureau of Land Management's
3 survey and plat of survey as accepted and approved on August
4 17, 1972 establishes the South boundary of the SALT RIVER
5 PIMA-MARICOPA INDIAN RESERVATION in Township 1 North, Range
6 5 East of the Gila and Salt River Base and Meridian, Maricopa
7 County, State of Arizona as a fixed boundary line.

8 3. That the Defendants JOHNSON & STEWART MATERIALS,
9 INC., EARL C. JOHNSON, EMMA JOHNSON, his wife, ROY JOHNSON,
10 MRS. ROY JOHNSON, his wife, and JOHN CAMPO III, Executor of
11 the Estate of LeROY JOHNSON claim certain interests in the
12 Northwest quarter of the Northwest quarter of Section 9,
13 Township 1 North, Range 5 East of the Gila and Salt River
14 Base and Meridian and that all property lying north of the
15 boundary line as established by the August 17, 1972 survey
16 lies within the reservation and said Defendants are hereby
17 ordered to vacate the premises.

18 4. It is further ordered that the proper damages
19 owing by these Defendants to the Plaintiff is \$30,000.00 for
20 the fair rental value of the Plaintiff's property and \$36,000.00
21 for the fair market value of the sand, gravel, rock and aggre-
22 gate material removed from the Plaintiff's property.

23 5. That pursuant to Rule 54 of the Rules of Civil
24 Procedure, the Court finds there is no just reason for delay
25 in entry of the Judgment and orders that this Judgment be
26 entered forthwith.

27 6. It is further ordered that if the Defendants
28 JOHNSON & STEWART MATERIALS, INC., EARL C. JOHNSON, EMMA
29 JOHNSON, his wife, ROY JOHNSON, MRS ROY JOHNSON, his wife, and
30 JOHN CAMPO III, Executor of the Estate of LeROY JOHNSON or
31 any of the Defendants shall appeal this Judgment within the
32 time allowed by law and post the necessary supercedas bond

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that no execution shall be issued pending the outcome of that appeal or the settlement of the appeal between the parties.

DONE IN OPEN COURT this 11th day of April 1977.

W. D. Murray
Hon. W. D. Murray
Senior United States District Judge

I hereby attest and certify on 2/27/92 that the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA
By [Signature] Deputy



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN
COMMUNITY, :
Plaintiff, :

vs. :

No. Cv-72-376-Phx.

ARIZONA SAND & ROCK CO., an
Arizona corporation, et al., :
Defendants. :

JOHNSON & STEWART MATERIALS,
INC., et al., :
Plaintiffs, :

vs. :

No. Cv-73-579-Phx.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al., :
Defendants. :

CITY OF MESA, an Arizona
a municipal corporation, :
Plaintiff, :

vs. :

No. Cv-73-769-Phx.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al., :
Defendants. :

SALT RIVER VALLEY WATER USERS'
ASSOCIATION, an Arizona corpora-
tion, et al., :
Plaintiffs, :

vs. :

No. Cv-74-553-Phx.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al., :
Defendants. :

STATE OF ARIZONA, ex rel.,
W. A. ORDWAY, Director of the
Arizona Department of
Transportation,

Plaintiff,

vs.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al.,

Defendants.

No. Cv-74-529-Phx.

**FINDINGS OF FACT
and
CONCLUSIONS OF LAW**

These consolidated actions involve the south boundary of the Salt River Indian Reservation in Township 1 North, Range 5 East, Gila and Salt River Base and Meridian, north of Mesa, Arizona. As a result of a decision by the then Secretary of Interior on January 17, 1969, a plat of survey was prepared and filed on August 17, 1972, showing that boundary at a location which would result in the inclusion within the reservation of certain property to which other parties claim an interest. The individual actions are these:

No. CIV-72-376. This is an action filed by the Indian Community against Arizona Sand and Rock Co., et al., for trespass, ejectment and damages for the removal of sand and gravel. The issue of the amount of damages, if any, has been severed and only the issue of liability is now before the Court. Of the defendants originally named in this action, only the following still remain: Johnson & Stewart Materials, Inc., Allied Concrete & Materials Co., Salt River Valley Water Users' Association, Arizona State Highway Commission (now the Arizona Department of Transportation), the County of Maricopa, Roy Johnson and Earl C. Johnson and their respective wives and the Executor of the Estate of Leroy Johnson, Deceased. Trans-america Title Insurance Company subsequently became a party defendant to this action on its motion to intervene upon the grounds that it has issued a policy of title insurance upon property owned by Allied Concrete & materials Co.

