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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

In re Determination of Navigability of the Upper Salt River	Case No. 04-008 NAV Response Memorandum

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, "Defenders") hereby submit their response memorandum in accordance with R12-17-108.01 regarding the navigability of the Upper Salt River.

1. **The Analysis and Evidence Offered By SRP Fails To Properly Evaluate the Upper Salt River In Its Natural and Ordinary Condition.**

As discussed at length in Defenders' Opening Brief, federal law is clear that any determination of navigability at the time of statehood must be based upon the watercourse's *natural* condition. Opening Memorandum, p. 4-7. Thus, where a river's flow has been altered by a dam or diversions, the Commission must evaluate the river as though such alterations had not occurred. Because Arizona joined the Union relatively late, most of our rivers had been subjected to significant alteration by the time of statehood. In the case of the Upper Salt, by 1912, two dams, the Roosevelt and Granite Reef Dam, had already been constructed. Three

additional dams were constructed in the 1920s and 1930s. The impact that these dams had on the flow must be taken into account by the Commission in its determination. *Defenders of Wildlife v. Hull*, 199 Ariz. 411; 18 P.3d 722 (2002)(holding that statutory provision which precluded consideration of diverted waters was unconstitutional). Because the evidence and analysis relied upon by Salt River Project ("SRP ")to assert nonnavigability fails to adjust for these impacts, its probative value is minimal. The relevant question before this commission is whether in 1912 the river would have been navigable if it was still in its natural condition. Consequently, any "expert" opinion that fails to factor in the impact of the dams and diversions in existence in 1912 is fatally flawed.

2. The Construction Of The Apache Trail Is Not Evidence Of The Non-Navigability Of The Upper Salt River.

In its Opening Brief, SRP argues that the decision to construct the Apache Trail is evidence that people at that time did not consider the Salt to be navigable.[1] This argument, however, is both legally irrelevant and logically flawed. First, as repeatedly recognized in the cases and noted in Defenders' Opening Memorandum, because a navigability determination requires only that the river have been *susceptible* to navigation in its ordinary and natural condition, it is irrelevant that the Upper Salt River was not the sole or preferred mode of navigation in the area. Moreover, the suggestion that the decision to build the Apache trail is evidence of nonnavigability disregards the context in which the decision was made. The decision to build a permanent land route as part of the regional transportation system made perfect sense given the fact that construction of Roosevelt Dam and the two "complete diversion" dams (Granite Reef and Jointhead) downstream would clearly make any future

[1] *See e.g. SRP Memorandum* at 7 ("If the Upper Salt River had been navigable, it would have been an easy task to float barges or other vessels up the river to haul workers and supplies.")

regular use of the Salt for transport of large shipments of goods impractical. Once constructed, the dams and associated irrigation systems would require continued attention, movement of population and goods from the newly irrigated areas would increase, and the need for a dependable transportation system linking rail and road traffic would become critical to the future economic success of the region.

Building a road also met the immediate needs of the territory as settlers attempted to capture the valuable water resources flowing through the Salt River Valley. In a desert region with no industry and no major populations connected by the river, irrigation was a higher-value use of this commodity than was transportation. Building a road was a practical choice independent of whether the river could have met the transport needs of that time prior to dam construction. Roosevelt Dam would require a large workforce and massive equipment and material for its construction that could not realistically be transported up river by barge given the draft of such vessels, the variability of flow and presence of occasional sand bars and narrow channels along the course of the river from Phoenix to the dam site. Navigability, however, is not determined by a watercourse's ability to support regular barge operations up and down the length of the watercourse.

The argument that construction of the Apache Trail in conjunction with the building of Roosevelt Dam is evidence that the Upper Salt River was not navigable prior to statehood also distorts both the historical record and the general procedure of dam building followed then and in later times. While it may have been physically possible to haul goods upriver at the beginning to the construction of the dam, once the water had been diverted during construction, and the flow dramatically reduced from the natural flow conditions as the Salt River's waters were captured to fill the dam's 1.4 million acre feet of storage capacity, further navigation would be jeopardized.

