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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

IN THE MATTER OF THE
NAVIGABILITY OF THE SALT
RIVER

Nos. 03-005-NAV and 04-008-NAV
(Consolidated)

**FREEPORT MINERALS
CORPORATION'S RESPONSE
TO OPENING MEMORANDA**

1 INTRODUCTION

2 Freeport Minerals Corporation (“Freeport”) submits its response to the opening
3 memoranda filed by the Arizona State Land Department (“ASLD”) and the Defenders of
4 Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, “Defenders”)
5 (ASLD and Defenders, collectively, the “Proponents”).

6 The Proponents once again contend that a river is navigable for purposes of title if
7 it is “boat-able” in modern recreational watercraft.¹ The Commission already correctly
8 rejected this contention as it was repeatedly raised regarding the San Pedro River, and
9 Santa Cruz River, the Gila River, and the Verde River, and the Proponents find
10 themselves once again at odds with binding United States Supreme Court precedent.

11 *The Daniel Ball* test is not about recreational boating in light-weight, durable
12 modern craft. To the contrary, “[n]avigability must be assessed as of the time of
13 statehood, and it concerns the river’s usefulness for ‘trade and travel,’ rather than for
14 other purposes.” *PPL Montana v. Montana*, 132 S.Ct. 1215, 1233 (2012). The Supreme
15 Court has expressly held that “present day recreational use” does not “bear on
16 navigability,” and that “reliance upon ... evidence of present-day, recreational use, at
17 least without further inquiry,” is erroneous “as a matter of law.” *Id.* Indeed, it is
18 erroneous to rely on evidence of modern boating unless it can be proven that “the
19 watercraft are meaningfully similar to those in customary use for trade and travel at the
20 time of statehood.” *Id.* at 1234.

21 Modern inflatable rafts and polyethylene kayaks are *not* meaningfully similar to
22 craft customarily used for trade and travel in Arizona *circa* 1912. Modern recreational
23 craft are lighter and therefore require less stream depth and – more importantly – they are
24 significantly more durable than historical wooden watercraft. Rocky, relatively shallow
25 rivers like the Upper Salt were not susceptible to use of the wooden boats suitable for
26

27 ¹ Defender Opening Brief at 16 (“[I]f the river is boat-able during modern times, it follows
28 that in its ordinary and natural condition, the river was navigable.”); ASLD Opening Brief
at 9.

1 conducting commerce in 1912. This fact is demonstrated not only by the physical
2 characteristics of the Upper Salt, but also by the nearly complete absence of historic
3 boating of the Upper Salt in its ordinary and natural condition. There were significant
4 needs, including mining, military, and early settlement that the Upper Salt River would
5 have met if it had been navigable in fact.

6 Applying the standard for navigability that is well-established through
7 longstanding United States Supreme Court precedent, the evidence presented to the
8 Commission requires a determination that the Upper Salt River was neither navigable nor
9 susceptible to navigation in its ordinary and natural condition.

10 **I. THE HISTORICAL EVIDENCE RELIED UPON BY PROPONENTS**
11 **DOES NOT DEPICT A RIVER SUSCEPTIBLE TO USE AS A**
12 **HIGHWAY OF COMMERCE.**

13 The Proponents of navigability must demonstrate by a preponderance of the
14 evidence that each segment of the river was navigable in its ordinary and natural
15 condition. *State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm'n*
16 (*“Winkleman”*), 224 Ariz. 230, 239, ¶ 17 (App. 2010). “[E]xtensive and continued use
17 for commercial purposes” is the “most persuasive” form of evidence to prove
18 navigability, but parties seeking to prove navigability may attempt to do so by showing a
19 river was susceptible to being used as a highway for commerce over which trade and
20 travel could have been conducted. *PPL Montana*, 132 S.Ct. at 1233 (quoting *United*
21 *States v. State of Utah*, 283 U.S. 64, 82-83 (1931)).

