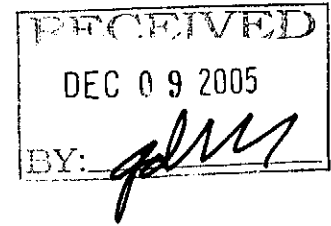


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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of
the Upper Salt River

No. 04-008 NAV

STATE LAND DEPARTMENT'S OPENING
POST-HEARING MEMORANDUM

The Salt River Valley is a desert region in which land is less important than the water that must be applied to it to make it productive. The Upper Salt River's perennial flows have supplied this valuable water to the Valley for more than a millennium. Prior to statehood, the river had reliable streamflow, healthy beaver populations, a variety of large fish species, and dense riparian vegetation. 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 2 (revised June 2003) (Exhibit No.27) (hereinafter "ASLD Report"). Hiram Hodge reported in his 1877 Arizona guidebook that "at low water [the Salt River] is a clear, beautiful stream, having an average width of two hundred feet for a distance of one hundred miles above its junction with the Gila, and a depth of two feet or more." ASLD Report at 3-26. Pioneer archaeologist Adolph Bandelier, who visited the Tonto Basin from May 23 to June 1, 1883, described the Salt River as "a broad, blue,

rushing stream, wider than the Gila, with clear and very alkaline waters,” and called it “the finest large river in the Southwest.” *Id.*

Although this beautiful river could and did afford a means of travel and commerce using low-draft boats designed for shallow waters, inhabitants of the region deemed its waters more valuable for irrigation of the rich agricultural lands through which it flowed than for other commercial uses. Consequently, proponents of agricultural development in the Salt River Valley successfully lobbied Congress and secured the enactment of the 1902 Reclamation Act, and a commitment of federal funds for construction on the Salt River of the first federal reclamation project: Roosevelt Dam. By 1912, extensive settlement of the Salt River Valley, dependent upon irrigation, and the filling of the newly-completed Lake Roosevelt Reservoir combined to restrict the river’s flow except in the portion of the river upstream of Roosevelt. *See id.* at 3, 8-2.

Each new state is admitted to the Union on an “equal footing” with the original thirteen states, which became sovereign owners of the beds of navigable waterways. A waterway is navigable if, in its ordinary and natural condition, it is used or susceptible of being used as a highway for commerce. Arizona should not be denied title to the bed of the Upper Salt River, which was navigable in its ordinary and natural condition, simply because the waters of that river were diverted for irrigation and storage.

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

According to the equal footing doctrine, each new state entered the Union “with all of the powers of sovereignty and jurisdiction which pertain to the original states, and . . . such powers may not be constitutionally diminished.” *Coyle v. Smith*, 221 U.S. 559, 572-73 (1911); *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). One attribute of sovereignty enjoyed by the original

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

Navigability is the key to the state's title to watercourses. Because this title was acquired from the federal government, navigability for title purposes is determined by federal law. *Defenders*, 199 Ariz. at 419, 18 P.3d at 730; *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 362, 837 P.2d 158, 164 (App. 1991). The Arizona Navigable Stream Adjudication Commission's (ANSAC) determination of navigability is therefore governed by the federal test of navigability, known as the "*Daniel Ball*" test, which provides:

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

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

The *Daniel Ball* test is applied to determine navigability in title, admiralty and maritime, and commerce clause cases. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979); see *Defenders*, 199 Ariz. at 418-419, 18 P.3d at 729-730. Navigability for title purposes is the commerce clause test with two exceptions: (1) navigability is determined at statehood; and (2) navigability is determined by the natural and ordinary condition of the watercourse at statehood, not whether it could be made navigable by artificial improvements. See *Appalachian*, 311 U.S. at 408-409. The Salt River presents a unique circumstance in which to apply the *Daniel Ball* test. The natural and ordinary condition of the river was dammed before statehood, thereby making a navigable watercourse through artificial improvements nonnavigable. No court has squarely addressed the principal question that this situation presents in the context of equal footing lands.

Although navigability means different things in different contexts, the Ninth Circuit held that the commerce clause test applies to riverbed title cases. *City of Centralia, Wash. v. F.E.R.C.*, 851 F.2d 278, 281 (9th Cir. 1988). Under the commerce clause, once a river is determined to be navigable, it is considered navigable forever whether or not it remains navigable in fact. *Appalachian*, 311 U.S. at

408 (citing *Economy Light & Power v. United States*, 256 U.S. 113 (1921)). Further, under the commerce clause, a river does not need to be suitable for navigation only in its ordinary condition; suitability may be the result of artificial improvements. *Appalachian*, 311 U.S. at 409.

