

Attorney General Terry Goddard  
Firm Bar No: 14000  
Laurie A. Hachtel (015949)  
Assistant Attorney General  
Natural Resources Section  
1275 West Washington Street  
Phoenix, Arizona 85007-2997  
Phone No.: (602) 542-7793

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Attorney for the Arizona State Land Department

**BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION**

In re Determination of Navigability of  
the Upper Salt River

No. 04-008 NAV

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

The Arizona State Land Department responds to the Opening Post-Hearing Memoranda filed by Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association ("SRP"), and the San Carlos Apache Tribe ("Tribe") concerning the Arizona Navigable Stream Adjudication Commission's ("ANSAC") hearings on the navigability of the Upper Salt River from the Granite Reef Dam to the Confluence of the White and Black Rivers.

By 1912, the natural and ordinary flow of the Upper Salt River, except for reach one above Roosevelt Dam, was substantially altered by impoundments at Roosevelt Dam. Irrigation projects dramatically altered both the form and function of the river, and changed it from a "natural" system to one that is entirely controlled. There is no evidence that suggests that anyone---from the earliest inhabitants to the current civilization---decided to harness and divert the river's reliable flows for domestic use and irrigation only because the Upper Salt was not useful for navigation, or because it was prone to floods and drought. Rather, the Salt River was the key to surviving and creating a strong agricultural and economic base for the Salt River Valley. See Arizona State Land Department Rep., *Arizona Stream Navigability Study for Salt River: Granite Reef Dam to the Confluence of the White*

and Black Rivers, Draft Final Report, at 8-1 (revised June 2003) (hereinafter "ASLD Report") (Evidence Item No. 27) ("E.I.").

**I. The Upper Salt River Below Roosevelt Dam, If in its Ordinary and Natural Condition at Statehood, Would Have Been Susceptible to Use as a Highway for Commerce.**

ANSAC should find the Upper Salt navigable if it determines that the river was capable of being used for transportation or commerce in its ordinary and natural condition at statehood. It is not necessary that trade and travel actually occurred on the river. See *United States v. Utah*, 283 U.S. 64, 82 (1931) ("[q]uestion of . . . susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. . . . The extent of existing commerce is not the test."); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122-123 (1921) (quoting *The Montello*, 87 U.S. (20 Wall.) 430, 441-442 (1874)) ("[c]apability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway."); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9<sup>th</sup> Cir. 1989) ("[t]est is whether the river was susceptible of being used as a highway for commerce at statehood, not whether it was actually so used.").

In applying the *Daniel Ball* test, ANSAC must consider the unique circumstances of Arizona's development. If limited or infrequent use of a watercourse can be explained by sparse settlement of the region, or the use of nearby trails or roads instead of the watercourse, the watercourse still may be proven to be susceptible to use as a highway of commerce. *United States v. Utah*, 283 U.S. at 81-82 (nonuse not indicative of nonnavigability based on many factors including nonsettlement of the region). Based on its bedrock geology which limited access to the river, the area surrounding the river was not largely populated at statehood.<sup>1</sup> ASLD Report at 4-15. The emphasis on the use of the Salt River was for water storage and irrigation, not for transportation and commerce. See SRP at 5 (focus was on

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<sup>1</sup> The majority of the population surrounding the Upper Salt is located in Gila County. The population in Gila County in 1910 was 16,348. U.S. Census Bureau; Decennial Census: 1900 to 1990; generated by Richard L. Forstall; using DataFerrett; <http://dataferrett.census.gov/>; (4 January 2006).

building water storage project). ANSAC must consider these factors in arriving at its navigability determination.<sup>2</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409-410 (1940) (navigability not affected by nonuse over extended period, changed conditions, or other forms of transportation).

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

ANSAC must find that the Upper Salt River was navigable when Arizona was admitted into the Union on February 14, 1912, if the river would have been susceptible to navigation in its **ordinary and natural** condition. See *United States v. Utah*, 283 U.S. at 75-76; *Alaska v. Ahtna, Inc.*, 891 F.2d at 1404 (citations omitted) ("Although the river must be navigable at the time of statehood, this only means that, at the time of statehood, regardless of the actual use of the river, the river must have been susceptible to use as a highway for commerce."); *Ariz. Ctr. For Law In The Pub. Interest v. Hassell*, 172 Ariz. 356, 362-363, 837 P.2d 158, 164-165 (App. 1991) ("[n]avigability is determined by reference to the ordinary and natural condition of the watercourse at the time of the state's admission to the Union."). The SRP and the Tribe do not address the ordinary and natural condition of the Upper Salt in their Opening Memoranda. For the reasons stated herein, the ordinary and natural condition of the Upper Salt at statehood compels a finding of navigability.

