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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

In re Determination of Navigability of the Lower Salt River, from Granite Reef Dam to the Gila River Confluence	No. 03-005-NAV **SALT RIVER PROJECT'S MEMORANDUM REGARDING PROCEEDINGS ON REMAND**

Pursuant to the Commission's notice dated December 14, 2011, the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (collectively, "SRP") submit their memorandum regarding what the Commission should do to comply with the Court of Appeals' opinion in this matter. *See State v. Arizona Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) ("*State v. ANSAC*"). Because the notice did not specify whether the Commission was requesting comments on procedural or substantive matters, SRP presents its initial comments on both issues (i.e., how ANSAC should proceed and also what its final decision should be on the merits). To the extent that the Commission allows parties an additional opportunity to file more complete briefs on the merits, SRP reserves its right to do so at the time and in the manner requested by the Commission.

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I. The Commission Should Reopen the Evidentiary Record, Hold a Public Hearing, and Provide an Opportunity for the Parties to Submit Briefs on the Merits.

As discussed below, the Commission told the Court of Appeals and the Arizona Supreme Court that, when it made its decision leading to the 2005 Report,[1] it had considered the river as it appeared in its ordinary and natural condition as of February 14, 1912—the same standard the Court of Appeals said it should apply. *See* ANSAC's Motion for Reconsideration, at 2 (Court of Appeals, May 10, 2010) (copy attached hereto as Exhibit 1); *see also* Section II(A), *infra*. With that being said, however, the Commission must recognize that the Court of Appeals remanded this case to the Commission "for further proceedings consistent with [its] decision." *State v. ANSAC*, 224 Ariz. at 245, 229 P.3d at 247. Thus, the Commission now should take special care to ensure that it follows the proper procedures and complies with the Court's mandate.

Having participated in the extensive proceedings leading up to the 2005 Report and being aware of the large amount of information that was submitted to the Commission at that time, SRP believes it is likely that little or no additional evidence exists that a party might offer to show that the Lower Salt River was or was not navigable in its ordinary and natural condition as of February 14, 1912. In an abundance of caution, however, and to ensure that each party has a full opportunity to submit its evidence, SRP requests that the Commission issue public notice and reopen the evidentiary record in this matter for a limited period of time to give parties a chance to submit any new or additional evidence if they choose to do so. Section 37-1123 of the Arizona Revised Statutes sets forth the procedures for receiving, reviewing, and considering evidence of navigability, and the Commission has in the past been steadfast in following those procedures. *See* A.R.S. § 37-1123. Thus, SRP submits that the Commission should reopen the evidentiary record, as provided in that statute, and allow parties to submit any new or additional evidence based upon the Court of Appeals' opinion.

[1] Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence (September 21, 2005) ("2005 Report").

See id. §§ 37-1123(A), (B). The period during which the record is reopened also would allow the Arizona State Land Department ("ASLD") to submit any new evidence it possesses, pursuant to A.R.S. § 37-1124.

The Commission should notice and hold one public hearing, to allow parties a final opportunity to submit evidence and, if the Commission desires, to hear arguments regarding the Court of Appeals' opinion and whether and how the Commission's 2005 Report should be revised based upon that opinion. That hearing can be held at the Commission's office in Phoenix. *See* A.R.S. § 37-1126. At the conclusion of the hearing or soon thereafter, the Commission can issue its new report and the matter will be subject to the statutory appellate procedures.

Because the present issues relate primarily to legal matters associated with the Court of Appeals' opinion, the Commission might desire to receive legal briefs from the parties on the substantive legal questions—e.g., was the river navigable in its "ordinary and natural condition" on the date of statehood? Those briefs, if deemed necessary by the Commission, could be submitted before or after the public hearing and could be in addition to or in lieu of oral arguments at the hearing itself.

Furthermore, the Commission should take notice that the United States Supreme Court, in the case of *PPL Montana, LLC v. Montana* (Case No. 10-218), currently has before it certain "navigability" issues that potentially could affect the analysis with regard to the Lower Salt River. That case was argued on December 7, 2011, and it is expected that the Court will issue a decision sometime this spring. Given the time required for the Commission to issue public notice, hold a hearing, and render a decision in the Lower Salt River case, it is likely that the Commission could have the benefit of this additional guidance from the United States Supreme Court before its Lower Salt River decision is finalized.

The procedures outlined in the statute and advocated by SRP herein are time-consuming, relatively costly, and arguably unnecessary, especially in view of the limited nature of the Court of Appeals' remand. Because this process with respect to the Lower Salt

River has been attempted and repeated so many times, however, SRP believes that all reasonable efforts to comply with the statutory requirements and the Court's mandate are warranted in this instance, to help ensure that the Commission and the parties are not placed back in this same procedural posture of starting over again at some point in the future.

II. The Lower Salt River is Not Navigable in its "Ordinary and Natural" Condition.

In its 2010 opinion, the Court of Appeals acknowledged that the Commission had expressly considered the impacts of Roosevelt Dam and Reservoir in determining whether the Lower Salt River was navigable at statehood. *See State v. ANSAC*, 224 Ariz. at 240, 229 P.3d at 252. The court continued on, however, to say that "conspicuously absent from [the Commission's] statement and from ANSAC's analysis is any evaluation of the effect of the numerous other dams, canals, and man-made diversions identified in its report as existing as of February 14, 1912." *Id.*

After reviewing the evidence and applying the proper legal standard, the Commission should find that the Lower Salt River was not navigable in its "ordinary and natural condition" as of the date of statehood.

A. The proceedings on appeal

The Court of Appeals found that the Commission had applied the wrong legal standard. *State v. ANSAC*, 224 Ariz. at 241-42, 229 P.3d at 253-54. The appeal in this case resulted in the odd circumstance of a lower tribunal (the Commission) filing a brief before an appellate court stating that it had done what the appellate court said it should do, and the appellate court then essentially saying, "We don't think that's what you did." The Commission filed a motion for reconsideration of the Court of Appeals' opinion, on the grounds, among other things, that it had already applied the standard that the Court said

should apply.[2] In that motion, the Commission summarized the "ordinary and natural condition" evidence upon which it had relied. *See* Exhibit 1, at 2-8. The Commission noted that, although it had mentioned only Roosevelt Dam and Reservoir in the concluding paragraph on page 46 of its 2005 Report, it did consider the impacts of the other dams, canals, and diversions in examining the "ordinary and natural condition" of the river. *Id.*

The Commission then filed a petition for review with the Arizona Supreme Court, again stating: "The Commission considered all of the diversion dams and manmade structures that were in existence as of February 14, 1912 and backed out their effect in determining the ordinary and natural condition of the river on that date." *See* Arizona Navigable Stream Adjudication Commission's Petition for Review by the Supreme Court, at 3-4 (Arizona Supreme Court, June 28, 2010) (copy, without attached Court of Appeals opinion, attached hereto as Exhibit 3). In that petition, the Commission pointed to pertinent passages from its 2005 Report showing that it had considered the impacts of pre-statehood dams, canals, and diversions other than Roosevelt Dam. *Id.* at 4. The Commission noted that it "went to great lengths from the evidence available, to determine the ordinary and natural condition of the river in the period prior to 1867 when Jack Swilling first began diverting water from the river for irrigation." *Id.* The Supreme Court denied discretionary review and did not address the substantive question of what test the Commission had actually applied.

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[2] The superior court rejected the contention that the Commission had not considered the river in its "ordinary and natural condition." The court stated: "Appellants argue that ANSAC should have considered the River's natural and ordinary condition as it existed in the mid-1800s. They did." *See* Ruling Minute Entry, *State v.* ANSAC, Maricopa County Superior Court NO. LC2006-000413-0001 DT (August 3, 2007) (copy attached hereto as Exhibit 2). The superior court then continued, carefully delineating in eleven separate paragraphs how ANSAC had applied the broader interpretation of the "ordinary and natural condition" clause, considered the river as it existed in the mid-1800s, and still found it non-navigable. *Id.* at 3-4.

B. The river is and was non-navigable.

Based upon the evidence in the record, the facts of this case show that the proponents of navigability (who had the burden of proof[3]) failed to prove navigability by a preponderance of the evidence. Among other things:

1. Even before the arrival of European settlers in the mid-1800s, the Salt River Valley was one of the most densely populated areas in the Southwest.[4] Despite the presence of between 80,000 and 200,000 residents in prehistoric times, no evidence was submitted to show that any of those individuals ever used or tried to use the river as a "highway for commerce." Exhibit 4, ¶ 5; 2005 Report, at 25.

2. The river has always been subject to alternating periods of floods and droughts. *See* Exhibit 4, ¶ 4. "Very high flood flows" existed during the Colonial Period (A.D. 650-900), washing out prehistoric flood gates and damaging canals. *Id.* "Major floods, as well as lower-than-normal flows," continued through the Classic Period (A.D. 1100-1350). *Id.*

3. No evidence was presented that any of the early explorers who ventured into the Valley, beginning in the 1860s, ever used the river as a means of transportation or commerce. *See* Exhibit 4, ¶¶ 6-14. Overland transportation always has been the primary method of trade and travel in the vicinity of the river. Explorers, trappers, and soldiers are reported to have traveled on foot or by horseback along the river in the mid-1800s, but no evidence shows that any of those individuals ever traveled (or attempted to travel) by boat up or down the river. *Id.*

4. Another group of individuals who were present in the area beginning in 1868 included the federal land surveyors who conducted the rectangular survey in the new territory. Historian Dr. Douglas Littlefield testified before the Commission that each of these surveyors was under specific instructions to distinguish between navigable and non-navigable streams.

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[3] *See State v. ANSAC*, 224 Ariz. at 228-29, 229 P.3d at 236-37.

[4] *See* Defendants' Statement of Facts on Appeal and Response to Plaintiffs' Joint Statement of Facts in Support of Their Opening Briefs ¶ 3, *State v. ANSAC*, Maricopa County Superior Court No. LC2006-000413-001 DT (November 30, 2006) (copy attached hereto as Exhibit 4).

See Exhibit 4, ¶ 14. None of these Government representatives ever once indicated that the river was navigable. *Id.* ¶ 15. "Significantly, while those surveys were done at varying times of the year, in different years, and by several individuals, all of the descriptions and plats that resulted from this work consistently portrayed the Salt River as being a non-navigable stream." *Id.* ¶ 16; *see also id.* ¶ 20.

5. A report submitted to the Commission by a consultant for the ASLD discussed a handful of accounts of attempts to boat or transport goods down the river between 1873 and statehood. *See* Exhibit 4, ¶¶ 35-50. These accounts were full of mishaps and misery for the participants. For example, an 1881 expedition known as "Yuma or Bust" actually "busted," only a few miles from Phoenix. *Id.* ¶ 38. On at least two trips, the boats were capsized and the parties lost all or most of their supplies. *Id.* ¶¶ 36, 41. Two of the participants were known to have died as a result of their adventures. *Id.* ¶¶ 42, 48. In other instances, the boats were destroyed or badly damaged. *Id.* ¶¶ 43, 49. None of those attempts could be considered successful.

6. The only recorded opinions on navigability by the participants in these attempts themselves showed that the river was not suitable as a "highway for commerce." Charles Hayden (father of late U.S. Senator Carl Hayden) and the other participants in a June 1873 trip to float logs down the Salt River to Tempe, the only known attempt to float logs on the river, "pronounce[d] the scheme a failure." *See* Exhibit 4, ¶ 36. Two engineers from the Reclamation Service, who survived only a mile in a boat on the river, stated that "[t]hey found the Salt river a poor stream for navigation." *Id.* ¶ 46.

7. Precipitation in the Salt River Valley and the adjoining watersheds occurs primarily during the summer "monsoons" and during larger winter storms. *See* Exhibit 4, ¶ 70. This weather pattern is reflected in the data relating to the monthly average flows of the river. The ASLD's consultant estimated monthly average flows near the upper end of this stretch of river. *Id.* ¶ 71. These variable flows reflect the erratic nature of the river, even on a monthly average basis. *Id.*

8. The testimony before the Commission showed that knowing the average annual flow of a river is of dubious value in determining whether that river is or was "navigable." As the ASLD's consultant admitted, "average annual flow rates are skewed due to high flood flow volumes relative to 'typical' flow rates." *See* Exhibit 4, ¶ 78. Due to the prevalence of huge floods, the "average" flow rate is biased substantially upward. *Id.* ¶ 79.

9. Geomorphologist Dr. Stanley Schumm testified regarding the braided nature of the river, containing numerous islands and sandbars. *See* Exhibit 4, ¶ 84. The Lower Salt "was a braided river, and the pattern of bars, islands, and low-water channels changed through time." *Id.* ¶ 85. It "was a wide, sandy-gravelly channel," and "the low-water channels shifted within the main channel and often more than one low-water channel was present." *Id.* ¶ 86. Dr. Schumm concluded that "[t]his wide and shallow Salt River channel, that contained numerous bars and islands, would not be favorable for navigation." *Id.* ¶ 87. In coming to this opinion, Dr. Schumm reviewed and relied upon, among other things, general land survey office maps of the river made in 1868 (and published in 1870) and a series of maps from that date up until and after statehood. *See* Exhibit 1, at 6.

The evidence does not support a contention that the Lower Salt River was navigable as of the date of statehood.

III. Summary and Requested Action

The Court of Appeals' remand places the Commission in a peculiar position. The Court's mandate requires the Commission to redo what it said it did the last time. In this context, however, "the best way out is always through."[5] The prudent approach is to reopen the record, hold a public hearing, and reconsider the evidence and the legal standard to ensure that the Commission's decision complies with the Court's opinion and mandate. SRP submits that, upon reviewing the evidence and applying the Court of Appeals' legal test, the

[5] *See In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999) (quoting R. Frost, *A Servant to Servants* in *Complete Poems of Robert Frost* 83 (1964)).

Commission should find that the Lower Salt River, in its ordinary and natural condition, was not used or susceptible to being used as a highway for commerce on February 14, 1912.

DATED this 13th day of January, 2012.

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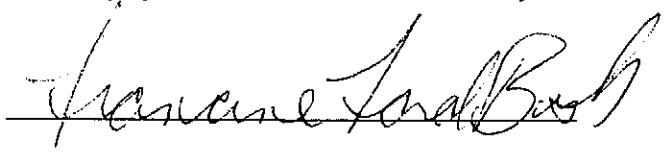

EXHIBIT 1

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ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, acting by and through Mark Winkleman, State Land Commissioner and the Arizona State land Department, and DEFENDERS OF WILDLIFE, DONALD STEUTER, JERRY VAN GASSE, JIM VAALER,

Plaintiffs/Appellants,

vs.

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION; SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT; SALT RIVER VALLEY WATER USERS' ASSOCIATION; ARIZONA STATE UNIVERSITY; CITY OF TEMPE; CITY OF PHOENIX, CITY OF MESA; PHELPS DODGE CORPORATION; MARICOPA COUNTY; CEMEX CEMENT, INC.; GILA RIVER INDIAN COMMUNITY OF CENTRAL ARIZONA; MARICOPA COUNTY FLOOD CONTROL DISTRICT,

Defendants/Appellees.

Case No. 1 CA-CV ~~07-0704~~

Maricopa County Superior Court
No. LC 2006-000413-001DT

MOTION FOR RECONSIDERATION

Defendant/Appellee, Arizona Navigable Stream Adjudication Commission ("ANSAC" or "Commission") respectfully moves that the Court reconsider its finding in the Opinion in the above case filed on April 27, 2010, in which it stated that ANSAC failed to apply the proper legal test to the evidence presented in determining whether the Lower Salt River was navigable or susceptible to navigability or non-navigable as of February 14, 1912. ANSAC received, compiled, reviewed and considered relevant historical and scientific data and information, documents and other evidence regarding the issue of navigability for title purposes and conducted a particularized assessment of the potential public trust claims on the Lower Salt River as required in Title 37, Chapter 7, Ariz. Rev. Stat., and *Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991). ANSAC held public evidentiary hearings on April 7 and 8, 2003 and considered the testimony and reports of all witnesses who appeared. After briefing by all of the parties, it held another hearing on January 27, 2004 and found that the river was not navigable or susceptible of navigation as of February 14, 1912.

