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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

In re Determination of Navigability of the Upper Salt River	No. 04-008-NAV **SALT RIVER PROJECT'S RESPONSIVE POST-HEARING MEMORANDUM**

The opening memoranda filed by the two proponents of Upper Salt River navigability (the Arizona State Land Department and the Defenders of Wildlife, et al.) contain little examination of the evidence introduced during the two hearings before this Commission and much discussion of the purported "liberal" legal standard of navigability for title purposes.[1] This heavy emphasis on the legal standard is perhaps not surprising when one considers that virtually none of the evidence introduced at the two hearings supports the proponents' position. In fact, the evidence in the record (including the reports prepared by the Land Department's own consultants) shows that the Upper Salt River is not, was not at statehood, and never has been "navigable" under the proper legal test.[2] Because the proponents of

[1] The only other opening memorandum was filed by the San Carlos Apache Tribe, which supports a finding of non-navigability for the Upper Salt River. The Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association (collectively, "SRP") join in the legal and factual arguments set forth in the San Carlos Apache Tribe's opening memorandum.

[2] The Defenders of Wildlife, et al. ("DOW") presented no expert or other live testimony at either of the hearings.

navigability have failed to satisfy their burden of proof, this Commission should find that the river was not navigable when Arizona became a state on February 14, 1912.

I. The Proponents of Navigability Overstate the Evidence Regarding Navigability.

Virtually all of the expert testimony and other evidence presented at the hearings favored a finding that the river was not navigable. Faced with this landslide of evidence, the State Land Department ("SLD") and DOW are confronted with the difficult task of not only trying to discredit the evidence presented by the other side but also trying to mount their own case so as to meet their burden of proof.[3] They have failed in that effort.

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

Proponents take the historical evidence and try to show that somebody, at some time, must have used the river as a "highway for commerce." The SLD, for example, goes so far as to argue that, because "there was no shortage of boats" in pre-statehood Arizona, the river must have been navigable. See State Land Department's Opening Post-Hearing Memorandum, at 11 (December 9, 2005) ("SLD Mem."). A review of the record shows, however, no evidence of a multitude of boats in central Arizona at or before statehood. The best evidence the SLD's consultants could muster was a set of anecdotal accounts of eight boating attempts over the course of thirty-seven years.[4] The record does not support the existence of more than a handful of boats in central Arizona over the entire period from 1873 to 1910. See id.

The SLD argues that "[v]irtually every reported story of boating on the Salt River includes an account of some unusual situation such as a boating accident, or an amusing anecdote" and, thus, "a reasonable conclusion is that boats were so commonly used that

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[3] The SLD and DOW are referred to herein collectively as "Proponents."

[4] See JE Fuller Hydrogeology & Geomorphology, Inc., Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Confluence of the White and Black Rivers, at 3-34 to 3-40 (revised June 2003) (EI 27) ("Fuller"); see also Salt River Project's Opening Post-Hearing Memorandum, Appendix A (December 9, 2005) ("SRP Mem.").

ordinary boating was not newsworthy and other boating incidents were generally unreported." Id. This argument stands the burden of proof on its head. It would be patently unreasonable for the Commission to assume that, because the local newspapers say little or nothing about boating, boating must have been an every-day occurrence. The only rational explanation for why most or all of the accounts of Salt River boating attempts include reports of accidents or "amusing anecdotes" is that boating on the river was dangerous and difficult and such attempts were extremely rare and newsworthy events.

The SLD has at times during these navigability proceedings relied upon the theory that "[t]he absence of evidence is not the evidence of absence." Because the Proponents bear the burden of proof, however, the "absence of evidence" is "evidence of absence" in this proceeding. Unless the Proponents can show, by a preponderance of the evidence, that the river was "navigable" at statehood, this Commission must find that the river was non-navigable. See SRP Mem., at 2-3.

DOW cites to assorted photographs of the river, asserting that "[i]n addition to written accounts of the trips, there is photographic evidence of boating on the Upper Salt." DOW's Opening Post-Hearing Memorandum, at 10 (December 9, 2005) ("DOW Mem."). The few old photographs that do exist, however, do nothing to show that the river was navigable at statehood. When questioned about the particular photographs, the SLD's consultants admitted that they did not know when or where the photographs were taken. See Reporter's Transcript of Proceedings, at 54-55 (October 20, 2005) ("Tr."). They further stated that, even as to those photographs purporting to show boats on the river, they had no information about the starting point, destination, or length of any such trip. See id. In fact, they conceded that one photograph showing a dog running on land alongside the river indicates that the trip was relatively short-lived, unless the "[d]og might have had a long run." Id. at 55.