22 **A. The Photographs Relied Upon By Defenders Do Not Support**
23 **Defenders’ Contention That The Upper Salt Was Susceptible To**
24 **Navigation In Its Natural Condition.**

25 Defenders refer to historical photographs that they argue reflect the Salt River in
26 its “natural condition”² Defenders refer to two photographs of Segment 3,
27 reproduced as Slides 140 and 143 from J.E. Fuller’s PowerPoint that he presented during
28 his testimony. The photograph reproduced in Slide 140 does *not* reflect the Salt River in

² Defenders Opening Brief at 7.

1 its “natural condition” This photograph was taken at the termination of Segment 3 at
2 “Roosevelt Reservoir,” at a time when water had already begun to fill the reservoir. The
3 pool in which the boat is floating is caused by man-made impoundments, and does not
4 reflect the Salt River in its natural condition. It is also clear that the boat is being used to
5 float in the filling reservoir, not to travel in the downstream direction, which is obstructed
6 by the reservoir impoundments.

7 Defenders’ second photograph, Slide 143, depicts a shallow river with split
8 channels and an absence of commercial trade or travel on the river.³ Rather than
9 supporting it, this historic photograph undermines Defenders’ assertion of navigability.

10 Defenders cannot cite to even a single photograph of Segment 2 to support its
11 contention of navigability.

12 **B. The Upper Salt River’s Scant History Of Boating Demonstrates**
13 **That It Was Not Navigable In Its Ordinary And Natural**
14 **Condition.**

14 Segment 2

15 Despite thousands of years of use and occupation of the region surrounding the
16 Upper Salt River, there is only a single account of historic boating on Segment 2.⁴ This
17 is the account involving a carpenter named Logan, who purportedly boated down the
18 White River and the Salt River to Hayden’s Ferry sometime prior to 1873.⁵ As described
19 in Freeport’s Opening Brief, this account occurred during “a spring flood,” which
20 explains why Logan may have been able to get a boat down the White River, Segments 1
21 through 3, and further downstream to Hayden’s Ferry.⁶ Accounts of boating during a
22 flood are not probative of navigability for purposes of title. *See, e.g., Winkleman*, 224
23 *Ariz.* at 241, ¶ 28; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698-
24 99 (1898).

25
26 ³ Defenders Opening Brief at 7 (referring to Exh. C030 at Slide 143).

27 ⁴ ASLD Opening Brief at 3, 18, 21; Defenders Opening Brief at 10.

28 ⁵ C054, Tab 392, p. 42; 5/17/16 Trans. 4577:11-17.

⁶ C054, Tab 392, p. 42.

1 The unreliability of this evidence as a measure of navigability is readily illustrated
2 by Logan’s apparent ability to traverse, not only several downstream segments of the Salt
3 River, but also the White River and Segment 1 of the Salt River. Not even Mr. Fuller or
4 the Proponents contend that the White River and Segment 1 are navigable for purposes of
5 title. Logan’s trip is no more relevant to a claim that Segments 2 and 3 are navigable
6 than to a claim that the White River is navigable. Logan’s trip is an exceptional
7 occurrence during a time of high water, and this account provides no indication that any
8 of these rivers or segments is navigable. *See, e.g., Rio Grande Dam*, 174 U.S. at 698-99
9 (it is “not every small creek in which a fishing skiff or gunning canoe can be made to
10 float at high water which is deemed navigable, but, in order to give it the character of a
11 navigable stream, it must be generally and commonly useful to some purpose of trade or
12 agriculture.”).

13 The Logan account is the only historic account involving Segment 2, and it is not
14 probative of navigability because it occurred during flooding, *i.e.* outside of the
15 “ordinary” flow condition of the Salt River. *Winkleman*, 224 Ariz. at 241, ¶ 28 (*The*
16 *Daniel Ball* test requires consideration of a river in its “ordinary” condition, *i.e.* absent
17 drought or flooding). The Proponents presented no other historical accounts of boating
18 Segment 2.⁷ Faced with an absence of boating history for the thousands of years in
19 which the region was used and occupied, the Proponents are forced to rely instead on
20 modern recreational boating in modern, durable craft that are dissimilar from the crafts
21 used to conduct commerce at statehood. The seminal decision governing these
22 proceedings, *PPL Montana*, makes clear that Proponents’ approach is legally flawed and
23 should be rejected.

