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10 **BEFORE THE ARIZONA NAVIGABLE STREAM**
11 **ADJUDICATION COMMISSION**

12 In re Determination of Navigability of
13 the Salt River

No. 03-005-NAV
No. 04-008-NAV
(Consolidated)

14
15 **SALT RIVER PROJECT'S**
16 **RESPONSE TO OPENING**
17 **MEMORANDA**

18 Pursuant to the Chairman's Order,¹ the Salt River Project Agricultural Improvement
19 and Power District and Salt River Valley Water Users' Association (collectively, "SRP")
20 submit their response to opening memoranda in this matter regarding the Salt River ("Salt").
21 Based upon the evidence in the record and application of the appropriate legal test, the
22 Commission should again find that the Salt is not navigable.

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26 ¹ Scheduling Order Setting Dates for Submission of Evidence, Submission of Memoranda and
27 Findings of Fact and Conclusions of Law, and Closing Argument on the Navigability of the Salt
River (May 26, 2016).

1 SRP submitted its opening memorandum on July 18, 2016. *See* Salt River Project’s
2 Opening Memorandum (July 18, 2016) (“SRP Brief”). SRP received the following opening
3 memoranda from other parties:

- 4 1. Cemex Cement, Inc.’s Opening Memorandum (July 18, 2016) (“Cemex Brief”);
- 5 2. Salt River Pima-Maricopa Indian Community’s Brief Opposing Navigability
6 (July 18, 2016) (“SRPMIC Brief”);
- 7 3. Cities of Phoenix, Tempe and Mesa Post-Hearing Opening Memorandum (July
8 18, 2016) (“Cities Brief”);
- 9 4. Gila River Indian Community’s Opening Post-Hearing Memorandum (July 18,
10 2016) (“GRIC Brief”);
- 11 5. San Carlos Apache Tribe’s Opening Post-Hearing Memorandum Regarding the
12 Navigability of the Salt River and Notice that the Tribe Joins in the Opening Post-Hearing
13 Memoranda Filed by SRP, Cemex, and the Cities of Phoenix, Tempe, and Mesa (July 18,
14 2016) (“SCAT Brief”);
- 15 6. Freeport Minerals Corporation’s Opening Post-Hearing Memorandum
16 Concerning the Non-Navigability of the Salt River (July 18, 2016) (“Freeport Brief”);
- 17 7. Arizona State Land Department Opening Post-Hearing Brief on the
18 Navigability of the Salt River for State Title Purposes (July 18, 2016) (“ASLD Brief”); and
- 19 8. Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler’s
20 Closing Memorandum regarding the Navigability of the Salt River (July 18, 2016) (“DOW
21 Brief”).

22 SRP, Cemex, SRPMIC, the Cities, GRIC, SCAT, and Freeport each took the position
23 that the Salt was not navigable. The ASLD and DOW (“Proponents”) argued that the river
24 was navigable. Nearly all of Proponents’ arguments already were addressed in SRP’s Brief,
25 and SRP incorporates those portions of its Brief herein by this reference. In this responsive
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1 brief, SRP addresses Proponents’ other arguments not previously discussed in the SRP Brief.
2 Concurrently herewith, SRP is filing its proposed findings of fact and conclusions of law.²

3 **I. If the Salt River was a “Highway of Commerce” as Proponents Contend, the**
4 **Federal Standard for Navigability would be Virtually Meaningless.**

5 The ASLD’s claim that the Salt is navigable is extraordinary, and the Commission
6 rejected it at least twice already.³ Well-settled law and the facts in the record amply support a
7 finding of non-navigability, and a contrary result would be irreconcilable with the United
8 States Supreme Court’s recent holding in *PPL Montana LLC v. Montana*, 132 S. Ct. 1215
9 (2012), and more than a century of federal law. *See* COL 4-11; *see also* SRP Brief, Section
10 IV. The federal standard for navigability is straightforward:

11 Those rivers must be regarded as public navigable rivers in law which are
12 navigable in fact. And they are navigable in fact when they are used, or are
13 susceptible of being used, in their ordinary condition, as **highways of**
14 **commerce, over which trade and travel are or may be conducted in the**
customary modes of trade and travel on water.

15 *The Daniel Ball*, 10 Wall. 557, 563 (1890) (emphasis added). If the legal standard for
16 navigability was so low that the Salt met it, then essentially “every small creek in which a
17 fishing skiff or gunning canoe [could] be made to float at high water” would be similarly
18 navigable, contrary to the well-established federal precedent. *See The Montello*, 87 U.S. 430,

21 ² *See* Salt River Project’s Proposed Findings of Fact and Conclusions of Law (August 17, 2016). As
22 used herein, SRP’s proposed findings of fact are referred to as “FOF,” and SRP’s proposed
conclusions of law are referred to as “COL.”

23 ³ *See* ANSAC, *Report, Findings and Determination Regarding the Navigability of the Salt River from*
24 *Granite Reef Dam to the Gila River Confluence*, at 45-46 (Sept. 21, 2005) (“2005 Lower Salt
25 Decision”). For identification purposes in this responsive memorandum and based upon the
Commission’s prior designations, “Lower Salt” refers to the stretch of the river downstream from
26 Granite Reef Dam. *See also* ANSAC, *Report, Findings and Determination Regarding the*
Navigability of the Upper Salt River from the Confluence of the White and Black Rivers to Granite
27 *Reef Dam*, at 64-65 (Dec. 13, 2007) (“2007 Upper Salt Decision”). “Upper Salt” refers to the stretch
of the river upstream from Granite Reef.

1 432 (1874). Under the overly broad and liberal standard advocated by the ASLD and DOW,
2 virtually every watercourse in the United States would be navigable for title purposes.