I. THE COMMISSION APPLIED THE CORRECT TEST TO THE LOWER SALT RIVER AS IT APPEARED IN ITS ORDINARY AND NATURAL CONDITION AS OF FEBRUARY 14, 1912

The Court states that ANSAC misapplied the federal test for navigability set forth in the Daniel Ball and Arizona statutes because it did not properly consider the river's ordinary and natural condition as of February 14, 1912 in that it failed to take into consideration pre statehood irrigation diversions and canals, other than Roosevelt Dam and Reservoir. The Court apparently basis its Opinion on the

summarization of the findings and determination of ANSAC set forth on pages 46-46 of its report dated September 21, 2005 as follows:

> Based upon all of the historical and scientific data and information, documents and other evidence produced and considered by the Commission, the Commission finds that the Lower Salt River between Granite Reef Dam and its confluence with the Gila River is an erratic, unstable and undependable stream characterized by periodic floods, sometimes extreme, followed by periods of drought when there is little or no water in the riverbed. The Commission finds that in its ordinary and natural condition, even in the absence of the existence of Roosevelt Dam and Reservoir, the Lower Salt River was a braided stream of two to four channels interspersed by sandbars and sand islands which shift with floods of high flow of water and as such had a configuration that would be impossible to be considered navigable or susceptible of navigability.

The Court said that since Roosevelt Dam and Reservoir was listed and Granite Reef Dam and all other diversion dams and canals were not listed it was apparently the intent of the Commission not to consider them. Roosevelt Dam and Reservoir was only listed because it is the largest of all of the pre-statehood dams on the Salt River and is not even within the reach of the Lower Salt River, which was being considered by the Commission, but it certainly affected the water levels. Rather than concentrate on that single statement in the findings, the Court should have considered the entire report to understand that the Commission was considering the river in its ordinary and natural condition on February 14, 1912 in its findings and determination and backed out the effect of not only Roosevelt Dam but all other pre-statehood diversions and dams, canals and ditches.

ANSAC was certainly aware of the diversion dams and other manmade structures that were in existence on February 14, 1912 and had to be considered in determining the ordinary and natural condition of the river on that date. These diversion dams are listed at pages 5 and 6 of the report and the Commission stated:

Since the Salt River, at the time of statehood, was primarily used for irrigation purposes, a number of structures were already in place which contributed to the low flow or even dry periods of the Lower Salt River. The following is the list of structures in existence on February 14, 1912, along with a description of where each canal head lies with respect to the Salt River:

Jointhead Dam, 1867, 56th Street

Salt River Canal (Swilling Ditch), 1867, head at Jointhead Dam

Maricopa Canal, ca. 1870, head at Jointhead Dam

Tempe Canal, 1870, head nine miles upstream of Jointhead Dam

Broadway Canal, 1870, head four miles upstream of Jointhead Dam

San Francisco Canal, ca. 1880, head at Tempe Canal

Utah Canal, 1877, head five miles upstream of Tempe Canal

Mesa Canal, 1878, head two miles upstream of Utah Canal

Grand Canal, 1878, head at Granite Reef Dam

Arizona Canal, 1883, head at Granite Reef Dam

Highland Canal, 1888, head three miles upstream of Mesa Canal

Consolidated Canal, 1891, head at Granite Reef Dam

Arizona Dam, 1883, later rebuilt as Granite Reef Dam, 1891

Roosevelt Dam, 1911, confluence of Tonto Creek and Salt River

Although Roosevelt Dam is not located within the reach of the Granite Reef Dam and its confluence with the Gila River, its presence at the time of statehood was considered in the final determination due to its amelioration of flooding and storage of water for use in low flow periods of the Salt River.

Clearly, from the foregoing, the Commission considered all of the diversion dams and canals in existence on the day of statehood and what affect they had on the ordinary and natural condition of the river.

In its Opinion, the court spends a good deal of time discussing the difference between ordinary and natural. The Commission does not disagree with these definitions and, in fact, was acutely aware of the difference in its charge to look at the river in its ordinary and natural condition. For example, the Court defines ordinary as "occurring in the regular course of events, normal, usual" from Black's Law Dictionary and from the online dictionary.reference.com as "customary, usual and normal." ANSAC recognized the difference between ordinary and natural (the latter meaning in its natural state, untouched by civilization or human acts) by pointing out in its report that the Hohokam civilization lived alongside the Salt River and utilized its water for irrigation and other home use for a period of over 2,000 years. (See its discussion on page 40 of the Report) In recognizing this difference, that ordinary means commonly encountered or usual, the Commission, as dicta and not a part of its findings, hypothecates that one might argue that ". . . use of the Salt River for irrigation could be expected and accepted and commonly encountered or usual and such use conforms to the normal and ordinary course of nature and thus is the normal or usual condition." This does not in any way effect the fact that the Commission recognizes that the test includes considering the river in its ordinary and natural condition as of statehood.

In its Opinion, the Court does recognize that the river was in its ordinary and natural condition before the Hohokam people arrived some 2,000 years ago and developed canals and other diversions to irrigate their fields, but that little, if any, historical data exists from that period. Thus, the Court states that "the river could be considered to be in its natural condition after many of the Hohokam's diversions had ceased to affect the River, but before the commencement of modern-era

settlement and farming in the Salt River Valley, when some of the Hohokam's diversions were returned to use and other man made diversions and obstructions began to affect the River. Evidence from that early period should be considered by ANSAC as the best evidence of the River's natural condition." (pages 28 and 29 of the Opinion)

The Commission did consider the period of the early and middle 1800's as the best evidence for the natural condition of the Lower Salt River. Unfortunately, there were no river gauges telling the flow of the river during this period of time. The Commission, however, did consider what evidence was available from the early Spanish explorers such as Father Kino, who traveled along the Salt River in 1696 (see page 26 of the Report) and the reports of the trappers and mountainmen who explored the West trapping furs, primarily beaver, from the 1820's to the 1840's. (page 26 of the Report) The testimony of Dr. Stanley Schumm, a former geomorphologist for the U.S. Geological Survey and a professor at Colorado State University, was most informative. He referred to a general land office survey made in 1868 and published in 1870, and then followed the various surveys and topographical maps up to statehood, which described the river and its flow. His testimony is found at pages 190 – 213 of the transcript of the record. He described the river over the years as a "braided river and a pattern of bars, islands and low water channels changed through time." See page 41 of the Report.

> Well, the question is, what was the river like in 1912. And we do have a little help to help us reach that conclusion. We have the 1870 General Land Office surveys; 1903, 1904 topographic maps; and a 1934 aerial photograph which is – this is one of these. So we know what the river was like 42 years before 1912, 9 years before, and 22 years after.
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> * * *

And here is a stippled area, a wide portion of the Salt River channel; mild, wide places. Here is the 1903-1904 low-water channel. And then superimposed on this is the channel map by the General Land office surveyors in 1868, published in 1870. And that's the light blue. And you can see multiple channels here, and they extend from the south bank to the north bank, indicating that all of this is channel of the Salt River. So that helps us understand what the Salt River was like in 1870, pretty much before the major divergence and major changes of the river.

* * *

And in this braided river, t hat flow would shift the bars, erode the islands, erode the banks, change the position of the low water channels and maintain the braided characteristics. So my conclusion is what we see in 1870, 1902, 1903, and 1934 clearly demonstrate that the river has been braided for this entire period of time. And in 1912, it was a wide, braided, low width to depth ratio, dynamic, active river.

* * *

So I guess my conclusion from this is that you folks, when you have water in your river, are dealing with something that's very dynamic, very changeable, and one that I would conclude would not be suitable for navigation.

(Pages 195-199)

In cross examination, Dr. Schumm testified:

Q. (by Mr. Helm): Your opinions, then, are not based on this stream in its natural and ordinary condition as a perennial stream?

A. My opinions are based upon that, because we have information from the 1870 surveys that the river was braided.

(Page 202)

Q. BY MISS HACHTEL: Dr. Schumm, under the ordinary – natural ordinary flow conditions prior to any man made structures or diversions of flow, is the Salt River channel stable, in your opinion?

A. It's a braided river, and it's highly dynamic, and it changes its character even in low flows.

Q. So is that a yes or a no to my question?

A. Ask me the question again.

Q. Okay. Under ordinary natural flow conditions, prior to man made structures or diversions of flow, is the Salt River channel stable?

A. No.

(Pages 210-211)

Dr. Doug Littlefield testified from the field notes of Wilfred Ingalls, the surveyor who performed the 1868 survey. He reported that at one place there were two channels with numerous sloughs running from one to the other and not too deep to prevent measuring across them. He also stated that the river was continually washing away the banks and islands, and changing its course. (Page 170-171)

Essentially what the Commission did was take the evidence of the river in the mid 1800's, especially prior to 1870 and use this information to describe the Salt River as it would have appeared in its ordinary and natural condition in 1912, without any man-made diversions or canals. It thus concluded that as of February 14, 1912, the river in its ordinary and natural condition, using the evidence from the 1860's and 1870's, was not navigable nor susceptible to navigability.

II. PRESUMPTION IN FAVOR OF STATE'S TITLE

In the first section of its Opinion, pages 16 – 18, the Court deals with the presumption against defeat of the State's title and states that Appellants assert that ANSAC ignored the strong presumption against defeat of the State's title and, therefore, its finding of non navigability must be declared invalid. While it is unclear what effect this portion of the Opinion has on the Court's decision, it seems clear that there is no presumption in favor of the State or against defeat of the State's title in this matter at this time. The Court quotes from a statement in its

earlier decision in *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 420, 18 P.3d 722, (Ariz. App. 2001):

> Determinations regarding the title to beds of navigable watercourses in equal footing cases must begin with a strong presumption against defeat of the State's title.

Note the underscored portion of this quote. The so called "strong presumption" only comes into effect after the body of water or watercourse has been found navigable. In *United States v. Alaska*, 521 U.S. 1, 117 S.Ct. 1881, 138 L.Ed.2d 231 (1997), the Court was dealing with tidelands in Alaska which were clearly navigable.

This Court, in *Defenders of Wildlife* expressly recognized that a determination of navigability was essential before a state having any public trust ownership claims to lands in the beds of the particular watercourse.

> The concept of navigability is "essentially intertwined" with public trust discussions and "[t]he navigability question often resolves whether any public trust interest exists in the resource at all." Tracy Dickman Zobenica, The Public Trust Doctrine in Arizona's Streambeds, 38 Ariz.L.Rev. 1053, 1058 (1996). In practical terms, this means that before a state has a recognized public trust interest in its watercourse bedlands, it first must be determined whether the land was acquired through the equal footing doctrine. However, for bedlands to pass to a state on equal footing grounds, the watercourse, overlying the land must have been "navigable" on the day that the state entered the union.

199 Ariz. at 418, 18 P.3d at 729 (also citing *O'Toole*, 154 Ariz. at 45, 739 P.2d at 1362 (Emphasis added)).

The Legislature and the Court of Appeals in *Defenders v. Hull* have recognized that, unless the watercourse was "navigable" at statehood, the State has no "public trust" ownership claim to lands under and along that watercourse. There has been no finding of navigability in this case, so the presumption does not

apply. The burden of proving navigability by a preponderance of the evidence is upon the proponents of navigability. A.R.S. § 37 1128(A).

In view of the foregoing and the authorities cited in footnote 11, page 17, of the Court's Opinion, at this stage of the proceedings, no presumption has arisen and this issue should not be considered.

III. ATTORNEYS' FEES

ANSAC also objects to and requests that the Court reconsider its award of attorneys' fees and costs. While the Appellants, Defenders of Wildlife, et al., may be the prevailing party at this stage of the proceedings, the Court has not ruled in their favor finding the river navigable, but merely vacated the Superior Court's Judgment upholding ANSAC's administrative determination of non navigability and remanded the matter for further proceedings. It would be more proper to wait on the issues of attorneys' fees pending resolution of this matter on the merits. *Tierra Ranchos HOA v. Hitchukov*, 216 Ariz. 195, 165 P.3d 173 (App. 2007)

Also, ANSAC questions applying the Private Attorney General doctrine in this case in favor of Appellants, Defenders of Wildlife, et al. The State of Arizona represented by its Attorney General is also an Appellant and a successful party in this case and certainly carried as big a load in the litigation as did Appellants, Defenders of Wildlife, et al. Accordingly, it does not seem proper to invoke the Private Attorney General doctrine in this case and certainly at this time.

IV. CONCLUSION

For the foregoing reasons, ANSAC requests that the Court reconsider its Opinion in this matter, grant this motion and affirm the lower court's decision upholding the Commission's finding of non-navigability.

RESPECTFULLY SUBMITTED this 10 day of May, 2010.

JENNINGS, HAUG & CUNNINGHAM, L.L.P.

Curtis A. Jennings

Curtis A. Jennings
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2010, I caused the original and four copies of the foregoing brief to be delivered to:

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Arizona Court of Appeals
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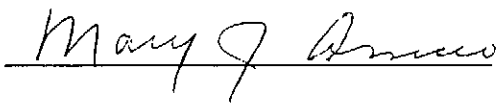

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 22, Arizona Rules of Civil appellate Procedure, the undersigned counsel of Defendant/Appellee Arizona Navigable Stream Adjudication Commission hereby certifies that the text of this Motion for Reconsideration uses proportionately spaced type of 14 points, is double spaced using a roman font (i.e., "Times New Roman") and contains 3,414 words.

Dated this 10 day of May, 2010.

JENNINGS, HAUG & CUNNINGHAM, L.L.P.

Curtis A. Jennings
Attorneys for Defendant/Appellee

1945-1

EXHIBIT 2

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000413-001 DT

08/03/2007

HON. CAREY SNYDER HYATT

CLERK OF THE COURT
C.I. Miller
Deputy

STATE OF ARIZONA
MARK WINKLEMAN

LAURIE A HACHTEL

v.

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION (001)
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT (001)
SALT RIVER VALLEY WATER USERS' ASSOCIATION (001)
ARIZONA STATE UNIVERSITY (001)
CITY OF TEMPE (001)
CITY OF PHOENIX (001)
CITY OF MESA (001)
PHELPS DODGE CORPORATION (001)
MARICOPA COUNTY (001)
CEMEX CEMENT INC (001)
GILA RIVER INDIAN COMMUNITY (001)
DEFENDERS OF WILDLIFE (001)
DONALD STEUTER (001)
JERRY VAN GASSE (001)
JIM VAALER (001)
HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA (001)
MARICOPA COUNTY FLOOD CONTROL DISTRICT (001)

CURTIS A JENNINGS
MARK A MCGINNIS
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JOY E HERR-CARDILLO
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JULIE M LEMMON

WILLIAM F HAUG
JAMES T BRASELTON

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000413-001 DT 08/03/2007

RULING MINUTE ENTRY

The Court heard oral argument on this appeal from the administrative decision of the Arizona Navigable Stream Adjudication Commission ("ANSAC" or "Commission") dated September 21, 2005, *In the Matter of the Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence, Maricopa County, Arizona, No. 03-005-NAV.* This Court has also reviewed the record below, including the transcript of the evidentiary proceedings before ANSAC, and the Opening, Responsive, Reply, and Amicus Curiae Briefs of all of the Parties. Having taken the appeal under advisement, the Court now makes its findings and conclusions.

On the appeal of an administrative decision, this Court is to decide only whether the action below was illegal, arbitrary, capricious, or involved an abuse of discretion. *Berenter v. Gallinger*, 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App. 1992). The appellate court is not to substitute its judgment for that of the Commission, upholding the Commission's decision if substantial evidence supports it. *Nutek Information Systems, Inc. v. Arizona Corporation Commission*, 194 Ariz. 104, 107, 977 P.2d 826, 829 (App. 1998). Nor does the appellate court attempt to re-weigh the evidence presented below to see if it would "find some evidence more or less persuasive or give it more or less significance" than the Commission below. *Shaffer v. Arizona State Liquor Board*, 197 Ariz. 405, 409, 4 P.3d 460, 464 (App. 2000). "If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion." *Webster v. State of Arizona Board of Regents*, 123 Ariz. 363, 365-66, 599 P.2d 816, 818-19 (App. 1979).

In this case, ANSAC was charged with making a determination regarding the navigability of a 37 mile stretch of the Salt River ("River") from the Granite Reef Dam to the confluence with the Gila River in Maricopa County, Arizona, as of the date of statehood, February 14, 1912. Over the course of three days of public hearings [April 7, 8, 2003, and January 17, 2004], the Commission took testimony and accepted hundreds of pages of documentary evidence which it reviewed in making its determination. The Commission's decision is set forth in a 46-page report in which it concludes as follows:

> [I]n its ordinary and natural condition, even in the absence of the existence of the Roosevelt Dam and reservoir, the Lower Salt River was a braided stream of 2 to 4 channels interspersed by sandbars and sand islands which shift with floods or high flow of water and as such had a configuration that would be impossible to be considered navigable or susceptible of navigability. Accordingly, the Commission finds that the Lower Salt River from Granite Reef Dam to its confluence with the Gila River was not used

> or susceptible of use for commercial trade or travel as of February 14, 1912, and therefore was not navigable as of that date nor was it susceptible to navigation. [September 21, 2005 Report, Findings and Determination at p. 46].