Because the rules applicable in commerce clause cases also apply in title cases, the concept of "indelible navigability" applies to navigability-for-title cases. See David M. Guinn, *An Analysis of Navigable Waters of the United States*, 18 Baylor L. Rev. 599, 564-565 (1966) (state should not lose title to river even if presently nonnavigable, as long as river was navigable at some point in the past). In fact, the Arizona Supreme Court has confirmed that the State owns title to the beds of all navigable streams within its borders, and that this title may not be defeated by artificial changes in the bed because it was channeled, artificially controlled, dammed, or diverted. *State v. Bonelli Cattle Co.*, 107 Ariz. 465, 468, 489 P.2d 699, 702 (1971).¹ It must therefore follow that Arizona received title to the beds of all rivers that were once navigable even if man-made diversions and obstructions have altered the physical features of the watercourse, so that it is no longer in its ordinary and natural condition and will no longer support commercial traffic.

II. The Upper Salt River, In Its Natural and Ordinary Condition, Was Used or Was Capable of Being Used As a Highway for Commerce. Therefore, Title to the Bed of the Upper Salt Passed to Arizona at Statehood.

A. To Determine Navigability of the Upper Salt River, ANSAC Must First Determine the Ordinary and Natural Condition of the River.

Watercourses are navigable in fact when they are used, or are susceptible of being used as

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

highways for commerce, in their “natural and ordinary condition.” See, e.g., A.R.S. § 37-1101(5) (“ordinary and natural”); *United States v. Utah*, 283 U.S. 64, 76 (1931) (“natural and ordinary condition”); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (“natural and ordinary condition”); *The Montello*, 87 U.S. (20 Wall.) 430, 435, 443 (1874) (“natural navigation”); *The Daniel Ball*, 77 U.S. at 563 (“ordinary condition”); *Defenders*, 199 Ariz. at 426, 18 P.3d at 737 (“natural and ordinary condition”). The *Daniel Ball* test requires that the navigability of rivers be assessed “in their ordinary condition.” *The Daniel Ball*, 77 U.S. at 563; see also *United States v. Utah*, 283 U.S. at 76; *Holt State Bank*, 270 U.S. at 56 (subsequent Supreme Court cases requiring assessment of “natural and ordinary” condition).

The Supreme Court has defined the phrase “ordinary condition” as a river’s “volume of water, the gradients and the regularity of flow.” *Appalachian*, 311 U.S. at 407. “Ordinary” means “[r]egular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances” Black’s Law Dictionary, 758 (6th ed.1991); see *Holt State Bank*, 270 U.S. at 57 (drought conditions on Mud River “exceptional,” not “the usual conditions”). Ordinary conditions necessarily exclude floods and other extraordinary high water events, but do include the average or normal reach of high water each year.

The second aspect of the condition requirement is that ordinary is restricted to “natural” watercourses. “Natural” means “[u]ntouched by man or by influences of civilization; wild, untutored, and is the opposite of the word ‘artificial.’” Black’s 712 ; see *United States v. Utah*, 283 U.S. 86 (“vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce.”).

Dams or diversions that caused low flow or a dry bed in the River are man-made

obstructions. Black's at 712. Moreover, construction activities in the bed and banks of the River made its condition unnatural, uncommon, and unusual. *See id.* at 758. The *Bonelli* court quoted approvingly that

'[a] watercourse does not lose its character as such by reason of the fact that it is improved by deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period . . . nor by reason of the fact that the water has all been dammed at a placed far up the stream. . . .'

Bonelli, 107 Ariz. 468, 489 P.2d, 702 (quoting *Smith v. City of Los Angeles*, 66 Cal.

App.2d 562, 153 P.2d 69). The *Bonelli* court also stated that

a river does not have to flow continuously across the whole of its bed to the high water mark in order to avoid a claim by abutting owners to a part of the river's bed. . . . Arizona does not lose title to the bed of the [Colorado] river to high water mark simply because the river has been dammed and its water channelized to a part of the bed.

Id.

By statehood, a man-made flow regime had replaced the natural and ordinary condition of the Upper Salt except for the reach upstream of Roosevelt Dam. Between 1900 and 1945, seven major dams were built on the main streams of the Salt River system. ASLD Report at 5-15. These dams have the capacity to store over two million acre feet of water. *Id.* In addition, an uncounted number of stock ponds, mining ponds, and other impoundments have been built within the watershed. *Id.* At statehood, Roosevelt Dam was filling and continued filling until 1915, during which period flow in the reaches downstream of the dam was severely restricted. *Id.* at 5-35. As a result of these man-

made obstructions, nearly all of the flow of the Upper Salt River except for the reach above Roosevelt Dam had been impounded, flowing only due to flood discharges and flow releases to supply downstream irrigation diversions. *Id.* at 8-2. Thus, to determine the River's ordinary and natural condition, ANSAC must determine the volume, gradient, and regularity of flow that would have occurred if these obstructions and diversions including in-stream mining, channelization, grading, artificial discharges, bridges, bank protection, and development, did not exist. *See Economy Light & Power Co.*, 256 U.S. at 118 (artificial obstructions that may be reduced by public authority do not preclude navigability of waterway if, assuming obstruction is reduced, waterway is navigable in its natural and ordinary condition).