3 The dearth of any significant archaeological or historical evidence of navigation on the
4 Salt would make a determination that it is navigable unprecedented.⁴ Despite the fact that
5 Native Americans have lived along the Salt for thousands of years, there is absolutely no
6 historical or archaeological evidence that any of the many Native American civilizations
7 navigated the Salt to any extent, let alone for trade and travel. *See* FOF 82-104; SRP Brief, at
8 2. Despite the fact that Spanish explorers encountered the Salt repeatedly as early as 1527
9 and as late as 1842, and the fact they were looking for navigable rivers, there is no evidence in
10 their voluminous and detailed records that they ever considered the Salt navigable, let alone
11 used it for trade or travel. *See* FOF 105-129; SRP Brief, at 3. Despite the fact that American
12 military expeditions repeatedly encountered the Salt and established forts and camps along it
13 as early as 1846, and the fact that they were ready, willing, and able to navigate the Salt, there
14 is no reliable evidence that they ever considered the Salt navigable, let alone that they used it
15 for trade and travel. *See* FOF 143-160; SRP Brief, at 3.

16 The archaeological and historical record demonstrates that, like the Native Americans
17 who lived along the Salt for millennia, even the earliest European settlers with advanced
18 European boating technology did not consider the Salt navigable, let alone use it for trade or
19 travel. *See* FOF 130-142, 161-267; SRP Brief at 5. USGS land surveyors who surveyed the
20 Salt as early as 1868 made the unanimous determination that the Salt was not a navigable
21 river. *See* FOF 200-237; SRP Brief, at 6; *see also Lykes Bros., Inc. v. U.S. Army Corps of*
22 *Eng'rs*, 64 F.3d 630, 636 (11th Cir. 1995) (stating that the navigability determinations of
23 federal surveyors are probative evidence regarding navigability). All of these people
24 encountered or lived along the Salt in its ordinary and natural condition, after ancient

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26 ⁴ *See* FOF 82-104; *see also* SRP Brief, Section V.A; *see also generally* SRP, *Information Regarding*
27 *Navigability of Selected U.S. Watercourses* (2003) [Lower Salt EI25] (“Navigability Compilation”) (compiling twenty-one court decisions regarding the navigability or non-navigability of various rivers throughout the United States).

1 irrigation diversions by the Hohokam stopped affecting the river, and before modern
2 irrigation diversions were established.⁵

3 The evidence regarding susceptibility to navigation is overwhelming: The Salt was not
4 navigable in its ordinary and natural condition. Contrary to the testimony of Mr. Fuller (the
5 ASLD's designated "expert" on most or all issues), the hydrology evidence in the record
6 clearly demonstrates that the Salt was a wildly erratic, *see* 470-477, and prohibitively shallow
7 stream. *See* FOF 478-520. The geomorphology evidence also proves that the river alternated
8 between steep canyon reaches with dangerous rapids, narrows, steep cliffs and boulders, and
9 wider alluvial valleys where the river would spread wide and shallow into shifting braided
10 channels and sandbars. *See* FOF 521-592.

11 Given the complete absence of any navigation on the Salt in the historical record,
12 Proponents have retreated almost exclusively to a handful of historical boating accounts in
13 newspapers,⁶ as well as evidence of modern recreational boating. Proponents lean heavily on
14 a handful of boating attempts on the Salt that occurred between May 1873 and June 1919, *see*
15 Tr. 3/10/16:3600-01 (Littlefield), that they have been able to aggregate over the last two
16 decades. *See, e.g.*, ASLD Brief, Section II.A; DOW Brief, Section I.E.1. A careful review of
17 these articles reveals that, if anything, they prove the Salt was not navigable. *See* FOF 268-
18 445. These accounts are replete with one-paragraph articles, mocking tones, boosterism,
19 wrecks, capsizes, and boaters who were forced to get out and push their boat. *See id.*; Section
20 II, *infra*; *see also generally* Cemex Brief. Reading through these articles provides the obvious

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22 ⁵ *See State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 242,
23 ¶ 30, 229 P.3d 242, 254 (App. 2010) ("Consequently, the [Lower Salt] could be considered to be in its
24 natural condition after many of the Hohokam's diversions had ceased to affect the River, but before
25 the commencement of modern-era settlement and farming in the Salt River Valley, when some of the
26 Hohokam's diversions were returned to use and other man-made diversions and obstructions began to
27 affect the [Lower Salt]. Evidence from that early period should be considered by ANSAC as the best
evidence of the [Lower Salt's] natural condition.").

⁶ The objectivity and reliability of these accounts are questionable because many of them were second
or third hand, and were tainted by boosterism and efforts to make them more entertaining. *See* FOF
283-302.

1 answer to the question: Why have people lived along the Salt for thousands of years while
2 never using it for trade or travel by boat? The only rational answer is that the Salt is not and
3 never was a navigable river that could support commercial navigation.

4 The other crutch upon which Proponents rely is evidence of modern recreational
5 boating. *See, e.g.*, ASLD Brief, at 9; DOW Brief, at 16. As cautioned by *PPL Montana*,
6 however, relying on this evidence (a large portion of Proponents' case) is improper if modern
7 recreational craft are not "meaningfully similar" to historical craft used in customary modes
8 of trade and travel at the time of statehood. *PPL Montana* held: "At a minimum, therefore,
9 the party seeking to use present-day evidence for title purposes must show: (1) the watercraft
10 are meaningfully similar to those in customary use for trade and travel at the time of
11 statehood; and (2) the river's poststatehood condition is not materially different from its
12 physical condition at statehood." 132 S. Ct. at 1233. Unfortunately for Proponents, modern-
13 day recreational watercraft have little in common with the type of craft used in customary
14 modes of trade and travel in 1912, *see* FOF 593-798, Section III, *infra*, and many portions of
15 the Salt are significantly **more** navigable now than they were in their ordinary and natural
16 condition in 1912. *See* FOF 813-863; Section III, *infra*.