Appellants contend that ANSAC 1) failed to consider the River in its ordinary and natural condition, 2) ignored or misinterpreted evidence concerning the River's ordinary and natural physical characteristics and its actual navigability, and 3) misinterpreted or misapplied the law regarding the "highway for commerce" requirement. In essence, Appellants wants this Court to re-weigh the evidence presented below and substitute its judgment by finding that the evidence rejected by ANSAC is more persuasive. This is not the role of the appellate court, but more importantly, the written decision of the Commission completely undermines Appellants' contention.

Appellants argue that ANSAC should have considered the River's natural and ordinary condition as it existed in the mid-1800s. They did. The following are several examples of ANSAC's consideration of the evidence of the River's natural and ordinary condition as it existed in the mid-1800s:

1) prior to 1870, the Lower Salt River was a perennial stream with an average flow in excess of 1000 cubic feet per second, Report p.4;

2) in 1865-1870, many of the early farmers utilized the existing Hohokam canals for their own irrigation purposes, p. 25;

3) in the 1830's and early 1840's, the trappers did not use boats for travel on the rivers or streams in this area, p. 26;

4) in 1867, Jack Swilling cleared out the old Hohokam canals for irrigation, p.27

5) Swilling's biggest problem was controlling the water in the river that was erratic, unpredictable, often flashy with lots of water in it, and at other times virtually dry. It did not have a steady flow; its flow was highly variable, p.28;

6) The early diversion dams were not permanent, were made of rock, dirt and brush and would wash away in a flood and have to be rebuilt, p. 28;

7) during the historical period from 1867 to statehood there is no record of any sustained commerce, travel or fishing on the lower Salt River, p. 30;

8) in various survey reports from 1865 to 1911, the Salt River was described as separating into two to four channels which constantly shifted and created sandbars, p. 31-32;

9) there is some evidence of recreational fishing, p. 33;

10) there were 16 accounts of boating or floating of logs in (mostly unsuccessful) attempts to use the Salt River for commercial travel between 1873 and 1915, but all occurred during periods of high water. p. 34;

11) at least half dozen ferries operated at heavy flow times between 1860-1915, but the ferries were not used for transportation on the river but merely to cross the river during high water times, p. 36. *see North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992)(where ferries used only to provide transportation across river this fact did not show susceptibility of the river for upstream or downstream commercial use).

All of the evidence set forth above that the Appellants' contend was not considered, plus more, was in fact utilized by ANSAC in applying the *Daniel Ball* test for navigability as codified in A.R.S. § 37-1101 *et seq.*; that is, whether the river at the time of statehood was

> used or susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water. A.R.S. § 37-1101(5). [*See* Report p. 16, 39].

With reference to the Appellants' contention that ANSAC ignored or misinterpreted their evidence of the physical characteristics of the river, the record again undermines their argument. ANSAC spent some time in their decision setting forth their consideration of all of the reports and evidence from all of the experts as to the Hydrology and Geomorphology of the River. [*See* Report at pp. 38-42]. However, Appellants' actual complaint is not that ANSAC did not consider this evidence. Appellants' complaint is that ANSAC gave more weight to the evidence presented by Dr. Schumm, who was not the State's expert. [*See* Report at pp. 40-41, 44].

1) indirect methods such as computing water flow rates on the Verde and Salt resulted in an average flow computed by Mr. Fuller [the State's expert] of 1,445 cubic feet per second ("CFS") and in another study an average annual flow estimate of 1,730 CFS, Report p. 38;

2) ANSAC considered evidence of other court decisions applying the *Daniel Ball* test involving 21 water courses, only 4 of which were found to be navigable with average annual water flows of 2,277 CFS, 7,316 CFS, 6,900 CFS, and 4,066 CFS, respectively...much higher than the estimated average annual flow computed for the Lower Salt River, p. 39.

3) ANSAC found the evidence of average annual flow on the River somewhat questionable with regard to proving navigability since as an average the figures necessarily reflect floods of 100,000 – 200,000 CFS followed by periods of drought where there is hardly any water in the river, p. 44;

4) Doctors Littlefield, Graff, and Ruff agreed with Dr. Schumm's testimony regarding the Lower Salt River being a braided river with sandbars and islands and multiple or compound channels which shifted following each period of flood or high flow. P. 40-41.

An "arbitrary action" has been characterized as "unreasoning action, without consideration and in disregard of the facts and circumstances." *Maricopa County Sheriff's Office v. Maricopa County Employee Merit System Commission,* 211 Ariz. 219, 222, 119 P.3d 1022, 1025 (2005). The record supports this Court's opinion that ANSAC gave substantial consideration to all the facts and circumstances presented to it. The Appellants simply believe that their interpretation of the facts is deserving of more credence than that of the Commission. Substantial evidence exists to support an agency's decision if either of two inconsistent factual conclusions is supported by the record. *Eastern Vanguard Forex, Ltd. v. Arizona Corporation Commission,* 206 Ariz. 399, 79 P.3d 86 (App. 2003).

Finally, Appellants' argue that ANSAC erred in applying the "highway for commerce" requirement within the test for navigability by looking only to examples of actual commerce, travel, and fishing or the absence thereof in determining that the Lower Salt was not susceptible to navigation. As set forth above, it is clear that ANSAC did consider the physical characteristics of the river and its uses by the Salt River Valley inhabitants from the time prior to and including the days of the Hohokam in 1100-1200 A.D. through to the early and mid 1800's up to and through statehood. Clearly, consideration of the examples of actual use of the river in it natural and ordinary condition for boating, logging, fishing, travel, and transportation is appropriate when determining the question of navigability. *See United States v. Utah*, 283 U.S. 64, 82 (1931)(evidence of actual use of streams, especially extensive and continued use for commercial purposes may be most persuasive of the susceptibility of use as a navigable river). However, if the examples of actual use as a highway for commerce are sparse, navigability can still be proved "where conditions of exploration and settlement explain the infrequency or

limited nature of such use." *Id.* Such is not the case here. The evidence overwhelmingly shows that this area was well-populated over the course of more than 1000 years prior to statehood.

ANSAC thoroughly traced, analyzed, and applied the controlling law in its decision. [Report pp. 4-17]. It spelled out and considered in painstaking detail the history of the Salt River Valley through which the Lower Salt traveled. [Report pp. 18-31]. It analyzed and weighed the expert testimony and evidence. [Report pp. 31-33, 38-41, 44]. It considered the personal and anecdotal testimony, along with historical newspaper accounts of the uses of the river. [Report pp. 33-37]. Finally, ANSAC concisely summarized its conclusions and determined that:

> [T]he Lower Salt River from Granite Reef Dam to its confluence with the Gila River was not used or susceptible of use for commercial trade or travel as of February 14, 1912, and therefore was not navigable as of that date nor was it susceptible to navigation.

There is nothing illegal, arbitrary, or capricious about the ANSAC decision, and it does not demonstrate an abuse of discretion.

IT IS ORDERED affirming the decision of the Arizona Navigable Stream Adjudication Commission dated September 21, 2005, in case No. 03-005-NAV.

EXHIBIT 3

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, acting by and through Mark Winkleman, State Land Commissioner and the Arizona State land Department, and DEFENDERS OF WILDLIFE, DONALD STEUTER, JERRY VAN GASSE, JIM VAALER, Plaintiffs/Appellants, vs. ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION; SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT; SALT RIVER VALLEY WATER USERS' ASSOCIATION; ARIZONA STATE UNIVERSITY; CITY OF TEMPE; CITY OF PHOENIX, CITY OF MESA; PHELPS DODGE CORPORATION; MARICOPA COUNTY; CEMEX CEMENT, INC.; GILA RIVER INDIAN COMMUNITY OF CENTRAL ARIZONA; MARICOPA COUNTY FLOOD CONTROL DISTRICT, Defendants/Appellees.	Case No. 1 CA-CV 07-0704 Maricopa County Superior Court No. LC 2006-000413-001DT ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION'S PETITION FOR REVIEW BY THE SUPREME COURT

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Defendant/Appellee, Arizona Navigable Stream Adjudication Commission ("ANSAC" or "Commission"), respectfully petitions the Supreme Court for review of the Decision of the Court of Appeals in the above case filed on April 27, 2010, in which it stated that ANSAC failed to apply the proper legal standard to the evidence presented in determining the Lower Salt River from Granite Reef to the Gila confluence was not navigable or susceptible to navigability as of Arizona's statehood date, February 14, 1912, vacating the Superior Court's decision and remanding for further proceedings.[1] The Court of Appeals erred. ANSAC applied the proper standard.

I. BACKGROUND AND REASON THIS PETITION SHOULD BE GRANTED

The real issue in this case deals with title to over 30,000 parcels of land located in the beds and the banks of various rivers and watercourses. Navigability is merely a vehicle by which property title is determined. If a stream or watercourse was navigable or susceptible of navigability on the date the State entered the union, under the equal footing doctrine, the beds and the banks up to the high water mark pass to the state to be held by the sovereign in a special trust for the benefit of all the people. *Center for Law v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991). If the stream or watercourse was not navigable or susceptible of navigability on the date of statehood,

[1] A copy of the Opinion of the Court of Appeals is attached to this Petition. A separate Appendix to this Petition is also filed concurrently herewith containing a copy of the Commission's Report. Findings and Determination dated September 21, 2005 (A); a copy of the decision of the Superior Court dated August 3, 2007 (B); a copy of the Commission's Motion for Reconsideration (C); and Order denying Motion for Reconsideration (D).

title to the beds and banks remains in such ownership as it was prior to statehood. The Court of Appeals has incorrectly decided an important issue of law that is of statewide interest which leaves the title to these parcels of land clouded.[2] It is important to the people of this state, especially those whose titles are affected, to have a resolution of this matter.

Pursuant to its statutory mandate, Articles 1 and 2, Chapter 7, Title 37, A.R.S., the Commission collected evidence, held hearings and took testimony and conducted a particularized assessment of potential public trust claims on the Lower Salt River as required in *Center for Law v. Hassell, supra*, and found that the Lower Salt River was not navigable or susceptible of navigability as of February 14, 1912. The Superior Court of Maricopa affirmed. The Court of Appeals in its published Opinion states that it does not believe the Commission applied the proper legal test to the evidence presented to it in that it believes the Commission failed to consider the Lower Salt River in its ordinary and natural condition as of February 14, 1912 and vacated the Superior Court's judgment and remanded the case for further proceedings.

II. THE COURT OF APPEALS ERRED IN STATING THAT THE COMMISSION FAILED TO APPLY THE CORRECT TEST IN DETERMINING NAVIGABILITY OF THE LOWER SALT RIVER AS OF FEBRUARY 14, 1912.

What the Court of Appeals did was misconstrue the Commission's "Findings and Determination" and did not consider the entire Report as a whole as Superior

[2] In addition to being an issue of statewide interest, it should be noted that there are five other river cases on appeal backed up behind this case and stayed by stipulation (two in Pima County and three in Maricopa County).

Court Judge Carey Hyatt did at the first level of appeal, affirming the Commission's Report, Findings and Determination.

The Commission did apply the federal test for navigability set forth in *The Daniel Ball,* 77 U.S. (10Wall) 557, 19 L.Ed. 999 (1870), and Arizona statutes because it did properly consider the river's ordinary and natural condition as of February 14, 1912. Basically, the Court of Appeals states that the Commission failed to take into consideration pre-statehood diversion dams and canals other than Roosevelt Dam and Reservoir. The Court of Appeals erred in effectively ignoring key parts of the entire Report, Findings and Determination.

The Court said that since Roosevelt Dam and Reservoir was listed and other diversion dams and canals were not listed in its findings and conclusion, it was apparently the intent of the Commission not to consider them. Roosevelt Dam and Reservoir was only listed because it is the largest of all of the pre-statehood dams on the Salt River and, importantly, is not within the reach of the Lower Salt River. The Court should have considered the entire report to understand that the Commission considered the river in its ordinary and natural condition on February 14, 1912 in its findings and determination and backed out the effect of not only Roosevelt Dam but all other pre-statehood diversions and dams, canals and ditches.

The Commission considered all of the diversion dams and manmade structures that were in existence as of February 14, 1912 and backed out their effect in

determining the ordinary and natural condition of the river on that date. On pages 5 and 6 of its Report, the Commission stated:

> Since the Salt River, at the time of statehood, was primarily used for irrigation purposes, a number of structures were already in place which contributed to the low flow or even dry periods of the Lower Salt River. The following is the list of structures in existence on February 14, 1912, along with a description of where each canal head lies with respect to the Salt River:
>
> [fourteen diversion dams listed] See also Appendix C, p. 4.
>
> Although Roosevelt Dam is not located within the reach of the Granite Reef Dam and its confluence with the Gila River, its presence at the time of statehood was considered in the final determination due to its amelioration of flooding and storage of water for use in low flow periods of the Salt River.

The Court of Appeals states that the Commission should have considered the river in its "ordinary and natural" condition as of February 14, 1912 and, after a discussion of the definition of these terms, which definitions Appellants agree, stated that this condition existed in the mid-1800's. The Commission went to great lengths from the evidence available, to determine the ordinary and natural condition of the river in the period prior to 1867 when Jack Swilling first began diverting water from the river for irrigation.

The Commission considered, among other evidence, Father Keno's trip to the Salt River Valley in 1696 at which time he gave the river its name, Rio Salado; the journeys of the trappers or mountainmen of the 1820's to 1840's were by foot, horseback or mule; the 1852 reconnaissance of the Salt River Valley by a member of

the Boundary Commission; the establishment of Camp McDowell on the Verde River in 1865. Appendix A, pp. 26-29. This same argument that the Commission should have considered the river in its ordinary and natural condition as it existed in the mid-1800's was made to the Superior Court at the first stage of the appeal. Judge Hyatt's Opinion stated that the Commission did, in fact, consider this and listed 11 instances of evidence (Appendix B, p. 3).

With regard to the contention that had the water not been removed from the river, there was sufficient water for the river to be navigable, the Commission looked at the calculations made by various experts that the flow was between 1,445 to 1,730 cubic feet per second (Appendix A, p. 38), but noted that

> [e]vidence was submitted by the Salt River project of federal or state court decisions in which navigability of a river was actually determined using the Daniel Ball test. Four of the 21 water courses listed in the document were found to be navigable in whole or in part by a federal or state court. Of these four navigable rivers, the lowest annual average flow was 2,277 cubic feet per second (CFS) for the great Miami River of Ohio, which was found navigable in part and non-navigable in part. The other three water courses found navigable had average annual flows of 7,316 CFS, 6,930 CFS and 4,066 CFS, all of which are much higher than the estimated average annual flow computed for the Lower Salt River listed above.

Appendix A, p. 39.

Equally important to the flow of water in the river was the evidence of the geomorphology or configuration or characteristics of the riverbed. Dr. Stanley Schumm traced the history of the river from 1868 down to 1912 and afterward. He started with a general land survey made in 1868 and published in map form in 1870 as

to the condition and configuration of the river at that time and then chronologically came forward using various surveys and topographical maps.[3] His description of the Lower Salt River, which was agreed to by Drs. Littlefield, Graff and Ruff, was as follows:

> Well, the question is, what was the river like in 1912. And we do have a little help to help us reach that conclusion. We have the 1870 General Land Office surveys; 1903, 1904 topographic maps; and a 1934 aerial photograph . . .
>
> * * *
>
> And here is a stippled area, a wide portion of the Salt River channel; mild [mile] wide places. Here is the 1903-1904 low-water channel. And then superimposed on this is the channel map by the General Land office surveyors in 1868, published in 1870. And that's the light blue. And you can see multiple channels here, and they extend from the south bank to the north bank, indicating that all of this is channel of the Salt River. So that helps us understand what the Salt River was like in 1870, pretty much before the major divergence and major changes of the river.
>
> * * *
>
> And in this braided river, that flow would shift the bars, erode the islands, erode the banks, change the position of the low water channels and maintain the braided characteristics. So my conclusion is what we see in 1870, 1902, 1903, and 1934 clearly demonstrate that the river has been braided for this entire period of time. And in 1912, it was a wide, braided, low width to depth ratio, dynamic, active river.
>
> * * *
>
> So I guess my conclusion from this is that you folks, when you have water in your river, are dealing with something that's very

[3] Transcript of Record, pp. 190-213; Appendix C, pp. 6-8.

