

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**SPARKS, TEHAN & RYLEY, P.C.**  
ATTORNEYS  
7503 FIRST STREET  
SCOTTSDALE, ARIZONA 85251  
TELEPHONE 480-949-1339

RECEIVED  
DEC 12 2005  
gmm  
mailed

Joe P. Sparks, Attorney I.D. No. 2383  
John H. Ryley, Attorney I.D. No. 2095  
Susan B. Montgomery, Attorney I.D. No. 20595  
Attorneys for San Carlos Apache Tribe

**BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION**

In re Determination of Navigability of the  
Upper Salt River

No. 04-008-NAV

**OPENING MEMORANDUM OF THE SAN  
CARLOS APACHE TRIBE FOLLOWING  
THE OCTOBER 20, 2005 HEARING TO  
DETERMINE WHETHER THE UPPER  
SALT RIVER IS NAVIGABLE**

The Arizona Navigable Stream Adjudication Commission (the Commission) held a hearing on October 20, 2005, in Phoenix, Arizona, to determine whether the Upper Salt River was navigable as of February 14, 1912, the date of Arizona's statehood, pursuant to the federal test to determine "navigability for title" under the equal footing doctrine.

The San Carlos Apache Tribe ("Apache Tribe" or "Tribe"), submits its Opening Memorandum following such hearing, and respectfully requests that the Commission determine that the Upper Salt River is non-navigable for the reasons stated below.

**A. The Federal Test to Determine the Navigability of a River for  
Title Purposes Under the Equal Footing Doctrine Requires  
Beneficial Commercial Navigation Under Ordinary Conditions**

"Whether a river is navigable is a federal question." *United States v. Holt State Bank*, 270 U.S. 49, 55-56, 46 S.Ct. 197 (1926). The federal test for navigability was first set forth in the

1 case of *The Daniel Ball*, 77 U.S. 557, 563 (1870):

2 Those rivers must be regarded as public navigable rivers in law which  
3 are navigable in fact. And they are navigable in fact when they are  
4 used, or are susceptible of being used, **in their ordinary condition**, as  
5 **highways for commerce**, over which trade and travel are or may be  
6 conducted in the customary modes of trade and travel on water.  
7 [Emphasis added].

8 The *Daniel Ball* test requires that a river was used, or was “susceptible” of being used, on  
9 the date of statehood, as a “highway for commerce,” because the navigability test was developed  
10 based upon the assertion of federal jurisdiction under the Commerce Clause of the U.S.  
11 Constitution, Article I, § 8. Thus, a river must have been susceptible to navigation for a  
12 commercial purpose to meet the *Daniel Ball* test.

13 The *Daniel Ball* test has been accepted as the federal standard to determine “navigability  
14 for title” under the equal footing doctrine. The navigability of a river must be determined as of  
15 the date of statehood. This is not true under the Commerce Clause cases, and therefore, these  
16 cases must be distinguished based upon this significant difference.

17 In *The Montello*, 87 U.S. 430 (1874), another case testing Congress’ power to regulate  
18 under the Commerce Clause, the U.S. Supreme Court further elaborated on the *Daniel Ball* test to  
19 determine “navigability”:

20 The capability of use by the public for purposes of transportation and  
21 commerce affords the true criterion of the navigability of a river,  
22 rather than the extent and manner of that use. **If it be capable in its  
23 natural state of being used for commerce, no matter in what mode  
24 the commerce may be conducted**, it is navigable in fact, and  
25 becomes in law a public river or highway. Vessels of any kind that  
26 can float upon the water, whether propelled by animal power, by the  
27 wind, or by the agency of steam, are, or may become, the mode by  
28 which a vast commerce can be conducted... [Emphasis added].

*Id.* at 441.

29 The court in *The Montello*, quoting a Massachusetts Supreme Court opinion, *Rowe v. The  
30 Granite Bridge Corporation*, 38 Mass. ( 21 Pickering at 344) 344, 347 (Mass. 1838), stated that  
31 **“It is not...every small creek in which a fishing skiff or gunning canoe can be made to float  
32 at high water which is deemed navigable**, but, in order to give it the character of a navigable  
33 stream, **it must be generally and commonly useful to some purpose of trade or agriculture.”**  
34 [Emphasis added]. *Id.* at 442. The *Montello* court further explained that **“...the vital and**

1 **essential point is whether the natural navigation** of the river is such that it **affords a useful**  
2 **commerce.** If this be so the river is navigable in fact, although its navigation may be  
3 encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.”  
4 [Emphasis added]. *Id.* at 443. Both *The Daniel Ball* and *The Montello* cases therefore require a  
5 “highway for commerce,” or “useful commerce,” as part of the navigability test.

6 All of the U.S. Supreme Court cases and lower federal court cases, including the Ninth  
7 Circuit Court of Appeals, applying and following the *Daniel Ball* and the *Montello* tests to  
8 determine “navigability for title” under the equal footing doctrine, have required “susceptibility  
9 for commercial use at statehood.” *See State of Alaska v. Ahtma, Inc., et al.* 891 F.2d 1401, 1405,  
10 1989 U.S. App. Lexis 18749 (9<sup>th</sup> Cir. 1989). All of these federal cases further impose the  
11 requirement that such commercial navigation take place under the “ordinary conditions” of a  
12 river, and not just at times when there are “high flows.”