24 Segment 3

25 In support of their contention that Segment 3 is navigable, the Proponents rely on
26 four accounts that, more likely than not, relate to only three separate events. The first is
27

28 ⁷ Freeport Opening Brief at 8-9.

1 the Logan account. As described above, this was an exceptional trip during “a spring
2 flood” that has no bearing on the navigability of the Salt River in its ordinary and natural
3 condition (or, for that matter, the navigability of the White River in its ordinary and
4 natural condition).

5 The next account(s) relied upon by the Proponents perhaps involved two events.
6 However, it is more likely that these account(s) relate to a single event involving
7 “Meadows” in the 1880s.⁸ While the ASLD proclaims in its opening brief that these
8 were separate occurrences,⁹ Mr. Fuller readily acknowledged that it is unclear whether
9 these two accounts describe the same Meadows trip.¹⁰ As described in Freeport’s
10 Opening Brief, whether there were two Meadows trips or only one is less important than
11 the fact that the accounts describe the journey as “a hazardous one” and “a desperate
12 undertaking” involving significant impediments to navigation, becoming stopped by
13 rocks, upturned boats and loss of supplies, and the fear of death.¹¹ Moreover, it is likely
14 that the Meadows trip occurred during a time of high water, as the stream was described
15 as ranging from six to 20 feet deep, which is far greater depth than the Upper Salt can
16 provide in its ordinary condition.¹² Such exceptional journeys at times of high water are
17 not evidence of navigability for purposes of title. *Rio Grande Dam*, 174 U.S. at 699 (the
18 Rio Grande River is non-navigable because “[i]ts use for any purposes of transportation
19 has been and is exceptional, and only in times of temporary high water.”).

20 The last instance of alleged boating relied upon by the Proponents involved the
21 loss of a boat in 1893. The Globe Power Company was involved in “measuring the flow
22 of water in the river, running lines for a system of reservoirs, [and] surveying for a
23 tunnel.”¹³ A boat was carried away by “[a] sudden rise in the river” Mr. Fuller

24 ⁸ ASLD Opening Brief at 3, 24-25; Defenders Opening Brief at 12-13.

25 ⁹ ASLD Opening Brief at 25.

26 ¹⁰ 10/20/15 Trans. 221:1-224:8 (Burtell).

27 ¹¹ Declaration ¶ 25 and Table 1; 2/23/16 Trans. 2771:10-25 (Burtell); Fuller’s 2003 Upper
Salt Report at 3-34, 3-25, 3-36.

28 ¹² Fuller’s 2003 Upper Salt Report at 3-34, 3-25, 3-36.

¹³ C053, Tab 384.

1 correctly conceded that the boat's purpose may have been ferrying the surveyors across
2 the river,¹⁴ and there is no evidence that the boat that was lost by the surveyors had been
3 used for anything resembling upstream or downstream commercial trade or travel.

4 Using a ferry to cross a river that exists as an obstacle to overland travel does not
5 constitute the use of the river for commercial trade or travel as required by the applicable
6 legal standard. That standard requires use of the river as a "highway," "conduit,"
7 "corridor," and "channel," none of which are demonstrated by the use of a boat to move
8 people across a river. See A.R.S. § 37-1101(3) and (5); *The Montello*, 87 U.S. 430, 431
9 (1874) (stating "the vital and essential point is whether the natural navigation of the river
10 is such that it affords a *channel* for useful commerce.") (emphasis added); see also *State*
11 *of N.D., ex rel. Bd. of Univ. & Sch. Lands v. United States*, 972 F.2d 235, 239 (8th Cir.
12 1992) (affirming district court's finding of non-navigability because "ferries functioned
13 much like bridges" and "were used only to provide transportation across the River" and
14 "were not used for transportation up or down the River.").