The *Daniel Ball* test requires that the navigability of rivers be determined "in their ordinary condition." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). "Ordinary condition" means the "volume of water, the gradients and the regularity of the flow." *Appalachian Elec. Power Co.*, 311 U.S. at 407. The Supreme Court intended by use of the phrase "ordinary and natural condition" that a watercourse be examined in its natural state, free of artificial obstructions such as dams, diversions, and canals. *Economy Light & Power*, 256 U.S. at 118. In discussing the building of dams and bridges

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<sup>2</sup> Because the *Daniel Ball* test involves a fact intensive inquiry that varies from state-to-state and from watercourse-to-watercourse, navigability determinations of watercourses in other states are not binding and their relevance is marginal at best when their climatic, hydrological, and historical evidence is compared to the Upper Salt River. See SRP, *Information Regarding Navigability of Selected U.S. Watercourses*, (Apr. 2003) (E.I. 25); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940) (navigability not determined by a formula that fits every type of stream under all circumstances and at all times).

across the Desplaines River, the Court stated that "[t]he fact, however, that **artificial** obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its **natural** state." *Id.* (emphasis added); *see also Holt State Bank*, 270 U.S. 49 (1926) (Court determined navigability of Mud Lake by considering the Lake in its natural state (filled with water) rather than in its present condition (drained dry by a drainage ditch)). By statehood, the Upper Salt's ordinary and natural flows were altered by man-made impoundments. ASLD Report at 4-12-4-13, 5-13.

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

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

Where actual use is limited or infrequent, a river's susceptibility to use as a highway for commerce may be proven by evidence of the river's physical characteristics. *Utah v. United States*, 403 U.S. 9, 12 (1971); *Appalachian Elec. Power Co.*, 311 U.S. at 410-419; *United States v. Utah*, 283 U.S. at 77-81; *Holt State Bank*, 270 U.S. at 52-53, 56-57; *Economy Light & Power Co.*, 256 U.S. at 118. The physical characteristics of the Upper Salt River clearly establish that the river could have been used for trade and travel if its ordinary and natural flows had not been altered.

**1. Hydrology.**

The Upper Salt is a perennial stream in its ordinary and natural condition. ASLD Report at 5-12, 8-2. Seasonal and annual flow rate fluctuations occur naturally on every navigable river in the world, some of which may be periodically nonnavigable due to temporary flood, drought, ice, or weather

conditions. The Upper Salt is no different. Long-term stream gauge records document that some adverse conditions are natural, but certainly not ordinary. First, floods do occur on the Upper Salt, but less than one percent of the time. *Compare* ASLD Report at 5-17, Table 12 (flow duration), 5-20, Table 16 (flow duration) *with* 5-25, Table 18 (floods). More than ninety-nine percent of the time (that is, in its “ordinary” condition), the river is not in flood. Transcript of ANSAC hearing Oct. 20, 2005, at 152: 5-8 (hereinafter “Tr. at \_\_\_”) (Fuller). Floods are rare and of short duration. Tr. at 152:1-23 (Fuller). Second, “high flow” is not equivalent to flooding, but rather is simply normal spring runoff. High flow contrasts with the annual period of low flow. *Compare* ASLD Report at 5-25, Table 18 (floods over 20,000 cfs) *with* 5-17 – 5-20, Tables 12-17 (flow average data). On the Upper Salt, seasonal high flow typically occurs in late winter and spring due to snow melt and is an ordinary and expected part of the river’s natural hydrology. ASLD Report at 5-6. Finally, ordinary flow is not defined by the seasonal low flow period that usually occurs during the summer. The ordinary, predictable, seasonal variation in flow discussed in detail in the ASLD Report includes the average, median, maximum, and minimum flow rates that depict the normal, expected range of flows at any given time of year. *See* ASLD Report at 5-18, Table 14, 5-19, Table 15, 5-20, Table 17; *see also* Tr. at 152: 15-23 (Fuller discussing predictability). Periodic navigability is enough to establish navigability for title purposes even if river is not susceptible to navigation at all seasons of the year or all stages of the water. *Economy Light & Power Co.*, 256 U.S. at 122; *see Athna*, 891 F.2d at 1402 (Gulkana River found navigable even though frozen six months of the year); *Oregon v. Riverfront Prot. Ass’n*, 672 F.2d 792, 795 (9<sup>th</sup> Cir. 1982) (McKenzie River found navigable based on seasonal log drives for seventeen years that occurred primarily during three months of the year).