In this action the Indian Community seeks an order of ejectment against all defendants from the reservation as determined by the Secretarial memorandum of January 17, 1969, and damages for trespass against all defendants except Allied Concrete Materials Company, Inc.,

In the course of proceedings in this case the court ruled that it would not consider a collateral attack by the defendants upon the decision of the Secretary of the Interior and this ruling resulted in the filing of the subsequent actions in which the following claims are asserted:

No. CIV-73-579. This is an action instituted by Johnson & Stewart Materials, Inc., Roy Johnson and Earl C. Johnson and their respective wives, and the executor of the Estate of Leroy Johnson (hereinafter collectively referred to as "Johnson & Stewart") against the Secretary of Interior seeking to invalidate the decision of the Secretary and the 1972 Plat of Survey. The plaintiffs claim an interest in a portion of the disputed property by reason of unpatented mining claims and assert that the Secretarial memorandum of January 17, 1969 is unlawful, exceeds the Secretarial powers, violates due process and constitutes a taking of property interests without just compensation and due process.

No. CIV-73-769. This is a similar action brought by the City of Mesa. It claims a fee simple interest in portions of the disputed property by reason of patents issued by the United States prior to the filing of the 1972 Plat of Survey.

No. CIV-74-553. This is a similar action brought by the Salt River Valley Water Users' Association. The Association claims an interest in a portion of the disputed property pursuant to a contract entered into with the United States in 1917 by which said land, which previously had been withdrawn for reclamation purposes, was conveyed to the Association, as Agent of the United States, for use in connection with the operation of the Salt River Project, a Federal reclamation project.

No. CIV-74-529. This is an action brought by the State 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.

The above consolidated cases came on for trial before the court, sitting without a jury, on March 17, 18, 22, 23 and 31, 1976. The plaintiffs were represented by their respective counsel, and the defendants were represented by their respective counsel; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence, the parties rested and thereafter, within the time granted by the court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the court for its consideration and decision, and the court having considered all of the evidence and testimony submitted at the trial of the cause, and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I

The Salt River Pima-Maricopa Indian Reservation was created by the Executive Order of President Rutherford B. Hayes, dated June 14, 1879. In issuing this order President Hayes acted pursuant to the authority of the Act of February 28, 1859).

II

The Reservation set aside by this Executive Order lies immediately east of what is now the City of Scottsdale and north of the City of Mesa. Its southern boundary is described in the Executive Order as being " " up and along the middle of the [Salt] river " ". At issue in this proceeding is the location of the river boundary in Township 1 North, Range 2 East, Gila and Salt River Base

and Meridian.

III

The area comprising the Salt River Reservation had been surveyed in 1868 by W. F. Ingalls under contract with the General Land Office. Ingalls' field notes and the plats of his survey show the Salt River flowing in two distinct channels, generally about one-half mile apart, from a point in Section 25, T2N, R5E, and thence southwesterly about six miles to Section 7, T1N, R5E, where they reunite.

IV

The fact of these two channels was the source of uncertainty over a period of many years as to the location of the reservation boundary in T1N, R5E. This uncertainty was expressed by the Acting Commissioner of the General Land Office in a letter dated March 7, 1888, to the Commissioner of Indian Affairs, stating that entries were being made along the river and that his office did not know whether or not the island between the channels was within the reservation.

V

The location of the middle of the Salt River in Township 1 North, Range 5 East, has been complicated by extensive works of man. Beginning in about 1870 a series of irrigation canals, together with their headings and dams, diverted river waters from their natural channels. Since 1911, with the construction of Roosevelt Dam and Granite Reef Dam, only occasional flood waters have flowed through this Township.

VI

The Salt River Indians formally requested the Interior Department to resolve the uncertainty of the boundary in this Township by a Community Council resolution dated March 23, 1940. In his cover letter forwarding this resolution to his superiors, the Superintendent of the Pima-Maricopa Agency observed that non-Indians were removing sand and gravel from the river bed and were dumping refuse on it.

VII

In 1962, the Salt River Community and a principal sand and gravel claimant, Arizona Sand & Rock, sought to settle the boundary controversy by agreeing to an arbitrary midline through the disputed area which they proposed to have surveyed and then fixed by Act of Congress. The Phoenix office of the Bureau of Land Management undertook to fix this negotiated midline along the ground but it was instructed by its Washington Office that its function was only to fix true boundaries and not to participate in the settlement of disputes by fixing compromise lines.