13 The Arizona Court of Appeals has held that the federal *Daniel Ball* standard must be  
14 applied in determining “navigability for title” under the equal footing doctrine as of February 14,  
15 1912. This standard requires that the water course, in its natural and ordinary condition, either  
16 was used or was susceptible of being used for travel or trade in any customary mode used on  
17 water. *See Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426, 18 P.3d 722, 730 (App. 2001).

18 In *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690 (1899),  
19 another Commerce Clause case, the Supreme Court held that “...the mere fact that logs, poles and  
20 rafts are floated down a stream occasionally and in times of high water does not make it a  
21 navigable river,” citing and relying on *The Montello* case. *Id.* at 698. The court also stated that  
22 “[its] use for any purposes of transportation has been and is exceptional, and only in times of  
23 temporary high water. **The ordinary flow is insufficient.**” [Emphasis added]. *Id.* at 699.

24 Thus, under the federal test for navigability for title determinations under the equal footing  
25 doctrine, commercial navigation is required, and it must take place during the “ordinary flow” or  
26 “ordinary condition” of a river, and not just during times of “high flows.”

27 In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Supreme Court determined that the Red  
28 River in Oklahoma was non-navigable under the equal footing doctrine, applying the *Daniel Ball*,

1 *Montello*, and the *Rio Grande Dam* federal cases and standards to determine navigability.  
2 *Oklahoma v. Texas* is very significant for navigability determinations in Arizona because the facts  
3 reported in the case regarding the Red River are very similar to the conditions of most rivers in  
4 Arizona at the date of statehood, including the Upper Salt River.

5 The *Oklahoma v. Texas* court first set the tone for its decision by stating at the outset that:

6 The evidence also discloses an occasional tendency to emphasize the  
7 exceptional conditions in times of temporary high water and to  
8 disregard the ordinary conditions prevailing throughout the greater  
9 part of the year.

10 *Id.* at 587.

11 The Supreme Court then reviewed the evidence and stated:

12 The river has its source in the Staked Plains of northwestern Texas  
13 and from there until it gets well into Oklahoma is within a region  
14 where the rainfall is light, is confined to a relatively short period in  
15 each year and quickly finds its way into the river. Because of this the  
16 river in the western half of the State [Oklahoma] does not have a  
17 continuous or dependable volume of water. It has a fall of three feet or  
18 more per mile and for long intervals the greater part of its extensive  
19 bed is dry sand interspersed with irregular ribbons of shallow water  
20 and occasional deeper pools. **Only for short intervals, when the  
21 rainfall is running off, are the volume and depth of the water such  
22 that even very small boats could be operated therein.** During these  
23 rises the water is swift and turbulent and in rare instances overflows  
24 the adjacent land. **The rises usually last from one to seven days  
25 and in the aggregate seldom cover as much as forty days in a year.**  
26 [Emphasis added].

27 *Id.* at 587.

28 The Court explained that in the stretch of the Red River in the western half of the state, the  
Red River gauge at Denison ranged between zero and 1 foot, and that there were only 42 days  
during the year 1910 (Oklahoma was admitted as a state in 1907) on which this gauge read 2 feet  
or over, and only 81 days on which it read 1 foot or over, and that an examination of the river  
from a flat bottom bateau drawing 5 and ½ inches of water when loaded was very difficult  
because of sand bars. The Supreme Court then held, based on this evidence that:

We regard it as obvious that in the western half of the State the river is  
**not susceptible of being used in its natural and ordinary condition  
as a highway for commerce;** and there is no evidence that in fact it  
ever was so used. [Emphasis added].

*Id.* at 588.

1           The Supreme Court then reviewed the conditions of the Red River in Oklahoma in the  
2 eastern part of the state where the Red River receives additional waters from the Washita and  
3 other tributaries and “has a practically continuous flow of varying volume, the extreme variation  
4 between high and low water being about thirty feet.” *Id.* at 589. The Court held that the Red  
5 River was non-navigable in the eastern stretch as well based upon the following evidence:

6           When the water rises it does so very rapidly and it falls in the same  
7 way. The river bed has a fall of more than one foot to the mile and  
8 consists of light sand which is easily washed about and is carried  
9 down stream in great quantities at every rise of the water. At all times  
10 there is an almost continuous succession of shifting and extensive  
11 sand bars. Ordinarily the depth of water over the sand bars is from six  
12 to eighteen inches and elsewhere from three to six feet. There is no  
13 permanent or stable channel. Such as there is shifts irregularly from  
14 one side of the bed to the other and not infrequently separates into two  
15 or three parts. **Boats with a sufficient draft to be of any service can  
16 ascend and descend only during periods of high water. These  
17 periods are intermittent, or irregular and short duration, and  
18 confined to a few months in the year.** [*Oklahoma* at p. 589].  
19 [Emphasis added].