> dynamic, very changeable, and one that I would conclude would not be suitable for navigation.

Appendix **C, pp. 6-7.** It was not the diversions, but the hydrology and geomorphology of the Lower Salt River that made it non-navigable which is what the Commission determined.[4]

The Court's statement that ANSAC has made contradictory findings as to the ultimate question of fact is incorrect. It cites on page 9, ¶ 6, to an earlier statute enacted in 1993 and later repealed by the Legislature under which ANSAC was required to initially classify a watercourse as either having "characteristics" of possible navigability or having no such characteristics. The Commission, as a preliminary procedural matter, voted that the Lower Salt River did have characteristics of possible navigability since it was a river channel and it did have some flow of water on occasion, including unpredicted floods of up to 200,000 cubic feet per second in order to take evidence and consider the natural course and flow of the river. Had it voted that there were no characteristics of navigability, there would have been no purpose in proceeding further with the taking of evidence and the Commission would then be before the Court as having ignored the clear fact that water does occasionally, sometimes in great quantities, flow down the river. This was not a finding on the merits in any way.

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[4] **Pp. 38-42 Report.**

No expert opinion or other evidence of navigability was submitted by the Appellants, proponents of navigability, who had the burden of proof.

III. PRESUMPTION AGAINST DEFEAT OF STATE'S TITLE

One might infer from its Opinion that the Court of Appeals would like to have found the Lower Salt River navigable as of the day of statehood, but could find no evidence supporting that outcome, nor could it find that a preponderance of the evidence favored that outcome. In the first section of its analysis (Opinion, pp. 16-18), the Court deals with a presumption against defeat of a state's title and seems to buy into the Appellants' position that the Commission ignored a strong presumption against defeat of the state's title and, therefore, its finding of nonnavigability must be declared invalid. The Court of Appeals does recognize that the law is clear that the burden of proof rests on the party asserting navigability and that there are no cases to the contrary. Other than showing its bent towards the Appellants' position, it is unclear why the Court of Appeals raised this issue. A review of all of the cases shows that there is no presumption in favor of the state or against defeat of the state's title in this matter at this time. The Court quotes from a statement in its earlier decision of *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 420, 18 P.3d 722, 731 (Ariz. App. 2001):

> Determinations regarding the title to beds of navigable watercourses in equal footing cases must begin with a strong presumption against defeat of the State's title.

Note the underscored portion of this quote – the so-called strong presumption applies only after the watercourse has been found navigable and an issue has been raised

which would divest the state of its title. If a strong presumption against defeat of the state's title exists as to all streams and watercourses without a previous finding of navigability, then every dry wash, arroyo or wadi in Arizona would be presumed to be navigable and owned by the state until some adjudicatory body declared otherwise. This is obviously an absurd result. All of the cases referring to the "strong presumption" dealt with tidelands or inland waters previously determined to be navigable.[5]

This Court, in *Defenders of Wildlife* expressly recognized that a determination of navigability was essential before a state may have any public trust ownership claims to lands in the beds of the particular watercourse.

> The concept of navigability is "essentially intertwined" with public trust discussions and "[t]he navigability question often resolves whether any public trust interest exists in the resource at all." Tracy Dickman Zobenica, The Public Trust Doctrine in Arizona's Streambeds, 38 Ariz.L.Rev. 1053, 1058 (1996). In practical terms, this means that before a state has a recognized public trust interest in its watercourse bedlands, it first must be determined whether the land was acquired through the equal footing doctrine. However, for bedlands to pass to a state on equal footing grounds, the watercourse, overlying the land must have been "navigable" on the day that the state entered the union.

199 Ariz. at 418, 18 P.3d at 729 (also citing *O'Toole*, 154 Ariz. at 45, 739 P.2d at 1362 (Emphasis added)).

The Legislature and the Court of Appeals in *Defenders v. Hull* have recognized that, unless the watercourse was "navigable" at statehood, the State has no "public

[5] *United States v. Alaska*, 521 U.S. 1, 117 S.Ct. 1881, 138 L.Ed.2d 231 (1997), the Court was dealing with tidelands in Alaska which were clearly navigable; *U.S. v. State of Oregon*, 295 U.S. 1, 55 S.Ct. 610 (1935), dealt with a surveyed line through wetlands and various lakes which was supposed to divide navigable and nonnavigable waters.

trust" ownership claim to lands under and along that watercourse. There has been no finding of navigability in this case, so no presumption has arisen and this issue should not be considered (footnote 11, page 17, of the Court's Opinion). The burden of proving navigability by a preponderance of the evidence is upon the proponents of navigability. A.R.S. § 37 1128(A).

Since the river had not been declared navigable, ANSAC did not begin its analysis with a strong presumption in favor of navigability, but considered all of the evidence impartially. As the Court of Appeals states on page 18 of its Opinion, "ANSAC's approach and analysis MUST BE wholly impartial and objective, . . .," in looking at the evidence, weighing the same and determining the preponderance of the evidence. That is exactly what the Commission did.

IV. ATTORNEYS' FEES

ANSAC also objects to and requests that the Court review the award of attorneys' fees and costs on the basis set forth in its Motion for Reconsideration (Appendix C) and its Objection to Statement of Costs.

V. CONCLUSION

For the reasons set forth in this Petition, ANSAC respectfully requests that the Supreme Court review and vacate the Opinion and decision of the Court of Appeals and affirm the Superior Court's decision upholding the Commission's finding of nonnavigability and further disallow the request of Appellees for attorneys' fees and costs.

DATED this _____ day of June, 2010.

JENNINGS, HAUG & CUNNINGHAM, LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14, Arizona Rules of Civil Appellate Procedure, I certify that the foregoing brief uses proportionally spaced type of 14 points or more, is double-spaced using a typeface known as Times New Roman. The brief contains 2,999 words according to the Word software used to create the brief, from the Introduction to the end of the Conclusion.

Dated: June 28, 2010

Curtis A. Jennings

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I caused the original and six copies of the foregoing brief to be delivered/mailed first class mail to:

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, acting by and through Mark Winkleman, State Land Commissioner, and the Arizona State Land Department; DEFENDERS OF WILDLIFE; DONALD STEUTER; JERRY VAN GASSE; JIM VAALER;

Plaintiffs,

vs.

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION; SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT; SALT RIVER VALLEY WATER USERS' ASSOCIATION; CITY OF TEMPE; CITY OF PHOENIX; CITY OF MESA; PHELPS DODGE CORPORATION; MARICOPA COUNTY; CEMEX CEMENT, INC.; GILA RIVER INDIAN COMMUNITY; HOME BUILDERS ASSOCIATION OF CENTRAL ARIZONA; MARICOPA COUNTY FLOOD CONTROL DISTRICT;

Defendants.

No. LC2006-000413-001DT

DEFENDANTS' STATEMENT OF FACTS ON APPEAL

AND

RESPONSE TO PLAINTIFFS' JOINT STATEMENT OF FACTS IN SUPPORT OF THEIR OPENING BRIEFS

(Assigned to the Hon. Douglas L. Rayes)

(Oral argument set for March 23, 2007, at 9:00 a.m.)

This is a judicial appeal of an administrative decision under Title 12, Chapter 7 of the Arizona Revised Statutes (A.R.S. §§ 12-901 to -914) and the Arizona Rules of Procedure for Judicial Review of Administrative Decisions. The facts in this appeal are as found by the Arizona Navigable Stream Adjudication Commission ("ANSAC") in its September 2005 decision. See Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence (September 21, 2005) ("Decision").

Pursuant to the Court's minute entry of August 28, 2006, Defendants Salt River Project Agricultural Improvement and Power District; Salt River Valley Water Users' Association; Phelps Dodge Corporation; Arizona State University; City of Tempe; City of Mesa; CEMEX Cement, Inc.; Gila River Indian Community; and Home Builders Association of Central Arizona hereby submit their Statement of Facts on Appeal in this matter. Defendants submit this statement of facts as a summary of the facts properly found by ANSAC and to comply with the Court's direction in its August 28, 2006 minute entry. By submitting this statement of facts, Defendants do not intend to admit or imply that this case should be resolved on a summary judgment standard pursuant to Rule 56 of the Arizona Rules of Civil Procedure.

Defendants also respond to Plaintiffs' Joint Statement of Facts in Support of Their Opening Brief, filed by Plaintiffs State of Arizona and Defenders of Wildlife, Donald Steuter, Jerry Van Gasse and Tim Vaaler on October 16, 2006 ("PSOF"). All admissions contained herein are for purposes of this proceeding only, and the Defendants expressly reserve their right to contest any and all factual assertions made by Plaintiffs in any future proceeding. Defendants' response to Plaintiffs' statement of facts begins on page 34.

As used herein, "IR" refers to the index of record on appeal. "Tr. at [date: page]" refers to the Reporter's Transcript of the April 7-8, 2003 hearing [IR B].

DEFENDANTS' STATEMENT OF FACTS ON APPEAL

1. In reaching its decision regarding whether the Lower Salt River (from Granite Reef Dam to the Gila River confluence) was "navigable" on February 14, 1912, ANSAC solicited and

received voluminous evidence with respect to the navigability of the Lower Salt River. Over 5,000 pages of documents were filed. See Decision, supra, at 22, Exhibit E.

a. "The written materials and documents submitted [were] approximately three feet thick." Id. at 22.

b. ANSAC held a two-day hearing, the transcript of which consists of 277 pages. See Reporter's Transcript of Proceedings (April 7-8, 2003) [IR B].

History of the Salt River Valley and the Lower Salt River

2. Marshall Trimble, Arizona's official State Historian, has described the Lower Salt River and the Salt River Valley as they existed in the period before statehood:

> The Salt River Valley was an agricultural paradise. It was nestled at the heart of some 13,000 square miles of watershed. However, the Salt River, which meandered through the valley, was as fickle as a stud at a snortin' post. One year it'd run over its banks and flood all the way into the center of Phoenix; the next year would be so dry the cows were giving powdered milk.
>
> In 1891, a flood spread the banks of the Salt River eight miles wide, washing out the railroad bridge at Tempe. Later in the decade, water was so scarce that folks were loading up their belongings and moving on to California. It was said a cactus wren wouldn't attempt to fly across the Salt River Valley without packin' a sack lunch. Those who stayed to await better days patrolled their irrigation ditches on horseback, armed with Winchesters. During the drought, brief but furious flash floods washed out dirt diversion dams, and farmers watched the precious water escape into the Gulf of California.

M. Trimble, Arizona: A Cavalcade of History 259 (1989) [IR D-23].

The prehistoric Salt River

3. "For more than 1,000 years water from the Salt River has allowed civilizations to flourish in the Salt River Valley." JE Fuller/Hydrogeology & Geomorphology, Inc., Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila River Confluence 2-1 (Sept. 1996) [IR D-7] ("Fuller"). Even before the arrival of European settlers, "[t]he Salt River Valley was one of the most densely populated areas in the prehistoric southwest and contained the most extensive irrigation system in prehistoric North America. The prehistoric population served

by the irrigation system has been estimated at between 80,000 and 200,000." Id.; see also Decision, supra, at 24-26, 42.

4. From the beginning of time, the Lower Salt River was subject to alternating periods of floods and droughts. See Tr. at 7:26 (Fuller); see also Fuller, supra, at 2-8.

a. At the hearing before ANSAC, Jon Fuller, the consultant retained by the Arizona State Land Department ("SLD"), testified: "Q. . . . [I]t's pretty clear that at least from the beginning of time as we know it to the time when the first settlers came here, the Salt River was – had variable flows and was subject to some extreme floods and other periods of extreme drought? A. Yes." Tr. at 7:26 (Fuller).

b. "Very high flood flows" existed during the Colonial Period (A.D. 650-900), "washing out prehistoric flood gates and damaging canals." See Fuller, supra, at 2-10.

c. "Major floods, as well as lower-than-normal flows" continued through the Classic Period (A.D. 1100-1350). Id. at 2-12.

5. No evidence exists to suggest that any of the prehistoric inhabitants of the Salt River Valley ever tried to float, or succeeded in floating, boats on the Lower Salt River. See id. at 2-13, 2-17; Tr. at 7:26-27 (Fuller).

Early exploration of the Salt River Valley

6. Francisco Vasquez de Coronado is reported to have used rafts on the Salt River, but Coronado used the rafts only to cross the river (not to travel up or down it), and Coronado's use of the river likely was to the east (upstream) of the reach of the river currently at issue or even on some other river. See Fuller, supra, at 3-6, 3-9.

a. Mr. Fuller's report states: "Byrkit . . . suggests that the Salt River was the river Coronado crossed using rafts, but most reconstructions of Coronado's route place this crossing to the east of the study area." Id. at 3-9.

b. Mr. Fuller testified:

Q. It's my understanding from your report that Coronado, if he did use rafts on the Salt River, used them to cross the river, not necessarily to make his voyage easier by going up or down the river, is that right?

A. That is my understanding.

Q. In fact, on page 3-9 of your report, you seem to say that – looks like it's possible, at least, or perhaps likely that Coronado's use of the rafts actually occurred upstream from Granite Reef Dam, so they wouldn't be in the study reach that we're talking about here?

A. Yes. It's also my understanding that there is some controversy on whether it is actually the Salt.

Tr. at 7:29-30 (Fuller).

7. Trappers such as James Ohio Pattie and Ewing Young have been reported to have traveled along the Salt River, but all indications are that their travels were by foot or on horseback, not in boats or canoes. See Fuller, supra, at 3-10; Tr. at 7:33 (Fuller); Decision, supra, at 26. Mr. Fuller testified:

Q. In the section on trappers, you talk about James Ohio Pattie and Ewing Young. Sometimes you talk about them going up the Salt. Do you see that?

A. Yes.

Q. And that's another instance, isn't it, where it looks like those folks were going up along the Salt, not necessarily in a canoe or boat?

A. That's correct.

Tr. at 7:33 (Fuller).

8. In 1849, Lt. Beckwith traveled from present-day New Mexico to the Lower Colorado River, and a portion of his route included the Salt River. His travels along the river were by foot or on horseback, not in a boat or a canoe. See Fuller, supra, at 3-10; Tr. at 7:33 (Fuller). Mr. Fuller testified: "Q. . . . You talk about Lieutenant Beckwith, in 1849, going down

the Salt River to the Colorado. He wasn't necessarily going in a boat, was he? A. My understanding is that he was not." Tr. at 7:33 (Fuller).

9. The United States Army kept a boat at the McDowell Crossing as early as 1867, but that boat was used only to cross the river during floods. See Fuller, supra, at 3-1.

a. Mr. Fuller's report states: "As early as 1867, the United States Army kept a boat at the lower crossing of the Salt River so that this transportation route could be kept open when the Salt River flooded." Id.

b. That report further states: "Heavy rains caused flooding in the Salt and Gila rivers, cutting off communication with the outside world. A boat, built for such emergencies, at the lower crossing of the Salt was carried away by the rising waters." Id. at 3-24.

c. Mr. Fuller testified: "Q. It's pretty clear for me that in the rest of your report, isn't it, that the purpose of leaving that boat there was to cross the river when it was flooded and not necessarily to go up and down the river, is that right? A. That's right." Tr. at 7:24 (Fuller).

10. No evidence exists to show that the Army's boat was ever used to travel or transport goods or supplies up or down the river, even though one of the reasons for the location of Phoenix was to supply agricultural products to the soldiers at Fort McDowell. See Fuller, supra, at 3-1, 3-24; Tr. at 7:24 (Fuller).

11. In 1826, the Salt River ("especially in the stretch from the Gila to the Verde") was "abounding" with beavers. Fuller, supra, at 3-6; Tr. at 7:30-31 (Fuller).

12. The "abundant" presence of beavers, Nature's own dam builders, would have been a natural impediment to navigation. See Tr. at 7:30-31 (Fuller) ("[I]t would be an obstruction.").