Investing in river dredging and a river transport fleet would be obvious folly to the people at the time who were intent on capturing the waters of the river for irrigation, not navigation.

Economic benefit, not a lack of navigability, underlay the push to build the road from Mesa to the dam site. Men and materials for construction could either go from the railhead at Globe to the site or up from Mesa. The Globe route was initially favored by the Reclamation Service due to its shorter distance and lower cost. *Id.* at 76. If the people of the Valley would raise the additional money needed to build the Roosevelt road, power transmission cables and telephone lines would follow the road down from the dam, while foodstuffs and workers would travel up from the Valley to work on the dam. *Id.* In a pamphlet written for the Salt River Valley Water Users' Association by their legal counsel, Joseph H. Kibbey [2], the case for voting in favor of raising bonds to build the road centered on the economic benefits to Valley towns that would be lost if the shorter route to Globe and the railroad there was chosen.

> For the next four years the money expended at Tonto [Roosevelt] for labor and food supplies, both of which can be obtained in the Salt River valley, if not barred by the difficulty and cost of transportation, will exceed $1,500 per day for every business day in the year; $1,000 for labor and $500 for food supply. In other words, if the food supply is obtained from this valley there will be expended here, on that count alone, more than $500 per day; and by locating the employment office here there will be a continual stream of laborers, numbering well up into the thousands, going and coming through the city for several years, each one of whom would leave here more or less cash, and to whom the total wages would exceed $1000 per day. The greater part of wages paid to men engaged in any work is expended where paid or at the city nearest and most convenient to the place of payment. Can we afford to lose the additional capital which would inevitably be put in circulation here.

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[2] Joseph H. Kibbey also served as the Attorney General of the Territory, eventually being confirmed by the U.S. Senate as Governor on February 27, 1905. He was also the judge in one of the cases cited frequently by non-navigation proponents as demonstrating the legal basis for non-navigability. Kibbey played a key role in obtaining government backing for Roosevelt Dam and the reclamation program that was to become the Salt River Project. Since he was a proponent of harnessing the might of the river system for irrigation, a state-based claim arising under the equal footing doctrine would have endangered the great work with which he was associated and countered the interests of his employer, the Water Users' Association.

Id. at 87 (citing the Arizona Republican of March 23, 1904). The road could also transport cement from the Roosevelt Dam plant to supply the Valley's growing demand for cement for irrigation ditches, sidewalks and construction, at one-half the market cost of the time. *Id.* Local leaders such as Benjamin Fowler, President of the Water Users' Association, Joseph Kibbey and hotelman John C. Adams characterized the road as "a proper business move" and said that "building the road was a business proposition, which would increase prosperity." *Id.* at 88.

Use of the Salt River to haul goods to the construction site was possible and indeed was identified as one of the two options available to bring materials to the work site in 1905 before the main roadway was completed. "There were two ways to get the supplies to the camp: one choice was to send it via pack trains and the other was to haul the goods upriver in a boat. Neither method was appealing, but until the river went down or the Roosevelt road was completed, those were the options." *Id.* at 101. While hauling hundreds of tons of supplies upriver on the Upper Salt River to the dam site was not "appealing," it was clearly not considered unfeasible at the time. Given the tonnage of goods and materials arriving by rail to be transported to the construction site, the lack of adequate vessels for river transport, and the planned diversion of the river's waters rendering future river transport unlikely, the construction of a freight road would still be necessary, cost-effective and beneficial to the region's future economic growth. Once the dam and the irrigation system it supported was completed, demand for transport of materials, people and produce to and from the newly opened irrigated farm land would grow.

Even major rivers whose navigability is unquestioned such as the Colorado River were not expected to serve as the sole means of transport for materials and personnel during dam construction. Rail and road links were fundamental first steps in dam construction. It is

interesting to compare the characterization of the Upper Salt River by the proponents of non-navigability with a description of the Colorado River on the Hoover Dam website of the Herbert Hoover Presidential Library and Museum.

> For hundreds of years the turbulent Colorado River cut its way through seven states and created some of the most beautiful canyons in the world. The river periodically flooded vast areas of land in California and Arizona. In addition, the canals which had been created to transport the water to irrigate and provide drinkable water, were inundated and destroyed by the periodic flooding. The water for the Colorado was needed to irrigate the arid southwestern states and provide drinking water for the growing urban populations.