VIII

The Phoenix office of the Bureau of Land Management sought to fix the boundary in the main channel of the River in this Township but, finding an uncertainty as to which of the channels was the principal one, referred the question to the Bureau Director in Washington. The letter of referral, sent by the Acting State Director of the BLM and dated October 26, 1962, included extensive historical material bearing on the channels of the River in this area and recommended a finding that the north channel was the main channel.

IX

The inquiry of the Phoenix District was answered in the memorandum of the Director of the Bureau of Land Management dated March 5, 1963. This memorandum reviewed the historical material and concluded that "The preponderance and weight of the evidence favors the recognition of the north channel of the Salt River as being the south boundary of the reservation." It also spoke candidly of the conflict between Indian and public land interests:

This Bureau has a prime and direct interest in the determination of this boundary through a continuing public land interest in lands outside the reservation. In general terms, lands and resources north of this boundary inure to the benefit of the Indians while the land and resources south of this line are subject to laws and regulations pertaining to public lands.

This memorandum was approved by the Assistant Secretary, Public Land Management, on May 6, 1964.

X

The Secretary of the Interior determined that, in this and in several other matters, the Bureau of Land Management was making decisions affecting Indian lands without due regard for their interests. Accordingly he directed the Solicitor to review the matter.

XI

The Solicitor personally became familiar with all material in the file of this proceeding, and, by memorandum dated January 17, 1969, held that the record indicated that the boundary of the reservation in Township 1 North, Range 5 East, was in the south channel of the Salt River. It is clear on the face of this memorandum, together with the 24 exhibits attached to it, that the Solicitor's review of the matter was done thoroughly and intelligently.

XII

By memorandum dated January 17, 1969, the Secretary of the Interior advised the Director of the Bureau of Land Management that he had determined, on the basis of the Solicitor's opinion, that the southern boundary was in the south channel.

XIII

Following the change of administration in the Executive branch of the Government on January 20, 1969, the matter was assigned for reconsideration by the new Assistant Secretary for Public Land Management. After a study of the extensive administrative record which included aerial photographs, discussions with representatives of the Indians and private interests, and after flying over the area to make a personal inspection, this Assistant Secretary directed a memorandum to the Director of the Bureau of Land Management in which he, in effect, confirmed the Secretarial order of January 17, 1969, and in which he determined that the south boundary should be accepted as being in the south channel as it existed during the 1965-66 flood.

XIV

Pursuant to the determination that the boundary lies in the south channel, a survey was undertaken under the supervision of Clark Gumm, Chief of the Cadastral Survey. The plat of this survey, consisting of four pages, was accepted on August 17, 1972.

XV

Pursuant to the order of the Chief of the Cadastral Survey, the thalweg of the south channel, i.e. the line connecting its lowest points, rather than the midline between the opposite banks, was located by the surveyors as the boundary. The reason for fixing the thalweg was that that was midline of the last water that flowed through the channel and because of the difficulty of locating accurately the banks of the channel.

XVI

The Arizona State Director of the Bureau of Land Management caused notice to be given in the Federal Register on September 8, 1972, that the plat of survey would be filed on October 16, 1972, unless it was protested before that date, and that all protests would be acted upon before the plat was filed.

XVII

Protests were timely filed by all parties to this action except the Secretary. Normally, such protests would be considered by the Director of the Bureau of Land Management but, because of the Bureau's particular interest in these proceedings, the protests were referred to the Secretary's office.

XVIII

The protests of all the parties to this action, except only that of the Indian Community, were directed only to the Secretarial Order of January 17, 1969, and did not deal with the manner in which the survey was carried out. Particularly, they did not question the use of the thalweg to fix the middle of the south channel nor the description of the surveyed boundary as being ambulatory. By memorandum dated August 2, 1973, the Acting Deputy

Assistant Secretary advised the Director of the Bureau of Land Management that the protests of all the parties except that of the Indian Community were dismissed and that the Indian Community had submitted a withdrawal of its protest conditioned on the dismissal of the others. Accordingly the Director of the Bureau of Land Management was directed to file the plat of survey in the Arizona State Office.