In its memorandum, the SLD goes so far as to argue that the fact that some people drowned in the river is evidence that it was navigable. See SLD Mem., at 15. If the test for navigability was as "liberal" as the SLD suggests, every small pond, swimming pool, and

bathtub in the Phoenix area would be "navigable" and therefore subject to a public trust ownership claim by the State.

The few accounts of attempted boating on the Upper Salt River in the period leading up to statehood must be seen for what they are—exceptional attempts by a few "daring adventurers" to perform extraordinary feats that almost uniformly ended in disaster. These isolated attempts did not and cannot transform the river into a "highway for commerce."[5]

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

Unable to show that the river was ever actually used for navigation, Proponents make much of the "average" flow of the river prior to statehood and its "average" depth, in an effort to show that the river was "susceptible" to being used as a "highway for commerce." See, e.g., SLD Mem., at 13-14; DOW Mem., at 10. Nothing about the Upper Salt River, however, is or ever was "average." The river has always been subject to alternating periods of devastating floods and prolonged droughts. See SRP Mem., at 13-15. For a desert watercourse whose flow consists primarily of snowpack and other precipitation from nearby mountains and from violent occasional local storms, arguments about an "average annual flow rate" have little meaning. See id.

The SLD asserts, for example, that the average depth of the river, "in its natural state," was "about three feet." SLD Mem., at 13. This use of "average," however, is deceptively simple and, unless properly understood, can distort reality both in terms of geography and time. A one-mile stretch of river, for example, can have an average depth of three feet if the upper half-mile has a depth of five feet, nine inches, and the lower half-mile has a depth of three inches. This mile of watercourse is obviously not "navigable," under any legal

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[5] Proponents also attempt to make much out of the post-statehood attempts to boat the river during limited times of certain years. See DOW Mem., at 11; SLD Mem., at 12-13. Those isolated instances of modern boating were addressed on pages 10-13 of SRP's opening memorandum and in more detail on pages 10-17 of the San Carlos Apache Tribe's opening memorandum. Proponents said nothing in their opening memoranda to detract from the analysis of that issue in the SRP and San Carlos opening memoranda.

definition, because the stretch with a three-inch depth could not be boated by any means. See SRP Mem., at 13.

Referring to an "average" depth and flow rate also distorts the view of the river over time. In its opening memorandum, SRP demonstrated how the extremely large floods that are known to have occurred on the Upper Salt River make the "average" depth or flow calculations meaningless for purposes of determining whether the river was navigable. See SRP Mem., at 14.

II. Proponents Misstate the Legal Standard of Navigability.

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

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

In general, Proponents cite to prior court decisions that espouse platitudes about the "equal footing" and "public trust" doctrines but do not address the "navigability" of any specific river. Like the three published Arizona opinions, the public trust law is full of decisions in which the courts have discussed the general scope of the legal doctrines without ever getting to a factual determination of navigability.[6] Proponents' heavy reliance upon such cases is not surprising because, as SRP found in preparing its compilation of "navigability" cases submitted to the Commission,[7] there is virtually no case law that would support a finding of navigability for the Upper Salt River on a factual basis. Although Proponents might take comfort in some favorable statements made in passing in court *dicta*, no court has ever found any river with the same general characteristics as the Upper Salt to be navigable. See EI 17.

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

[7] See Information Regarding Navigability of Selected U.S. Watercourses (April 2003) (EI 17).

DOW thinks it has found such a case, but it has not. In its memorandum, DOW again cites North Dakota v. Andrus as a case where supporting its position that "the federal test for navigability for title (under the Equal Footing Doctrine) is a liberal one." DOW Mem., at 7. Although the federal court in the case DOW cites did find the Little Missouri River navigable at statehood, that finding was overruled by a subsequent federal court decision.[8]

The Little Missouri River navigability litigation began sometime prior to 1981 as a dispute between the United States and the State of North Dakota. See North Dakota v. Andrus, 506 F. Supp. 619 (D.N.D. 1981).[9] The United States, throughout the first phases of that litigation, consistently contended that the Federal Quiet Title Act applied and that, under that act, North Dakota had waited too long to bring its "public trust" title claim. See North Dakota v. Andrus, 671 F.2d 271, 273 (8th Cir. 1982). In part for that reason, during the first hearing before the federal district court, the United States "did not present any evidence on navigability." Id. Both the federal district court in 1981 and the court of appeals in 1982 rejected the United States' legal argument and found that the statute of limitations in the Federal Quiet Title Act did not apply. Id. at 276.