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

The *Daniel Ball* test does not require actual commercial use or navigation of a river; all that is required is proof that the Upper Salt River in its ordinary and natural condition was susceptible to use as a highway for commerce at the time of statehood. *United States v. Utah*, 283 U.S. at 82-83; *see also The Montello*, 87 U.S. (20 Wall.) at 441-442. Susceptibility permits a finding of navigability for remote watercourses that are capable of being used for trade or travel, but have not been so used because of lack of demand for such uses or for some other reason. The Supreme Court recognized that the arid, western states would be disadvantaged if navigability could only be established by actual use. *United States v. Utah*, 283 U.S. at 82; *see Appalachian*, 311 U.S. at 405-406 (“[i]t is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains.”). The rugged

terrain and remoteness of the bedrock canyons of the Upper Salt minimized the potential for human impacts on the watershed and channel at statehood. ASLD Report at 3, 3-40 (canyons above and below Tonto Basin viewed as having difficult access), 4-10. Consequently, this test may be met if a river is shown merely to be capable of commercial use even if there is little evidence that it was in fact so used. *See United States v. Utah*, 283 U.S. at 82. In resolving navigability-for-title issues, courts have therefore relied upon two types of evidence: (1) historic records of navigation; and (2) records that demonstrate physical characteristics of the watercourse that could have supported navigation.

1. The Upper Salt River Was Actually Used Historically, Thereby Demonstrating Its Susceptibility to Use for Navigation.

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

At least nine documented accounts of commercial and recreational boating on the Upper Salt were identified between 1870 and 1910. *See* ASLD Report at 3, 3-34 – 3-40. Historical boating accounts indicate that boating occurred throughout the year during the period prior to statehood. *Id.* at 3, 3-40. A variety of boats were used to construct Roosevelt and Granite Reef dams. Boats were

used to transport construction materials, workers, and equipment to the dam sites as well as to cross the river. *Id.* at 3-37 - 3-39, 8-1 - 8-2. The boats typically used were low-draft flatboats, rowboats, skiffs, rafts, canoes, or other small craft. *Id.* at 3-40, 6-1. In June 1885, typically a month of seasonal low flows, a group of men successfully boated in a 18' x 5' boat from four miles above the Tonto Creek confluence to Phoenix. *Id.* at 3-35. The men intended to determine if logs could be floated to Tempe. *Id.* at 3, 3-35 - 3-36. Based on the trip's success, one of the men contracted for the delivery of over one thousand railroad ties. *Id.* at 3-36. Charles Hayden's attempt to float logs failed in the reach of the Upper Salt River due to an obstruction of a narrow canyon. *Id.* at 3-34. The fact that Charles Hayden attempted his log floatation in June, the summer low flow period, is strong evidence that he believed that flow in the Salt could support log transportation.

A watercourse is a highway for commerce if utilized as a path between two points. *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir. 1985) ("central theme remains the movement of people or goods from point to point on the water"). The Supreme Court found that nine boats used occasionally by ranchers to haul their livestock from the mainland to one of the islands or vice-versa was sufficient evidence to show that the Great Salt Lake was used as a highway for commerce. *Utah v. United States*, 403 U.S. at 11. The Court concluded that "[t]he Lake was used as a highway and that is the gist of the federal test." *Id.* If owners transporting their livestock demonstrate that a watercourse was used as a highway for commerce then boating accounts that transported both passengers and goods demonstrate that the Upper Salt was a highway for commerce. *See id.* at 11-12.

In the majority of the historical accounts, the boats on the Upper Salt successfully reached their destination. The one unsuccessful boating account was not due to the lack of stream flow, but

rather natural obstructions such as snags, boulder riffles, waterfalls, or narrow canyons on the Upper Salt River, all of which exist on other navigable rivers. ASLD Report at 3, 6-4, 8-1. Navigability is not destroyed because a watercourse is interrupted by occasional natural obstructions or portages, nor does navigation need to be open at all seasons of the year, or at all stages of the water. *Economy Light & Power*, 256 U.S. at 122; *United States v. Utah*, 283 U.S. at 84-86.

Historical evidence of boating on the Upper Salt indicates that there was no shortage of boats. ASLD Report at 6-3. Virtually every reported story of boating on the Salt River includes an account of some unusual situation such as a boating accident, or an amusing anecdote; a reasonable conclusion is that boats were so commonly used that ordinary boating was not newsworthy and other boating incidents were generally unreported. While boat use may have declined as impoundments diminished the river's natural flow, the mere presence of so many boats in an arid region like Arizona during the early settlement period suggests that boats were commonly used on the river. *Id.* When assessing evidence of historic use, such evidence must be weighed in context, including the distribution of population in Arizona, the types of industry that were conducted at statehood, and the availability of numerous alternatives to river transportation. As the Supreme Court observed:

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

Appalachian, 311 U.S. at 409-10; see *United States v. Utah*, 283 U.S. at 82 (actual use may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited

nature of use, susceptibility may be proven). Explorers and travelers' descriptions of the Upper Salt River in the late nineteenth and early twentieth centuries were not as common as descriptions for other Arizona rivers because of the remoteness of the location, the rugged terrain, and the Apache threat. ASLD Report at 3-24.