Average hydrologic and hydraulic data reasonably depict the ordinary and natural conditions on the Upper Salt. While it is true that the average annual flow rate for the river is skewed upward by large floods, use of average data is the standard of practice for describing stream flow conditions.<sup>3</sup> *See* Tr. at 151:12-21 (Fuller). The SRP characterizes average annual flow data as unreliable and dubious;

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<sup>3</sup> The U.S. Geological Survey (USGS) defines the standard of practice for the collection of streamflow data in the United States. The USGS routinely reports flow data, including for Arizona streams, in terms of annual and monthly averages.

however, the SRP in turn relies on this very data to support its arguments. *See* SRP at Appendix B (comparison of annual mean flow rate for various streams).<sup>4</sup> In fact, the SRP's own expert witness, Dr. Stanley Schumm, relied upon average annual flow estimates. *See* Stanley A. Schumm, Ph.D., P.G., *Geomorphic Character of the Upper Salt River*, at 10, Table 2 (Jan. 2005) (E.I. 28) (hereinafter "Schumm Report"); Tr. at 88:10, 93: 4-5, 101: 13-15 (Schumm). Furthermore, to address any potential bias in the average data, the ASLD Report also presented median flow rates and monthly flow rates (maximum, average, and minimum). ASLD Report at 5-20, Table 17 (median flow rate), 5-18, Table 14 (minimum, maximum, and mean flow rates); Tr. at 151:22-24 (Fuller). The data clearly shows that regardless of whether average, maximum, median, or minimum flow rates are used, the Upper Salt is boatable at all times of the year. *See* Exhibit 1, State Land Department's Opening Post-Hearing Memorandum (hereinafter "ASLD Opening"). Similarly, average flow depth estimates referenced in the ASLD Report were verified by field observations and gauge records, and were proven to accurately depict the ordinary and natural condition of the river. ASLD Report at 4-1 – 4-12, 5-27 – 5-33, Table 22; *cf.* Tr. at 91:7, 91:15-16, 96:24, 97:5-6 (Schumm's lack of field work). Modern boating on the river today at ordinary flow rates substantiates the depth estimates presented in the ASLD Report and refutes the assertion of extremely shallow flow proposed by SRP. *See* Tr. at 60:18-25 – 61:1-10 (Fuller). Based on the stream gauge data summarized in the ASLD Report, the following facts are known with certainty about the Upper Salt: (1) normal flow varies from 103 cfs to 2,040 cfs; (2) high flow is from March to May; and (3) low flow is from June to August. ASLD Report at 5-18, Table 14, 5-19, Table 15.

## 2. **Geomorphology.**

The perennial Upper Salt has a pool and riffle pattern, and is located within a confined bedrock canyon over most of its length. ASLD Report at 4-11; Tr. at 148:9 – 149:18 (Fuller), 95:5-8 (Schumm).

A perennial stream is one in which there is always reliable flow. ASLD Report at 4-10. A pool and riffle stream consists of long, flat pools separated by short, slightly steeper riffles (rapids). *See* ASLD

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<sup>4</sup> The SRP's criticism about adding upstream gauge data is unfounded. SRP at 14. Adding the upstream gauge data actually underestimates the flow rate downstream of the Verde River confluence since the flow rates increase in the downstream direction on the Upper Salt. *See* ASLD Report at 5-17, Table 5.

Report at 4-9. Some rapids on the Upper Salt are steep and fast, which provide a challenge that attracts recreational boaters. *See* U.S. Forest Service, *Evaluation of Navigability at the Time of Statehood: Salt River* at 4 (Jan. 1998) (E.I. 8); *compare* U.S. Forest Service, *Recreation Opportunity Guide Tonto National Forest Upper Salt River* at 9-21 (1995) (E.I. 8). None of the rapids are obstacles that prevent navigability, and all can be portaged. *See id.* at 5; *see also* ASLD Report at 3-34 – 3-40 (historical accounts that document canoeing and rafting in these reaches in handmade wooden boats). Downstream of the Verde River confluence, the Salt has a slightly sinuous compound channel pattern that is confined by high, stable terraces. ASLD Report at 4-9 – 4-10, 4-12; Schumm Report at 2. A compound channel consists of a sinuous, well-defined low flow channel, where boating occurs, inset within a broad floodplain with significantly different characteristics. Tr. at 149:1-18 (Fuller).