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

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[8] DOW also cites Oregon v. Riverfront Protection Ass'n, 672 F.2d 792 (9th Cir. 1982), for the proposition that a watercourse can be determined navigable "despite occasional impediments such as sand or gravel bars, and despite the fact that it is only navigable a few months out of the year." DOW Mem., at 7. The record is clear, however, that the Mackenzie River at issue in that case supported the transportation of "[t]housands of logs and millions of board feet of timber," 672 F.2d at 795, and had an annual mean flow rate of approximately 4,000 cfs. See SRP Mem., Appendix B. Those characteristics bear no relation to those of the Upper Salt River, during any time period.

[9] The entire history of the Little Missouri River litigation is recounted in North Dakota v. United States, 972 F.2d 235 (8th Cir. 1992), a copy of which included at Tab 14 of EI 17.

and relieve itself from the effects of the statute of limitations. See North Dakota v. United States, 972 F.2d at 237 n.2.

After the federal statute was amended, North Dakota filed a second lawsuit in the same court to assert its same claims to streambed lands against the United States. This time, however, the United States hired experts, submitted evidence, and vigorously presented its factual case regarding "navigability." North Dakota v. United States, 770 F. Supp. 506 (D.N.D. 1991). When presented with a more complete evidentiary record, the same federal district court that had in 1981 found the river navigable at statehood held in 1991 that "North Dakota ha[d] failed to prove by a preponderance of the evidence that the Little Missouri River was a navigable river when North Dakota was admitted to the union and became a state in 1899." Id. at 513. The Eighth Circuit Court of Appeals affirmed in 1992. North Dakota v. United States, 972 F.2d at 240.

In its compilation of "navigability" cases submitted to the Commission, SRP included the 1991 federal district court decision and the 1992 Eighth Circuit affirmance. See EI 17, Tab 13. DOW, however, continues to solely upon the 1982 decision, mentioning the later decisions only in a *"rev'd on other grounds"* designation. DOW's reliance on the 1982 decision is severely misplaced. First, as a practical matter, the 1982 decision is less persuasive authority because its was issued following a hearing at which only one side presented evidence. The United States, choosing to rely upon its statute of limitations argument under the Federal Quiet Title Act, submitted no evidence on the actual issue of navigability. North Dakota v. Andrus, 671 F.2d at 273.

Second, and more important, because the 1981 and 1982 decisions were made by courts acting outside their authority under the Federal Quiet Title Act (as subsequently found by the Supreme Court in 1983), those decisions have no force or effect as a matter of law. In fact, in the second round of litigation starting after the federal act was amended, North Dakota argued that those decisions were entitled to great weight as "law of the case," but the court of appeals firmly rejected that argument: "In view of our holding that the trial court was without

jurisdiction to inquire into the merits of North Dakota's complaint, however, we need not belabor this point. **Entered in the absence of jurisdiction, the entire judgment must be reversed.**" North Dakota v. Block, 789 F.2d 1308, 1314 (8th Cir. 1986) (emphasis added).[10]

Although SRP agrees with DOW that much can be learned from the Little Missouri River litigation regarding application of the federal "navigability" test to particular watercourses, that information must come from the proper and final disposition of that case—not from an interim decision that was issued by a court lacking jurisdiction and with only one side presenting evidence. When presented with complete evidence and legal argument regarding the Little Missouri River, the federal district court found that it was not navigable at statehood, and the Eighth Circuit Court of Appeals affirmed. That dispute involved some of the same type of evidence at issue here for the Upper Salt, and North Dakota lost despite having significantly more and better evidence than does Arizona in this case. North Dakota presented evidence of a "tie drive," which the courts found did not prove navigability, even though that tie drive was infinitely more successful than any such attempt on the Upper Salt. See 770 F. Supp. at 509-10. North Dakota presented evidence of prehistoric boating on the river; no such evidence exists for the Upper Salt. Id. at 511-12. The North Dakota court also was not persuaded by the state's "statistical analysis" of the river's "boatability," finding that such analysis "is not a reliable indicator of the river's navigability at the time of statehood." Id. at 512. The Little Missouri River cases strongly refute Proponents' position that the Upper Salt is "navigable."[11]

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[10] See also North Dakota v. United States, 770 F. Supp. at 508 n.6 (EI 17, Tab 13); North Dakota v. United States, 972 F.2d at 237 n.3.