15 Moreover, navigability is not demonstrated by a very few exceptional instances of
16 attempted boating. To the contrary, it must be shown that the river is "commonly useful"
17 for the purpose of "trade and travel." *Rio Grande*, 174 U.S. at 698-99 (1899) (to be
18 deemed navigable a river "must be generally and commonly useful to some purpose of
19 trade or agriculture."). This is particularly true when the exceptional attempts were
20 largely unsuccessful, as boats were caught on rocks and passengers were tossed from the
21 boats and feared for their lives.

22 **II. THE UPPER SALT WAS NOT CAPABLE OF MEETING THE** 23 **SIGNIFICANT TRANSPORTATION NEEDS THAT EXISTED** 24 **DURING EARLY SETTLEMENT NEAR THE UPPER SALT RIVER.**

25 The Proponents' attempt to explain-away the lack of historical use of the Upper
26 Salt by asserting that there were no needs to use the river for trade and travel.¹⁵ In so
27 doing, the Proponents' choose to bury their heads in the sand rather than address the

28 ¹⁴ 5/19/16 Trans. 4996 (Fuller).

¹⁵ ASLD Opening Brief at 6, 21.

1 numerous settlements along and near the Upper Salt. The evidence is abundantly clear
2 that early non-Indian settlement by the military, miners, farmers and ranchers, and those
3 involved in the construction of Roosevelt Dam resulted in the establishment of several
4 populations centers along and near the Upper Salt River. Each of these early settlements
5 required the transport of supplies, goods, and people.¹⁶ Had it been susceptible to such
6 use, the Upper Salt would have been used as a highway for transporting mail, minerals,
7 supplies, and soldiers.

8 For instance, Fort Apache, a military installation “‘of singular importance to the
9 Army’ due to its location between the domains of the Apaches and Navajos”¹⁷ was
10 established above the headwaters of the Salt River. Overland transportation to Fort
11 Apache was, to say the least, unsatisfactory; Fort Apache was recognized to be the most
12 expensive location to supply in all of Arizona.¹⁸ Fort Apache enjoyed access to Segment
13 2,¹⁹ yet the military was unable to put the Upper Salt to use. It is readily apparent that,
14 “[i]f the Salt River had been a practical and reliable means of transportation at this time,
15 the military would have utilized it to supply Fort Apache rather than having to rely on the”
16 unsatisfactory overland routes that the military was forced to use.²⁰ The reason that the
17 Upper Salt was not used is clear – other than an exceptional one-time occurrence during
18 “a spring flood,” the Upper Salt was not suitable for transporting supplies or people
19 downstream.

20 Likewise, Globe, McMillenville, and Roosevelt were all settled near the Upper
21 Salt, and all had various transportation needs. This was also true of the various
22 population centers corresponding to the six post offices that were established along or
23

24 ¹⁶ Declaration ¶¶ 45-61. These significant needs are summarized and described in Section
25 III.B. of Freeport’s Opening Brief.

26 ¹⁷ Declaration ¶ 47 (*quoting* Brandes, *Frontier Military Posts of Arizona* (1960) pp. 10-
27 11).

28 ¹⁸ Declaration ¶¶ 47-50; 2/23/16 Trans. 2801 (Burtell).

¹⁹ Declaration ¶¶ 47-50 and Figures 3a and 3b.

²⁰ Declaration ¶¶ 47-50 and Figures 3a and 3b.

1 near the Salt River in the 1880s and 1890s. Yet the Upper Salt was not up to the task of
2 meeting the tangible transportation needs of *any* of these communities. The Upper Salt
3 was not used for these purposes for one simple reason: it was not susceptible to use as a
4 highway of commerce.

5 **III. THE PROPONENTS CONTINUE TO ERR AS A MATTER OF LAW**
6 **IN THEIR RELIANCE UPON MODERN RECREATIONAL CRAFT**
7 **AND MODERN RECREATIONAL BOATING.**

8 The Proponents continue to misconstrue the applicable legal standard for
9 determining navigability. In particular, they misconstrue the requirement of “commerce”
10 and “trade and travel [that] were or could have been conducted in the customary modes
11 of trade and travel.” A.R.S. § 37-1101(5). The Proponents’ burden was to prove that
12 Segments 2 and 3 “could sustain the kinds of commercial use that, as a realistic matter,
13 might have occurred at the time of statehood.” *PPL Montana*, 132 S.Ct. at 1233.
14 However, rather than addressing the Upper Salt’s susceptibility to use as a highway of
15 commerce at statehood, the Proponents mistakenly rely on present-day recreation in
16 modern watercraft.