13. In 1894, the Army Corps of Engineers considered the possibility of whether the Salt River was navigable. Lt. Col. W.H. Benyaurd "determined that the Gila, Salt, and their tributaries 'are not navigable waters of the United States.'" D. Kupel, Historical and Scientific Evidence Concerning Navigability of the Lower Salt River 15 (April 2003) [IR D-29] ("Kupel"). In 1895,

the Advocate General of the War Department forwarded that finding by the Army Corps of Engineers to the Secretary of War. Id.

Federal land surveys and patents

14. Federal land surveyors, who were present in the Salt River Valley at a relatively early date and who were responsible for conducting the rectangular survey in the new territory, were under specific instructions to distinguish between navigable and non-navigable streams. See D. Littlefield, Assessment of the Salt River's Navigability Prior to and On the Date of Arizona's Statehood 11-27 (December 5, 1996) [IR D-16]; Tr. at 7:167-71, 175-77 (Littlefield).

15. None of these Government representatives ever once indicated that the Lower Salt River was navigable. See Littlefield, supra, at 27-50.

16. "Significantly, while those surveys were done at varying times of the year, in different years, and by several individuals, all of the descriptions and plats that resulted from this work consistently portrayed the Salt River as being a non-navigable stream." Id. at 51.

17. The Federal Government granted over 225 separate patents that touch or overlay the Lower Salt River to private individuals. See id. at 113; Tr. at 7:171-75 (Littlefield); Decision, supra, at 32.

18. In not one case did any of those patents (or the supporting patent files) indicate that acreage was being withheld because the river was navigable. See Littlefield, supra, at 113; Tr. at 7:172 (Littlefield).

19. None of the patents issued by the State of Arizona to private parties reserved lands because the river was navigable or otherwise indicated that the river might be a "highway for commerce." See Littlefield, supra, at 113-14; Tr. at 7:173 (Littlefield); Decision, supra, at 32.

20. Dr. Douglas Littlefield, summarizing his conclusions based upon hundreds of hours of historical research (including survey records, land patents, other government documents, and newspapers), stated: "From this wealth of information, covering the huge array of documentary sources, only one conclusion can be reached: The Salt River was not navigable on or before February 14, 1912." Littlefield, supra, at 223; see also Decision, supra, at 31-32, 43.

The Lower Salt River from the 1870s to 1911: Water storage efforts

21. Much of the local community's energy during the period prior to statehood was focused toward building a water storage project, so that the landowners could "take control of the unpredictable waterway." See LeRoy, "Salt River Centennial," Phoenix Magazine 67 (February 2003) [IR D-24]; see also Tr. at 7:217-18, 229-30 (Roberts); Decision, supra, at 28-30.

22. That water storage project, completed after decades of fits and starts, became the Salt River Federal Reclamation Project, one of the first Federal Reclamation projects undertaken after passage of the 1902 Reclamation Act:

> For Valley residents, the [completion of Roosevelt Dam] was the culmination of years of work and planning. The temperamental Salt River had vexed farmers with alternative floods and droughts. In February 1903, a group of local farmers hoped to turn the tide by forming the Salt River Valley Water Users' Association. They pledged more than 200,000 acres of their own land as collateral for a government loan to build the massive dam, which would control the river's erratic flow, generate electric power and provide a water reserve. The plan was called the Salt River Project.

LeRoy, supra, at 68; see also Trimble, supra, at 259-61; Decision, supra, at 28-30.

23. Several things had to happen before the Federal Government could build Roosevelt Dam, the cornerstone of the Salt River Federal Reclamation Project. (Roosevelt Dam is located at the confluence of the Salt River and Tonto Creek, upstream from Granite Reef Dam.) See K. Smith, The Magnificent Experiment: Building the Salt River Reclamation Project, 1890-1917 72 (1986) [IR D-24].

24. First, a local entity needed to be created to contract with the Government on behalf of the landowners. The Salt River Valley Water Users' Association became that entity. See Tr. at 7:231 (Roberts).

25. Second, the Government needed to obtain lumber to build the framework for the masonry dam. A sawmill was constructed in the Sierra Ancha Mountains, upstream from the dam site. See Smith, supra, at 72-73; see also E. Zarbin, Roosevelt Dam: A History to 1911 89 (1984) [IR D-24].

26. A road was constructed to cover the twenty-three miles from the sawmill to the dam: "The lumber road was, by necessity, the first piece of construction on the project; wood was needed for construction of the permanent camp, culverts, and bridges for the roads, tunnel timbering, and building forms for concrete structures." Smith, supra, at 73; see also Zarbin, supra, at 75.

27. The historical record contains no mention of floating the timber necessary for dam construction downstream on the river. Rather, all of the timber was transported from the sawmill to the dam site using the lumber road. See Smith, supra, at 73; Zarbin, supra, at 75.

28. Third, the Government had to figure out a way to get workers and supplies from Phoenix to the dam site. "[N]o freight road existed from the construction site to Mesa . . . , and the road to Globe was treacherous, winding through several mountain ranges." Id.

29. The Government constructed the Apache Trail (initially known as the Roosevelt Road), a remote, twisting route from Mesa to Roosevelt, including a stretch of eleven miles "in very rough country known as Fish Creek Hill." Zarbin, supra, at 76; see also Smith, supra, at 75. Photographs of construction and early use of the Apache Trail appear in Zarbin, supra, at 91, 114, 133, and 146.

30. Construction of the road required the work of at least 200 men and involved a "3,700-foot-long crossing over Tonto Creek and the removal of rock and other material eighteen to twenty miles, primarily by hand." Smith, supra, at 75; Zarbin, supra, at 77. These difficulties made construction of the road extremely expensive. The total cost of building the road was $350,644, in 1900s dollars. See Zarbin, supra, at 104; see also Smith, supra, at 76 (some portions of the road cost as much as $25,000 per mile).

31. Among the biggest difficulties in the road construction were the alternating periods of floods and droughts. See Zarbin, supra, at 90, 96; Smith, supra, at 75.

a. In 1904, "[t]he greatest obstacle to all of the road work . . . was the drought. The problem was getting water to the workers." Zarbin, supra, at 90.

b. That same road was "heavily damaged by flooding" in the spring and fall of 1905. See Smith, supra, at 75.

c. At one point in February 1905, the road was covered by water fifteen feet deep. See Zarbin, supra, at 96.

32. No evidence exists in the record that the Government ever seriously considered transporting workers or supplies up the Salt River using water-borne vessels. See generally Tr. at 7:124-26 (August), 7:234 (Roberts).

a. Regarding the Apache Trail, Dave Roberts, Manager of Water Rights and Contracts at the Salt River Project, testified:

> All that was up there at the time were horse trails. And so, how to get men and material up in that area and to be able to have an area that you could communicate back downstream with folks that were working on the project, as well as being able to have material come up to the dam site, was a real tricky issue for these folks.
>
> All the evidence that we have seen is they never considered using the Salt River to take material up there. They went to the expense – and at that time, the Apache Trail cost more than $300,000 to construct. And if you have ever been on it, you know how treacherous it is. They lost a lot of lives – or, several lives in the construction of that trail.

Tr. at 7:234 (Roberts).

b. Historian Dr. Jack August testified: "So the Salt River was not viewed – and certainly Arthur Powell Davis, director of the [federal] reclamation service [which constructed the dam], entered discussion rather early on, by the way, and he liked the idea of the road, but he never considered using the Salt to carry men and material to the site." Tr. at 7:125 (August); Decision, supra, at 31.

33. Even a ferry boat that was later used on Roosevelt Lake was brought in by rail and then transported overland by wagon to the lake. See Littlefield, supra, at 168-69; Tr. at 7:166 (Littlefield). Historian Dr. Douglas Littlefield testified: "So they brought the boat by wagon to Phoenix and then continued to carry the boat by wagon up the Apache Trail to Lake Roosevelt . . .

. And certainly they would have used the river if the river had been capable of navigation." Tr. at 7:166 (Littlefield).

34. During the period prior to the completion of Roosevelt Dam in 1911, the river remained subject to alternating periods of devastating floods and prolonged droughts. See Fuller, supra, at 3-8; Tr. at 7:32-33 (Fuller), 7:109-12 (August); Decision, supra, at 29.

a. For example, major floods hit the area in 1890 and 1891. "Severe" and "extreme" drought plagued the Valley from 1897 to 1904. Flooding returned again in 1905. See Fuller, supra, at 3-8; Tr. at 7:32-33 (Fuller), 7:109-12 (August).

b. Dr. August testified:

> It was an erratic and unpredictable stream, described by contemporaries as, and I quote: The biggest flood of the Salt River that had ever been known. The 1891 flood erased two decades of human effort and toil at the edge of the Salt River – and including the Hayden properties, by the way, was – the old Monti's La Casa Vieja was there, all those properties.
>
> . . .
>
> And then, . . . a drought occurred in 1897. . . . It was kind of a cruel irony after the flood that there was a drought. Really, some say it lasted 10 years. I'll quote from one of Hayden's friends: The big drought started in the 1890s and extended to 1903, practically 10 years.
>
> . . .
>
> Certainly by 1897, some consider that one of the worst years of the drought. Water scarcely trickled in the Salt River; crops failed. There were water shortages for livestock, for domestic use, and the local economy virtually ground to a halt.
>
> The following year, 1898/1899, the desert began reclaiming the Haydens' previously green fields, livestock died, settlers began moving out of the region, and many people abandoned what was prosperous farms. It was a bad time. Those who stayed basically prayed or hoped for some kind of change in the weather.

Tr. at 109-12 (August).

Attempts to boat the Salt River near statehood

35. In May 1873, two men allegedly transported a flat boat down the Lower Salt River from Hayden's Ferry to the Swilling Canal. See Fuller, supra, at 3-18, 3-19; Tr. at 7:39-41 (Fuller); Decision, supra, at 35.

a. The support for this boating account is limited to one 1873 newspaper article that consists of forty-five words. See Fuller, supra, at 3-18, 3-19; Tr. at 7:39-41 (Fuller).

b. This trip went a distance of no more than one to two miles and happened at a time of year that typically is subject to relatively higher spring runoff. See Fuller, supra, at 3-18, 3-19; Tr. at 7:39-41 (Fuller); id. at 7:221 (Roberts); Decision, supra, at 5 (head of the Swilling Canal was located near present-day 56th Street).

36. In June 1873, Charles Hayden and others attempted to float logs down the Salt River to establish a lumber mill at Tempe. See Fuller, supra, at 3-18, 3-19; Tr. at 7:42-43 (Fuller).

a. The trip involved "much toil and difficulty, on account of rapids and boulders in the river." The Hayden party itself "pronounce[d] the scheme a failure." The group "lost their arms, ammunition and provisions, excepting flour." At one point, they came to a canyon so narrow that a log could not pass through it. Eventually, they "were compelled to abandon their boat and foot it." See Fuller, supra, at 3-18, 3-19; see also Tr. at 7:42-43 (Fuller).

b. When Charles Hayden constructed his house, known as La Casa Vieja in Tempe in the 1870s, "he had all the finished and unfinished lumber for its construction delivered from Prescott by mule team." D. Kupel, Historical and Hydrological Analysis of the Salt River with Reference to Navigability 29 (December 6, 1996) (citing "Trip to Ancient Landmark in Tempe is Interesting Motor Tour," Phoenix Evening Gazette, Nov. 5, 1930) [IR D-18]).

c. Dr. Jack August, who has conducted extensive research on the life of Senator Carl Hayden and written his biography, testified at the hearing that Senator Hayden "always laughed about the 1873 attempt by his father to move those logs down, and what a disaster it really was." Tr. at 7:114 (August).

37. A February 17, 1881 newspaper reported that two men "will leave to-morrow" on a trip to Yuma down the Salt and Gila Rivers. See Fuller, supra, at 3-19; Tr. at 7:43-44 (Fuller).

a. Nothing in that newspaper article (or from any other source) indicates whether the trip actually occurred. See Fuller, supra, at 3-19; Tr. at 7:43-44 (Fuller).

b. Regarding this incident, Mr. Fuller testified: "Q. And there is no follow-up story to say if they actually left or they actually survived? A. None that I'm aware of." Tr. at 7:44 (Fuller).

c. This trip, if it occurred, happened during a month of relatively high runoff. Tr. at 7:44 (Fuller).

38. In November or December 1881, Bucky O'Neill and two other men initiated the somewhat infamous "Yuma or Bust" expedition. See Fuller, supra, at 3-20; Tr. at 7:44-45 (Fuller).

a. The boat "busted" near Gila Bend, with the crew "enduring great hardships" and "being compelled to wade in the water the greater portion of the time and push the craft ahead of them." See Fuller, supra, at 3-20.

b. A November 30, 1881 Phoenix Gazette article reported that the party was seen "yesterday, only twelve miles from here, all wading in mud and water up to their knees, pulling their boat, and apparently as happy (?) as mudturtles." See Fuller, supra, at 3-20 (question mark in original); Tr. at 7:44-45 (Fuller).

39. Another account of attempted boating on the river near statehood is mentioned in what appears to be Mr. Jim Meadows' obituary in 1909, which states that Mr. Meadows and three other men floated the river from near present-day Roosevelt Dam to Tempe in 1883. See Fuller, supra, at 3-20, B-4; Tr. at 7:45-46 (Fuller).

a. No contemporaneous report of this attempt has been located. See Tr. at 7:45-46 (Fuller).

b. Regarding this incident, Mr. Fuller testified: "Q. So there is nothing that we know of – no contemporaneous 1883 newspaper article that talks about this trip number 5? A. None that I'm aware of. Q. And the 1909 article doesn't say what time of year it was? A. Again, not that I'm aware of." Id. at 7:45-46 (Fuller).

c. The 1909 article recounts difficulties the crew experienced, stating: "In passing through the second box [canyon,] they got hung upon the rocks and had to roll more rocks into the water to raise the water high enough to float the boat clear." Fuller, supra, at 3-20.

d. Nothing in the 1909 article indicates what time of year this alleged 1883 trip took place (if it did take place) or whether it occurred during a flood. See Fuller, supra, at 3-20, B-4; Tr. at 7:45-46 (Fuller).

40. In February 1883, a local newspaper article stated that the "Salt River is a navigable stream and should be included in the river and harbor appropriation." See Fuller, supra, at 3-20.

a. The river was not, however, included in any appropriation under the federal Rivers and Harbors Act. Nothing in the record suggests that the river was ever seriously considered for such a federal appropriation. See Tr. at 7:47-48 (Fuller).

b. Nineteenth-century Western newspapers often acted not only as reporters of news but also as "boosters" for the local community in an effort to attract settlers to growing towns. See Littlefield, supra, at 156; Tr. at 7:164-66 (Littlefield). These early newspapers had substantial incentive to exaggerate the benefits of their local communities. See Littlefield, supra, at 156; see also Fuller, supra, at 3-20; Decision, supra, at 32. Another historian reports that "[t]he fact that such attempts were recorded in the local newspapers shows that such incidences were rare, often dangerous, and thus newsworthy." See E. Lacy, A Historical Analysis of Portions of the Salt and Gila Rivers, Arizona 32 (attached as Exhibit 2 to IR D-18).

c. The same 1883 article reports on a purported trip from McDowell to a pier on the Salt River Valley Canal. See Fuller, supra, at 3-20; Tr. at 7:47-48 (Fuller).

d. The trip was reportedly made in a "canvas skiff." See Fuller, supra, at 3-20; Tr. at 7:47-48 (Fuller).

e. This trip, if it occurred, happened during a month of relatively high runoff. Tr. at 7:47-48 (Fuller).

41. In June 1885, five men attempted to float a boat on the river as an experiment to see if logs could be successfully floated down the river. See Fuller, supra, at 3-21; Decision, supra, at 35.

a. "The rapids with numerous projecting boulders [made] the trip a hazardous one," and, "on one occasion, they were wrecked, losing provisions, fire arms, etc." Fuller, supra, at 3-21.

b. Regarding this incident, Mr. Fuller testified: "Q. And this is another time where the boat flipped over, and they lost a bunch of their supplies? A. That's what the article says, yes." Tr. at 7:49 (Fuller).

c. Another article regarding this failed experiment states: "The boat on one occasion shot under a cave, but a few feet high, and where its inmates commenced to fear that the end had come; here the fish were so that thick the boat floated on their backs. They expected every minute to strike a waterfall and have their boat dashed to pieces, as they feared when they shot the cave." Fuller, supra, at 3-21 to 3-22.

d. Nothing in any of the newspaper articles, which refer to the five men as "daring adventurers," suggests that these individuals actually floated logs down the river, as opposed to simply trying to float a boat and investigate whether logs could be floated. See Fuller, supra, at 3-21, 3-22; Tr. at 7:48-50 (Fuller).

e. Mr. Fuller testified: "Q. . . . [T]his is a situation where those folks tried to float a boat down the river – didn't necessarily take the logs with them at the time – just to see if they could at some time float logs down the river? A. That is my understanding." Tr. at 7:48 (Fuller).