XIX

The claims of the parties with respect to lands within the southern boundary of the reservation in Township 1 North, Range 5 East, as that boundary is defined in the plat of survey dated August 17, 1972, are as follows:

(a) The Salt River Valley Water User's Association claims a possessory interest in the north half of the northwest quarter, the northwest quarter of the northeast quarter, and the southwest quarter of the northwest quarter. These were purportedly withdrawn under the first form withdrawal orders issued pursuant to Section 3 of the Act of June 17, 1902, 43 U.S.C. 416, which authorizes withdrawals of public land for reclamation project purposes. The Association's claim to withdrawn lands is based on its contract with the United States dated September 6, 1917, by which the United States transferred to it the care, operation and maintenance of the project. There is no instrument or other record of transfer to the withdrawn lands in Section 3 to the Association.

(b) The State Highway Commission and Maricopa County have not in this proceeding claimed any interests in lands north of the surveyed boundary. However the Indian Community has claimed against them for sand and gravel removed from the withdrawn lands in Section 3. These removals of sand and gravel were made under color of authority of permits issued by the Secretary of the Interior pursuant to the Act of August 4, 1939, 43 U.S.C. 387.

(c) Allied Concrete and Materials Company, Inc. holds a deed to the southwest quarter of the northwest quarter of Section 3.

(d) Johnson & Stewart Materials, Roy Johnson, Earl C. Johnson and the late Leroy Johnson have removed sand and gravel under unpatented mining claims from the northwest quarter of the northwest quarter of Section 9.

(e). The City of Mesa holds record title to the south half southeast quarter, §7; the north half, northwest quarter, §18; the northwest quarter and the west 33' of the northeast quarter, northeast quarter of §18; and the southeast quarter, northeast quarter of §3.

XX

In determining that the boundary lies in the south channel of the river in Township 1 North, Range 5 East, the Secretary gave due consideration to the pertinent historical materials. Particularly:

(a) The Secretary gave due consideration to the historical record preceding the issuance of the Executive Order of June 14, 1879, and properly determined that it does not indicate whether the north or the south channel was intended as the boundary. A map dated March 4, 1879, shows that Captain A. R. Chaffee recommended a reservation with a south boundary in the south channel; an earlier map identified as being "traced in the Adjutant General's office, January 1879" shows a proposed reservation with a south boundary running north of the river; Major General McDowell, Commander of the Military Division of the Pacific, recommended a reservation with a south boundary being "along the middle of the Salt River"; Inspector J. H. Hammond, reporting on March 8, 1879, that the Pimas and Maricopas had settled on both sides of the river, recommended a reservation with the north bank of the Salt River as the south boundary. The Executive Order followed the recommendation of the acting Commissioner of Indian Affairs dated June 12, 1879, by stating the boundary to be "up and along the middle of the said river" without specifying one channel or the other.

(b) The Secretary gave due consideration to the Ingalls' survey of 1868 and properly concluded that it provided evidence, though limited and inconclusive, that the south channel was larger than the north. The Secretary noted that where section lines crossed channels the length of the section lines from bank to bank were an average of 4.83 chains across the south channel and 3.71 chains across the north channel. It was established at the trial that the perpendicular distances across the channels could be calculated at points

where the section lines crossed the channels on the basis of data provided in Ingalls' notes and the average width of the south channel so computed, was 301.19 feet and that of the north channel was 183.55 feet.

(c) The Secretary gave due consideration to the sketch plat of the reservation prepared in the Surveyor General's office in Tucson and dated July 12, 1879, and reasonably found it unpersuasive. It is not a survey plat and there is no evidence that the person who drew it ever saw the Salt River.

(d) The Secretary gave due consideration to the surveys of Chillson in 1888 and Farmer in 1910 and reasonably concluded that they did not fix the boundary and that they provide no indication of which was the main channel. Both of these surveyors, having been retained to survey the reservation for agricultural allotment purposes, meandered only the north bank of the north channel which was the southern boundary of the reservation lands suitable for farming. Neither the plats of their survey nor their field notes indicate the relative sizes of the channels. There is a dotted line on the Farmer plat labelled "Reservation Boundary" which would lie approximately in the north channel if such channel had been defined on the plat. But this is not a survey line, no reference to it is made in the Farmer field notes, and it was most likely placed on the plat by someone other than Farmer merely to indicate that the boundary was south of the meander line.

(e) The Secretary gave due consideration to the letter of the Commissioner of Indian Affairs to the Commissioner of the General Land Office, dated August 1892, which refers to a plat which has not been identified, which the Indian Commissioner said "indicates that the principal portion or branch of the river runs south of the island, and that what is termed the north channel is a much narrower stream."