The geomorphic condition and characteristics of the Upper Salt have varied little since statehood, except where the river has been dammed to create water supply reservoirs. ASLD Report at 4-10, 4-15; Tr. at 53:21-23 (Gilpin). The geomorphic condition of the Upper Salt is directly analogous to the Colorado River in the Grand Canyon, a river reach that is navigable. Like the Upper Salt, the Colorado today primarily flows in response to dam releases. *Arizona v. California*, 373 U.S. 546, 553-554 (1963). At statehood, the Colorado, which also flows through deep canyons, was subject to extreme floods, droughts, large seasonal variations in flow rate, erosion, and human impacts. *Id.*

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

ANSAC need not base its determination solely on the river's physical condition. The actual historic and current use of the Upper Salt River proves that the river was capable of being used for trade or travel. *See Utah v. United States*, 403 U.S. at 11-12; *United States v. Utah*, 283 U.S. at 81; *Holt State Bank*, 270 U.S. at 57.

1. **Historical Boating.**

Historic evidence of boating on the Upper Salt supports a finding that it would have been navigable at statehood in its ordinary and natural condition. Contrary to the SRP's and the Tribe's characterization that every boating incident on the Salt River resulted in disastrous consequences or only

occurred during floods, the evidence itself provides a different, more realistic picture. The ASLD Report documents fourteen accounts of boating on the Upper Salt River in the years prior to statehood, the majority of which describe successful trips where the participants reached their destination. ASLD Report at 3-34 – 3-40, Appendix B; see *Economy Light & Power*, 256 U.S. at 122 (“[n]avigability . . . is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages”). Two of the “failures” occurred in the hazardous construction zone at the partially built Roosevelt Dam, and a third “failure” at the flat water impoundment area at the Granite Reef Dam. ASLD Report at 3-38-3-39. None of these “failures” resulted from the ordinary and natural condition of the river.

Successful boating trips occurred throughout the year, and covered the river from just above Roosevelt to Granite Reef Dam. *Id.* at 3-34 – 3-40; Tr. at 26:16-24, 144:9-20, 145:9-13 (Fuller). Only one of the trips occurred during a flood. Tr. at 37:19, 41:22, 42:15, 45:5, and 47:17 (Gilpin/Fuller). All of the historical boating accounts, except one, are documented by photographs, newspaper reports, or historical documents, all of which are sources of historical information commonly relied upon by both historians and courts. Tr. at 13:16-14:4 (Gilpin). The SRP categorically dismisses newspaper accounts of successful boating incidents as factually dubious entertainment pieces, but then relies on these same newspaper accounts as evidence of boating hazards. SRP at 1, 9, Appendix 1. Further, boating was not an unusual occurrence; it occurred during “dry” months as well as during seasonal high flows by shallow draft boats. ASLD Report at 3-34 – 3-40; Tr. at 26:16-24 (Fuller); cf. *Oklahoma v. Texas*, 258 U.S. 574, 587 (1922). The indisputable conclusion is that successful boating did occur on the Upper Salt River throughout the years before diversion of the Salt’s natural runoff.<sup>5</sup>

## 2. Modern Boating.

Modern boating has occurred and continues today over the entire Upper Salt River, from the confluence of the White and Black Rivers to Granite Reef Dam. ASLD Report at 6-1 – 6-7; Tr. at 21:10-22:3 (Fuller). The types of boats used vary seasonally with the normal fluctuations in flow rate. Modern boating on the Upper Salt includes a significant component of commercial boating. Tr. at 63:4

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<sup>5</sup> Irrigation diversion and water storage depleted most of the ordinary and natural flow from the river by 1912 making boating less frequent. ASLD Report at 4.



– 81:15 (Fuller). Commercial endeavors include guided river trips (paid guides), one-day and multi-day rafting trips (for-profit companies), commercial and recreational river permits by the U.S. Forest Service and the White Mountain Apache Tribe, and boat-based environmental surveys routinely conducted by the Arizona Game and Fish Department. Tr. at 68:5-14, 71:12-20 (Fuller), 135:6 – 142:4 (Weedman).