42. In December 1888, two soldiers from Fort McDowell tried to float a canoe on the Verde and Salt Rivers to the Mesa Dam. See Fuller, supra, at 3-21.

a. One of the soldiers was killed when he accidentally shot himself while lifting the boat over a dam. See Fuller, supra, at 3-21.

b. The exact location or length of the trip is uncertain. See Tr. at 7:51 (Fuller).

c. Mr. Fuller testified: "Q. . . .We don't really know how far on the Salt this trip actually occurred? A. No." Tr. at 7:51 (Fuller).

d. There was a major flood of more than 43,000 cubic feet per second ("cfs") in 1888. See Fuller, supra, at 3-20, 7-21 (Table 28); Tr. at 7:50-51 (Fuller).

43. In January 1889, a ferry boat broke loose from the Maricopa Crossing and floated downstream on the Gila River until it "came in contact with a willow snag just in the middle of the river." Fuller, supra, at 3-22.

a. The newspaper account of this incident states: "The current of the river being about the rate of fifteen miles per hour[,] the five men lost control of her and she struck the snag. She was cut in two parts as if she had come across a buzz saw. She is a total loss." Fuller, supra, at 3-22.

b. Most or all of this trip likely occurred on the Gila River, not the Salt River. See Tr. at 7:52 (Fuller).

c. A major flood occurred on the Salt River in the spring of 1889, with a maximum recorded flow rate of 33,794 cfs occurring on March 17, 1889. See Fuller, supra, at 7-21; Tr. at 7:52-53 (Fuller).

44. A modern-day historian thinks he remembers seeing a newspaper article from 1890 or 1891, indicating that logs or sawn timber from Fort McDowell were floated down the Verde River to be used in constructing headgates for the Consolidated Canal. See Fuller, supra, at iv, 3-23; Tr. at 7;24-25 (Fuller).

a. No such article has ever been found. See Fuller, supra, at 3-23; Tr. at 7:24-25 (Fuller).

b. Even the historian's recollection, as described in Mr. Fuller's report, does not indicate that the timber was actually floated on the Salt (as opposed to the Verde) River. See Fuller, supra, at 3-23; Tr. at 7:24-25 (Fuller).

c. Furthermore, even if this recollection were correct and documented, nothing exists in the record to show that this event did not occur during the major flood in 1890 (143,288 cfs on February 22, 1890) or 1891 (285,000 cfs in February 1891). See Fuller, supra, at 7-22 (Table 7-16); Tr. at 7:24-25, 7:53-54 (Fuller).

45. In February 1895, two men allegedly boated down the San Francisco River to Clifton, down the Gila River to Sacaton, and then down the Salt and Gila Rivers to Yuma. See Fuller, supra, at 3-23.

a. This trip, if it did occur, was taken in close proximity to the flood in the winter of 1895 (82,994 cfs on January 18, 1895). See Fuller, supra, at 3-22, 7-21 (Table 28); Tr. at 7:54-55 (Fuller).

b. Regarding this incident, Mr. Fuller testified: "Q. Again, another instance of where somebody tried to put a boat in the river in what appears to be a flood? A. It's certainly near the time of the flood, yes." Tr. at 7:54-55.

46. In December 1905, two engineers from the Federal Reclamation Service, inspecting certain facilities on the Lower Salt River, tried to travel by boat on the river. See Fuller, supra, at 3-23.

a. Mr. Fuller's report quotes from the newspaper article recounting this incident:

> They found the Salt river a poor stream for navigation, however, and in the voyage of a mile they were shipwrecked twice, though without loss of life or property. In the first incident the boat went on a rock in a rapid and the next time stuck on a sandbar. On one occasion it threatened to turn over, but was righted with a little difficulty. They finally made a landing a little above the Consolidated [Canal] head and after a walk of perhaps a mile met Dr. Chandler, who drove them to Mesa.

Fuller, supra, at 3-23.

b. The engineers later resumed their inspection on horseback. See Littlefield, supra, at 160.

c. These two individuals encountered these difficulties with exposed rocks and sandbars despite the fact that the river was almost certainly at or near record flood stage. The newspaper account of their expedition is dated December 9, 1905. One of the largest floods on record for this period occurred in late November and early December 1905, with a maximum recorded flow of 199,500 cfs on November 27, 1905. See Fuller, supra, at 3-23, 7-21 (Table 28); Tr. at 7:55-57 (Fuller) ("Q. And 199,500 cfs is a lot of water? A. It's a big flood."); Littlefield, supra, at 160.

47. In March 1905, Jacob Shively reportedly constructed a boat at a lumber company in Phoenix, "intending to float it to Yuma." Fuller, supra, at 3-23.

a. "On March 29, it was reported that Shively and his boat had been sighted at Arlington and Buckeye and were headed for the Wolfley dam." Fuller, supra, at 3-23.

b. The only locations at which this craft is reported to have been spotted are on the Gila River, not the Salt River, so no evidence exists to indicate that this boating effort actually involved the Salt River. See Fuller, supra, at 3-23; Tr. at 7:57-58 (Fuller).

c. Mr. Fuller testified: "Q. So there's nothing in the article, except for the fact that the boat was built in Phoenix, that actually says these folks were traveling on the Salt River? A. That's correct." Tr. at 7:57-58 (Fuller).

48. In February 1905, a boat was used to rescue people on the Salt River during a flood. See Fuller, supra, at 3-23; Tr. at 7:58-59 (Fuller).

a. The first boat, piloted by John Tizler, "struck a barbed wire fence and capsized. Tizler was drowned." Fuller, supra, at 3-23. A second boat was sent to rescue his wife. See Fuller, supra, at 3-23; Tr. at 7:58-59 (Fuller).

b. The sheriff, who coordinated the rescue efforts, "believed the river so dangerous that he said he would not undertake a similar venture for $500." Littlefield, supra, at 160.

49. In June 1910, two men reportedly took a rowboat from Roosevelt Dam to Granite Reef Dam, and then to Mesa via the South Canal. See Fuller, supra, at 3-23.

a. No portion of this trip occurred on the reach of the Lower Salt River that is at issue in this proceeding. See Tr. at 7:60 (Fuller).

b. Mr. Fuller testified: "Q. So these folks never traveled on the reach that we are here to talk about today? A. No." Tr. at 7:60 (Fuller).

c. "The row boat which was used throughout the journey was in a very dilapidated condition at the end of the trip. Before the start was made three bottoms had been placed in the craft and one of these bottoms had been worn through by the constant friction of the boulders and sands found in shallow waters." Fuller, supra, at 3-23.

d. On several occasions, "the men were compelled to lift their craft from the water and carry it over obstacles and at other times to haul it along the stands." Fuller, supra, at 3-23.

e. The newspaper article reporting on their adventure expressly states that they "have no serious intention of attempting to go into competition with the stage company." Fuller, supra, at 3-23.

f. This trip was undertaken in relatively close proximity to the flood of 1910, which included a maximum recorded flow rate of 294,000 cfs on January 2, 1910. See id. at 7-21 (Table 28); Tr. at 7:59-61 (Fuller).

50. In January 1915, according to one newspaper account, a boat was used to rescue people from the flooded Salt River. See Fuller, supra, at 3-23.

a. The newspaper article does not specify where on the Salt River the rescue occurred, so it cannot be determined whether this event took place in the reach of the Lower Salt River at issue. See Fuller, supra, at 3-23; Tr. at 7:61 (Fuller).

b. Mr. Fuller testified: "Q. And there is no indication in the report where on the Salt River this was? A. No." Tr. at 7:61 (Fuller).

Fishing on the Salt River

51. No evidence exists that any person ever used a boat to fish on the Lower Salt River. See Fuller, supra, at 3-15, 3-16; Decision, supra, at 37-38.

52. Two newspaper articles "mention fish being supplied to local markets," but nothing in the record supports a conclusion that these fish came from the Salt River. See Fuller, supra, at 3-16; Tr. at 7:34-35 (Fuller). Mr. Fuller testified: "Q. So even though it's in the Phoenix paper, they could have not been fishing in the Salt River? A. I don't know." Tr. at 7:34-35 (Fuller).

53. Another newspaper article states that "restaurants occasionally furnish their boarders with excellent fish caught in the Salt River." See Fuller, supra, at 3-16.

54. At least one newspaper article states that the supply of fish was obtained at a time when the river was "very low, and the pools [were] well filled with fish." Id. at B-7.

The Salt River ferries

55. Hayden's Ferry, a cable ferry which operated near present-day Mill Avenue in Tempe, is the best known of the ferries that operated at some times of some years on the Salt River. See Fuller, supra, at 3-7; Tr. at 7:31 (Fuller); Decision, supra, at 30.

a. "Hayden's Ferry was used only when high water impeded fording the river." Fuller, supra, at 3-7.

b. The ferry "was carried downstream several times during flooding." Fuller, supra, at 3-7.

56. Regarding Hayden's Ferry, Mr. Fuller's report states:

> When the Salt River was at a high stage, travelers depended on Hayden's Ferry to transport their teams and wagons across the swollen river. The wood ferry boat ran from the northwest base of the butte to the north bank of the river by cable on poles. By lowering the boat's rear end, the current would swing it across the stream.

Fuller, supra, at 3-7.

57. "Probably most of the ferries operated on the Salt River were short-lived, expedient ventures, that were mentioned in the papers only when they first went into service." Fuller, supra,

at 3-26; Tr. at 7:38 (Fuller); Decision, supra, at 36. At the hearing before ANSAC, historian Dr. Jack August testified as follows regarding Hayden's Ferry:

> In fact, they never really made money off it, per se. It helped him [Charles Turnbull Hayden, father of Carl Hayden] gain an economic toehold in the region in the 1870s. But in fact, perhaps more than anyone else, Carl Hayden, on his reminiscences, said that the Salt River served as a barrier rather than a corridor for transportation. . . . It indicated that the river served neither commercial nor, in fact, navigable purposes. In fact, this mode of crossing the river was seasonal, at best, and more often than not, it was episodic.

Tr. at 7:113 (August).

58. The location of Hayden's Ferry was not coincidental.

a. Geomorphologist Dr. Stanley Schumm testified at the hearing before ANSAC regarding the "Tempe constriction," an outcropping of bedrock in the river near the former location of the ferry. See Tr. at 7:198-99 (Schumm); see also S. Schumm, Geomorphic Character of the Salt River (March 2003) [IR D-26].

b. Mr. Fuller testified that "[t]here is the bedrock that crops out of the surface or near the surface near Tempe Butte; forms somewhat of a divide in the river." Tr. at 7:14 (Fuller).

59. The constriction forces groundwater to the surface and also narrows the width of the channel. These two factors combined to make the Hayden's Ferry site an excellent location to cross the Lower Salt River. See Tr. at 7:198-99 (Schumm).

a. Hydrologist Allen Gookin testified on this issue at the hearing before ANSAC:

> Now, the geology of this region is such that the river regained flow at a location approximately where the Mill Avenue Bridge stands today. The reason that the river gained flow is the same reason that Mill Bridge exists where it is today: Bedrock comes nearer to the surface.
>
> They built Mill Bridge there because they could put the pilings in the bedrock – which is, incidentally, why it stood up during the floods when all the new ones fell down – and the water comes up because of that bedrock formation. It is not purely coincidence that that's where Hayden's Ferry was, because that was a

wetter spot in the river than the river naturally would have been, due to the geology of that area.

Tr. at 7:144-45 (Gookin).

b. In a 1988 publication, former Arizona State University geomorphologist Dr. William Graf stated: "The Salt River is constricted here by Tempe Butte on the south and the Papago Hills on the North. . . . The Salt River is effectively narrowed at Tempe Crossing, which makes it an ideal location for a ford and bridge crossing." W. Graf, The Gila and Salt Rivers in Central Arizona: A Geographic Field Guide 105 (1988) [IR D-23].

c. In a 1971 publication, Dr. Paul Ruff, then an Associate Professor of Engineering at Arizona State University, stated: "The constriction of the Salt River channel as it passes the Tempe Butte and the conglomerate outcropping to the north . . . in effect produces a gorge. . . . In this region of the Salt River, the flow of water is pooled . . . ." P. Ruff, A History of the Salt River Channel in the Vicinity of Tempe, Arizona, 1868-1969 8 (1971) [IR D-23]. The 1971 report by Dr. Ruff [IR D-23] also contains numerous photographs showing the Tempe constriction.

60. The physical features of the Tempe constriction did not (and do not) cover any significant length of the river. The braided nature of the channel is present just upstream and downstream from the Tempe constriction. See Slides Presented by Dr. Schumm at hearing on April 7, 2003 [IR D-51].

61. The physical nature of the Hayden's Ferry location was relatively unique among other locations on the river. See Tr. at 7:198-99 (Schumm).

62. In 1881, "[s]everal times floods washed out the cable supports on the north side of the river and took the ferry downstream. Hayden had only to send a team of horses downstream to haul the boat back because it would only float a few miles before landing on a sandbar." Fuller, supra, at 3-7; see also Tr. at 7:32 (Fuller), 7:114 (August); see also Decision, supra, at 30.

a. The boat apparently could float relatively well across the river at the point of the constriction in times of high water, but could not float very far up or down the braided channel

(even at high water) without getting stuck on a sandbar or other obstruction. See Fuller, supra, at 3-7.

b. Mr. Fuller testified: "Q. . . . [Your report] talks about Hayden's Ferry sometimes, during floods, washing out. And it says, actually, doesn't it, that Hayden – most of the times the ferry got stuck on a sandbar someplace not very long down the river, and all Hayden had to do was send horses down to pick up the ferry? A. When it broke loose, yes." Tr. at 7:32 (Fuller).

63. Mr. Fuller further testified: "Q. The river, for purposes of those main transportation routes, as you have talked about in your report, really was an impediment that needed to be crossed by the ferry? A. It would be an obstacle, yes." Tr. at 7:72 (Fuller).

64. Furthermore, other historians report that the "last known use of a ferry on the Salt River occurred in 1909." See Kupel, supra, at 7 (citing E. Lacy et al, A Historical Analysis of Portions of the Salt and Gila Rivers, Arizona (February 1987) and M. McCroskey, The Great Ferry War of 1905 and Other Adventures on the Gila River, Arizona, The Smoke Signal (1988)). The ferries are proof that "the Salt River served as a barrier rather than a corridor for transportation." Tr. at 7:113 (August); see also Decision, supra, at 30-31, 36.

The Lower Salt River after completion of Roosevelt Dam in 1911

65. The purpose of constructing Roosevelt Dam was to capture the extreme flood flows and to store the water for use during the alternating periods of floods and droughts. See D. Roberts, The Historical Development and Use of Water from the Salt River in the Salt River Valley 29 (April 7, 2003) [IR D-36] ("Roberts"); see also Tr. at 7:217-18 (Roberts).

a. In a report prepared for ANSAC, Dave Roberts, Manager of Water Rights and Contracts at the Salt River Project, wrote: "The creation of the Salt River Federal Reclamation Project tamed the flashy, unpredictable Salt River bringing certainty to the Valley's water supply to support its continued growth and economic development." Roberts, supra, at 29.

b. At the hearing before ANSAC, Mr. Roberts testified:

> The other aspect about the Salt River . . . is that . . . it is an erratic, unpredictable, often flashy river. It doesn't flow steady all the way through every single year. It's highly variable. And because of that variability, in terms of the ability to reliably use the water on the land for people to make a living, that led to the formation of the Salt River Federal Reclamation Project. . . .
>
> If the river had flowed steady, . . . if it had flowed the same rate every year, you probably would not have needed the Salt River Project to store water because the water was coming down fairly consistently. All you needed to do was to divert it and use it on the land. But it doesn't flow that way . . . .
>
> And because of that, the Salt River Project was developed.

Tr. at 7:217-18 (Roberts).

66. Due in part to the construction of Roosevelt and subsequent dams on the Salt and Verde Rivers, "[b]y statehood, except on rare occasions when runoff from the Salt River watershed exceeded the capacity of SRP's water storage and diversion facilities, water users in the Valley appropriated all of the water in the Salt River for diversion and use on Valley lands." Roberts, supra, at 29; see also Tr. at 7:217 (Roberts); Decision, supra, at 4.