17 **A. Recreation Was Not A Commercial Use At Statehood.**

18 Navigability for title relates to a river’s ability to sustain the kinds of commercial
19 activities that occurred at the time of statehood. *Id.* Recreational boating was not a
20 commercial activity in Arizona at the time of statehood. Recreational boating did not
21 become a popular activity until several decades later, when the advent of durable
22 materials made recreational boating feasible. As Mr. Fuller explained in his 1998 Final
23 Report, Criteria for Assessing Characteristics of Navigability for Small Watercourses in
24 Arizona, “rivers were not generally used for recreational travel until the development of
25 new materials such as fiberglass and artificial rubber after World War II,” and
26 commercial recreational rafting, which did not begin until the 1930s, did not become
27 common until the 1970s.²¹ Accordingly, evidence relating to the number of modern-day

28 ²¹ Item No. C021, Freeport 6, pp. 32-33.

1 recreational trips made down the river, the cost of the trips, and the number of boaters
2 employed to lead trips has no relevance concerning any commercial activity that occurred
3 *circa* 1912.²² Hauling people and supplies for commercial purposes in historic
4 commercial crafts is wholly dissimilar from the recreational activities in modern durable
5 crafts that constitute the bulk of the Proponents' evidence.

6 **B. Modern-Day Durable Watercraft Are Not Meaningfully Similar**
7 **To Those In Customary Use For Trade And Travel At The Time**
8 **Of Statehood.**

9 The Supreme Court has expressly held that evidence of use of modern boats can
10 only support a finding of navigability if “[a]t a minimum, ... the party seeking to use
11 present-day evidence for title purposes” can show that “(1) the watercraft are
12 meaningfully similar to those in customary use for trade and travel at the time of
13 statehood; and (2) the river’s post-statehood condition is not materially different from its
14 physical condition at statehood.” *PPL Montana*, 132 S.Ct. at 1234.²³ The navigability
15 proponents fail in their efforts to relate modern recreational watercraft to the kinds of
16 commercial watercraft used in 1912. The reality is that these modern recreational craft
17 bear little resemblance to the craft customarily used for commercial purposes at the time
18 of Arizona’s statehood.

19 **1. Modern-Day Watercraft Are Lighter And Require Less**
20 **Stream Depth.**

21 Establishing that modern craft are meaningfully similar to historic commercial craft
22 is important because “lightweight canoes or kayaks” and other modern craft “may be able
23 to navigate water much more shallow or with rockier beds than the boats customarily used
24 for trade and travel at statehood.” *Id.*

25 ²² ASLD Opening Brief at 15-17.

26 ²³ The Proponents rely on *Hardy v. State Land Bd.*, 360 P.3d 647, 662-63 (2015) in a
27 misplaced attempt to distinguish *PPL Montana*. The Oregon Court of Appeals decision in
28 *Hardy* is inapposite. The river under consideration in *Hardy*, the Rogue River, is
significantly larger than the Upper Salt River and provides no basis for meaningful
comparison. In contrast, the non-navigable San Juan River in Utah provides an excellent
basis for comparison with the Upper Salt. 2/23/16 Trans. 2821:9-2823:11 (Burtell); *see*
also Declaration ¶¶ 63-68.

1 The Supreme Court’s concerns expressed in *PPL Montana* have direct applicability
2 to the Proponents’ evidence for the Upper Salt. While six inches to one foot of depth may
3 be sufficient to float some modern recreational craft, those depths are insufficient for
4 engaging in meaningful commerce using the watercraft commonly used for commercial
5 purposes at statehood. This is established through the complete absence of any
6 commercial use of the Upper Salt River despite a long history of occupation by people
7 reliant upon the river.