Modern boating for reach one of the Upper Salt, the White and Black Rivers confluence to Roosevelt Reservoir, clearly demonstrates the river's susceptibility for navigability because there has been no substantive change in its physical characteristics, *i.e.*, stream geomorphology and hydrology. *See* ASLD Report at 6-5; *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (present commercial use of Gulkana River in Alaska provided conclusive evidence of river's susceptibility for commercial use at time of statehood). Modern boating using canoes, rafts, and kayaks (crafts similar to those used at statehood) on the Upper Salt occurs throughout the year, although most commercial boating is done during the late winter and spring during the annual high flow period. ASLD Report at 6-6; Transcript of ANSAC hearings Oct. 20, 2005, at 65: 20, 25, 66: 1 (hereinafter "Tr. at ___") (commercial rafting trips typically operate at desired flow rates between 800 cfs and 4,000-6,000 cfs, but are able to float at rates between 700 cubic feet per second ("cfs") and up to 10,000 cfs). More extensive recreational and commercial rafting has been conducted on the Upper Salt River upstream of Roosevelt Reservoir since the 1950s. *Id.* at 3, 3-39, 8-2. Several commercial recreational rafting trip outfitters currently hold U.S. Forest Service permits for commercial operations on the Upper Salt. *Id.* at 6-6; Tr. at 72: 13-14. For almost thirty years, Arizona Game and Fish has conducted surveys for fish composition within the river. Tr. at 135: 12, 19-20. The Game and Fish Department prefers to conduct these surveys during low flows when the river is more confined. Tr. at 136: 9-10. Even so, the Department has been able to conduct the surveys using a

variety of boats such as open canoes, inflatable rafts, and kayaks, at various times of the year at variable flow rates. Tr. at 135: 22-25; 136: 6-8 (boated in August below 100 cfs, and in February at approximately 2000 cfs). The contemporary capacity for navigation in boats of the size used for transporting passengers and goods at statehood is substantial evidence of susceptibility for navigation.

2. In Its Ordinary and Natural Condition, the Physical Characteristics of the Upper Salt River Were Sufficient to Support Navigation and Commerce.

The second type of evidence bearing on navigability addresses the physical characteristics of the watercourse, which are examined to determine whether a watercourse could support navigation. See *Utah*, 403 U.S. at 12; *Appalachian*, 311 U.S. at 410-413; *United States v. Oregon*, 295 U.S. at 15-18; (Master's Report made findings of present and past physical condition); *United States v. Utah*, 283 U.S. at 77-81; *Holt State Bank*, 270 U.S. at 52-53, 56-57; *Oklahoma v. Texas*, 258 U.S. 574, 586-589 (1922). Courts are not limited to examining the physical condition of a watercourse at statehood, but may also consider historic evidence of its physical condition. See *United States v. Oregon*, 295 U.S. 1, 15-18 (1935).

The Upper Salt River, in its natural state, was a perennial stream. ASLD Report at 5-12, 5-35. Streamflow rates supported rich riparian vegetation, fish and beaver populations, and a large irrigation based agricultural economy downstream of the Upper Salt. *Id.* at 512. The average annual flow rate ranged from approximately 700 cfs at reach one to more than 1,500 cfs downstream of the Verde River confluence. *Id.* at 5-20, 5-35; see Exhibit 1. At these flow rates, the average depth of the river would be about three feet, velocity around four feet per second, and the width about 100 feet. *Id.* These conditions exceed the minimums required for boating. *Id.* at 6-2, 6-6. Early records

and reconstructed flow rates for the period prior to statehood demonstrate that flow rates exceeded 1,200 cfs more than half the time, and minimum flow rates generally exceeded 200 cfs, even during extended dry periods prior to 1912. *Id.* at 5-12.

Furthermore, substantial hydrologic data demonstrate that the minimum annual and seasonal flow rates are sufficient to support low-draft boating on the Upper Salt. Flow duration data published by the U.S. Geological Survey (USGS) indicate that the minimum flow rate required for canoeing- 40 cfs -(see Tr. at 136:7) is exceeded ninety-nine percent of the time downstream of the U.S. Highway 60 Bridge, and ninety-five percent of the time upstream of U.S. Highway 60. ASLD Report at 5-20, Table 16. Floods are a normal, but rare occurrence on the Upper Salt. Tr. at 152:7. Flow duration data published by the USGS indicate that non-boatable flood stages, over 10,000 cfs, occur far less than one percent of the time. ASLD Report at 5-20, Table 16, 5-25, Table 18. Further, the modern, long-term gage data are representative of river conditions at the time of statehood. *Id.* at 5-17. Collectively these hydrologic data show that in its ordinary and natural condition, the Salt River regularly had enough water and was deep enough to support navigation in a variety of boats.