National Archives and Records Administration, *Hoover Dam: Before Building the Dam,* <http://www.ecommcode.com/hoover/hooveronline/hoover_dam/before/toc.html> (accessed December 29, 2005).

One of the first measures taken to prepare the way for building Hoover Dam was to construct a railway to move personnel and materials needed for construction to the dam site and to remove debris from the site as construction progressed. *Id.* An oral history regarding the dam construction, provided by John F. Cahlan, underscores the importance of land transport to dam building.

> Now understand that before they could start the actual construction of Boulder Dam, there were two other major contracts that had to be completed. One was the road from Boulder City to the dam site; and the second was a railroad line from the Union Pacific Railroad out to Boulder City.

NARA, *Hoover Dam: Construction of the Dam*, http://www.ecommcode.com /hoover/hooveronline/hoover_dam/const/103.html

If the construction of the Apache Trail is evidence of non-navigability of the Upper Salt River, are we then to believe that the construction of a rail line to the site of what became Hoover Dam is evidence that the Colorado River was not navigable as well?

In sum, the construction of the Apache Trail, when considered in its historical context, is a completely rational decision even though the Upper Salt River was navigable at the time.

3. The Kibbey and Kent Decrees do not preclude a finding of navigability

In its Opening Brief, SRP reasserts the argument raised in a 1994 Motion to Dismiss, that the Kibbey Decree[3] and the Kent Decree[4] preclude a finding of navigability by this Commission. This argument disregards both the law and the historical context in which the decrees were issued. A review of the Kibbey and Kent decrees reveals that they were water rights cases concerned with resolving competing claims for water rights among established private interests. "Navigability" for purposes of adjudicating water rights is different from "navigability" for purposes of determining title to the riverbed. *See Oregon by Division of State Lands v. Riverfront Protection Assoc* 672 F. 2d 792, 794 n. 1 (9th Cir. 1982). A determination that the Salt River was not navigable prior to statehood for purposes of determining water rights under the prior appropriation doctrine is not inconsistent with a determination that the Salt River was navigable as of statehood for purposes of title. *Id.* Neither case sought to determine whether the Salt River was susceptible to use as a highway for commerce. Indeed, the river's non-navigability was probably assumed as a matter of expediency in the Kibbey Decree, and the Kent Decree, in turn, relies on that finding.

Moreover, a determination of navigability for purposes of title would have been contrary to the interests of the settler groups and business leaders of the time who shared a common commitment to water storage and irrigation as the engines of economic development in the arid West. Such a finding would have undermined land patents issued by the federal government to

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[3] *Wormser v. Salt River Canal Co.*, No. 708 Second Judicial Dist., Territory of Ariz. (March 31, 1892)

[4] *Hurley v. Abbott*, No. 4564, Third Judicial District, Territory of Arizona, County of Maricopa, (March 1, 1910)

irrigators while possibly stalling the construction of water storage and diversion dams such as Roosevelt and Granite Reef Dam needed to expand acreage under cultivation, generate electric power and smooth out the fluctuation of water availability to coincide with the agricultural calendar. Judge Joseph H. Kibbey, who would later serve as Attorney General and then Governor of the Territory as well as legal counsel for the Salt River Valley Water Users' Association, knew full well the importance of settling land claims and water rights disputes to the grand design of mastering the Salt River for agriculture. His ruling in *Wormser v. Salt River Canal Co.*, No. 708 Second Judicial Dist., Territory of Ariz.(March 31, 1892) was supportive of a well-regulated irrigation regime.

4. SRPMIC v. Arizona Sand & Rock Co. Did Not Address or Resolve The Issue of Whether the Upper Salt River Was Navigable.

In its opening brief, SRP also asserts, incorrectly, that the federal district court decision in *Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co.*, D. Ariz. Cause No. Civ. 72-376 PHX WDM (April 13, 1977) ["*SRPMIC*"] found the Upper Salt River non-navigable. It is fundamental that in order to have a preclusive effect, a prior case must have actually litigated the issue and the resolution of the issue must be essential to the decision. *See, e.g. J. W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 690 P. 2d 119 (1984). Yet, that is not true with respect to the case relied upon by SRP.