8 This is also established through Archimedes’ Principle. Modern plastics and
9 rubbers are lighter than the wood that was used to construct boats in Arizona at the time of
10 statehood. In accordance with Archimedes’ Principle, a lighter modern boat will displace
11 less water than a heavier wooden boat. This means that historic boats made out of wood
12 required more stream depth than those made from light-weight modern plastics and
13 inflatables.²⁴ Modern light-weight canoes and kayaks require less water than wooden
14 historic boats, and they are therefore better suited to use on the Upper Salt River.
15 Accordingly, for purposes of navigability analysis, modern light-weight canoes and
16 kayaks are *not* meaningfully similar to the wooden boats available at statehood.

17 **2. Modern-Day Watercraft Are Far More Durable Than**
18 **Wooden Craft Available At Statehood.**

19 More important than the difference in draw is the difference in durability. Modern
20 recreational craft are significantly more durable than the craft used in 1912. This fact is
21 uncontroverted.²⁵ Proponents admit that “modern canoes may be more durable than
22 historical canoes,” and they concede that durability is relevant in Segments 1 through 4.²⁶

23 Notably, it was the introduction of these modern, durable, low-draw recreational
24

25 ²⁴ 2/23/16 Trans. 2787:18-2790:17: (Fuller); 1998 Final Report, Criteria for Assessing
26 Characteristics of Navigability for Small Watercourses in Arizona, Item No. C021,
Freeport 6, p. 32.

27 ²⁵ 10/22/15 Trans. 624-25 (Fuller); 1998 Final Report, Criteria for Assessing
28 Characteristics of Navigability for Small Watercourses in Arizona, Item No. C021,
Freeport 6, p. 32.

²⁶ ASLD Opening Brief at 11.

1 crafts that were not available at statehood that was the primary driver behind the
2 development of recreational boating well after statehood:

3 The *development of durable small boats* – plastic, fiberglass and other
4 modern types of canoes and kayaks, inflatable boats for single paddlers and
5 for groups – all contributed to the rising popularity of river running in
6 Arizona especially on rivers not previously considered boatable, or boatable
7 only very rarely because of low water.²⁷

8 The United States Supreme Court addressed this circumstance squarely in *PPL*
9 *Montana*. In holding that the Montana Supreme Court erred in relying on evidence of
10 modern recreational boating, the United States Supreme Court recognized, as did
11 Mr. Fuller in his 1988 report, that “[m]odern recreational fishing boats, including
12 inflatable rafts and lightweight canoes or kayaks, may be able to navigate water much
13 more shallow or with rockier beds than the boats customarily used for trade and travel at
14 statehood.” *PPL Montana*, 132 S. Ct. at 1234.

15 The Proponents attempt to bootstrap their evidence concerning modern
16 recreational watercrafts to Mr. Dimock’s one-time use of a wooden boat on the Salt
17 River.²⁸ However, Mr. Dimock’s attempt to travel on Segments 5 and 6 of the Salt River
18 has no bearing on the navigability of Segments 2 and 3, which have very different
19 characteristics. Furthermore, the segments on which he attempted to boat are regulated
20 by man-made dams, and still Mr. Dimock’s boat ran aground.²⁹

21 What is far more relevant with respect to the Upper Salt River is that Mr. Dimock
22 chose to not make any attempt to use his wooden boat on either Segment 2 or Segment 3.
23 Mr. Dimock admitted that he would not want to use his Edith replica or any other
24 wooden boat on the Upper Salt.³⁰

25
26 ²⁷ Item No. C021, Freeport 6, p. 32 (emphasis added).

27 ²⁸ ASLD Opening Brief at 12.

28 ²⁹ ASLD Opening Brief at 12.

³⁰ 5/19/16 Trans. 543:9-545:19 (Fuller).