Most of the Upper Salt River is formed within deep bedrock canyons. *Id.* at 4-9, 4-15. Bedrock along the channel margins in these canyons precludes significant movement of the river channel or other channel changes. *Id.* Based on this bedrock geology, the Upper Salt does not experience dramatic widening during floods. *But see*, Stanley A. Schumm, Ph.D., P.G., *Geomorphic Character of the Upper Salt River*, at 12 (Jan. 2005) (Exhibit No. 28) (hereinafter "Schumm Report"). Contrary to Dr. Schumm's opinion, the Upper Salt is not braided, but rather, consists of cobble and boulder riffle patterns, interspersed with shallow, sand-and-gravel bed pools. ASLD Report at 4-11, 5-6; *but see* Schumm Report at 2, 12, Tr. 96:19.

An abundance of evidence demonstrates that the average depth of the Upper Salt is representative of the actual depth of the river. ASLD Report at 5-31, Table 22. First, many people currently boat and historically have boated the river. *Id.* at 3-1 – 3-62; 6-1 – 6-7. Secondly, people have drowned in the river. *Id.* at 3-38. Finally, the river supports a large, native fish species. *Id.* at 3-27, 3-36 (Salt river trout weighing 8-10 pounds, some weighing 40 pounds); Tr. at 141: 20-21, 24-25 (fish weighing 50-60 pounds and 3-4 feet long).

Not one of the early explorers described a dry riverbed in the Upper Salt at any time of year. ASLD Report at 5-11. The report of the Meaders voyage described the river, in the month of June, as “six to twenty feet deep, with no driftwood or other debris in it.” *Id.* at 3-36. Historical descriptions not only help determine the River’s natural and ordinary condition, but also are helpful in determining whether the watercourse was capable of being used as a highway for navigation or commerce. In the case of the Upper Salt River, the evidence demonstrates that the river was actually used, both historically and currently, which, in turn, demonstrates that the river was susceptible to use as a highway for commerce at statehood, in accordance with the *Daniel Ball* test.

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

Under the equal footing doctrine, a strong presumption exists against defeat of a state’s title. *Montana v. United States*, 450 U.S. 544, 552 (1981); *see Defenders*, 199 Ariz. at 426, 18 P.3d at 737; *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197-198 (1987). Only an express statement of congressional intent can operate to divest future states of their public trust land. *Montana*, 450 U.S. at 551-552. The only purposes for which such divestiture has been found to be proper are: (1) to perform international obligations; (2) to improve the land for commerce with

foreign nations and other states; or (3) or to carry out public purposes for which the United States held the territory. *Id.*

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

III. Conclusion.

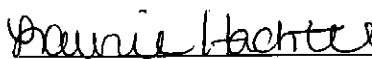
The Upper Salt River has been the backbone of development for the Salt River Valley. Without its reliable flows, there would be no modern-day Phoenix, Tempe, or Mesa. The river supported the prehistoric Hohokam, and encouraged development of the Arizona Territory by pioneers. The first priority of all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

statehood.

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

DATED: December 9, 2005

TERRY GODDARD



Laurie A. Hachtel
Assistant Attorney General

ORIGINAL AND SEVEN COPIES of the foregoing
hand-delivered for filing this 9th day of
December, 2005 to:

Arizona Navigable Stream Adjudication Commission
1700 West Washington, Suite #404
Phoenix, AZ 85007

///

and COPY sent by U.S. mail this 9th day
of December, 2005 to:

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

COPY of the foregoing sent by U.S. mail
this 9th day of December, 2005 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
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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