(f) The Secretary gave due regard to the topographical survey map of 1902-03 prepared by the United States Geological Survey which shows that the south channel was the main channel at that time.

XXIII

The court finds all of the facts agreed to by the parties in the Pre-Trial Order.

From the foregoing Findings of Fact the court draws the following

CONCLUSIONS OF LAW

I

This court has jurisdiction of the consolidated cases under Title 28 U.S.C. 1331, 1361, 1362, 2201, 2202 and Title 5 U.S.C. 701-706.

II

The Congress has vested in the Secretary of the Interior the authority and the duty to survey the boundaries of Indian Reservations. Act of April 8, 1964, 13 Stat. 41, 25 U.S.C. §176.

III

A survey undertaken by the Secretary of the Interior within the scope of his statutory authority is accorded extra-ordinary deference by the judiciary.

IV.

Interior Department proceedings for the determination of instruction to surveyors, and the conduct of the survey on the ground, are executive functions with respect to which the Secretary is not required to give a hearing to affected persons or to make findings on the basis of a record.

V

A person who makes entry upon land which is near reserved land, the boundary of which has not been fixed by a survey, enters subject to the risk that his entry may later be determined to be within the reservation.

VI

The Secretary of the Interior has the legal authority and responsibility to review and to reverse any action taken with respect to a survey by the Director of the Bureau of Land Management.

VII

The fact finding procedures employed by the Department of the Interior to determine the boundary of the Salt River were adequate and the relevant facts were placed before, and considered by, the Secretary of the Interior.

VIII

The court can review the Secretary's survey of the south boundary of the Salt River Indian Reservation only to determine if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In reviewing the Secretary's decision, the court is limited to reviewing the administrative record.

IX

Boundaries of Indian reservations cannot be diminished except by Act of Congress. Act of March 3, 1927, 25 U.S.C. 398(d). Principles of estoppel and adverse possession cannot be invoked to deprive an Indian tribe of its land.

X

The Secretary of the Interior cannot be estopped from enforcing the public policy in favor of the protection of Indian rights.

XI

The land claimants all have standing to sue.

XII

Lands reserved for Indians are not part of the public domain and any patents, licenses, permits, or claims issued under, or made pursuant to, the public land laws are void ab initio.

XIII

The laws protecting Indians must be liberally construed for their benefit and protection.

XIV

Practical construction given to laws fairly susceptible of different constructions, by those charged with the duty of executing them, is entitled to great respect.

XV

The July 12, 1879 map entitled "Plat showing lands reserved for Pima and Maricopa Indians by Executive Order of June 14, 1879" is not an official plat since it does not reflect the findings of a duly authorized and approved survey of the land represented.

XVI

Neither the Chillson survey nor the Farmer resurvey attempted to locate the south boundary of the reservation, but merely meandered the north bank of the north channel of the Salt River. A meander line is not a boundary but merely determines the sinuosities of a river.

XVII

The south boundary of the Salt River Indian Reservation was not surveyed before 1972. The 1972 survey was an original survey of the boundary and not a resurvey conducted pursuant to 43 U.S.C. 772.

XVIII

When a stream has two or more channels the middle of the stream is synonymous with the thread of the stream or the middle of the main channel.

XIX

The branching out of a boundary stream into a new channel, circumventing a body of land rather than eroding through it, is an avulsion which does not result in a change in the boundary. The boundary rather remains fixed in the former channel. In consequence of this principle the counterclockwise arcing of the mainstream around the north and west of Section 3, and through the south halves of Sections 4 and 5, as shown in the aerial photographs, did not remove the boundary from the south channel, from which the avulsive changes took place.

XX

The Secretary of Interior's determination that the south boundary of the Salt River Indian Reservation lies along the deepest points of the south channel was reasonable.

XXI

The plat of survey accepted in 1972 correctly fixes the south boundary of the Salt River Indian Reservation as established by the Executive Order of June 14, 1879.

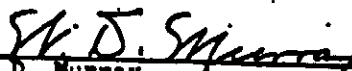
XXII

Since the Secretary of the Interior acted within the scope of his statutory authority and since the statute pursuant to which he acted is constitutional, the suits against the Secretary are in fact suits against the United States and must be dismissed on the grounds of sovereign immunity.

XXIII

The United States is not an indispensable party to the action brought by the Salt River Indian Community.

Done and dated this 16th day of August, 1976.


W. D. Murray
Senior United States District
Judge.