20 *Id.*

21           The Court also recognized that near the eastern Oklahoma boundary before railroads were  
22 extended into that section, there had been boats of light draft carrying merchandise in that vicinity  
23 of the Red River, but only in periods of high water and then with some difficulty. The court then  
24 held that the eastern stretch of the Red River was also non-navigable:

25           While the evidence relating to the part of the river in the eastern half  
26 of the State is not so conclusive against navigability as that relating to  
27 the western section, we think **it establishes that trade and travel  
28 neither do nor can move over that part of the river, in its natural  
and ordinary condition....Its characteristics are such that its use  
for transportation has been and must be exceptional, and  
confined to the irregular and short periods of temporary high  
water. A greater capacity for practical and beneficial use in  
commerce is essential to establish navigability.** [Emphasis added].

29 *Id.* at 591.

30           Thus, the *Oklahoma v. Texas* case definitively established that commercial navigation  
31 must take place during the ordinary condition or ordinary flow of a river, and not just during times  
32 of “high flows” in order to satisfy the “navigability for title” test.

33           In *United States v. Oregon*, 295 U.S. 1 (1935), the Supreme Court held that three lakes in  
34 Oregon were non-navigable because “The Special Master found that the boating which took place

1 in the area involved had no commercial aspects...” The Supreme Court in *Oregon* squarely held  
2 that non-commercial recreational boating for the purposes of trapping and duck hunting in the  
3 spring and fall was insufficient to establish navigability for title purposes (“The boats were all of  
4 light draft, those most in use being canvas canoes or homemade rowboats drawing between one  
5 and six inches of water.”). *Id.* at 21.

6 The Supreme Court in *Oregon* held that these facts “...establish an absence of that capacity  
7 for general and common usefulness for purposes of trade and commerce which is essential to  
8 navigability,” that “[a]t most the evidence shows such an occasional use of boats, sporadic and  
9 ineffective, as has been observed on lakes, streams, or ponds large enough to float a boat, but  
10 which nevertheless were held to lack navigable capacity;” citing *The Montello, Rio Grande Dam,*  
11 *and Oklahoma v. Texas* cases as controlling federal authority. *Id.* at 23.

12 Similarly, the Ninth Circuit Court of Appeals has ruled in several cases that commerce is  
13 an essential requirement for the “navigability for title” test. For example, in *Ahtna*, the lower 30  
14 mile stretch of the Gulkana River in Alaska was at issue. The flow of the river in this stretch was  
15 3,600 to 4,800 c.f.s. from May to September, and an average of three feet deep. Commercial  
16 recreational craft including aluminum powerboats and inflatable rafts were used since the 1970's  
17 for guided fishing and sightseeing trips, and the Ninth Circuit observed “A substantial industry of  
18 such **transportation for profit** emerged in the lower Gulkana, which industry today employs 400  
19 people.” [Emphasis added]. *Id.* at 1405. The court held in *Ahtna* that “[u]nder the facts of this  
20 case, we think the present use of the lower Gulkana is **commercial** and provides conclusive  
21 evidence of the lower Gulkana’s **susceptibility for commercial use at statehood**. [Emphasis  
22 added]. *Id.* *Ahtna* observed commercial use as an element of the federal standard to determine  
23 navigability under the equal footing doctrine applying the federal standard as adopted by the  
24 United States Supreme Court.

25 In *Adams v. The Montana Power Company*, 528 F.2d 437 (9<sup>th</sup> Cir. 1975), the Ninth  
26 Circuit similarly held that commerce under the *Daniel Ball* test requires commercial activity and  
27 commercial craft, and that non-commercial recreational boating use by fisherman, water skiers, or  
28 pleasure boaters, cannot satisfy the commerce requirement under the *Daniel Ball* test. The Ninth

1 Circuit observed that for admiralty jurisdiction “[n]either non-commercial fishing nor pleasure  
2 boating nor water skiing constitutes commerce.” [Emphasis added]. *Id.* at 438.

3 Similarly, in *State of Alaska v. United States*, 754 F.2d 851 (9<sup>th</sup> Cir. 1985), the court took  
4 into account transportation methods in use at the time of statehood and reaffirmed that commerce  
5 is an essential requirement of the navigability test under the equal footing doctrine, by holding  
6 that the use of floatplanes on an Alaskan lake did not make the lake navigable so as to pass title to  
7 the bed of the lake to the State of Alaska. *Id.* at 854. The court held that “...the crux of the test is  
8 still the requirement that the body of water be susceptible of use as a highway or channel for  
9 commerce on water,” and that “...in this context, the lake is a terminus or launching point for  
10 floatplanes, not ‘a *channel* for useful commerce.’” *Id.*

11 Thus, under the federal standards to determine navigability under the equal footing  
12 doctrine, there must have been beneficial commercial navigation under the ordinary condition or  
13 flow of a river with a transportation mode in use at the time of statehood in order to establish  
14 navigability. Furthermore, non-commercial or private recreational boating does not satisfy the  
15 federal test to establish navigability for title.

16 **B. The Evidence Shows that the Upper Salt River Was Non-**  
17 **Navigable at Statehood Applying the Federal Standards to**  
18 **Establish Navigability Under the Equal Footing Doctrine**

19 The “Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the  
20 Confluence of the White and Black Rivers,” (herein “the “ASLD Study”), as revised and dated  
21 June 2003, by JE Fuller/Hydrology & Geomorphology, Inc., was prepared on behalf of the  
22 Arizona State Land Department (“ASLD”), for the Upper Salt River, and has been filed with the  
23 Arizona Navigable Stream Adjudication Commission (“ANSAC”), as required by A.R.S. §§ 37-  
24 1123 and 37-1124.