1 **3. Canoes Were Not The Watercraft Commonly Used For**
2 **Commercial Purposes At Statehood.**

3 *The Daniel Ball* test requires navigability to be assessed by reference to the types
4 of boats customarily used to conduct commerce at the time of statehood. *PPL Montana*,
5 132 S.Ct. at 1234. The bulk of the Proponents’ modern recreational boating evidence
6 involves inflatable rafts, plastic canoes, and plastic and inflatable kayaks. Based on these
7 limitations in their evidence, the Proponents endeavor to draw a meaningful comparison
8 between modern canoes and kayaks and historic wooden canoes. As summarized above,
9 modern canoes and kayaks are *not* meaningfully similar to wooden canoes, because the
10 modern recreational crafts require less stream depth, and because they are far more
11 durable than wooden canoes.

12 However, even if modern canoes and kayaks were meaningfully similar to wooden
13 canoes, which they are not, Proponents would still fail to meet their burden of proof.
14 Simply put, canoes were not the types of boats “in customary use for trade and travel” in
15 Arizona when it attained statehood in 1912. To the contrary, the boats customarily used
16 to conduct commerce in Arizona and the Southwestern United States during that era were
17 “the keelboat and the early steamboat.”³¹ There is no evidence of use of canoes to
18 conduct commerce in Arizona *circa* 1912. Commercial navigation on the Colorado River,
19 Arizona’s sole navigable river, was conducted using steamboats, not canoes.³²

20 The Proponents attempt to equate their modern recreational crafts to small boats
21 that require less water than the types of craft used to conduct commerce at the time of
22 statehood. They do so because even Mr. Fuller had to concede that the Upper Salt is not
23 capable of floating any larger boats.³³ By focusing on inapplicable modern recreational

24 _____
25 ³¹ 3/30/16 Trans. 16:4197:2 – 4198:1 and 4223:3-4224:5 (Newell); accord Lingenfelter
26 Affidavit, C021, at Freeport 3, ¶ 29 (“The craft customarily used for trade and travel at the
27 time of statehood included large steamboats and gasoline powered paddle wheelers....”);
28 11/20/15 Trans. 1735:1-25 (Gookin).

³² Lingenfelter Affidavit, C021, at Freeport 3, ¶ 14-16, 29.

³³ 10/20/15 Trans. 259:23-260:10 (Fuller).

1 crafts *and* inapplicable historic crafts, Proponents have failed to meet their burden to
2 present the Commission with evidence that the Upper Salt was navigable in its ordinary
3 and natural condition in boats customarily used to conduct commerce in Arizona at
4 statehood.

5 In sum, the navigability proponents have erred as a matter of law by relying on
6 modern recreation craft and modern recreational boating. They have applied an erroneous
7 standard, and they have therefore failed to meet their burden of proof.

8 **CONCLUSION**


9 Not only have the navigability proponents failed to satisfy their burden of proof,
10 but the overwhelming weight of the evidence clearly demonstrates that the Upper Salt
11 River was neither navigable nor susceptible to navigation in its ordinary and natural
12 condition at or before statehood. The Upper Salt was never used as a highway for
13 commerce in its ordinary and natural condition despite the need for such a highway to
14 supply military installations and to support mining and early settlement. There were
15 significant needs to use the river, and the fact that inefficient and extremely expensive
16 overland travel was used instead confirms the other lines of evidence that demonstrate that
17 the Upper Salt River was not susceptible to commercial navigation in its ordinary and
18 natural condition.

19 RESPECTFULLY SUBMITTED this 17th day of August, 2016.

20 SNELL & WILMER L.L.P.

21
22 L. William Staudenmaier
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MAILING CERTIFICATE

ORIGINAL AND SIX COPIES of the foregoing
sent via U.S. mail for filing this 17th day of August, 2016 to:

Arizona Navigable Stream Adjudication Commission
1700 West Washington, Room B-54
Phoenix, AZ 85007

COPY sent via e-mail this 17th day of August, 2016 to:

George Mehnert
Director
nav.streams@ansac.az.gov

COPY sent via e-mail this 17th day of August, 2016 to each
party on the mailing list (see <http://www.ansac.az.gov/parties.asp>)
for *In re Determination of Navigability of the Salt River*

By: Kathy Power

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