67. No attempts to boat the Lower Salt River are known to have occurred between 1940 and 1965 or since 1995. See Tr. at 7:72-73 (Fuller).

68. Several of the individuals who have tried to boat the river in recent decades have either died or required rescue. See Fuller, supra, at 8-4.

69. "Modern boat use on the river does not provide proof of susceptibility of a stream to navigation at statehood." Id.; Tr. at 7:69 (Fuller).

Climate, Hydrology, and Geomorphology of the Lower Salt River

70. Precipitation in the Salt River Valley and the adjoining watersheds "occurs during two major seasons; in late summer as intense, localize[d] orographic thunderstorms; and in winter as large-scale cyclonic storms which originate over the Pacific Ocean." Fuller, supra, at 5-4; see also id. at 7-3; Tr. at 7:62 (Fuller); Decision, supra, at 38.

a. "Orographic" refers to the fact that the storms are "associated with or induced by the presence of mountains." Webster's New Collegiate Dictionary 810 (1977).

b. Mr. Fuller testified: "Q. And based upon what you found in your report, Jon, you would agree with me, wouldn't you, that in the Salt River Valley most of our rain comes during two periods: that's sort of the winter rainstorms we have, and the summer monsoons which typically come all at once. Isn't that right? A. Yeah." Tr. at 7:62 (Fuller).

71. In Table 26 of his report, the SLD's consultant summed gauge data on the Upper Salt River at Roosevelt and the Verde River at Tangle Creek to yield an estimated combined flow number at the confluence of the Salt and Verde Rivers (near the upper end of the reach at issue in this proceeding). See Fuller, supra, at 7-17.

72. That data showed a variation in monthly average flows from 3,420 cfs in March to 501 cfs in June. See id.

73. In the hydrologic information submitted to ANSAC, there were little or no stream gauge records available for this reach of the river at or before statehood, and no flow duration statistics were available to reflect flow conditions. Id. at 5-4, 7-1, 7-6; Tr. at 7:15, 7:62 (Fuller).

a. Mr. Fuller testified: "There are some records for the Lower Salt River, but they are sporadic and tend not to be very systematic." Tr. at 7:15 (Fuller).

b. Mr. Fuller also testified: "Q. Isn't it also true . . . that as far as gauge data for this reach of the river, in and about statehood, there isn't any? A. There's not much." Tr. at 7:62 (Fuller).

74. No flow records exist for the actual day of statehood—February 14, 1912. See Fuller, supra, at 7-14.

75. Due to this almost complete lack of any real data, what the SLD's consultant did was to add the Upper Salt and Verde figures discussed above and arrive at an estimate of flows on the Lower Salt River. See id. at 7-17 (Table 26); Tr. at 7:15, 7:68 (Fuller).

a. Mr. Fuller testified: "The most reliable hydrologic data come from the long-term stream gauges upstream from the study reach in the terms of estimating . . . the natural flow into the area." Tr. at 7:15 (Fuller).

b. Mr. Fuller further testified: "There were several instances of gauge data within the study reach. There was no systematic data. So in this calculation here, yes, we used the gauge data that were upstream of the study reach and added those together." Tr. at 7:68 (Fuller).

c. The Upper Salt gauge was at Roosevelt, and the Verde gauge was at Tangle Creek. No analysis was performed to determine whether the flows at Roosevelt or Tangle Creek actually made it (in the same magnitude) to the confluence of the Upper Salt and Verde. Furthermore, no analysis was performed to determine whether the combined flow at the Upper Salt/Verde confluence ever made it to the Lower Salt/Gila confluence or to any particular point in between. See Fuller, supra, at 7-17; Tr. at 7:15, 7:68-69 (Fuller).

76. The average annual flow rate of 1,445 cfs contained in Table 26 of the SLD's consultant's report was an estimate based upon measured values for points outside the study area and assuming that every drop of water in the Upper Salt River at Roosevelt and the Verde River at Tangle Creek made it all the way down to the Lower Salt/Gila confluence. See Fuller, supra, at 7-17; Tr. at 7:15, 7:68-69 (Fuller).

77. Dr Hjalmar Hjalmarson, on behalf of the Maricopa County Department of Transportation, also submitted information on annual average flows. See Hjalmarson, Hydrology Along the Natural Channel of the Salt River (February 25, 2003) [IR D-22]. Dr. Hjalmarson submitted only a one-page report and was not called to testify at the hearing before ANSAC. His brief report states that the "estimated Mean annual flow" of the Salt River upstream of the Salt River Indian Reservation is 1,730 cfs, and the "base flow" is about 260 cfs. See id.

78. For the Salt River, "[a]verage annual flow rates are skewed due to high flood flow volumes relative to 'typical' flow rates." Fuller, supra, at 5-5.

79. Due to the prevalence of huge floods in the Salt River, the "average" flow rate is biased substantially upward. See Tr. at 7:63-64 (Fuller); Decision, supra, at 38.

a. John Wesley Powell, in his report of the United States Geological Survey of 1891-1892, described the discharge of the Salt River as having the highest variability between low and high discharges of all the twenty-nine western rivers he surveyed. See Kupel, supra, at 21 (citing Behan, An Historical Analysis of the Salt River 1830-1912, at 5 (May 12, 1988)).

b. Historian James H. McClintock described the flow of the river in 1901 as follows: "[F]or the greater part of the year, the Salt River is a river only in name. Yet it is one of the most considerable of the flood streams in the nation." Decision, supra, at 33.

c. Mr. Fuller's report states: "As with other Southwestern streams, average annual flow rates are skewed due to high flood flow volumes relative to 'typical' flow rates." Fuller, supra, at 5-5.

d. Mr. Fuller testified:

> Q. . . . [I]f you compare an average flow rate for the Salt River and an average flow rate for something in Ohio or Iowa someplace, that the flow rate for the Salt River will actually look a little higher, on average, than it really is typically . . . ?
>
> A. . . . If you're averaging 1, 1, 1, and 100, the 100 is going to skew the average quite high, and it's not representative, so much, of your population. And that is similar to the way floods work in Arizona, which is when the floods come, they tend to be quite high, or you have a high flood-ratio year.
>
> The 100-year floods, the large floods are orders of magnitude larger than the average annual flood. And that's a different situation in these other regions.

Tr. at 7:63-64 (Fuller).

e. A flow of 199,500 cfs occurred during a flood on November 27, 1905. See Fuller, supra, at 7-21.

f. If the November 1905 flood had lasted for only two days, an average daily flow for all of the other 363 days in the year of only 353.8 cfs would have resulted in an average annual flow of 1,445 cfs. See Fuller, at 5-5; Tr. at 7:63-64 (Fuller).

g. If a flood of 199,500 cfs lasted for three or more days, the flow in those three days alone would be enough to make the average annual flow be greater than 1,445 cfs—even if the flow for each of the other days in the year was zero. See Fuller, at 5-5; Tr. at 7:63-64 (Fuller).

80. A document compiled and submitted to ANSAC by SRP, Information Regarding Navigability of Selected U.S. Watercourses (April 2003) [IR D-25] ("Watercourse Information"), contained information on every federal or state court decision SRP could locate in which the "navigability" of a river was actually determined using the Daniel Ball test. Appendix A attached hereto summarizes the annual mean (average) flow information, compiled by the United States Geological Survey, for each of the twenty-one watercourses discussed in that document.

81. The SLD's consultant estimated the average annual flow of the Salt River, without considering the presence of any dams or diversion structures, at 1,445 cfs. See Fuller, supra, at 7-17 (Table 26).

82. The County's consultant estimated the average annual flow at 1,730 cfs. See Hjalmarson, supra.

83. Four of the twenty-one watercourses listed in Appendix A have been found "navigable," in whole or in part, by a state or federal court. See Appendix A; see also Decision, supra, at 39.

a. Of those four "navigable" watercourses, the lowest annual average flow is 2,277 cfs—for the Great Miami River in Ohio, which was found navigable in part and non-navigable in part. See Appendix A.

b. The other three "navigable" watercourses had average annual flow rates of 7,316 cfs (the Colorado River in Utah), 6,930 cfs (the Green River in Utah), and 4,066 cfs (the McKenzie River in Oregon). See id.

c. Five rivers that courts have specifically determined to be non-navigable (the Arkansas River in Oklahoma, the Chattahoochee River in Georgia, the Little River in Arkansas, the Neosho River in Kansas, and the Red River on the border between Oklahoma and Texas) have average annual flow rates higher than either Mr. Fuller's 1,445 cfs or Dr. Hjalmarson's 1,730 cfs. See id.

84. At the ANSAC hearing, Dr. Schumm presented extensive testimony regarding the braided nature of the Lower Salt River, containing numerous islands and sandbars. See Schumm, supra, at 2; Tr. at 7:194-200 (Schumm); Decision, supra, at 33, 40-41.

85. The Lower Salt "was a braided river, and the pattern of bars, islands, and low-water channels changed through time." Schumm, supra, at 3; see also Tr. at 8:7 (Bowers).

86. It "was a wide, sandy-gravelly channel," and "the low-water channels shifted within the main channel and often more than one low-water channel was present." Schumm, supra, at 3.

87. "This wide and shallow Salt River channel, that contained numerous bars and islands, would not be favorable for navigation." Id. at 4.

88. Referring to the area near old Jointhead Dam on the Lower Salt River in a 1988 report, Dr. William L. Graf stated: "The channel pattern here is braided." Graf, supra, at 117.

89. In a 1971 report, Dr. Paul F. Ruff described the Lower Salt River as having two distinct channels. See, e.g., Ruff, supra, at 8-10. Dr. Ruff's report also contains a general description of braided channels, such as those found on the Lower Salt River:

> Braided channels are associated with aggradation, easily eroded (sandy) bank materials, rapid shifting of the bed sediments, and continuous shifting of the flow channels. A braided configuration occurs when any channel is excessively wide for the amount of sediment that is available to be transported by the water. . . . The braided channel(s) that carries the largest part of the sediment load will usually aggrade until it carries only a small part of the streamflow, and eventually the channel is abandoned. Fluctuating discharges also contribute to braided channel configurations.

Id. at 3.

90. Vegetation was widespread in the historical channel of the Lower Salt River. See Kupel, supra, at 18-19. One account of historic conditions reveals that there were areas of the river with dense vegetation:

> Prior to dam construction in the early 1900's, the Salt River riparian vegetation was dominated by cottonwood, willow and the various species of mesquite trees. Mesquites occurred along the outer bank of the river and defined the outer edge of the natural riparian vegetation zone. Willow and cottonwoods were located inward of the mesquites, adjacent to the river bottom and closer to where there was a more continuous flow of water. . . . Some channel areas were barren, while others had vegetation in strips along the river bottom and in abandoned high flow channels. The historic bottom lands of the Salt River valley supported a variety of vegetation, including trees, shrubs, marsh plants and some grasses. ... Vegetation grew so densely in some places it was impossible to cross the bottom lands, while in other locations vegetation was open and more scattered.

Id. at 19 (citing Army Corps of Engineers, Rio Salado Project website (available at http://www.spl.usace.army.mil/pd/az/riosalado.html)). Upon evaluating information relating to the historic channel condition, Dr. Kupel concluded that "the dense riparian vegetation present at statehood acted as an impediment to navigation." Id. at 19.

Wormser v. Salt River Valley Canal Co. (Kibbey Decree)

91. The first decision regarding the navigability of the Lower Salt River was issued by Judge Joseph H. Kibbey of the Territorial District Court in 1892. Wormser v. Salt River Valley Canal Co., No. 708, Second Judicial District, Territory of Arizona, County of Maricopa (March 31, 1892) ("Kibbey Decree"); see also Decision, supra, at 18-19. A copy of the Kibbey and Kent Decrees was submitted to ANSAC as part of SRP's Motion to Dismiss filed on January 14, 1994, and resubmitted on August 27, 1996 [IR 6].

92. That suit was initiated by downstream water users and canal companies against upstream appropriators. See generally Kibbey Decree, supra, at 1-5; see also Tr. at 7:226, 241 (Roberts). The court characterized the plaintiffs' complaint as follows: "[The plaintiffs] filed their complaint in this court against the Arizona canal company, alleging that the Salt River is a natural unnavigable stream rising in the mountains in the eastern part of the territory and running

thence in a westerly direction to its junction with the Gila River in Maricopa County." Kibbey Decree, supra, at 4-5; see also Tr. at 7:161-62 (Littlefield); Decision, supra, at 18-20.

93. In ruling on the water rights at issue in that case, Judge Kibbey relied upon the 1864 "Howell Code" and the Desert Land Act of 1877. Judge Kibbey decided that territorial law applied and went on to apply that law to the water rights dispute. See Kibbey Decree, supra; Decision, supra, at 18-19.

94. A finding of non-navigability was necessary to Judge Kibbey's decision in that case. When the case was decided in 1892, the United States retained control over all navigable streams. See generally Federal Power Comm'n v. Oregon, 349 U.S. 435, 454 n.2 (1955). Had the river been navigable, it is much less clear that Judge Kibbey would (or could) have applied the territorial law of prior appropriation. Judge Kibbey found, however, that because the Lower Salt River was "unnavigable," territorial law applied. See Decision, supra, at 19.

Hurley v. Abbott (Kent Decree)

95. The Kibbey Decree set forth the rights to water from the Salt River as between the various canal companies, but Judge Kibbey did not "attempt to define the rights of individual irrigators." Kibbey Decree, supra, at 74; see also Tr. at 7:226, 241 (Roberts); Decision, supra, at 20.

96. Events subsequent to the issuance of the Kibbey Decree, including the pending development of the Salt River Federal Reclamation Project, made it necessary that rights be established as between individual appropriators and not just between the canal companies. See Decision, supra, at 20. The determination of these individual rights was set forth in the 1910 Kent Decree. Hurley v. Abbott, No. 4564, Third Judicial District, Territory of Arizona, County of Maricopa (March 1, 1910) [copy attached to IR D-6].

97. In determining the rights of individual appropriators, Judge Kent relied heavily on the legal rules set forth in the Kibbey Decree. Judge Kent expressly stated that the relevant portion of the river was a "non-navigable stream" and, therefore, applied territorial prior appropriation law. Id. at 3; Decision, supra, at 4-5.

98. The finding of non-navigability was essential to the adjudication of water rights in the Kent Decree, as it was in the Kibbey Decree, because it determined what law applied. See also Tr. at 7:161-62 (Littlefield).

SRPMIC v. Arizona Sand & Rock Co.

99. A more recent court decision addressed the navigability of the Lower Salt River. See Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., D. Ariz. (April 13, 1977) (Cause No. CIV 72-376-PHX) ("SRPMIC").

100. In 1972, the Salt River Pima-Maricopa Indian Community filed an action in federal court to eject certain defendants from lands claimed to be part of the Salt River Indian Reservation. A portion of the lands in dispute was situated within the banks of the river below Granite Reef Dam. Id.

101. SRP, the State, and Maricopa County were parties to that consolidated action. See Consolidated Pretrial Order, SRPMIC (March 17, 1976). Complete copies of the Consolidated Pretrial Order and Judgment in SRPMIC are attached as Appendices C and D to IR C-3. The pretrial order was expressly incorporated into the final judgment. See id.

102. The State initially argued that it held title to the disputed lands because the river was navigable and the State owned its bed. In the final judgment, the court held that the title to the lands was vested in the United States, not the State of Arizona. The court based its finding upon its conclusion that "[t]he Salt River is not now [1977] and never has been a navigable river." IR C-3, ¶ 30, at 11; see also Decision, supra, at 21-22.

Other Territorial and County Government Proceedings

103. The Arizona Territorial Legislature, in 1865, declared "that the Colorado River is the only navigable water in this Territory." Memorial of the Legislature of Arizona, 38th Cong. 2d Sess., Mis. Doc. No. 17 (Jan. 25, 1865).

104. In 1909, the Arizona Territorial Legislature passed a bill authorizing the construction and maintenance of bridges across any non-navigable stream upon petition by taxpayers to the county Board of Supervisors. See Kupel, supra, at 5-6 (citing "Twenty-Fifth

Legislature Adjourns at Six Thirty," Arizona Gazette (March 19, 1909), and Chapter 73, An Act Relating to the Construction of Bridges Across Non-Navigable Streams Within the Territory of Arizona, 25th Terr. Leg. (March 18, 1909)). The bill was referred to as the "general bridge bill." Id. at 5 (citing "Pass Bill to Purchase Fair," Arizona Gazette (March 16, 1909)).