25 At the October 20, 2005, ANSAC navigability hearing regarding the Upper Salt River, Jon  
26 Fuller testified regarding the ASLD Study that he helped prepare and revise in 2003. Mr. Fuller  
27 refrained from offering any ultimate opinion as to whether the Upper Salt River is either  
28 navigable or non-navigable. This is, of course, a mixed question of fact and law.

The ASLD Study divides the Upper Salt River into three reaches. The first upstream reach

1 is Reach 1, which is defined as that reach of the Upper Salt River starting at the confluence of the  
2 White and Black Rivers on the San Carlos Apache Reservation, and flowing downstream through  
3 the White Mountain Apache Reservation and the Tonto National Forest, through the rugged, steep  
4 and narrow bedrock canyons to Roosevelt Reservoir. Reach 2 is from Roosevelt Reservoir to  
5 Stewart Mountain Dam. Reach 3 is from Stewart Mountain Dam to Granite Reef Dam.

6 Based on the ASLD Study, and Mr. Fuller's testimony at the October 20, 2005 hearing,  
7 there is no historical evidence of useful and beneficial commercial navigation on the Upper Salt  
8 River, prior to or on the date of Arizona's statehood, February 14, 1912.

9 The ASLD Study reports on eight historical accounts of boat trips from 1873 to 1910.  
10 Many of these boat trips were complete failures. For example, the Arizona Weekly Miner  
11 reported in 1873 that Charles Hayden's attempt to float logs down the upper Salt River canyon to  
12 establish a lumber mill in Tempe was a "failure." The Arizona Weekly Miner also reported that  
13 Charles Hayden and his party "were compelled to abandon their boat and foot it," when they lost  
14 their arms, ammunition and provisions on account of the rapids and boulders, and "arrived in a  
15 canyon so narrow as not to admit of the passage of a log." See ASLD Study at p. 3-34.

16 In 1885, the Arizona Gazette reported a party of five men who took a boat trip down the  
17 Upper Salt River to explore the Salt River canyon "...said to be about 60 miles long through  
18 which a boat was never known to pass." See ASLD Study at p. 3-35-36. The Arizona Gazette  
19 article continues that "Through the box canyon of the Salt river the banks frequently towered  
20 above them over 1,000 feet, and on one occasion they were wrecked, losing provisions, fire arms,  
21 etc." Like the earlier 1873 exploratory boat trip, the purpose of the 1885 trip was also to see if  
22 logs could be rafted down the lower Salt River. Both trips were failures.

23 Thus, while there are two reported attempts to use the Upper Salt River starting from  
24 Reach 1 downstream through Reach 2 and 3 for commercial purposes by rafting logs down the  
25 river in 1873 and 1885, there is no verifiable historical evidence that logs were ever floated down  
26 the Upper Salt River in any successful commercial enterprise.

27 The ANSAC Study also reports at p. 3-36, that according to Scott Soliday, a research  
28 historian at the Tempe Historical Museum, who depended upon hearsay upon hearsay as



1 evidence, that there was one article in the Mesa Free Press sometime during 1890 or 1891,  
2 describing how some logs were floated down the Verde River from Fort McDowell and used in  
3 the headgates of Consolidated Canal downstream. This was not on the Upper Salt River. This  
4 article also could not be located. Dennis Gilpin from SWCA who wrote the "Historical Overview  
5 of the Upper Salt River," Section 3 of the ASLD Study, testified at the October 20, 2005 hearing  
6 that this particular historical report was "a pretty unreliable account because we were not able to  
7 actually find the original documentation." See Transcript of October 20, 2005 hearing (herein  
8 "TR") at p. 24. Thus, it should be given no evidentiary weight by the Commission.

9 The few other anecdotal historical articles prior to statehood do not report any sustained or  
10 successful commercial boating or use of the Upper Salt River as a "highway for commerce" prior  
11 to or on the date of statehood, and the two historical accounts of attempts to navigate Reach 1 of  
12 the Upper Salt River to float logs for commercial purposes resulted in disaster and had to be  
13 abandoned.

14 The ASLD Study therefore correctly concludes at p. 6-6, "No evidence of significant  
15 commercial boating industries developed on the Upper Salt River as of 1912 was uncovered."  
16 The Apache Tribe agrees with this conclusion based on the historical evidence.

17 In addition, as Jon Fuller concluded with respect to the use of the Upper Salt River at  
18 anytime prior to or after statehood for commercial purposes, such as, hauling ore, cattle, or salt,  
19 "The Salt River in its ordinary and natural condition is not suitable for that kind of navigation."  
20 TR at p. 145.

21 The nominal historical boating evidence is therefore insufficient to establish that the  
22 Upper Salt River was ever commercially and successfully used for navigation prior to statehood  
23 under the federal standards necessary to establish navigability for title. The evidence fails to  
24 support significant boating of any kind on the Upper Salt River, other than a few anecdotal  
25 accounts spread out over a period of more than thirty-nine years from 1873 to 1912, when  
26 Arizona became a state.