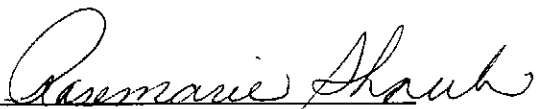
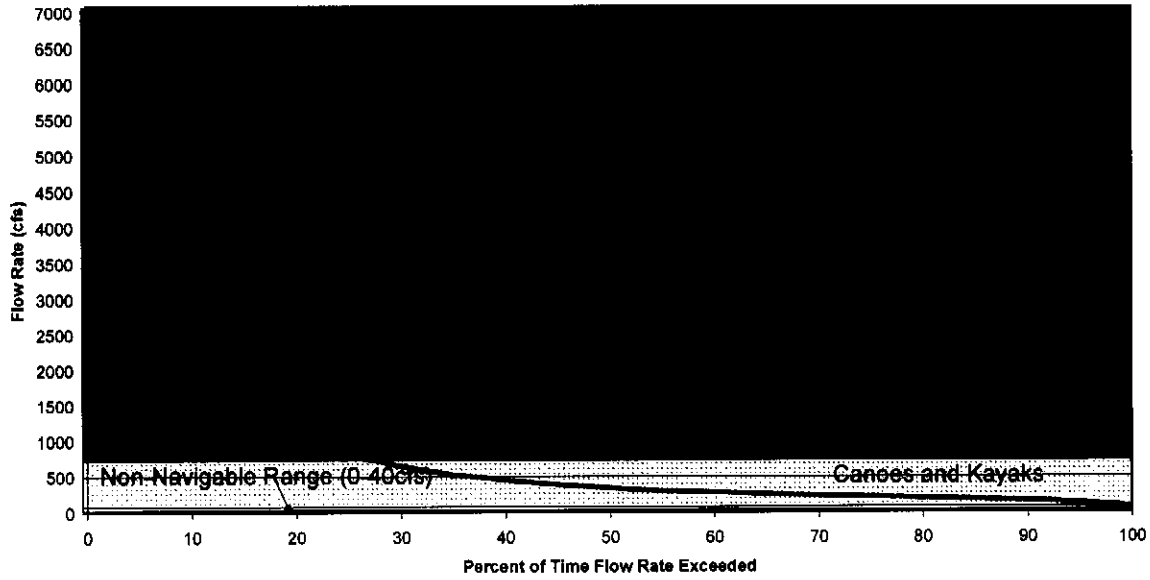
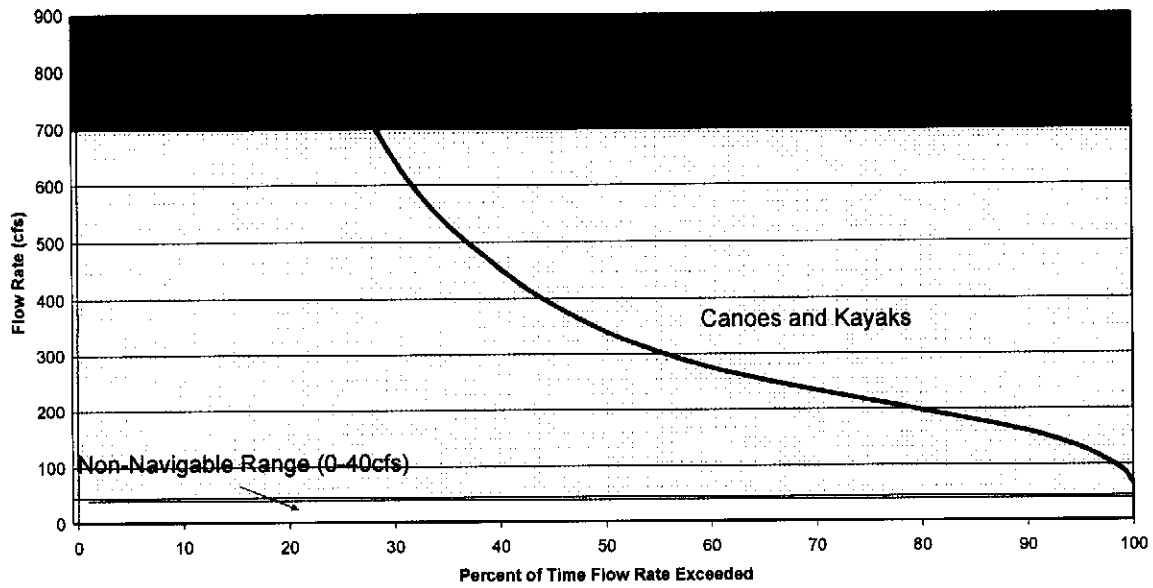
By: 
Secretary to Laurie Hachtel

EXHIBIT 1

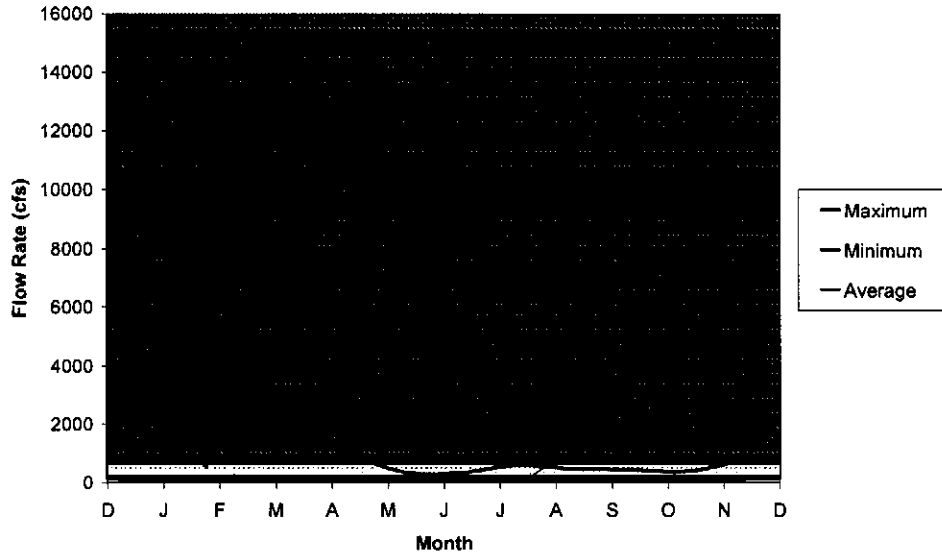
Upper Salt River-Ordinary Flow Rates
Salt River near Roosevelt