105. Subsequently, Maricopa County citizens petitioned the Maricopa County Board of Supervisors, pursuant to the bridge bill, for the construction of bridges in the county, including one bridge across the Salt River at Center Street. Id. at 6 (citing Minutes of the Maricopa County Board of Supervisors, Book 9, at 18-21 (April 20, 1909); Minutes of the Maricopa County Board of Supervisors, Book 9, at 65-68 (June 21, 1909)). The Board of Supervisors approved the petition, and referred the matter to a public vote. Id. (citing "Bridge Election Called for June 10," Arizona Gazette (April 29, 1909)). The voters approved the measure for the bridge over the Salt River. Id.

106. After the election, the Maricopa County Board of Supervisors asked the county attorney, G.P. Bullard, to analyze specific issues relating to the vote and the construction of the bridge, including whether the bridge could be constructed entirely within an incorporated city. Id. In analyzing that issue, Mr. Bullard opined that the "[t]he proposed bridge is to be constructed over a large water-course, to wit, a large non-navigable stream." Id. (citing "Two Bridge Questions," The Arizona Republican (May 5, 1909)).

107. Thereafter, "Maricopa County proceeded to construct the Center Street (later known as Central Avenue) bridge in due course." Id. at 7. The bridge was formally opened to the public and dedicated on June 28, 1911. Id. (citing "Dedication of Center Bridge," Arizona Gazette (June 29, 1911)).

108. A portion of the northern boundary of the Gila River Indian Community begins "at a point in the middle of the Salt River 4 miles east from the intersection of said river with the Gila River" and then coming around and back to "a point in the Gila River opposite the middle of the Salt River; thence up the middle of the Salt River to a place of beginning." Executive Order (November 15, 1883) (Chester A. Arthur); see also Tr. at 7:141, 143, 144, and 150 (Gookin).

DEFENDANTS' RESPONSE TO PLAINTIFFS' JOINT STATEMENT OF FACTS IN SUPPORT OF THEIR OPENING BRIEFS

109. PSOF ¶¶ 1-5: Admitted.

110. PSOF ¶ 6: Admitted. In addition to Plaintiffs' statement regarding the historic flow of the Lower Salt River, the SLD's consultant testified that there were little or no stream gauge records of the Lower Salt River at or before statehood. See Paragraphs 73-74, supra.

111. PSOF ¶ 7: Admitted. The Lower Salt River's flows also fluctuate due to the occurrence of floods. See Paragraphs 78-79, supra.

112. PSOF ¶ 8: Admitted in part, denied in part. Plaintiffs' statement accurately summarizes the information contained in the Fuller Report. However, evidence of diversions, impoundments and groundwater withdrawals are just one factor in determining the low-flow runoff and stream flow rates generally.

113. PSOF ¶ 9: Denied. The only support for Plaintiffs' statement is a quotation from the report submitted to ANSAC by Hjalmar W. Hjalmarson [IR D-22]. The report cites no authority for the finding and, furthermore, the statement is too ambiguous to determine its meaning.

114. PSOF ¶ 10: Admitted. Plaintiffs accurately report the information contained in the Fuller Report.

115. PSOF ¶¶ 11-14: Denied. Plaintiffs accurately summarize the findings in the Fuller Report. However, Dr. Schumm also presented data and testified that the geomorphic condition of the Lower Salt River was braided in nature, with sandbars and islands. See Paragraphs 84-87, supra. Furthermore, Dr. Schumm testified that the Lower Salt River had a wide and shallow channel. See Paragraph 87, supra. Additional information on the historic channel also indicates that areas of the Lower Salt River had dense riparian vegetation in and along the river. See Paragraph 90, supra.

116. PSOF ¶ 15:

a. PSOF ¶ 15(a): Admitted. However, Mr. Powell also described the discharge of the river as having the greatest variability between low and high discharges of all the 29 western rivers he surveyed. See Paragraph 79(a), supra.

b. PSOF ¶ 15(b): Admitted. Plaintiffs have summarized the estimates of average annual flow from the Fuller Report. However, Defendants deny that the average annual flow rate is conclusive evidence of the flows of the Lower Salt River, and assert that average annual flows are skewed upward due to high flood flow volumes. See Paragraphs 75-76, 78-79, supra.

c. PSOF ¶¶ 15(c)-(d): Admitted.

d. PSOF ¶ 15(e): Admitted. Plaintiffs have accurately summarized Mr. Hjalmarson's report. However, similar to the Fuller Report, Dr. Hjalmarson's one-page report is also based upon average annual flows and Defendants similarly deny that such evidence is conclusive on the stream flow of the river. See Paragraph 77, supra.

117. PSOF ¶ 16: Admitted. Plaintiffs have summarized the information contained in the Fuller Report. Defendants have submitted additional information on the stream flow characteristics and geomorphology of the Lower Salt River. See Paragraphs 75-90, supra.

118. PSOF ¶ 17: Denied. Defendants deny that the minimum stream conditions for recreational boating, as set forth in the Fuller Report, are met on the Lower Salt River most of the year. Furthermore, there is only limited evidence of both historic boating accounts and modern recreational boating on the river. See Paragraphs 67-69, supra.

119. PSOF ¶¶ 18-25: Admitted. Plaintiffs have summarized the evidence in the record regarding the settlement of the Salt River Valley by the Hohokam. However, although the Salt River Valley was a densely populated area in the prehistoric southwest, there is no evidence that any prehistoric inhabitants, including the Hohokam, ever tried to boat the Lower Salt River. See Paragraph 5, supra.

120. PSOF ¶¶ 26-39: Admitted. See Paragraphs 6-13, supra.

121. PSOF ¶ 40: Admitted. There is no evidence in the record that trappers ever traveled by boat or canoe on the Lower Salt River. See Paragraph 7, supra.

122. PSOF ¶ 41: Admitted. Plaintiffs have accurately quoted the referenced passage from the Fuller Report.

123. PSOF ¶ 42: Admitted. The abundance of beavers, and the dams they construct, would have been an obstruction to any attempted navigation. See Paragraph 11-12, supra.

124. PSOF ¶ 43: Admitted.

125. PSOF ¶¶ 44-46: Admitted. Plaintiffs have accurately quoted from Dr. Littlefield's report and the Fuller Report. However, none of the government representatives, including G.P. Ingalls and W.F. Ingalls, ever indicated that the Lower Salt River was navigable. See Paragraphs 15-16, supra.

126. PSOF ¶¶ 47-48: Admitted. Plaintiffs have accurately quoted from the Fuller Report.

127. PSOF ¶¶ 49-50: Admitted. See Paragraph 112, supra.

128. PSOF ¶ 51: Admitted. Significantly, the Kibbey Decree also found that the Lower Salt River was "unnavigable." See Paragraphs 91-94, supra.

129. PSOF ¶¶ 52-53: Admitted. See Paragraph 112, supra.

130. PSOF ¶¶ 54-56: Admitted.

131. PSOF ¶¶ 57-58: Admitted. See Paragraphs 65-66, supra.

132. PSOF ¶ 59: Admitted. Defendants also supplement Plaintiffs' statements regarding the Kent Decree by noting that a finding of non-navigability of the Lower Salt River was essential to the adjudication of water rights in the Kent Decree. See Paragraphs 95-98, supra.

133. PSOF ¶¶ 60-61: Admitted.

134. PSOF ¶ 62: Denied. The accounts of attempted boating show that boating, floating logs for potential commercial purposes, or navigation was non-existent and not possible. The first diversion of water for irrigation began about 1870. Defendants deny Plaintiffs' assertion that the non-navigable status of the river in 1912 was solely a result of irrigation diversions. The record is

devoid of any evidence of any instances of boating prior to 1870. See Paragraphs 3-20, supra. In addition, the hydrologic and geomorphic evidence further demonstrates that the Lower Salt River was not susceptible to boating before 1870. See Paragraphs 70-90, 111, supra. The river was non-navigable even before the irrigation diversions began.

135. PSOF ¶ 63: Admitted. See Paragraph 112, supra.

136. PSOF ¶¶ 64-65: Admitted in part, denied in part. Defendants admit that there were ferries that operated at some times of some years on the Salt River. However, Defendants deny Plaintiff's conclusory statement as to the reason why ferries ceased to operate on the Lower Salt River. The most obvious reason for the demise of the Salt River ferries was the construction of bridges, which provided a more secure and reliable means to cross the river during times of high water. See Paragraphs 104-107, supra.

137. PSOF ¶ 66: Denied. Defendants deny Plaintiffs' assertion that "there was no shortage of boats in the Salt River Valley." There is no evidence in the record regarding the number of boats in the Salt River Valley prior to or at statehood. Furthermore, given that the Lower Salt River was non-navigable, it did not take many boats in the area to result in "no shortage of boats."

138. PSOF ¶ 67: Admitted. However, the historic record regarding this account is limited and the entire length of the trip was approximately one to two miles. See Paragraph 35, supra. Additionally, the trip occurred during a time of year with generally higher spring runoff. Id.

139. PSOF ¶ 68: Admitted. However, there are no accounts that Charles Hayden ever floated logs down the length of the Lower Salt River and, indeed, he acknowledged that his attempt was a failure. In fact, when Charles Hayden constructed his house in Tempe, he had lumber delivered via a mule team. See Paragraph 36, supra.

140. PSOF ¶ 69: Admitted. It is also noteworthy that the location of Hayden's Ferry was near the "Tempe constriction," which forces groundwater to the surface and narrows the width of the channel. As a result of the constriction, water is pooled in that particular area of the

river. Furthermore, historians report that the last known use of any ferry on the Salt River occurred in 1909. See Paragraphs 55-64, supra.

141. PSOF ¶¶ 70-71: Admitted. Defendants have also submitted additional historical information on these reported boating accounts. See Paragraphs 37-38, supra.

142. PSOF ¶ 72: Admitted in part, denied in part. Defendants admit that, in February 1883, Jim Meadows may have attempted to float a canvas skiff on the Salt River; however, Defendants deny that such an account was a "successful" trip. There is evidence that the crew encountered difficulties, such as getting caught on rocks that forced the passengers to roll more rocks into the water to raise the water level so the float could have proper clearance. See Paragraph 39, supra.

143. PSOF ¶ 73: Admitted. The Arizona Gazette included, in February 1883, an article about a purported trip on a canvas skiff. Plaintiffs fail to mention that this trip occurred during a month of relatively high runoff. Furthermore, Plaintiffs ignore the fact that nineteenth century Western newspapers often embellished the attributes of local towns as an avenue to attract settlers. See also Paragraph 40, supra.

144. PSOF ¶¶ 74-76: Admitted. There were ferries that operated at some times of some years on the Salt River. See Paragraphs 55-64, supra.

145. PSOF ¶ 77: Admitted in part, denied in part. There was a newspaper account from June 1885 documenting that five men attempted to float a boat on the river. However, Defendants deny that these men "successfully" boated the river. It is reported that the trip was "hazardous." Furthermore, none of the historic accounts indicate that the men actually floated logs down the river, although they may have speculated as to that possibility. See Paragraph 41, supra.

146. PSOF ¶ 78: Admitted. See Paragraph 42, supra.

147. PSOF ¶ 79: Admitted in part, denied in part. The evidence does not show that any portion of this incident actually occurred on the Lower Salt River. See Paragraph 43, supra.

148. PSOF ¶ 80: Denied. The evidence in the record establishes that one person thinks he recalls seeing a newspaper article about a supposed attempt by A.J. Chandler to float logs down the river. However, this article was never located. See Paragraph 44, supra.

149. PSOF ¶ 81: Admitted. There were ferries that operated at some times of some years on the Salt River. See Paragraphs 55-64, supra.

150. PSOF ¶ 82: Admitted. See Paragraph 45, supra.

151. PSOF ¶ 83: Admitted. There were ferries that operated at some times of some years on the Salt River. See Paragraphs 55-64, supra.

152. PSOF ¶¶ 84-88: Admitted. See Paragraphs 46-50, supra.

153. PSOF ¶¶ 89-93: Admitted in part, denied in part. The Fuller Report made mention of two newspaper articles indicating that fish was supplied to local markets and one article that stated restaurants occasionally served fished caught in the Salt River. However, there is no evidence in the record to indicate that any person ever used a boat to fish on the Lower Salt River. See Paragraphs 51-54, supra.

154. PSOF ¶¶ 94-95: Admitted.

155. PSOF ¶¶ 96-100: Admitted. Plaintiffs have summarized material contained in Earl Zarbin's book, Roosevelt Dam: A History to 1911. Defendants also have submitted extensive historical information on the construction of Roosevelt Dam and Apache Trail. See Paragraphs 21-34, supra.

156. PSOF ¶ 101: Admitted. Defendants admit that Plaintiffs have summarized material contained in Earl Zarbin's book, Roosevelt Dam: A History to 1911. The quotation from Zarbin makes clear that any purported use of the river as an option for bringing materials to the worksite was during flooding. The sentence that precedes Plaintiffs' quotation is: "There was no way to get the supplies directly to Roosevelt because the over-the-hill road had not been completed, and the road along the river past the dam site remained under water." Zarbin, Roosevelt Dam: A History to 1911 at 101 [IR D-24]. Furthermore, the quotation in Zarbin referred to historical events that occurred in 1905, during which it is reported that the Lower Salt River experienced

severe floods. See Paragraph 79, supra. In February 1905, for example, the Apache Trail was covered by water fifteen feet deep. See Paragraph 32, supra. At that point, one perhaps could have floated a boat up the road itself.

157. PSOF ¶¶ 102-107: Admitted.

158. PSOF ¶ 108-109: Admitted. See Paragraph 112, supra.

159. PSOF ¶ 110: Denied. See Paragraphs 84-89, supra.

160. PSOF ¶ 111: Admitted. There is some evidence of modern recreational boating in some years and during limited times of the year. See Paragraphs 66-69, supra.

161. PSOF ¶ 112: Admitted in part, denied in part. The Salt-River Pima-Maricopa Indian Community brought suit against certain defendants, including the State and Maricopa County. The non-navigability of the Lower Salt River was essential in the court's ultimate conclusion in the case. See Paragraphs 99-102, supra.

162. PSOF ¶¶ 113-122: Admitted.

DATED this 30th day of November, 2006.

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AND COPY hand-delivered this 30th day of
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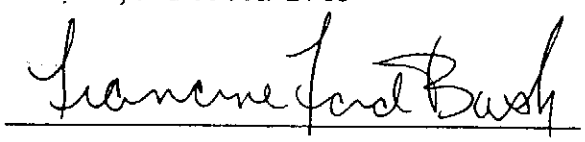

APPENDIX A

COMPARISON OF ANNUAL MEAN FLOW RATE FOR VARIOUS STREAMS (cubic-feet per second)

River	Navigable?	Cfs	Data Source
Salt River (AZ)	To be determined	1,455	Fuller Report
Arkansas River (OK)	No	7,561	USGS data at Tulsa, OK (1926-1999)
Cedar River (WA)	No	164	USGS data near Cedar Falls, WA (1946-2000)
Chattahoochee River (GA)	No	2,031	USGS data at Buford Dam, GA (1943-2000)
Colorado River (UT)	Yes	7,316	USGS data near Cisco, UT (1914-2000)
Fisheating Creek (FL)	No	252	USGS data at Palmdale, FL (1932-2000)
Great Miami River (OH)	In part	2,277	USGS data at Dayton, OH (1914-1999)
Green River (UT)	Yes	6,930	USGS data at Green River, UT (1895-2000)
Little River (AR)	No	2,892	USGS data at Rivervale, AR (1948-1976)
Little Missouri River (ND)	No	555	USGS data near Watford City, ND (1935-1999)
McKenzie River (OR)	Yes	4,066	USGS data near Vida, OR (1925-2000)
Neosho River (KS)	No	2,764	USGS data near Parsons, KS (1922-2000)
Red River (OK/TX)	No	9,363	USGS data at Arthur City, TX (1906-1999)
Rio Grande (NM)	No	1,513	USGS data at Otowi Bridge, NM (1896-2000)
Sinnemahoning Creek (PA)	No	399	USGS data at Sinnemahoning, PA (1954-2000)
White River (AR)	No	563	USGS data at Fayetteville, AR (1964-1993)
Wolf River (TN)	No	1,107	USGS data at Germantown, TN (1970-2000)

Source: Information Regarding Navigability of Selected U.S. Watercourses (April 2003) [IR D-25].