17 Black's Law Dictionary defines a highway as "any **main** route on land, on water, or in
18 the air" or, alternatively a "main public road, esp. a wide one, connecting towns or cities."
19 *See Highway, Black's Law Dictionary* (10th ed. 2014). It is self-evident that a "highway of
20 commerce" requires something more than any stream of water that expert boaters with cutting
21 edge, modern recreational boating technology can scrape down without cargo. This is
22 supported by federal case law and Arizona statute. *Alaska v. United States*, 754 F.2d 851, 854
23 (9th Cir. 1985); *see also*, A.R.S. § 37-1101(3) (defining a "highway for commerce" as "a
24 corridor or conduit within which the exchange of goods, commodities or property or the
25 transportation of persons may be conducted"). Even the most liberal of out-of-state cases that
26 stretch the federal standard beyond its reasonable limits indicate the same. *See, e.g., Hardy v.*
27 *State Land Bd.*, 274 Or. App. 262, 281, 360 P.3d 647, 659 (2015), *review denied*, 358 Or.

1 550, 368 P.3d 25 (2016) (“However, ‘the evidence must be confined to that which shows the
2 river could sustain the kinds of commercial use [that is, trade **and** travel] that, **as a realistic**
3 **matter**, might have occurred at the time of statehood.”) (emphasis added).⁷ Proponents
4 define a “successful” boating account as a trip where “the boat, boater and cargo arrived at the
5 destination.” See ASLD Brief, at 2. As the boating attempts upon which Proponents heavily
6 rely amply illustrate, this standard does not relate, in any meaningful way, to what is needed
7 to sustain “as a realistic matter” the kinds of commercial trade and travel that were customary
8 at the time of Arizona’s statehood. See Section II, *infra*. As the United States Supreme Court
9 held more than a century ago: “It is not . . . every small creek in which a fishing skiff or
10 gunning canoe can be made to float at high water which is deemed navigable, but, in order to
11 give it the character of a navigable stream, it must be generally and commonly used to some
12 purpose of trade or agriculture.” *The Montello*, 87 U.S. at 432 (citations and internal
13 quotation marks omitted).

14 **II. The Boating Attempts Proponents Cite as Evidence of Navigability**
15 **Overwhelmingly Illustrate that the Salt Never Has Been a Navigable River.**

16 According to the ASLD: “There were at least 31 accounts of boating, *the vast majority*
17 *of which were successful . . .*” See ASLD Brief, at 2 (emphasis in original). Mr. Fuller
18 himself considers only two of these boating attempts unsuccessful. See Tr. 5/17/16:4502-03
19 (Fuller); see also Tr. 10/22/15:722-23 (Fuller). SRP encourages the Commission to carefully
20 look at the articles cited by Mr. Fuller rather than his summaries. See *Compilation of Boating*
21 *Accounts (2015) [C048] (“Compilation”)*. As every expert with a history or archaeology
22 degree in this round of hearings testified, these accounts demonstrate that the Salt was not
23 navigable. See FOF 281.

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26 ⁷ A petition for certiorari to the United States Supreme Court has been filed in *Hardy v. Land Board*,
27 274 Or. App. 262, 360 P.3d 647 (2015). See *Hardy v. Land Board*, Petition for Certiorari Filed, No.
15-1351 (U.S. May 03, 2016).

1 At least six of the accounts were one paragraph or less long. *See* Five Tons of Wheat,
2 FOF 303(a) (one sentence that is six lines in one paragraph); James Stewart, FOF 3412(b)
3 (The entire relevant text reads: “Supt. James Stewart of the stage company will launch his
4 boat in the Salt river tonight.”); Cotton and Bingham, FOF 345(a) (one paragraph of eight
5 lines); Yuma or Bust, FOF 348(a) & (c); Willcox and Andrews, FOF 353(a) (one paragraph);
6 Advertisement, FOF 413(a) (a single paragraph advertisement for a potential hunting and
7 fishing trip).

8 At least five of the attempts occurred during the high flow season. *See* Five Tons of
9 Wheat, FOF 303(e), 309 (April); Willcox and Andrews, FOF 354 (Mr. Fuller testified:
10 “Again, this is February, so it’s during the high flow portion of the river.”); Gentry and Cox,
11 FOF 372 (“higher flow conditions, maybe a small flood”); Adams and Evans FOF 396(e), 398
12 (February); Shively, FOF 400(q), 404-405. In addition, it is impossible to know what time of
13 the year many of the accounts occurred. *See generally* FOF 268-445.

14 Even further, at least four of Mr. Fuller’s accounts specifically indicate that the attempt
15 occurred during a flood. *See* Hauling Freight to Roosevelt, FOF 406(a) & (b) (“The recent
16 rains have put the Salt River in the raging torrent class, although at this time the water is
17 receding. . . . [A]t the time of the heavy rains and floods, the nearest the Mesa stage could get
18 to Roosevelt was Rottiche’s camp”); Reclamation Service Engineers, FOF 418(a)
19 (detailing the attempt by Reclamation Service engineers to inspect diversion facilities after a
20 flood using a boat); Rains, FOF 422(b) (The article is entitled “An Act of Piracy on the
21 Raging Salt.”); Logan, FOF 438 (“When rain and melting snow caused a spring flood, he and
22 three others came down the White and Salt Rivers to Hayden’s Ferry.”).

23 At least six of the attempts indicate only an intention to put a boat on the river without
24 evidence that they ever took place. *See* James Stewart, FOF 342(a), 344; Cotton and
25 Bingham, FOF 345(b), 346-347; Advertisement, FOF 413(b); Selly, FOF 426(a) (This
26 “boating attempt” is merely a report that a local man was building boats for various
27 individuals. It does not mention where the boats were intended to be used or for what

1 purpose.); Two Trappers, FOF 442 (the brothers were building a boat they intended to use on
2 the Salt); Globe Power Company, FOF 443 (an account of a boat being washed away, not of
3 actual navigation).

4 At least five of the attempts were over exceptionally “short” distances on the Salt. *See*
5 Five Tons of Wheat, FOF 307 (two miles); Spaulding, FOF 370; Gentry and Cox, FOF 371(d)
6 (just a few miles); Reclamation Service Engineers, FOF 418(b) (“voyage of a mile”);
7 Greenwald, FOF 436 (around two or three hundred feet).