27 The inquiry under the federal test to establish navigability does not end here, however,  
28 since such test has always included the separate related issue of whether a river was "susceptible"

1 to commercial use on the date of statehood, even though there was not any “actual” commercial  
2 use on the date of statehood. *See The Daniel Ball, and United States v. Utah*, 283 U.S. 64, 82  
3 (1931).

4 Therefore, even though there is no reliable evidence of any successful or sustained  
5 commercial navigation prior to or on the date of statehood to establish navigability, nevertheless,  
6 ANSAC must also consider and determine the issue of whether evidence of modern-day boating  
7 down the Upper Salt River is sufficient to establish “susceptibility” to commercial navigation of  
8 the Upper Salt River on the date of statehood. *See United States v. Utah*, 283 U.S. 64, 82 (1931).

9 Evidence of modern-day boating on the Upper Salt River since 1912 involves either  
10 guided or private recreational rafting on Reach 1 of the Upper Salt River. In this regard, the  
11 ASLD Study briefly reports on such recreational rafting on Reach 1 of the Upper Salt River in  
12 Section 6, at pp. 6-5 and 6-6. The ASLD Study concludes at p. 6-6, “Modern boating using  
13 canoes, rafts, and kayaks on the Upper Salt River Reach 1 occurs throughout the entire year,  
14 **although most commercial boating is done during the late winter and spring during the**  
15 **annual high flow period.”** [Emphasis added]. None of the accounts, however, start at the  
16 confluence of the White and Black Rivers. Rather, they begin, if at all, miles downstream at the  
17 Salt River Bridge.

18 Mr. Fuller testified at the October 20, 2005 hearing that the “commercial boating” he was  
19 referring to in the above-quoted sentence of the ANSAC Study are the sporadic recreational  
20 “guided” rafting trips which only take place during the “high flows” of the Upper Salt River in  
21 Reach 1 when the flows exceed 700 cfs after heavy rains or snow melt. TR at p. 64. Inflatable  
22 rubber rafts are used for such guided recreational rafting tours on Reach 1 which only became  
23 available after World War II. TR at pp. 52 and 66.

24 Mr. Fuller also testified, however, that the desired flow rate for such guided rafting trips  
25 on Reach 1 is from “800 [cfs] to say, 6,000 [cfs], in that range.” TR at pp. 64-65. Mr. Fuller  
26 further testified that with respect to the 8 guided rafting trips he has personally taken down Reach  
27 1 since about 1996, “Most of the trips we’ve had are between 1,500 [cfs] and 3,000 [cfs].” All  
28 appear to have been at or below the Salt River Bridge.

1 The median flow rate<sup>1</sup> of the Upper Salt River, where the guided rafting trips depart from  
2 the White Mountain Apache Reservation, beginning at the Salt River Bridge, is only  
3 approximately 210 cfs, as measured by the nearby U.S.G.S. Chrysotile gaging station. 210 cfs  
4 represents the ordinary flow of the Upper Salt River at this departure point. TR at pp. 74-75. *See*  
5 Table 17 of the ASLD Study at pp. 5-20 which shows the "Long-Term Flow Estimates for the  
6 Upper Salt River." None of the trips cited appear to have started at the head of Reach 1 at the  
7 junction of the Black and Salt Rivers, but rather, started many miles downstream near the Salt  
8 River Bridge.

9 Since the Upper Salt River is often subject to flooding during heavy rains especially during  
10 the winter months, this skews the amount of the average or mean flow of the Upper Salt River on  
11 Reach 1, which is reported to be approximately 660 cfs. *See* Table 17, ASLD Study at p. 5-20.

12 The "Twelfth Annual Report of the U.S. Geological Survey to the Secretary of the Interior,  
13 1889-1890, Part II, Irrigation," at p. 58, reported that with respect to the Salt River, it was subject  
14 to: "short sudden floods carrying considerable volume of water for a few hours, and at longer  
15 intervals, perhaps of three or five years, there are enormous floods, whose violence and duration  
16 is phenomenal. These latter, however, are rather to be feared than to be depended upon as  
17 beneficial." *See* "Assessment of the Navigability of the Parts of the Upper Salt River," Douglas  
18 Littlefield, Ph.D., dated October 5, 2005, filed with ANSAC, at p. 78.<sup>2</sup>

19 \_\_\_\_\_  
20 <sup>1</sup>"Median flow rate" means that 50% of the time flows are lower, and 50% of the time,  
21 flows are higher. TR at p. 74. Median flow rate therefore represents the condition of a river  
22 under ordinary conditions. The mean or average flow of a river, however, may not represent the  
23 ordinary, or predictable and reliable flow of a river, because flooding during heavy rains skews  
24 the average flow number much higher, and therefore does not represent a river under ordinary and  
25 reliable flow conditions. This is true for the Upper Salt River which is often subject to floods  
26 which exceed 20,000 cfs during heavy rains. *See*, for example, Tables 18 and 19, ASLD Study, at  
27 pp. 5-25, 5-26.