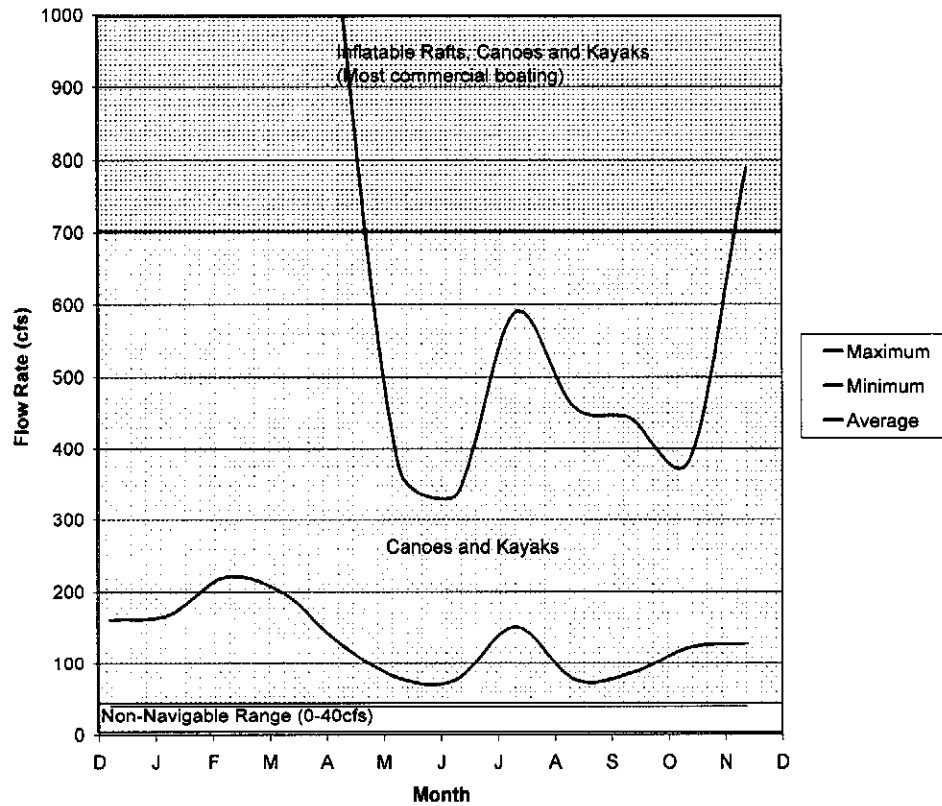
Upper Salt River-Ordinary Flow Rates
Salt River near Roosevelt



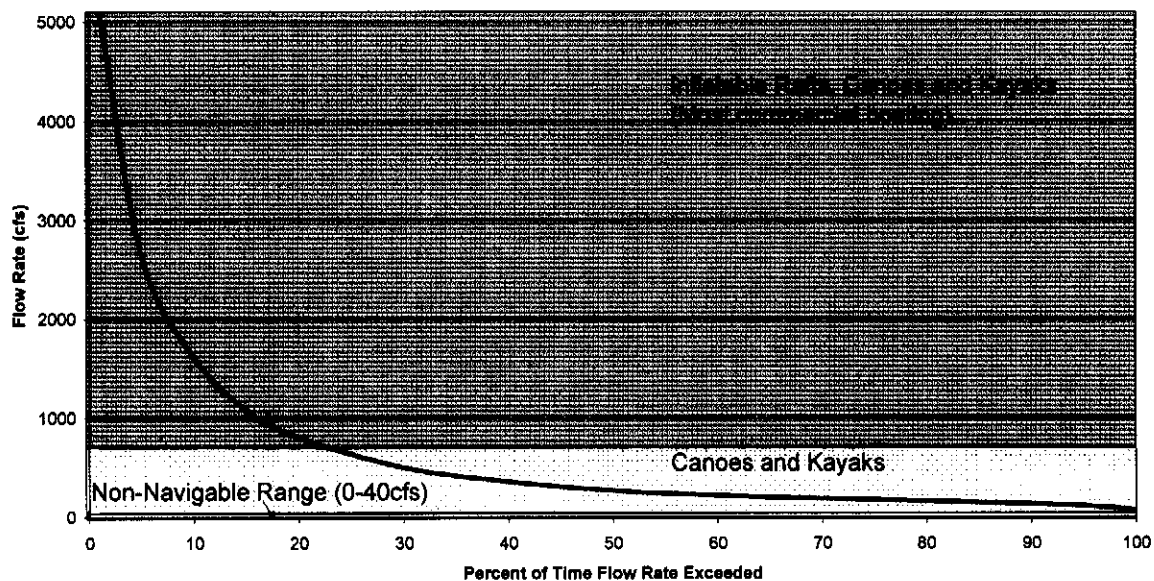
**Upper Salt River - Monthly Flow Rates
Salt River near Roosevelt**