8 With regard to at least four of the attempts, the boaters themselves called the attempts
9 failures. *See* Hayden Log Float, FOF 317(a) (The party “pronounced the scheme a failure.”);
10 Reclamation Service Engineers, FOF 418(a) (“They found the Salt river a poor stream for
11 navigation.”); Thorpe and Crawford, FOF 429(g) (The subheading of the article states:
12 “Another Story of Two Men Not Including the Dog. The Route is not Recommended for
13 General Travel.”); Logan, FOF 438 (“As a result of this trip, Mr. Hayden decided that logs
14 would lodge in the canyons and could only be floated when the river was in flood, but that at
15 such times it would not be possible to hold them by a boom in the river.”).

16 During at least eight of the trips, the boat either capsized or was damaged. *See* Hayden
17 Log Float, FOF 317(b) (“With much toil and difficulty, on account of rapids and boulders in
18 the river, they descended a long way, when, having lost their arms, ammunition and
19 provisions, excepting flour, they arrived at a canon [sic] so narrow as not to admit the passage
20 of a log and were compelled to abandon their boat and foot it.”); Yuma or Bust, FOF 348(d)
21 (“We have advices, however, that the boat reached Gila bend and ‘busted.’”); Burch, FOF
22 359(h) (“[O]n one occasion they were wrecked, losing provisions, fire arms, etc.”); FOF
23 359(n) (“On one occasion their boat upset and much of their supplies were lost.”); Hudson
24 Reservoir and Irrigation Co., FOF 387(c) (“Last Monday afternoon one of the canvas boats
25 employed in the passage was overturned and the occupants were thrown into the water. When
26 the boat was finally recovered two of the ribs were found to be smashed and the boat was
27 nearly rendered unserviceable.”); Shively, FOF 400 (“The captain reported having

1 encountered rough water and for a time the boat was semi-submarine.”); Reclamation Service
2 Engineers, FOF 418(b) (“[I]n a voyage of a mile they were shipwrecked twice, though
3 without the loss of life or property. In the first accident the boat went on a rock in a rapid and
4 the next time struck on sandbar.”); Thorpe and Crawford, FOF 429(b) (“The row boat which
5 was used throughout the journey was in a very dilapidated condition at the end of the trip.
6 Before the start was made three bottoms had been placed on the craft and one of those had
7 been worn through by the constant friction with boulders and sands found in shallow
8 waters.”); Ensign and Scott, FOF 433(c) (“The first few rapids were taken all right, Robert
9 Ensign told the Rotarians. Then the boys had their first upset. . . . It was not long after
10 righting the boat that they went over again. There are some rapids that they dared not attempt
11 to run.”).

12 At least four of the boating attempts do not even mention the Salt. *See* Hamilton,
13 Jordan, and Halesworth, FOF 338(a), 340; Shively, FOF 400(b); Advertisement, FOF 413(c);
14 Selly, FOF 428.

15 During at least four of the attempts, the boaters had to get out of their boat and push or
16 pull it. *See* Yuma or Bust, FOF 348(b) (“all waiding [sic] in mud and water up to their knees,
17 pulling the boat, and apparently as happy(?) as mudturtles.”); FOF 348(e) (“enduring great
18 hardships, being compelled to wade in the water the greater portion of the time and push the
19 craft ahead of them.”); Meadows, FOF 356(e) (“In passing through the second box they got
20 hung up on rocks and had to roll more rocks into the water to raise the water high enough to
21 float the boat clear.”); Sykes and McLean, FOF 374(c) (“After riding for half a mile we were
22 dry—in fact dusty—sand. Nothing but sand of the most parched variety down the river bed
23 as far as we could see. We camped and prospected ahead, finally locating a trickle of water
24 about a mile farther down so we carried the boat and things to the water. There wasn’t
25 enough water to float the boat with us in it, but by walking along each side and helping the
26 craft over the shallower places we managed to make some progress.”); Thorpe and Crawford,
27 FOF 429(b) (“Many times the men were compelled to lift their craft from the water and carry

1 it over obstacles and at other times had to haul it along the stands.”). “Mere use by initial
2 explorers or trappers, who may have dragged their boats in or alongside the river despite its
3 non-navigability in order to avoid getting lost, or to provide water for their horses and
4 themselves, is not itself enough.” *PPL Montana*, 132 at 1233.

5 The ASLD goes to great lengths to spin this meager and strange record of attempts to
6 boat the Salt well beyond reasonable speculation. For instance, in its brief, ASLD writes: “In
7 January of 1879, Hamilton and two others boated from Phoenix to Yuma and reported the
8 River ‘perfectly practicable for navigation’ such that a flat-boat drawing two feet could be
9 loaded with goods from Phoenix and boated down to Yuma.” *See* ASLD Brief, at 4
10 (emphasis in original). The actual article does not even mention the Salt, however. *See*
11 Boating Compilation, Tab 3 [C048]. The article clearly discusses the Gila, not the Salt:
12 “Whether the Gila river is available for navigation is a question which was never settled in the
13 affirmative” *Id.* We have no idea if they even put their boat on the Salt or they had their
14 boat hauled to the Gila, as the boaters in the Sykes and McLean account did. *See* FOF 374(b).
15 Moreover, Dr. Littlefield testified that the article was typical of the type of boosterism for
16 which early Arizona newspapers were famous. *See* FOF 338(b). This is born out, because no
17 one ever actually used boats to haul goods from Phoenix to Yuma. *Id.*

18 The ASLD likewise contorts case law to support their position. For instance, the
19 ASLD cites *Economy Light & Power Co.*, 256 U.S. 113, 117 (1921), for the premise that the
20 “Court found the Desplains [sic] River navigable where it was used by canoes or other light
21 draft boats common to early fur trading days.” *See* ASLD Brief, at 4. The ASLD ignores the
22 fact, however, that the evidence of actual commercial navigation in that case was substantial
23 (much more substantial than what Proponents submitted on the Salt):

24 Supplies in **large quantity** and variety, needed by the early settlers, also were
25 transported over this route between Chicago and St Louis and other points.
26 Canoes and other boats of various kinds were employed, having light draft, **but**
27 **capable of carrying several tons each**, and manned by crews of six or eight
men.