Most commercial rafting on the Upper Salt is conducted between March 1<sup>st</sup> and May 15<sup>th</sup> because that is when the seasonally high flows occur. See ASLD Report at 6-6; *compare* Tribe at 14. Depending on the flow rates in any given year, the commercial rafting season may be extended or shortened. Rafting is usually conducted at flow rates ranging from 700 cfs to 20,000 cfs, a condition that occurs approximately twenty-five percent of the time. See ASLD Opening, Exhibit 1 (depicting ordinary seasonal fluctuation that demonstrates that natural flow rates are predictable and are normally within the boatable range); Tr. at 68:1-4 (Fuller), 33:24-25 (Fuller). Kayaking occurs at flow rates that range from 100 cfs to 10,000 cfs, a condition that occurs approximately ninety-five percent of the time. See *id.*; Tr. at 69:25 – 70: 1-8 (Fuller). Canoeing occurs at flow rates that range from 100 cfs to 2500 cfs, a condition that occurs approximately ninety percent of the time. See *id.*; Tr. at 136:7 (Weedman). Given this flow data, canoeing and kayaking can occur during any month, even at minimum average flow rates during the dry summer months. ASLD Report at 5-19, Table 15, Tr. at 135:20-25 (Weedman).

Personal or private use of boats may demonstrate the availability of the stream for the simpler types of commercial navigation. See *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 788 (9<sup>th</sup> Cir. 1981) (finding that use by light craft, primarily Indian canoes, plus shingle bolt transportation sufficient to sustain a navigability finding); see *Ahtna*, 891 F.2d at 1405 (court found evidence of present day recreational boating conclusive of navigability); *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (1998) (“evidence of the river’s capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel.”); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 422, 18 P.3d 722, 732 (App. 2001) (citing *Utah*, 403 U.S. at 11) (*Daniel Ball* test has been interpreted to neither require both trade and travel together nor that trade and travel be commercial). Moreover, contrary to the SRP and the Tribe’s assertions, navigability

is not limited to certain types of boats or dependent on the nature of commerce. SRP at 7, 10, 20, Tribe at 9; see *The Montello*, 87 U.S. (20 Wall.) at 441-442 ("the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted . . . [i]t would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway."); *Holt State Bank*, 270 U.S. at 56 ("navigability does not depend on the particular mode in which such use is or may be had-----whether by steamboats, sailing vessels or flatboats."); *North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus*, 671 F.2d 271, 278 (8<sup>th</sup> Cir. 1982), *rev'd on other grounds sub. nom., Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273 (1983) (canoes represented viable means of transporting persons and goods at North Dakota's statehood); *but see State of North Dakota ex rel. Bd. of Univ. and School Lands v. United States*, 972 F.2d 235 (8<sup>th</sup> Cir. 1992) (finding Little Missouri River nonnavigable).

The primary differences between modern boating and historical boating include the durability of the boats, access to rivers, and the availability of free time. ASLD Report at 3-40; Tr. at 51:18 – 53:20 (Fuller). The primary similarity between historical boats and modern boats is the amount of water required to float them, a condition that has not changed since 1912. ASLD Report at 6-4, Table 3.

There is more than sufficient evidence for ANSAC to conclude that the Upper Salt is navigable. For example, one jurisdiction found the Little Missouri River navigable based on evidence of only isolated cases of historic use by small craft such as canoes, some brief and unsuccessful efforts to float logs downstream, and the river's modern use by hundreds of recreational canoes annually. *North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus*, 671 F.2d at 277-78; *but see State of North Dakota ex rel. Bd. of Univ. and School Lands v. United States*, 972 F.2d 235 (finding Little Missouri River nonnavigable). The river was deemed navigable even though it was impassable at most times of the year due to winter freezes, high flood levels during spring runoff periods, and low summer flows (the river's maximum depth was only two and one-half feet), it had a shallow bottom, substantial rapids, swift moving current, and other obstructions. *Id.* The court stated:

Although we feel that the evidence in the record concerning navigability is rather thin, we still affirm the district court. The legal standards on navigability are liberal, and we must bear in mind that the issue is one of potential commercial use and hence navigability at the time of statehood, not in the present day.

*Id.* at 278.