28 <sup>2</sup>*See* also, the same Twelfth Annual Report of the U.S. Geological Survey at p. 298, and  
pp. 312-313, describing flood flows of the Upper Salt River over 300,000 cfs. *See* Littlefield  
"Assessment Report" dated October 5, 2005, at p. 79. The U.S. Department of Agriculture  
reported in 1902 that the Salt River "...is subject to great variations in flow...[and] conditions  
combine to make a great difference between the winter and the summer flow. After heavy rains  
in the mountains, especially during the winter, the Salt River is sometimes unfordable for weeks,  
while during the hot, dry weather of the summer it is sometimes reduced to a mere brook, the  
flow during the winter months of some years being ten to twenty times what it is during some  
months of the following summer." *See* "Utilizing Our Water Supply," U.S.D.A., McClatchie  
(1902), quoted in the Littlefield "Assessment" Report dated October 5, 2005, at pp. 91-92.

1 The Apache Tribe objects to the characterization of the few sporadic recreational guided  
2 rafting trips down Reach 1 in the ANSAC Study by Mr. Fuller at p. 6-6 as being “commercial,” as  
3 though placing this label on such boating was sufficient by itself to satisfy the “trade and  
4 commerce” requirement under the federal navigability test. It is not.

5 Such sporadic recreational guided rafting which only takes place during “high flows” is  
6 not sufficient to demonstrate useful and beneficial commerce under the federal navigability test.  
7 While the guided tour operators do charge a fee for conducting such trips, the limited sporadic  
8 nature of such trips as reviewed below does not satisfy the “trade and commerce” requirement  
9 under the navigability test. These trips are therefore referred to herein as “guided” rafting trips,  
10 rather than “commercial” rafting trips to make this distinction and requirement under the  
11 navigability for title test clear.

12 Such “guided” rafting trips fail to establish “susceptibility” to commercial navigation on  
13 the date of statehood under the federal standards and cases interpreting these standards, because  
14 (1) such sporadic guided rafting trips are not sufficient to establish sustained and beneficial  
15 commercial navigation as required under the federal navigability test; (2) such sporadic guided  
16 rafting trips only take place during “high flows,” and not under “ordinary conditions,” as required  
17 under the navigability test; and (3) the high-tech rubber rafts used today for these recreational  
18 guided rafting trips were not available until after World War II.

19 A few sporadic modern-day guided rafting trips cannot reliably relate back to 1912 under  
20 the “susceptibility” test to establish that there could in fact have been similar boating in 1912  
21 when wooden boats represented the customary mode of travel then, and modern-day high-tech  
22 inflatable rafts were not available.

23 Mr. Fuller testified at the October 20, 2005 hearing, that several (maybe up to four)  
24 “mostly out-of-state” rafting operators conduct recreational guided rafting trips down Reach 1 of  
25 the Upper Salt River. TR at p. 72. Mr. Fuller was unable to answer how many guided rafting  
26 trips on the average take place a year, or since 1985. TR at p. 70. Mr. Fuller, however, testified  
27 that there are some years when the flow of the Upper Salt River is too low to conduct these  
28 guided rafting tours (TR at p. 70); that in other years, the “window of opportunity” to raft during

1 “high flows” may be only 2 to 3 weeks upon very short notice (TR at p. 71); and that in typical  
2 years, such guided rafting only takes place over approximately a period of one month out of the  
3 year, but only when there are “high flows.” TR at pp. 70-71.

4 Mr. Fuller testified that such guided rafting trips depend primarily on the snowmelt in the  
5 winter or spring, or after heavy rains. TR at pp. 67 and 73. He testified that typically there will  
6 only be one guide with from 6 to 10 persons on board a raft. TR at p. 66. Mr. Fuller did not  
7 know whether these guided rafting trips were profitable for their operators. TR at p. 81.

8 Mr. Fuller also testified that these guided tour operators must obtain special permits from  
9 both the U.S. Forest Service and the White Mountain Apache Tribe. TR at p. 71. The special  
10 permits issued by the U.S. Forest Service are limited in number. TR at pp. 72 and 80. He  
11 mentioned no permits which would have been required from the San Carlos Apache Tribe and  
12 White Mountain Apache Tribe if they had entered the River at the junction of the White and  
13 Black Rivers.

14 The fact that only a few of these guided raft trips are conducted by out-of-state operators  
15 only some years when there is an unpredictable short “window of opportunity” of only several  
16 weeks, or perhaps for a month or so during other years; the fact that they only take place during  
17 “high flows” over 700 cfs, but usually between 1,500 and 3,000 cfs; and the fact that it is  
18 unknown if such guided tours are profitable, is not sufficient to satisfy the federal test requiring  
19 useful, sustained, and beneficial “commercial” navigability, i.e., use of the Upper Salt River as a  
20 “highway for commerce” under ordinary conditions. *See, for example, Oklahoma v. Texas*, 258  
21 U.S. 574, 591 (1922), reviewed at pp. 5-8 in subsection A herein, where the U.S. Supreme Court  
22 stated under similar hydrological conditions regarding the Red River, that “Its characteristics are  
23 such that its use for transportation has been and must be exceptional, and confined to the irregular  
24 and short periods of temporary high water. A greater capacity for practical and beneficial use in  
25 commerce is essential to establish navigability.”