1 *Economy Light & Power Co.*, 256 U.S. at 117 (emphasis added); *see also The Montello*, 87
2 U.S. at 432 (“The stream was then navigated by long, narrow boats, called Durham boats-
3 vessels from **seventy to one hundred feet long** and twelve broad, drawing, when loaded from
4 two to two and a half feet of water.”) (emphasis added).

5 The ASLD cites cases where rivers were found navigable based on evidence of historic
6 log drives. *See* ASLD Brief, at 5, 8 (citing, *e.g.*, *Nw. Steelheaders Ass’n, Inc. v. Simantel*, 112
7 P.3d 383, 392 (Or. App. 2005) (“That test run apparently proved successful because the
8 company’s 1925 annual franchise report to the state reported moving 200,000 board feet of
9 timber down river in that year.”); *Oregon v. Riverfront Prot. Ass’n*, 672 F.2d 792, 795 (9th
10 Cir. 1982) (“Thousands of logs and millions of board feet of timber were driven down the
11 river.”)). No such evidence exists on the Salt and, in fact, what does exist is evidence of
12 **failed attempts** at log drives. For instance, Charles Hayden tried to float logs down the Salt
13 and determined “that logs would lodge in the canyons and could only be floated when the
14 river was in flood, but at such times it would not be possible to hold them by a boom in the
15 river.” *See* Carl T. Hayden, *Charles Trumbull Hayden Pioneer*, at 42-43 (1972) [C053–
16 ASLD 392]; FOF 438. Likewise, Burch attempted to navigate the Salt to determine if he
17 could float logs down the Salt to his sawmill in Phoenix, but his boat was upset and he lost
18 some of his supplies. *See* FOF 359. There is no evidence that Burch (or anyone else) ever
19 attempted to float logs down the Salt subsequent to this trip. *Id.* Neither the evidence nor the
20 case law supports Proponents’ claim that the Salt was navigable in its ordinary and natural
21 condition.

22 **III. Modern Recreational Boating is Not Relevant to or Probative of the Salt’s** 23 **Navigability.**

24 Proponents cling to evidence of modern recreational boating on the Salt. *See* ASLD
25 Brief, at 9; DOW Brief, at 16. Dr. Newell made it exceedingly clear: “In terms of time, in
26 the colonial period a smaller cargo could be profitable. In the late 19th century you would
27 pretty much need a large cargo to be profitable, when of course, the evidence bears that out.”

1 See Tr. 3/31/16:4302 (Newell). But, Dr. Newell saw “no evidence of small cargos ever being
2 used on the Salt.” *Id.* When asked what kinds of craft were used in customary modes of trade
3 or travel at the time of Arizona’s statehood, Dr. Newell testified: “By the end of the 19th
4 century, you’re looking at large keelboats or mountain boats carrying 10, 15, 20 tons or
5 steamboats carrying hundreds of tons or large passenger component.” See Tr. 3/31/16:4302-
6 03 (Newell). He also looked for evidence of craft other than these boats. *Id.* Dr. Newell
7 testified that there is “no meaningful relationship at all” between modern recreational craft
8 and the historic watercraft he listed in his report. See Tr. 3/30/16:4246 (Newell). At the time
9 of Arizona’s statehood, canoes and other small draft boats simply were not the type of craft
10 customarily used for commercial trade or travel. See FOF 638-653.

11 Even if they were, however, modern recreational boats used by Proponents’ boating
12 witnesses are not meaningfully similar to boats customarily used for trade and travel at the
13 time of Arizona’s statehood. For instance, Tyler Williams, one of the ASLD’s witnesses, has
14 boated up to seventy streams and rivers in Arizona in his kayak. See Tr. 10/21/2015:337
15 (Williams). A recent article from *The Arizona Republic* details the extreme lengths to which
16 Arizona recreational boaters will go to find adventure:

17 It can be hard to find good places to kayak in Phoenix. Cody Howard and his
18 pals have done their best. They’ve slid their boats off tile roofs into swimming
19 pools. They’ve paddled in irrigation canals, at night. They’ve jumped wakes
and done stunts on Bartlett Lake, a speedboat dragging them along. . . .

20 Definitions of creek boating, also known as steep creeking, or creeking, vary,
21 but it generally involves launching a kayak down a high-running creek, a steep
22 section of river. Elite creek boaters look for Class 5 or Class 6 rapids,
waterfalls, deep cauldrons. They plunge over drop-offs 20 feet of water.
23 Thirty. Forty. More. They ping-pong off stony chutes, down unknown chasms
24 and nameless runs where logs and undercuts lie waiting and the whitewater runs
brown.

25 See Ron Dungan, “Up a creek, with a paddle: Desert kayakers chase the water,” *The Arizona*
26 *Republic* (April 29, 2016) [C054–C]. When asked why modern recreational boats are capable
27

1 of such activity, Mr. Fuller testified: “Because of its durability and design, designed to take --
2 some of them are designed to take high impact.” *See* Tr. 5/19/16:5054 (Fuller). Mr. Fuller
3 agreed that these stunts meet his definition of a “successful” boating attempt, because the boat
4 and the boater reached their destination. *See* Tr. 5/19/16:5055-56 (Fuller). Modern
5 recreational boats are exceptionally more durable than those used in 1912. *See* FOF 678-688.

6 It is not just durability, however. The ASLD’s own witnesses have written that plastic
7 canoes and inflatable rafts allow recreational boaters to navigate streams that were never
8 boatable in historic boats and for many more days a year than was previously possible. For
9 example, Mr. Slingluff, who testified in the prior round of Commission proceedings, wrote:

10 Shallow creeks and rivers are boatable in many different canoes, but aluminum,
11 canvas, and wood boats are easily damaged and difficult to repair. Plastic
12 canoes are durable, slide easily over rocks, slip quietly through the water, and
13 do not conduct heat or cold. Plastic canoes can open areas to sportsmen that are
14 otherwise only a wish.