[11] The SLD also cites the Arizona Supreme Court's ill-fated decision in State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), rev'd, 414 U.S. 313 (1973), reh'g denied, 434 U.S. 1090 (1978). See SLD Mem., at 5 & n.1. The Arizona court's Bonelli holding was, however, based upon a factual determination that the channelization of the Colorado River affected the river "rapidly and perceptibly." 107 Ariz. at 468, 489 P.2d at 702. No such factual determination has been requested, authorized, or made in this matter. Furthermore, Bonelli dealt with **post-statehood** changes in the river, after the State's title had already vested. See id. at 469, 489 P.2d at 703. The relevant events with respect to the Upper Salt River were, conversely, primarily pre-statehood. See SLD Mem., at 2.

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

The SLD contends that "[i]n the majority of the historical accounts, the boats on the Upper Salt River successfully reached their destination." SLD Mem., at 10. This statement is, however, clearly belied by the facts in the record regarding the travails of those who attempted to boat the river between 1873 and 1910. See SRP Mem., Appendix A.

The plain requirement of the "navigability" test is that the river must be "used" or "susceptible to being used" as a "highway for commerce." A.R.S. § 37-1101(5). Attempting to float a boat on a river and drowning, repeatedly running aground on sandbars and having to get out and push, or having your boat with three bottoms end up "in a very dilapidated condition" does not constitute "navigation" or use of a watercourse as a "highway for commerce." See id. Although some of the participants might have actually ended up where they were intending to go on some of these voyages, these isolated and calamitous accounts of boating do not meet Proponents' burden of proving "navigation."

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

The evidence shows that the river is not, was not at statehood, and never has been used or susceptible to being used as a "highway for commerce." Proponents have not met their burden of proving that the river is or was "navigable," **under any conditions at any time.** See A.R.S. § 37-1128(A). The evidence in the record dictates a finding of non-navigability, regardless of how the Commission considers the effects of Roosevelt Dam and other pre-statehood facilities on the river. The most direct and logical answer to the question of whether and how the Commission should view any pre-statehood changes to the river is that **it doesn't matter**. The river was not used or susceptible to being used as a "highway for commerce" prior to settlement in the Valley, and it was not used or susceptible to being used as a "highway for commerce" after settlement began. Proponents' arguments about what is meant by the "ordinary and natural condition" of a watercourse are not determinative of this Commission's final conclusion.

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

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

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

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

Proponents argue that "ordinary and natural" means that the Commission must disregard all human interaction with the river. DOW, for example, contends that "the Commission must evaluate the river as if the diversions and dams did not exist." DOW Mem.,

at 10; see also SLD Mem., at 5-8. Proponents cannot, however, have it both ways. If "natural" means the absence of any human effect, the Commission also must assume that no dredging, channel clearing, or other aids to navigation could occur on the river—an assumption that would constitute the death knell for Proponents' navigability arguments on river like the Upper Salt, with deep, narrow canyons in the upper reaches and wide, braided channels in the lower reaches.

In making this argument, Proponents continue to rely upon cases deciding navigability in contexts other than "public trust" title. Proponents, for example, rely upon the United States Supreme Court's decision in Economy Light & Power v. United States, 256 U.S. 113 (1921), for the proposition that "ordinary and natural" requires the Commission to imagine that human hands had never touched the river. See DOW Mem., at 6; SLD Mem., at 8, 9, 11. Economy Light, however, was not a case involving "navigability" for purposes of determining a state's "public trust" title to streambeds. Rather, that 1921 decision involved a determination of the Federal Government's powers under the Commerce Clause of the United States Constitution and the Rivers & Harbors Appropriation Act of 1899. Economy Light, 256 U.S. at 117.

"Navigability for title determination under the equal footing doctrine is distinguishable from navigability for determination of federal jurisdiction under the Commerce Clause." Hull, 199 Ariz. at 421, 18 P.3d at 732. No court in a "public trust" title case has ever adopted the holding of Economy Light in construing the words "ordinary and natural condition" in the process of finding a particular river navigable. Furthermore, other courts have distinguished and limited the holding of that case, even within the narrow context in which it was decided. For example, in a subsequent 1940 decision, the United States Supreme Court held that, although courts can assume away some artificial obstructions to navigation in a Commerce Clause case, those assumptions must be within reason: "There must be a balance between cost and need at a time when the improvement would be useful." United States v.

Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940), reh'g denied, 317 U.S. 594 (1941).