26 *State of Alaska v. Ahtna*, 891 F.2d 1401 (9<sup>th</sup> Cir. 1989), reviewed in subsection A, also  
27 does not support a determination of navigability, since the facts in *Ahtna* showed that the guided  
28 tours on the Gulkana River in Alaska regularly took place there every year for five months from

1 May through September, where the ordinary flow was from between 3,600 to 4,880 cfs, and that  
2 the guided tours supported a substantial and profitable economic industry employing over 400  
3 persons.

4 Assuming *arguendo* that such sporadic guided rafting trips on the Upper Salt River could  
5 satisfy the “trade or commerce” requirement for navigability, which they cannot, they would still  
6 not satisfy the additional requirement that such navigation take place under “ordinary conditions,”  
7 and not just during unpredictable sporadic times of snowmelt, heavy rains, and “high flows”  
8 while using transportation methods in use at the time of Statehood. See subsection A, and see, for  
9 example, *The Daniel Ball*, *The Montello*, and other U.S. Supreme Court and federal cases cited  
10 herein, including *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690  
11 (1899); and *Oklahoma v. Texas*, 258 U.S. 574 (1922), requiring commerce under the ordinary  
12 conditions of a river.

13 In addition, while evidence of modern-day boating may under certain circumstances be  
14 related back to demonstrate the possibility of susceptibility for navigation at the time of statehood,  
15 this argument fails because modern-day high-tech inflatable rafts cannot be related back to the  
16 boats that were available for commercial purposes when Arizona became a state in 1912.

17 In *North Dakota v. United States*, 770 F. Supp. 506, 512 (D.N.D. 1991), the federal district  
18 court rejected evidence of modern-day canoe trips on the Little Missouri River because “The  
19 court finds this evidence demonstrates that the river may be susceptible to canoe travel  
20 occasionally and in times of high water—generally, in April and May. This modern evidence of  
21 ‘susceptibility’ must be considered in relation to the contemporary evidence of use and  
22 susceptibility at the time of statehood. The contemporary evidence indicates that the river was  
23 neither used nor susceptible to use as a highway for useful commerce.”

24 The Eighth Circuit in *North Dakota v. United States*, 972 F.2d 235, 240 (8<sup>th</sup> Cir. 1992),  
25 upheld the district court’s findings stating that “The district court found that modern day canoe  
26 use and modern day “boatability” data are not reliable indicators of the River’s navigability at  
27 statehood.”

28 The holding of the Eight Circuit in *North Dakota v. United States*, 972 F.2d 235 (8<sup>th</sup> Cir.

1 1992), supports the Apache Tribe's argument that modern-day guided rafting trips are not a  
2 reliable indicator of the Upper Salt River's navigability at the time of statehood. There is not any  
3 contemporary evidence at the time of statehood that boats that could have been used for  
4 commercial purposes could have navigated Reach 1 of the Upper Salt River. The wooden boats  
5 that existed prior to statehood wrecked, and were not able to navigate Reach 1 of the Upper Salt  
6 River.

7 To further support the Apache Tribe's argument that modern-day rafting cannot be related  
8 back under the "susceptibility" test, the Apache Tribe directs the Commission's attention to the  
9 Forest Service's special report filed with ANSAC regarding modern-day rafting on Reach 1 of  
10 the Upper Salt River. See "Evaluation of Navigability at the Time of Statehood: Salt River,"  
11 Forest Service, U.S.D.A. (January 1998).

12 In this Forest Service report prepared for the Commission, Mr. Bazan, the Forest  
13 Supervisor for the Tonto National Forest, concluded in his cover letter to the Commission  
14 accompanying the report that "We are confident you will concur the Salt River definitely is not a  
15 navigable river through those National Forest System lands which are addressed in the enclosed  
16 report."

17 The Forest Service reports that guided modern-day recreational rubber rafting trips on  
18 Reach 1 of the Upper Salt River started in about 1985 when the Forest Service first started issuing  
19 Special Use Permits for such guided tour operations. See Forest Service Report at p. 9

20 The Forest Service concludes in its report:

21 River-runners today, with their high-tech equipment and improved  
22 techniques, simply cannot be compared with the situation in 1912; to  
23 do so would be like comparing a delicate, bruise-prone apple with a  
24 thick-skinned, practically indestructible orange. Proof that boaters  
have run this river in the recent past is simply not directly relevant to  
the criteria for navigability...." [Forest Service Report at p. 7.]

25 The Apache Tribe agrees with the above statement of the Forest Service that modern-day  
26 rafting cannot relate back to 1912 to establish navigability under the susceptibility test. The  
27 historical record shows that the wooden boats that existed and were used prior to and on the date  
28 of statehood that attempted to raft Reach 1 of the Upper Salt River, wrecked, and had to be  
abandoned because of the narrow canyons, rapids and boulders they encountered. While modern-

1 day high-tech rafts may now be able to often maneuver through and over these rapids and  
2 boulders during “high flows,” they did not exist at the time of statehood.

3 The federal criteria developed for stream conditions for various types of boating in Table 1  
4 and Table 2 at p. 6-2 of the ASLD Study, were developed to quantify instream flow needs for  
5 recreational boating, and cannot be compared to the boating requirements of boats used for  
6 commercial purposes prior to or at the time of statehood. The draft requirements for modern-day  
7 high-tech rafts are quite different than the draft requirements for the wooden boats that could have  
8 been used for commercial purposes prior to or at the time of statehood. Furthermore, modern-  
9 day inflatable rafts have high maneuverability whereas the wooden boats that existed at the time  
10 of statehood did not have such maneuverability.