15 *See* Jim Slingluff, “Shallow Streams: Liquid Paths into Wilderness,” *The Southwestern*
16 *Sportsman* (Feb. 15, 1991) [C055-C]. Likewise, a prior report that Mr. Fuller participated in
17 writing readily admits that modern boating technology created the sport of recreational
18 boating in Arizona well after the time of statehood:

19 Commercial recreational rafting started in the 1930s, but developed in the
20 1970s, on the Colorado River (especially upstream in Utah) and later on the
21 Salt, Gila, and Verde Rivers. The development of durable small boats – plastic,
22 fiberglass and other modern types of canoes and kayaks, inflatable boats for
23 single paddlers and for groups – all contributed to the rising popularity of river
24 running in Arizona especially on rivers not previously considered boatable, or
25 boatable only very rarely because of low water.

26 *See* Stantech Consulting Inc., in Association with JE Fuller/Hydrology & Geomorphology,
27 Inc., *Criteria for Assessing Characteristics of Navigability for Small Watercourses in*
Arizona, at 32 (1998) (“Stantech 1998”) [Upper Salt EI11]; FOF 613. This technology allows
boaters to regularly use streams that even Proponents have not argued are navigable. *Id.*

1 (“Twenty rivers [in Arizona] are reported to be used frequently in the spring high water
2 season by boaters and a few more are boated occasionally.”). The same Stantech report also
3 states that modern materials and technology allow these boaters to use dryland rivers well
4 beyond the few days a year that they once could be boated using historic boats:

5 There is a bit of revolution in river running going on in the state that makes it
6 hard to give definitive information. Boaters who aren’t content to resign
7 themselves to **a few days of fun per year on most of the state’s rivers have**
8 **started using durable plastic canoes and single person inflatables to run**
9 **them at levels well below what was in the past has been considered**
10 **boatable.** These seemingly stubborn individuals may end up **dragging their**
11 **boats over a riffle too shallow to float once in a while** but to pay that small
12 inconvenience for the reward of a day in the river is well worth it in their eyes.

13 *See* Stantech 1998, at 36 [Upper Salt EI11] (emphasis added).

14 Additionally, the Salt (at least in Segment 5, the extreme upstream portion of Segment
15 6, and the reservoirs in Segments 3 and 4) is considerably **more** navigable now than it was in
16 its ordinary and natural condition at the time of statehood. *See* FOF 813-863; *PPL Montana*,
17 132 S. Ct. at 1233-34 (“If . . . the river has changed in ways that substantially improve its
18 navigability, then the evidence of present-day use has little or no bearing on navigability at
19 statehood.”). Due to the flow regulation of the dams, the braided, shifting channels, and
20 sandbars of the Salt were channelized, stripped of sand, and reinforced by substantially more
21 vegetation. *See id.* The flow regulation also continues to provide substantially more days a
22 year with artificial flows above the historical natural mean. *Id.* Thus, Mr. Dimock’s staged
23 trip with his historic replica of the *Edith* in August 2015 with a flow of 650 cubic-feet per
24 second likely would not have occurred (or at least would not have occurred with any
25 predictable regularity, absent a short-duration, summer monsoon storm) on Segment 5 or 6 in
26 its ordinary and natural condition. *See* FOF 689-706.

27 **A. Mr. Mickel’s Testimony Demonstrates that the Salt is Not Navigable.**

 Proponents put great emphasis on Mr. Mickel’s testimony due to his recent experience
running a modern-day commercial rafting operation on the Upper Salt. *See, e.g.,* ADWR

1 Brief, at 15. Mr. Mickel testified that, with regard to his rafting operation on the Upper Salt,
2 “[w]e hope for three months and that predictable season where we can deliver the experience
3 that we’re advertising.” *Id.* at 405; *see also* Mild 2 Wild website (2015) [C031–SRP 2]; FOF
4 623. He also testified that the rafting season can be as short as “just March and into early
5 April.” *See* Tr. 10/21/15:405 (Mickel). In comparison, he also runs rafting operations on the
6 Lower Animas River in Colorado that can run from mid-April through October. *Id.* at 406.
7 His operation on the Upper Animas River runs from August 1 to mid-May. *Id.* His operation
8 on the Colorado River runs from April to October, but some companies go even longer. *Id.* at
9 407. Some rafting operations did not even run rafting trips on the Salt in 2014 due to low
10 water conditions. *Id.* at 420-27. Mr. Mickel’s trips on the Upper Salt do not operate beyond
11 the February/March to May/June season because it is unpredictable. *Id.* at 388. Mr. Mickel’s
12 company does not operate trips outside of the high water season. *Id.*

13 **VI. The ASLD’s Attempt to Conjure the Remote Possibility that Native Americans**
14 **Might Have Used Boats on the Salt Defies a Reasonable Review of the Evidence.**

15 The ASLD strings together a number of tenuous pieces of evidence in an attempt to
16 create (out of thin air) the possibility that some of the Native Americans who lived along the
17 Salt might have used boats, despite the complete lack of Native American boats or boating in
18 the historical and archaeological record, despite the repeated testimony of its own witnesses to
19 the contrary, and contrary to the testimony of every witness who testified before this
20 Commission with a history or archaeology degree. *See* ASLD Brief, at 33-34. The ASLD
21 states: “Hodge speculated that the canals may have been used for a crude system of
22 navigation by means of balsas or cane rafts made from reeds and sticks. . . .” *See* ASLD
23 Brief, at 33.