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

Despite the SRP's urging that courts previously determined that the Salt River was nonnavigable prior to statehood, to date no court has adjudicated the navigability of the Salt River for title purposes.<sup>6</sup> Without any evidence that these earlier court decisions performed the analysis required under the *Daniel Ball* test, these decisions do not satisfy *Hassell's* particularized assessment requirement.

In *Defenders*, the Court rejected appellees' arguments that the Legislature made an "independent finding" of nonnavigability and that ANSAC's finding of nonnavigability was made under the most liberal federal test. 199 Ariz at 427, 18 P.3d at 738. The *Defenders* Court stated:

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

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

**A. Kibbey and Kent Decrees.**

Advocates of nonnavigability contend that decisions in *Wormser v. Salt River Valley Canal Co.*, No. 708, Second Judicial District, Territory of Arizona, County of Maricopa (Mar. 31, 1892) (the "Kibbey Decree") and *Hurley v. Abbott*, No. 4564, Third Judicial District, Territory of Arizona, County of Maricopa (Mar. 1, 1910) (the "Kent Decree") are conclusive determinations that the Salt River is

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<sup>6</sup> The Department incorporates by reference herein its Response to Salt River Project's Motion to Dismiss filed with the Commission on January 21, 1994, its Response to the Notice of Lack of Jurisdiction filed with the Commission on January 9, 1994, and its Response to Demand Petition filed with the Commission on January 19, 1994.

nonnavigable. *See* SRP at 17-18. Although these Decrees each included a statement that the Salt River was not navigable, neither court applied the *Daniel Ball* test. A holding under state law is not determinative of navigability under federal law. *Puget Sound Power & Light Co.*, 644 F.2d at 788. Moreover, the Kibbey and Kent courts addressed appropriate water rights in the context of the territorial law regarding the use of surface waters under the Desert Land Act. The courts manifestly did not make the “particularized assessment” that is required for equal footing claims. *See Hassell*, 172 Ariz. at 371, 837 P.2d at 173. ANSAC should therefore disregard SRP’s contentions made on the basis of these decrees.

**B. Salt River Pima-Maricopa Indian Community Decision.**

SRP infers that a prior lawsuit to which the Department was not a party, and which did not litigate the issue of navigability for title precludes the Department from now asserting the navigability of the Salt River. *See* SRP at 18-19. But, the issue of whether the Salt River was navigable at statehood was not litigated, determined, or essential to the court’s ruling in *Salt River Pima-Maricopa Indian Cmty. v. Arizona Sand & Rock Co.*, D. Ariz. (CIV 72-376-PHX) (Apr. 13, 1977) (“SRPMIC”). SRP’s characterization of the navigability issue as “important to the court’s decision” is unfounded. The court’s finding of nonnavigability, included with thirty paragraphs of stipulations among the parties, is not a judicial determination of navigability for title purposes of the Salt River. Not only was the *Daniel Ball* test not applied by the court, no evidence was even submitted regarding the Salt River’s navigability. Further, the Highway Commission or Department of Transportation’s interest in the subject property was limited to certain licenses and permits for removal of sand and gravel, and rights-of-way granted by the Bureau of Reclamation to Transportation, not navigability and advocating for the public trust.<sup>7</sup>

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<sup>7</sup> The “State” referred to in the SRPMIC pleadings is the Arizona State Highway Commission (CIV 72-376), and the State on behalf of the Director of the Arizona Department of Transportation (CIV 74-529). The State Land Commissioner, not the Highway Commission or its Director, is responsible for advocating for the public trust. *See* A.R.S. §§ 37-102(A) (Department shall administer all laws relating to lands owned by, belonging to the State); 37-101(17) (defining state lands as any land owned or held in trust, or otherwise, by the State).