SRPMIC involved a boundary dispute between the Salt River Pima-Maricopa Indian Community and a number of private and governmental entities that had interests in land along the southern boundary of the area claimed by the Indian Community. The southern boundary of the reservation was not clearly defined at the time of its creation and a number of surveys conducted subsequently failed to clarify whether the territory conferred to the Indian Community included both the north and south channels where the river forked along the edge of the

reservation. The state transportation department, the City of Mesa, the Salt River Valley Water Users' Association and Johnson & Stewart Materials, Inc. all brought suit against the Dept. of the Interior to overturn a decision by the Secretary that confirmed the reservation boundary as lying along the southern branch of the fork and calling for all contesting land claimants to vacate that area. Five causes were consolidated in a pretrial order, including a suit brought by the Indian Community against Arizona Sand & Rock Co. for trespass, ejectment and damages for the removal of sand and gravel, and four suits brought by the land claimants against the Secretary of the Interior seeking to reverse the boundary decision and reject the 1972 Plat of Survey upon which it was based. *SRPMIC*,,

The *SRPMIC* Consolidated Pretrial Order, filed March 12, 1976, contains in paragraph 30 the following statement. "The Salt River is not now and never has been a navigable river." This statement follows a listing of storage dams built along the Salt River and the Verde River and their respective storage capacity. The six dams listed are shown to have a total storage capacity of 2,072,045 acre feet of water, providing a graphic view of the sizable volume of water that flowed through the Verde and Salt Rivers. While the SRP memorandum cites this statement as the basis for issue preclusion (*SRP* at 18), the presentation of the issues before the court, provided in section IV, pgs. 11-20 of the Pretrial Order makes no reference to either the navigability of the Salt River nor to any considerations of its actual or susceptible use as a highway of commerce. Nor does that court's Findings of Fact and Findings of Law, issued as a separate attachment to the judgment of the court filed on April 13, 1977, contain any mention of navigability.

The SRP memorandum mischaracterizes the basis for the state's argument with the decision of the Secretary of the Interior by asserting that "[t]he State initially argued that it held

title to the disputed lands because the river was navigable and the State owned its bed." *SRP* at 18. No factual basis is provided for this assertion, however. In fact, the State of Arizona never asserted a claim of ownership in the dispute over the boundary of the Salt River Pima-Maricopa reservation in its filings with the court.

Finally, the SRP brief extends the mischaracterization of the *SRPMIC* final judgment by asserting, wrongly, that "[I]n the final judgment, the court held that the title to the lands was vested in the United States, not the State of Arizona." *SRP* at 18. At no point was title of the lands contested by the State of Arizona. Rather, the fundamental issue before the court was whether the land in dispute was part of the reservation created by executive order or whether it remained public land administered by the Federal Government through the Department of Interior. Thus, it is clear that the issue of navigability of the Upper Salt River was not before *SRPMIC* court and a "finding" of navigability was neither made nor required.

III. Conclusion

For these and the reasons included in Defenders' Opening Memorandum submitted on December 9, 2005, we urge the ANSAC to find that the Upper Salt River was navigable at statehood

Respectfully Submitted this 29th day of December 2005.

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One original and six copies of the
foregoing Opening Memorandum
were mailed this 29th day December, 2005

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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

In re Determination of Navigability of the Upper Salt River	Case No. 04-008 NAV Notice of Errata

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, "Defenders") hereby submit this notice of errata to include a citation inadvertently deleted from their Response Memorandum regarding the navigability of the Upper Salt River.

On Page 4, beginning on line 5 of the Response memorandum, it should read:

"The Globe route was initially favored by the Reclamation Service due to its shorter distance and lower cost. Earl A. Zarbin, *Roosevelt Dam: A History to 1911* (Salt River Project 1984) (EI 4) at 76."

Respectfully Submitted this 9th day of January 2006.

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One original and six copies of the
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