24 The actual source states, however: “Feature 57 was an enigmatic canal-side basin
25 tentatively interpreted as having served as a field tail water return point, a boat or raft slip or a
26 feature for soaking potter’s clay, hides, or other products.” *See* T. Kathleen Henderson,
27 *Hohokam Irrigation and Agriculture on the Western Margin of Pueblo Grande: Archaeology*

1 *for the PHX Sky Train Project*, at 91 (“Henderson”) [C028–ASLD 313]; Tr. 10/22/2015:696-
2 97 (Fuller); Fuller, *Presentation to ANSAC: Salt River Navigability*, slide 110 (Oct. 15, 2015)
3 [C030-ASLD364] (“Fuller PowerPoint”). Ms. Kenderson’s study further cautions: “The
4 possibility that Feature 57 was designed for the purpose of parking and loading rafts was
5 originally introduced as a humorous suggestion from a lack of more traditional possibilities
6 that demonstrated a cogent fit with the growing data set against the other. This interpretation
7 is offered again with due caution and trepidation, yet it seems worth entertaining until more
8 data are recovered from other such features or until someone uncovers a Hohokam raft.” *See*
9 *Henderson*, at 111 [C028–ASLD 313].

10 The ASLD next writes: “Cushing may have discovered a canoe in a prehistoric canal.”
11 *See* ASLD Brief, at 33. The actual source, Mr. Fuller’s report, states: “Cushing **speculated**
12 that the Hohokam also used their canals for floating balsa rafts. (David Wilcox, personal
13 communication, 1993).” Lower Salt EI30, at 2-16 (emphasis added). When asked whether
14 claims of a canoe found in the canals were speculative, Mr. Fuller answered: “I don’t know
15 how you’re characterizing it as speculation. You know, **that would be a good question to**
16 **ask an archaeologist, what degree of certainty they had there.**” *See* Tr. 10/22/2015:700
17 (Fuller) (emphasis added). Dr. Newell, who is a Ph.D. archaeologist, testified:

18 There’s a complete absence of evidence of archaeological remains of boats or
19 anything related to boats in the archaeological record, not one. . . . Because in
20 my experience, in navigable rivers that are used for trade and transportation,
21 there is a plethora of evidence, of archaeological evidence of just about every
22 kind of -- every kind of boat ever used on that river, from dugouts used 2,000
23 years ago to recent craft. I mean rivers are just full of the wreckage of their
constant use. The total absence of any such evidence on the Salt speaks
extremely strongly to its lack of use or ability to use, susceptibility, as far back
as the Hohokam period.

24 *See* Tr. 3/30/16:4289 (Newell). In other words, if you do ask an archaeologist (as Mr. Fuller
25 suggested), the answer is that the evidence in the record does not support a conclusion that
26 any Native Americans used boats on the Salt.

1 Puzzlingly, the ASLD claims that Dr. Newell testified that “it would be extremely
2 unlikely that any decomposable evidence would be found many hundreds of years later by
3 archaeologists” *See* ASLD Brief, at 33. In the portion of the transcript that the ASLD
4 cites to support this claim, however, Dr. Newell actually testified:

5 In my experience, I have seen boats well-preserved in sand and gravel
6 environments, so **I would expect them to be found had the Hohokam ever**
7 **used them.** . . . A dry environment sometimes will preserve wood, but water is
8 actually a pretty good preservative itself of wood. . . . **But considering the age**
9 **of the Hohokam culture, you would expect to find remains under sand had**
10 **they been using those; and there’s no evidence that they ever did, of course.**

11 *See* Tr. 3/30/16:4392 (Newell) (emphasis added).

12 The ASLD next claims: “A recent study of the canals cautiously speculated that one
13 excavated canal feature may have been a boat or raft slip.” *See* ASLD Brief, at 33. This is,
14 however, the same citation as the Hodge speculation regarding balsa boats from the
15 Henderson article discussed, *supra*.

16 Next, the ASLD lurches from (1) claiming that the reason there is no archaeological
17 evidence on the Lower Salt in Segment 6 of Maricopa or Pima navigation is because those
18 Native Americans did not live directly on the river to (2) claiming that maybe the Pima and
19 Maricopa used boats to fish on Segment 6. *See* ASLD Brief, at 33-34. This claim is based
20 on a singular sighting of a Maricopa fishing party “on the river,” but it makes no mention of
21 boats at all, linked tenuously to the fact that the Maricopa used boats on the Colorado to fish.
22 *See* GRIC Brief, at 16-18. In reality, and despite the ASLD’s best efforts to ignore it, the
23 archaeological and historical record is entirely absent of any evidence of Native American
24 boating on the Salt. *See* FOF 802-104.

25 **VII. Historical Photographs and Descriptions of the Salt Demonstrate that it was Not**
26 **Susceptible to Navigation.**

27 Proponents cherry-picked certain historical photographs and descriptions of the Salt in
order to paint an unrealistically rosy picture of its natural flows and conditions. *See, e.g.,*

1 DOW Brief, at 5-9. Other historical descriptions demonstrate exactly why the Salt was never
2 used for navigation. *See* FOF 446-469. For instance, Alfred J. McClatchie's *Utilizing Our*
3 *Water Supply*, published by the Office of Experiment Stations in 1902, states:

4 The Salt River, like all streams having a watershed with many steep slopes, is
5 subject to great variations in its flow . . . [and] conditions combine to make a
6 great difference between the winter and the summer flow. After heavy rains in
7 the mountains, especially during the winter, the Salt River is sometimes
8 unfordable for weeks, while during the hot, dry weather of summer it is
9 sometimes reduced to a mere brook, the flow during the winter months of some
10 years being ten to twenty times what it is during some months of the following
11 summer.

12 *See* Littlefield Lower Salt, at 163 [C001].

13 Additionally, in the *Eleventh Annual Report of the U.S. Geological Survey* (1891),
14 John Wesley Powell wrote:

15 In this basin are found rivers most difficult and dangerous to examine and
16 control, differing in character and habit from those of the North as widely as in
17 geographic position. In place of the regularly recurring annual floods of spring
18 and early summer, so strongly marked on the discharge diagrams of other
19 basins, these rivers show conditions almost the reverse, being at that season at
20 their very lowest stages – even dry – and rising in sudden floods at the
21 beginning of and during the winter. These floods are of the most destructive
22 and violent character; the rate at which the water rises and increases in amount
23 is astonishingly rapid, although the volume is not always very great. . . . From
24 this it will be recognized that the onset of such a flood is terrific. Coming
25 without warning, it catches up logs and boulders [sic] in the bed, undermines
26 the banks, and, tearing out trees and cutting sand-bars, is loaded with this mass
27 of sand, gravel, and driftwood – most formidable weapons for destruction.