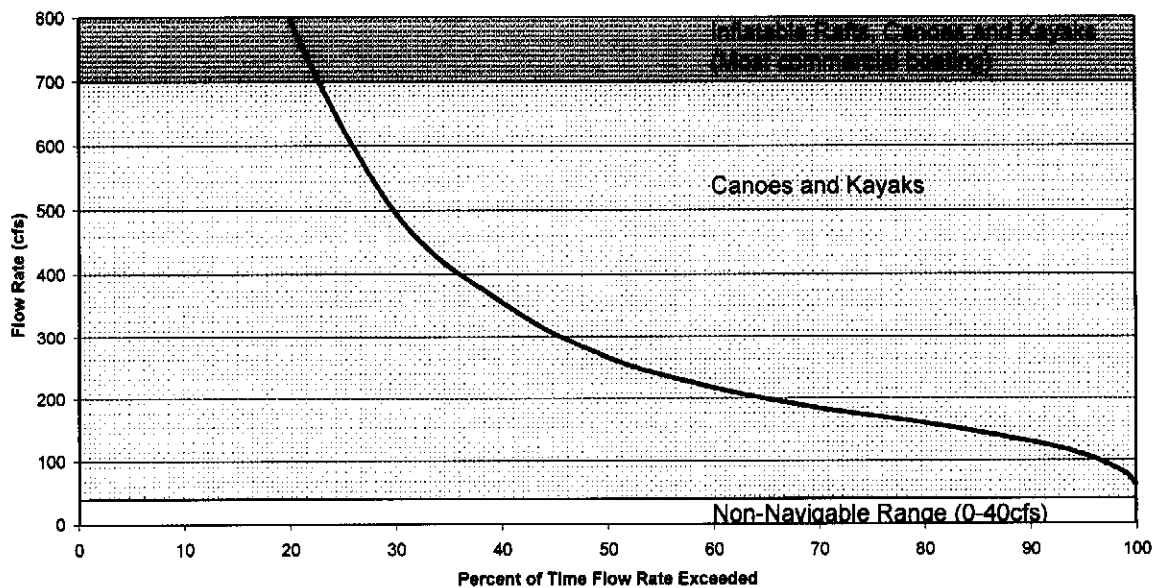
**Upper Salt River - Monthly Flow Rates
Salt River near Roosevelt**



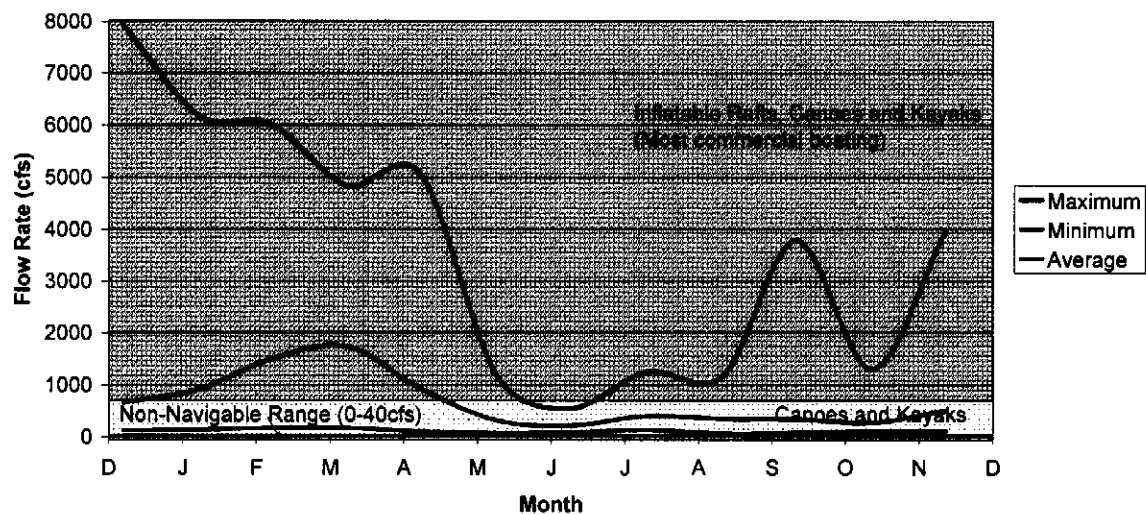
Upper Salt River - Ordinary Flow Rates
Salt River near Chrysofile



Upper Salt River - Ordinary Flow Rates
Salt River near Chrysofile



Upper Salt River - Monthly Flow Rates
Salt River near Chrysofile



Upper Salt River - Monthly Flow Rate
Salt River near Chrysofile