11 Moreover, as the 1998 Forest Service report indicates at p. 7, with respect to both modern-  
12 day guided rafts as well as kayaks and canoes that “...even these boats regularly fall victim to the  
13 river” today.

14 Evidence of modern-day high-tech rubber rafting or “boatability” is therefore not a  
15 reliable indicator of the Upper Salt River’s commercial navigability at statehood under the federal  
16 “susceptibility” test, since such modern-day high-tech rafts did not exist at the time of statehood.

17 To further support a determination by the Commission of the non-navigability of Reach 1  
18 of the Upper Salt River, Dr. Stanley A. Schumm, an expert geomorphologist who testified at the  
19 October 20, 2005 hearing, concluded in his report regarding Reach 1 of the Upper Salt River that  
20 the bedrock outcrops in the channel created waterfalls [steep gradients in Reach 1 vary from 17 to  
21 31 feet per mile],<sup>3</sup> rapids, and narrow canyons “would have prevented commercial navigation.”  
22 See “Geomorphic Character of the Upper Salt River,” Stanley A. Schumm, Ph.D., January 2005,  
23 p. 12, filed with ANSAC.

24 The ASLD Study also reports that modern-day private recreational rafting in smaller one-  
25 man kayaks or canoes may take place most of the year during the lower or ordinary flows of the  
26 Upper Salt River, at approximately 200 c.f.s., as Mr. Fuller testified. See Table 4, ASLD Study at  
27

---

28 <sup>3</sup>See Forest Service Report dated 1998, “Evaluation of Navigability at the Time of  
Statehood: Salt River, at p. 3.



1 p. 6-6, and Mr. Fuller's testimony, TR at p. 69, as interpreting Table 4 to only apply to private  
2 recreational rafting.

3 Private recreational rafting, however, does not satisfy the federal standards to establish  
4 commercial navigability as reviewed under the federal case law in subsection A herein. *See*, for  
5 example, *United States v. Oregon*, 295 U.S. 1 (1935) (non-commercial recreational boating is  
6 insufficient to establish navigability for title under the equal footing doctrine).

7 Finally, the ASLD Study does not contain any information regarding navigability of the  
8 Upper Salt River on the San Carlos Apache Reservation, and Mr. Fuller testified that he was not  
9 aware of any guided rafting trips on the Upper Salt River which started on the San Carlos Apache  
10 Reservation. TR at pp. 71-72.

### 11 **C. Conclusion**

12 The proponents of the navigability of the Upper Salt River cannot establish by a  
13 preponderance of the evidence that any reach of the Upper Salt River was navigable prior to or on  
14 the date of statehood.

15 There is not sufficient historical evidence of any successful and sustained commercial  
16 navigation on the Upper Salt River prior to statehood, on the date of statehood, or even at anytime  
17 after statehood.

18 Evidence of a few sporadic modern-day guided rafting trips which are conducted only  
19 during "high flows" on Reach 1 of the Upper Salt River starting on the White Mountain Apache  
20 Reservation, with high-tech rubber rafts that did not exist in 1912, is not sufficient to establish  
21 that Reach 1 of the Upper Salt River was "susceptible" to commercial navigation at the time of  
22 statehood under the required federal standards and federal case law to establish navigability.

23 Private recreational rafting on Reach 1 of the Upper Salt River, such as, in one-man  
24 canoes or kayaks, cannot satisfy the federal navigability test which requires commercial  
25 navigability.

26 The Apache Tribe therefore respectfully requests that ANSAC determine that all reaches  
27 of the Upper Salt River, including Reach 1 starting on the San Carlos Apache Reservation, are  
28 non-navigable.

1 DATED this 9<sup>th</sup> day of December, 2005.

2 SPARKS, TEHAN & RYLEY, P.C.

3  
4 By

  
Joe P. Sparks

John H. Ryley

Susan B. Montgomery

Attorneys for San Carlos Apache Tribe

5  
6  
7 **ORIGINAL** plus six copies of the foregoing  
mailed this 9th day of December, 2005, to:

8 Arizona Navigable Stream Adjudication Commission  
9 1700 W. Washington  
Suite 304  
10 Phoenix, AZ 85007

11 **COPY** of the foregoing mailed this  
9th day of December to:

12 Laurie Hachtel, AAG  
13 for the Arizona State Land Department  
1275 West Washington  
14 Phoenix, AZ 85007

15 Joy Herr-Cardillo  
Arizona Center for Law in the Public Interest  
16 2205 E. Speedway Blvd.  
Tucson, AZ 85719

17 Mark McGinnis  
18 Rebecca Goldberg  
For the Salt River Project  
19 Salmon, Lewis & Weldon  
2850 E. Camelback Road  
20 Phoenix, AZ 85016

21 Bill Staudenmaier  
Mike Kafka  
22 For Phelps Dodge  
Ryley, Carlock & Applewhite  
23 1 North Central Avenue, Suite 1200  
Phoenix, AZ 85004

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

28 By

  
I:\INDIAN\SCAT\ANSAC\openingmemouppersaltiver.pld.wpd