28 *See* Littlefield Lower Salt, at 119-20 [C001].

29 DOW's selection of photos is also lopsided. For instance, DOW cites a photograph of
30 the Tonto-Salt confluence that now rests below Roosevelt Lake. *See* DOW Brief, at 7 (citing
31 Fuller PowerPoint, slide 143 [C030-ASLD364]). Other historical photographs of that same
32 location show a river that is shallow and braided into multiple channels. *See Historical*

1 *Photograph PowerPoint Presentation, See Historical Photograph PowerPoint Presentation,*
2 at slides 3-7, 30-39, 56, 77-81, 84-85 (Dec. 7, 2015) [C038] (“Historical Photos”).

3 DOW cites a photograph of three men in a boat, writing: “This photograph, taken in
4 1910, shows three men in a shallow boat on the Salt River near the Roosevelt dam, which was
5 under construction at the same time.” *See* DOW Brief, at 8 (citing Fuller PowerPoint, slide
6 140 [C030-ASLD364]). This photograph does nothing to show the Salt in its ordinary and
7 natural condition, since these boaters are floating on Roosevelt Lake. *See* Newell, at 20
8 [C044]. Mr. Fuller testified that the boat in the picture “would not be the boat that you would
9 choose to run significant rapids.” *See* Tr. 11/17/2015:1081-82 (Fuller); Fuller Presentation,
10 slide 140. The photographs of the Tonto-Salt confluence, *supra*, show what the Salt looked
11 like before the reservoir. This also helps shed light on Mr. Fuller’s “Selly” boating attempt,
12 which is just an article about someone building boats at Roosevelt one year prior to this
13 photograph. *See* FOF 426-428.

14 DOW next cites a photograph of the Roosevelt dam site in 1906. *See* DOW Brief, at 8
15 (citing Fuller PowerPoint, slide 142 [C030-ASLD364]). DOW writes: “The flow on the day
16 it was taken was 10,000 cfs, so the flow is **a little above normal** but the river is not in a flood
17 stage. The photograph shows a river with a single channel, no significant rapids, and a fairly
18 placid river.” *Id* (emphasis added). It is notable that, on rebuttal, after correcting his
19 hydrological data, Mr. Fuller testified that the median flow rate for Segment 4 (containing the
20 dam site) was 405 cfs. 10,000 cfs is approximately **twenty-five times even Mr. Fuller’s**
21 **median flow**. SRP submitted other historical photographs of the dam site that show more
22 ordinary flows with protruding rocks, gravel bars, and rapids. Historical Photos, slides 3-7,
23 30-39, 56, 77-81, 84-85 [C038].

24 DOW next cites a photograph of the Mormon Flat dam site and writes: “This
25 photograph taken in 1916 near Mormon Flat shows a river with a single channel, no rapids, no
26 beaver dams, no braiding. What Mr. Fuller described as ‘a pretty boatable channel.’” *See*
27 DOW Brief, at 8 (citing Fuller PowerPoint, slide 150 [C030-ASLD364]). SRP submitted

1 other historical photographs of the dam site that show more rocks, gravel bars, and rapids.
2 *See* Historical Photos, slides 46-50, 210-215 [C038]. Moreover, Dr. Mussetter never claimed
3 that the box canyon portions of the Salt contained braids.

4 DOW next cites a photograph of the Horse Mesa dam site and states: “It shows flow
5 filling the canyon bottom. There are no rapids or braiding, and the water is calm. Again, Mr.
6 Fuller described the river captured in the photograph as ‘boatable.’” *See* DOW Brief, at 8
7 (citing Fuller PowerPoint, slide 150 [C030-ASLD364]). SRP submitted other historical
8 photographs of the dam site that show more rocks, gravel bars, and rapids. *See* Historical
9 Photos, slides 217-227 [C038].

10 DOW next cites a photograph of the Hayden’s Ferry and states: “It shows the ferry
11 with a wagon on it and a boat with several people on it crossing the river.” *See* DOW Brief,
12 at 9 (citing Fuller PowerPoint, slide 154 [C030-ASLD364]). DOW ignores the fact that other
13 evidence in the record clearly shows that, “[t]hrough most of the year, the river was
14 seldom more than a foot deep, and could easily be crossed at the fords []. However, spring
15 freshets could last several days, and the current generally ran faster and higher throughout the
16 spring. A few boats were kept near the river in the late 1860s, and John Smith briefly
17 operated a ferry at McDowell Crossing. Hayden established a more permanent ferry at the
18 Tempe Crossing in 1871[]. **These ferries were seasonal and could only run during times
19 of high water.**” *See* Archaeological Consulting Services, Ltd., *Hayden Flour Mill:
20 Landscape, Economy, and Community Diversity in Tempe, Arizona*, VOLUME 1:
21 Introduction, Historical Research and Historic Architecture, at 65 [C018–ASLD 15]
22 (emphasis added). Dr. Littlefield submitted other photographs of the area, for example, with
23 people driving cars and wagons across the river. *See* Littlefield Declaration, at Appendix
24 B:50-52 (some photographs showing the river dry).

25 Despite Proponents’ attempts to argue otherwise, the historical descriptions and
26 photographs illustrate a non-navigable river.


27 . . .

1 **VIII. Summary and Requested Action**

2 Even after many more hearing days and thousands more pages of evidence, the record
3 still does not support a finding that the Salt is or ever was navigable. The Commission should
4 again find the Salt non-navigable.

5 DATED this 17th day of August, 2016.

6 SALMON, LEWIS & WELDON, P.L.C.

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