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

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

### **III. Land Patents, and Surveyors' Actions Are Not Determinative of the Navigability of the Upper Salt River.**

Federal and State patents did not dispose of the bedlands beneath the Salt River, and thereby deprive Arizona of its title to these lands under the equal footing doctrine. *See* SRP at 5. There is no evidence that the federal government departed from its established policy of treating lands underlying navigable waters as held for future states. *Holt State Bank*, 270 U.S. at 54-55 ("It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."); *see Defenders*, 199 Ariz. at 426, 18 P.3d at 737 ("determinations regarding the title to beds of navigable watercourses in equal footing cases must begin with a strong presumption against defeat of state's

title." No evidence exists that the government issued these patents as an exceptional circumstance required by some international duty or public exigency. *Holt State Bank*, 270 U.S. at 55; see *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) (Supreme Court upheld the Illinois Legislature's repeal of an earlier legislative grant of land beneath the navigable waters of Lake Michigan to the Illinois Central Railroad). Any attempted disposition of public trust property must be preceded by an application of the *Daniel Ball* test under the equal footing doctrine—which has never been done for the Salt River. Moreover, Arizona did not assert its claims to bedlands until the mid-1980s. *Land Dep't v. O'Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (App. 1987); *Hassell*, 172 Ariz. at 360, 837 P.2d at 162. Thus, it is not surprising that there is no reservation or notation concerning the riverbed in nineteenth century and early twentieth century patents.

The fact that surveyors did not meander the Salt River is also not evidence of the nonnavigability. See SRP at 4-5. The United States Supreme Court dismissed a similar argument made by the state in *Oklahoma v. Texas*. 258 U.S. at 585. The Court found "little significance" in surveyors' meander lines, because "those officers were not clothed with power to settle questions of navigability." *Id.* The SRP's expert, Dr. Douglas Littlefield, was unable to define the term "navigable" as used in federal surveying instructions. Tr. at 115:4-7, 133:19-20 (Littlefield). Without a clear definition, the determination of whether a river was navigable lay within each surveyor's discretion. Dr. Littlefield admitted that surveyors simply relied upon their common sense in determining whether a river was navigable, and that the determination varied depending on the time of year or particular year. Tr. at 133:19-25 – 134:1-12 (Littlefield).

#### **IV. Conclusion.**

As SRP correctly noted: This Commission has an important job to do. It must determine as of February 14, 1912, what the ordinary and natural condition of the Salt River would have been if its reliable flows were not already impounded and diverted for uses other than navigation. ANSAC is entrusted with protecting Arizona's citizens' entitlement under the equal footing doctrine to precious natural resources—the beds of navigable watercourses. The interests of the beneficiaries of the public trust are just as important as the interests of private parties. The State has established by a

preponderance of the evidence that the Salt River was susceptible for use as a highway for commerce in its ordinary and natural condition. Indisputable proof of susceptibility of the Upper Salt River includes the following: (1) historical accounts establish that people boated the river during every part of the year; (2) modern boating using a variety of boats; (3) geomorphic data that demonstrate a permanent, significant river with a single, well-defined channel; and (4) scientific flow records demonstrate permanent, adequate water supply. The Department requests that the Commission find that the Upper Salt River was navigable on February 14, 1912.

DATED: January 10, 2006

TERRY GODDARD



Laurie A. Hachtel  
Assistant Attorney General

ORIGINAL AND SEVEN COPIES of the foregoing hand-delivered for filing this 10th day of January, 2006 to:

Arizona Navigable Stream Adjudication Commission  
1700 West Washington, Suite #304  
Phoenix, AZ 85007

and COPY sent by U.S. mail this 10th day of January, 2006 to:

Curtis A. Jennings  
Jennings, Haug & Cunningham  
2800 North Central Avenue, Suite #1800  
Phoenix, AZ 85004-1049  
462877 NRS04-0112

COPY of the foregoing sent by U.S. mail  
this 10th day of January, 2006 to the  
following persons who indicated they  
were a party and appeared at the public hearing:


Joy Herr-Cardillo  
Arizona Center for Law in the Public Interest  
2205 E. Speedway Blvd.  
Tucson, AZ 85719

Mark McGinnis  
Rebecca Goldberg  
For the Salt River Project  
Salmon, Lewis and Weldon  
2850 E. Camelback Rd.  
Phoenix, AZ 85016

Bill Staudenmaier  
Mike Kafka  
For Phelps Dodge  
Ryley, Carlock and Applewhite  
1 North Central Ave. 1200  
Phoenix, AZ 85004

Joe Sparks  
John Ryley  
Sparks, Tehan & Ryley, P.C.  
For San Carlos Apache Tribe, Tonto Apache Tribe, Yavapai Apache Nation  
7503 First Street  
Scottsdale, AZ 85251

John Helm  
Sally Worthington  
Helm & Kyle  
For Maricopa County  
1619 E. Guadalupe Suite One  
Tempe, AZ 85283

By:   
Secretary to Laurie Hachtel