Proponents contend that, based primarily upon cases such as Economy Light, this Commission should assume away all of the diversion and storage works on the Upper Salt River, all of the cattle grazing near the river, and all development in the proximity of the river, so as to consider the river in its "ordinary and natural condition." That argument could not be said to strike "a balance between cost and need," **even if** the Economy Light concepts applied in this context. See id.

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

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

In the final section of its memorandum, the SLD contends that "[n]o language in the Reclamation Act suggests, much less establishes, that the federal government intended to divest a state of its public trust interests, or to convey title or interests in streambeds to the beneficiaries or operators of reclamation projects." SLD Mem., at 16. This argument lacks merit, for several reasons.

First, the SLD incorrectly assumes that some entity other than the Federal Government holds title to the Reclamation facilities and the lands beneath them. SRP operates the project

and holds a possessory interest, but the legal title holder for all Reclamation facilities in the Salt River bed is the United States of America.[12] Thus, although it is correct that the Federal Government did not "convey title or interests in streambeds to the beneficiaries or operators of reclamation projects," that statement is true only because the United States expressly intended to **retain legal ownership interest in itself.**[13] The United States did not necessarily convey legal title to streambed lands associated with the Reclamation Project to SRP or its shareholders, but it likewise did not intend to convey such title to the State of Arizona on February 14, 1912.

Second, with respect to the former streambeds that now lie beneath Roosevelt Lake, the United States acquired title from the prior private title holders for the express purpose of creating a storage reservoir for irrigation and other water uses. See SRP Mem., at 23; EI 30; Fuller, supra, at 3-17 to 3-21. Although the "clear expression" of intent might not be present in the Reclamation Act itself, such intent certainly is present in the United States' purposeful acquisition of these particular properties.

Third, and perhaps most important, the intention of the United States Congress with respect to the interaction of the Reclamation Act and the "equal footing" doctrine is clear and not subject to reasonable challenge. As Proponents acknowledge, any State interest in streambed lands is the result of Arizona becoming a state in 1912, on an "equal footing" with the prior forty-seven states. See SLD Mem., at 2. The act of Congress that allowed Arizona to become a state—the very vehicle through which Arizona obtained title to any "equal footing" lands within its boundaries—is the 1910 Arizona-New Mexico Enabling Act.[14] The

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

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

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

Arizona courts have recognized the Enabling Act as "the fundamental and paramount law," which "cannot be altered, changed, amended, or disregarded without an act of Congress" and is controlling over even the Arizona State Constitution.[15]

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

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

Enabling Act § 20, ¶ "Seventh."

If that were not enough, a later section of the Enabling Act expressly provided for "Water Power Designations," to be made by Secretary of the Interior within five years after statehood. In addition to the broad reservation of authority for Reclamation projects under Section 20, the lands within the Water Power Designations were specifically retained by the Federal Government and not passed to the State upon admission to the Union:

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

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

Id. § 28 (emphasis added). Significant portions of lands lying within and along the Upper Salt were the subject of "Water Power Designations" issued pursuant to Section 28 of the Enabling Act. See Map, Reclamation Withdrawals and Water Power Designations (EI 34).

Ample authority exists, in the very act that allowed Arizona to ultimately become a state, that Congress intended the Reclamation interests to be paramount and that the new state "fully acquiesce[d]" in the United States' ultimate rights to construct and operate the Reclamation facilities on the river. The Enabling Act constitutes a "clear expression of congressional intent" on this subject.[16]

IV. The Commission Should Strike the SLD's "Exhibit 1."

The SLD attaches to its opening memorandum new evidence that was not properly admitted into the record, referred to as "Exhibit 1." The SLD cites that document only once, on page 13 of its memorandum. That citation contains no reference to the Commission's evidence log, because that exhibit does not appear on the log. The "exhibit" is not merely a compilation of evidence already in the record, but rather appears to contain new evidence.

The Commission's rules provide for the closing of evidence on a particular watercourse at the conclusion of the hearing. See A.A.C. R12-17-108.01. Chairman Eisenhower closed the taking of evidence on the Upper Salt River at the conclusion of the October 20, 2005 hearing. See Tr. at 154-57. SRP respectfully requests that the Commission disregard the SLD's "Exhibit 1" on the grounds that it was belatedly submitted. SRP further requests that the "exhibit" be formally stricken from the record, for purposes of preserving the integrity of the record in this matter for any appeal. See A.A.C. R12-17-107(C).

V. Summary and Requested Action

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

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

DATED this 10th day of January, 2006.

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